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This is the fifth edition of Georgian Law Review, which is prepared in Georgian and English languages. It enables legal specialists and other interested persons to become informed on the development of Georgia's legal system and the legal systems of EU and its Member States. Georgian Law Review is free of charge and also available through the Internet:

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INTRODUCTION

Dear Reader,

With best wishes for a happy and successful New Year we would like to welcome you to our 3rd quarter 1999 edition of the Georgian Law Review and at the same time take the opportunity to congratulate Georgia to be accepted by the World Trade Organization for becoming a new member which marks a milestone of Georgia's integration into the world economy.

This edition is introduced by ***Giorgi Papuashvili***, member of the Administrative Board of Young Lawyers' Association of Georgia, who analyses history and structure of the formation of the Georgian government system and compares it with existing experience of those of western and other CIS countries. Showing the process of development of Georgian democracy he comes to the conclusion that the establishment of a pure presidential system in Georgia was the result of a bargaining process of various political forces that ended in a compromise.

Mariam Tsatsanashvili, Deputy Minister of Justice, analyses the legal nature of the concept of information. She develops legal basics for the elaboration of a Georgian legislation on protection of general personal and business information in which she is closely involved.

In order to outline WTO consistent measures to protect domestic industries against unfair competition ***Alexander Barnewitz***, European Legal Expert of GEPLAC, introduces and discusses the respective WTO agreement on safeguards and analyses the value of the introduction of respective legislation to the Georgian legal system that is at present under consideration.

Siegfried Lammich, Leading Scientist of the Max-Planck-Institute for Foreign and International Criminal Law in Freiburg/Breisgau (Germany), provides an overview on the organisational framework of the activities of attorneys in Germany which might be useful for reorganisation and developing process of the bar in Georgia which is a key issue to foster the implementation of new legislation in Georgia as well.

Givi Amiranashvili, Leading Specialist of Consular Department of the Ministry of Foreign Affairs of Georgia, reviews the peace-keeping operationsof the United Nations and suggests improvements on how their effectiveness might be increased. In particular the author analyses the importance of the Charter of the United Nations for carrying out the above mentioned operations.

Jan Strebniok, Attorney at Law at the Moscow office of the German Law Firm Nörr, Stiefenhofer and Lutz, provides a critical analyses of investment promotion rules established under the law on investments in the Russian Federation. The author indicates that many of those provisions are too general to meet the requirements of business development in Russia.

Finally, ***Mamuka Jgenti***, Head of the Department of Council of Europe and Human Rights of the Ministry of Foreign Affairs of Georgia, analyses the Treaty of the European Community with regard to the structure of the external relations of the European Community and discusses relevant jurisdiction of the European Court of Justice.

January 2000, Tbilisi

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PRESIDENTIAL SYSTEMS IN POST-SOVIET COUNTRIES: THE EXAMPLE OF GEORGIA

Introduction

This article is devoted to the problems of establishing presidential systems in post-Soviet countries, focusing on the case of Georgia. Among the former Soviet republics, as well as among European states, Georgia represents the only example of a pure (American) presidential system of government. Therefore, the crucial question must be - how could it happen that this kind of presidential system, which was not seriously discussed until the last moment of constitution making, came to be adopted in Georgia? The article concludes that the reasons for the establishment of this kind of system were:

1. Compromise among the different political forces of the country.
2. In addition to historical, political, social, legal, and economic factors, the main influences for this compromise were:
   a) The ability of political forces from the government (primarily identified with the personality of *Shevardnadze*) and from the opposition (primarily the Republican party) to leave behind their particularistic interests, and to assume political responsibility and co-operate with political rivals in order to manage the compromise necessary for the democratic development of the country; and
   b) The nature of the pure presidential system based on the principles of separation of powers and checks and balances, which made it possible to reach a compromise at the final stage of constitution making.

In examining the problems mentioned above, the article gives a brief overview of presidential, semi-presidential and parliamentary systems. Then the common and distinctive features characteristic of post-Soviet countries making their institutional choice among these systems are reviewed. The essay provides a comparative analysis and classification of presidential systems in post-Soviet countries.

Turning to the case of Georgia, I evaluate the constitution-making process and the factors influencing it. For a better understanding of the nature of the system, I have also made a legal analysis of the pure presidential institutional arrangement established in Georgia.

Chapter I - Problems of Institutional Choice

This chapter gives the definitions and the basic characteristics and variations of democratic political systems.

1. 1. Definition of Systems

Basically, there are three systems of democracy: presidential, parliamentary, and semi-presidential.

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The parliamentary is considered the most widely used system of government and is often referred to by scholars as the British system, because it was the British system, which first developed the principle of cabinet responsibility.

In a parliamentary system, only one elected body - parliament - exists, which is a dominant player in the formation of a government. Usually, the head of state (who is either a monarch or a president elected by parliament) formally appoints the head of the government. In fact the power of head of state is largely ceremonial.

The parliamentary regime of democracy is a system of mutual dependence: the government is politically responsible to the legislature. It must be supported by a majority in the legislature and should resign if it receives a vote of no confidence. At the same time the executive power has the capacity to dissolve the legislature and call for new parliamentary elections.

Although the head of the government's - for whom there are various different official titles, such as prime minister, premier, chancellor, minister-president, - position in the cabinet can vary from pre-eminence to virtual equality with the other ministers, there is usually a relatively high degree of collegiality in decision-making and the prime minister is mostly considered as 'first among equals' *(primus inter pares)*. Members of the government can usually simultaneously be members of the parliament (exceptions include the Dutch, Norwegian and Luxembourg governments).

Within the "pure" presidential system**,** or so-called American system, the population elects the President independently from the parliament, and legislative and executive authorities are independent from each other. It is often associated with the system of a separation-of-powers and "checks and balances". The principle of separation of powers, expounded by *Locke* and especially by *Montesquieu*, is crucial for an understanding of the essence of the American constitutional design and presidential government.

The main features of the presidential system are the following:

1. The president as well as the parliament are elected directly by popular election, consequently there are two agents of the electorate;
2. The president is elected for a fixed term of office, which normally cannot be changed: either shortened or prolonged. This prevents the parliament from forcing his resignation (except the case of using the procedure of impeachment). At the same time the presidency is an uni-personal office. However there are exceptions such as when there several persons were directly elected in the two-person Cypriot administration (1960-63) and in the Uruguayan Colegiado (1918-33; 1952-67).[1]
3. The president is the head of state and at the same time is the only head of the executive power; therefore this system does not provide for the institution of a prime minister and the executive is not divided. The president appoints ministers with confirmation by the parliament and dismisses them without such confirmation.
4. The president is not, as in parliamentary governments, responsible to the parliament, but to the constitution. Although parliament may initiate the president's impeachment process, this just implies that impeachment enforces judicial compliance with the constitution and does not include political responsibility.

[1] *J. Linz*, "Presidential or Parliamentary Democracy: Does it make difference?", *J. Linz* and *A. Valenzuela* (eds.), The Failure of Presidential Democracy, John Hopkins University, 1994, p. 6.

5. In a pure presidential system the different branches can check and balance one another so that none of them shall predominate. The president cannot dissolve the parliament and the parliament also cannot dismiss the president by a vote of no confidence.

The semi-presidential (French) system is considered to be a mixture of the parliamentary and presidential systems. This system was first clearly identified and analysed by *Duverge* in 1980.[2] The basic common features of the system are that the executive power is exercised both by the president who is elected directly by popular vote, and by the cabinet; so at the same time the president is not necessarily the chief executive.

Therefore, the regime has both a prime minister, who depends upon the continuing confidence of parliament, or at least the absence of an explicit vote of no confidence, and a president elected directly by the voters with power to nominate a candidate for prime minister. The president has the right to dissolve parliament and call new elections (with or without restrictions).[3] In some cases he also has the power of veto.

Constitutions which lay down semi-presidential governments are relatively heterogeneous and starting from the Weimar Republic have emerged under different circumstances in different countries. However, it is more identified as the French system and the Constitution of the French Fifth Republic of 1958, initiated by *De Gaulle*, is considered the main model of semi-presidentialism.

1.2. Benefits and drawbacks

The relative merits of these forms of democracy have been debated for a long time. Most scholars argue that the vast majority of the stable democracies in the world today are parliamentary regimes. As *Linz* suggests, a careful comparison of presidential and parliamentary democracies leads to the conclusion that, on balance, the former is more conductive to stable democracy than the latter. [4]

Supporters of the parliamentary form of government have the following arguments:

1. The executive "instability" of parliamentary systems may give these systems the flexibility to change governments quickly when circumstances change or when serious executive failures call for new leadership. A prime minister who becomes involved in scandal or loses the support of her/his party or majority coalition and whose continuance in office might provoke instability can be much more easily removed.

2. In parliamentary systems, power sharing and coalition are fairly common and are accordingly attentive to the demands and interests of even smaller parties, which makes slower the process of polarisation in society.

A leader, whose party gains less than 51 percent of the seats, might be forced to share power with another party or to constitute a minority government to become a prime minister. This means that the prime minister will be much more aware of the demands of different groups and much more concerned about retaining their support.

[2] *M. Duverge*, "A new Political System Model: Semi-presidential government", European Journal of Political Research, 1980, No. 8, p. 37.
[3] Usually this happens when a president attempts to obtain a favourable parliamentary majority by dissolving parliament. In the French Fifth Republic these attempts was performed successfully by *De Gaulle* in 1968 and by *Mitterand* in 1981 and, with slightly less success, in 1988.
[4] *J. Linz*, "The Perils of Presidentialism", Journal of Democracy, 1990, No. 1, p. 52.

3. Such a system promotes the constant support and accompaniment of facilitating legislation. The cabinet requires the continued aid of legislation. The cabinet can compel legislation by the threat of resignation, and the threat of dissolution.

4. The parliamentary system promotes the concentration of accountability. The government is accountable before the electorate as well as the political parties forming it. The party with a majority, or even a stable coalition of parties, can easily be made accountable to the voters. At the same time, a prime minister and his own party can be made accountable to the parliament by a vote of confidence at any time.[5]

5. Parliamentary regimes last much longer than presidential ones. The data show that 14 democracies (or 28 per cent of the 50 cases) died under a parliamentary system. Only one (12.5 per cent of 8 cases) died under a mixed system, and 24 (52 per cent of 46 cases) died under presidential systems.[6]

Critics of the parliamentary system argue that:

1. The cabinet's dependence makes potential cabinet instability an inherent and inevitable feature of parliamentary systems. In such a system there may be many cases of executive instability, frequent cabinet crises and changes of prime minister. Examples of such political instability are the third and fourth French Republics, Italy and Portugal. Such developments may result from the frequent use of the legislature's power to upset cabinet by votes of no confidence or, without any formal no-confidence motions being adopted, as a result of a cabinet's loss of majority support in the legislature.

2. In the parliamentary system, there is fusion of the legislative and executive functions (instead of the implementation of the principle of the separation of powers). The legislatures in parliamentary systems have two incompatible functions: making laws and supporting a cabinet in office.

The supporters of the presidential system have the following main arguments:

1. Presidentialism provides more executive stability, which is based on the president's fixed term of office. At the same time presidential power minimises the risk of unstable cabinets.

2. The popular election of the chief executive - president - can be regarded as more democratic than the indirect "election" - formal or informal - of the executive in parliamentary systems.

3. Separation of powers, on which the system is based, means limited government, an indispensable protection of individual liberty against government "tyranny".[7]

4. In the presidential system, a president and a legislature co-operate in the legislative process. Only in such a system can legislatures fully perform the task for which they are democratically elected, namely, to legislate. A separated system offers various opportunities for negotiation between the president and legislature and between the political parties.[8]

[5] *J. Linz*, "Presidential or Parliamentary Democracy: Does it make difference?", *J. Linz* and *A. Valenzuela* (eds.), The Failure of Presidential Democracy, John Hopkins University Press, 1994, p. 15.
[6] *A. Przerowski*, *et al.*, "What Makes Democracy Endure?", Journal of Democracy, 1996, No. 1, p. 45.
[7] *J. Madison*, "The Federalist", No. 47, 48, *A. Lijphart*, Parliamentary versus Presidential Government, Oxford University Press, 1992, p. 52.
[8] *R. Jones*, "Separated but Equal Branches", University of Wisconsin Madison,1988, p. 28.

5. Voters directly elect an executive that cannot be removed by shifting coalitions in the parliament. It is directly and personally responsible for policies and not the cabinet, not a coalition or the leaders of the party, as in the parliamentary system. *Hamilton* argues that single-person responsibility in executive power is a much more appropriate system, as plurality in the executive "tends to conceal faults and destroy responsibility".[9]

6. The arguments of some scholars on the danger in such system for the usurpation of power by the president can be ignored as in almost all constitutions there are provisions for the prevention of this such as a prohibition of the re-election of the president, impeachment mechanisms, independent judicial power and other tools.

The fundamental problems related to presidency are the following:

1. The separation of power also means the deviation of responsibility, and hence diffuse and unclear responsibilities. Voters cannot know to whom - the president or the legislature - the credit or blame for public policies undertaken is due; therefore democratic accountability is lost. At the same time, *Bagehot* argues that the mutual independence of president and legislature causes a mutual antagonism that weakens both of them.[10]

2. The problem of executive-legislative conflict, which may turn into "deadlock" and "paralysis", is the inevitable result of the co-existence of the two independent organs. Not only the president, but also the legislators, especially when they represent cohesive, disciplined parties that offer clear ideological and political alternatives, can claim democratic legitimacy. Since both derive their power from the votes of the people in a free competition among well-defined alternatives, a conflict is always possible and at times may erupt dramatically. There is no democratic principle to resolve it, and the mechanisms that might exist in the constitution are generally complex and sometimes of difficult and doubtful democratic legitimacy for the electorate.[11]

3. In the presidential system, the "rigidity" of presidential election for a fixed term has much less flexibility to be adjusted to the political process. *Bagehot* states that presidentialism lacks an "elastic" element:[12] A president, who has lost political confidence, cannot practically be replaced and impeachment is a very uncertain and time-consuming process.[13]

4. Such a system operates according to the rule of "winner-takes-all" zero-sum-game. In a presidential election, only one candidate can win, everybody else loses. Winners and losers are sharply defined for the entire period of the presidential mandate. Consequently, the composition of the president's executive will likely consist only of the supporters of the president. A defeated presidential candidate, according to the principle "loser loses all", has no official role in politics and must wait at least four or five years without any access to executive power and patronage.[14]

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[9] *A. Lijphart*, Parliamentary versus Presidential Government, Oxford University Press, 1992, p. 56.
[10] *W. Bagehot*, "The English Constitution: The Cabinet", *A. Lijphart*, Parliamentary versus Presidential Government, Oxford University Press, 1992, pp. 67-69.
[11] *J. Linz*, "The Perils of Presidentialism," Journal of Democracy, 1990, No. 1, p. 53.
[12] *W. Bagehot*, "The English Constitution: The Cabinet", *A. Lijphart*, Parliamentary versus Presidential Government, Oxford University Press, 1992, p. 70.
[13] *J. Linz*, "Presidential or Parliamentary Democracy: Does it make difference?", *J. Linz and A. Valenzuela (eds.)*, The Failure of Presidential Democracy, John Hopkins University, 1994, p. 10.
[14] *J. Linz*, "The Perils of Presidentialism", Journal of Democracy, 1990, No. 1, p. 56.

5. The implicit plebiscitary component of presidential authority is likely to make a president sense that he is the only elected representative of the whole people. The identification of leader with people fosters certain populism.

6. Presidentialism is more prone to leading to authoritarian government. The concentration of the executive power in the hands of one individual may be regarded as inherently undemocratic. There is much experience of Latin American countries having a presidential system, when there were deep contradictions between constitutional texts and political practices. A popular president with a disciplined party behind him might defeat the constitutional scheme of checks and balances, thus obviating a key advantage of presidentialism.[15]

7. In the presidential system, there is no way to hold a president accountable who cannot be presented for re-election. He cannot either be punished by the voters by defeat or rewarded for success by re-election. If re-election is possible, the president can try to escape blame by shifting responsibility to the legislature, particularly if the opposition dominates it. Even if his own party is in majority, the division of power gives him the possibility to play the same game. At the same time, the voters have to wait for the end of the presidential term to demand accountability.

8. The succession mechanism in presidential systems is poorly designed and likely to give power to an unprepared and electorally illegitimate vice-president.

Supporters of semi-presidential system argue that it is a collection of the best sides and advantages of the parliamentary and pure presidential systems and have the following arguments for semi-presidentialism:

1. In the semi-presidential system the problems of fixed-term and rigidity are avoided. A dual leadership system may be able to provide a combination of authority and flexibility. A government, which is dependent very much on confidence from a parliament, is usually changed in the case of political or economic crisis caused by the actions of the government. It has worked well in France since the adoption of such a system and it has not given rise to a major constitutional crisis even preventing potential crisis, such as the coexistence (cohabitation) of a right-wing legislative majority and a left-wing president. [16]

2. The problem of majoritarianism also may be avoided, as a cabinet is the subject to parliamentary confidence, it will not be as narrowly representative of the president's interests as will a presidential cabinet.

3. The problem of the conflict between the president and parliament because of the claim on mutual legitimacy also can be overcome by such a system, as even in a majority president will have a greater incentive than under pure presidentialism to anticipate and accommodate the demands of his party or coalition.

4. While political outsiders can still be elected as president under a semi-presidential system, the prime minister enjoys constitutional protection from the dominance of the president.

[15] *J. Linz*, "The Virtues of Parliamentarism", Journal of Democracy, 1990, No. 4, p. 90.
[16] *N. Suleiman*, "Presidentialism and Political Stability in France", *J. Linz* and *A. Valenzuela (eds.)*, The Failure of Presidential Democracy, John Hopkins University, 1994, p. 151.

5. A president can act as an "above-the-parties" arbiter in a dual leadership system. He can delegate more controversial political tasks to a prime minister.[17]

Opponents of the French semi-presidential system argue that the case of France cannot be presented as an example of the success of the system, as it was simultaneously introduced with other important changes in the political system of the country, for example in the electoral system. They refer basically to the following criticism of this system:

1. The semi-presidential system has a dual executive system or dual leadership - a president and prime minister -, which is a significant break with the principle of separation of powers. At the same time, the presidential power to dissolve the parliament would also violate the principle of the separation of powers, which may encourage presidential absolutism and produce executive dominance instead of separation of power.

2. In many constitutions establishing a semi-presidential system, a clear division is not defined between the authorities of the head of the state and head of the government. Where either or both fail to recognise the claims to executive authority made by the other, cohabitation could degenerate into a regime crisis.[18]

3. Many constitutional as well as political problems can be developed in such a dual executive situation when it is unclear who has authority over the armed forces, the president or the prime minister.[19]

Chapter II - Institutional Choice in Post-Soviet Republics

At the end of the 1980s, all the Communist regimes started a tremendous process of political, economic, and social change. The specific outcome of this massive process of transformation will take some time and will continue to be the focus of scholarly work for the foreseeable future. My task in chapter II is limited primarily to identifying the importance of the institutional design in newly democratised countries and the specific problems and factors of the institutional choice in post-Soviet countries. At the same time it is necessary to evaluate elements of commonality and diversity and to make a comparative overview and classification of presidentialisms in ex-Soviet republics.

2.1. Importance of Institutional Choice

Some scholars suggest that cultural and economic factors have more influence on democratic development than Constitutional definitions of executive and legislative authority. For example, *Lipset*, arguing on the economic influence on the development of democracy, suggests that long-enduring democracies are disproportionately found among the wealthier and more Protestant nations. [20]

However, most scholars argue that the survival of democracies *does* in fact depend on their institutional systems. *Lijphart* gives the examples of India, some Latin American countries, and South Europe, showing that an "unfavourable" cultural background and level of economic development are not absolute obstacles to democracy; indeed, for countries negatively effected by such conditions, the

[17] *J. Blondel*, "Dual Leadership", *A. Lijphart*, Parliamentary versus Presidential Government, Oxford University Press, 1992, p. 50.
[18] *M. Shugart* and *J. Carey*, *Presidents and Assemblies*, Cambridge University Press, 1992, p. 57.
[19] *J. Linz*, "Presidential or Parliamentary Democracy: Does it make difference?", *J. Linz* and *A. Valenzuela (eds.)*, The Failure of Presidential Democracy, John Hopkins University, 1994, pp. 57-59.
[20] *S. Lipset*, "The Centrality of Political Culture", Journal of Democracy 1990, No. 4, pp. 80-82.

question of whether parliamentarism or presidentialism would serve them better is especially important.[21]

Although it is not my main task to evaluate the importance of the institutional choice in post-Soviet countries, I maintain that both institutional and economic-cultural factors may influence the democratic development of these countries.

2.2. Debates over institutional choice

After reviewing the importance of institutional choice, it seems not surprising, that after the dissolution of the USSR and collapse of the socialist system, policy-makers and constitutional experts have vigorously debated the relative merits of different types of democratic regimes. The question of debate has addressed whether presidential or parliamentary democracy is the better for the newly established ex-Soviet republics.

Some scholars argue that presidentialism in these countries means the establishment of not performed democratic regimes. The deep social and economic crisis that most of these countries inherited from their authoritarian predecessors reinforces certain practices and conceptions about the proper exercise of political authority. This leads in the direction of delegative, not representative democracies, which still are not consolidated (i.e., institutionalised) democracies. *O' Donnell* suggests that in such a system there is a real danger of usurpation of the power by the President. Representation entails accountability not only vertically, but also horizontally. As the latter characteristic of representative democracy is extremely weak or non-existent in delegative democracies, it gives the president the apparent advantage of allowing rapid policy making, but at the possible expense of failure at the implementation stage, as well as negative outcomes.[22]

At the same time presidentialism is inimical to the consociational compromises that may be necessary in the process of democratisation and during periods of crisis, whereas the collegial nature of parliamentary executives makes them conducive to such pacts.

In post-Soviet countries, while there has been an introduction of some features of democracy and constitutionalism, it does not mean that they function in the same way as those in the West. Democracy itself could establish a constitutional framework for the election of an authoritarian and populist government - hostile to market reforms, tough in relations with ethnic minorities and political opponents and unsympathetic to the aims of real transformation. Therefore, there is a genuine possibility that democratic processes may be changed by an openly authoritarian leadership.[23] Besides this, in post-authoritarian regimes the president acts under completely different conditions than in democratic states. In these countries there are still undeveloped, weak party-systems and a democracies with presidential systems under these circumstances will only slowly develop.[24]

Some scholars argue that the establishment of presidentialism in post-Soviet countries is inevitable and necessary. Effective institutions and proper practices cannot be built in a day. To deal effectively with the immense economic and social crisis faced by newly democratised countries, it is necessary that such institutions already be in place.

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[21] *A. Lijphart*, Parliamentary versus Presidential Government, Oxford University Press, 1992, p. 22.
[22] *G. O'Donnell*, "Delegative Democracy", Journal of Democracy, 1994, No. 1, pp. 60-62.
[23] *I. Rogan*, "Constitution Making or Constitutional Transformation in Post-Communist Societies?", Political Studies, XLIV, 1996, p. 586.
[24] *S. Mainwaring,* "Presidentialism in Latin America", *A. Lijphart*, Parliamentary versus Presidential Government, Oxford University Press, 1992, p. 115.

It is evident that the economic, legal, and administrative reforms, needed for such a radical transformation, requires a certain concentration of political power. Strong presidencies emerge mostly in societies that are not well organised enough to have a parliament that is capable enough to support a government undertaking tough economic and other reforms. While reform cabinets may change frequently, the reformist president stays in his position, guaranteeing the continuity and legitimacy of reforms.[25]

Open competition for the presidency may provide a much better education in democracy than dangerous intrigue and bargaining about cabinet posts among parliamentary parties. At the same time, the antipathy of the electorate towards the legislative bodies may remain because of corruption scandals and demoralising fractiousness. A charismatic president can help overcome the apolitism accompanying post-Communist societies. A popular president may be very useful also for sustaining some public confidence in elected bodies combating the feeling among citizens that they are not properly represented. He may also represent the unity of the nation, as the public may be divided between anti-communists and communists.[26]

2.3. Factors influencing the Choice of Presidentialism

In the 1990s, almost all post-Soviet countries chose the presidential form of government with various degrees of power. Since parliamentary democracies last longer, scholars often try to answer why did most of the newly independent states of the former Soviet Union choose presidentialism and what has determined the initial choice of democratic institutions.

An important explanatory factor for presidential choice in post-Soviet area is related to the prior regime type, absence of a usable democratic legacy and democratic traditions. During the USSR totalitarian practices predominated.

At the same time, institutional disintegration and social chaos has put a great burden on the political system. The process of democratisation is made more difficult by the painful legacies of the past as well as by painful economic reforms, ethnic, religious, separatist and other problems.[27]

One of the important factors influencing institutional choice, together with the past, can be found also in the structure of old regime élites of post-Soviet countries. The choice of regime type seems to be a way by which élite actors try to secure access to power. *Easter* indicates that three structural types of old regime élites emerged from the post-communist transitions:

1. Consolidated old regime élites, where old regime élites successfully retained their "monopoly of power resources" in the transition phase and opposition forces were too weak. In this case, presidentialism was chosen primarily. It was more useful for consolidated old regime élites to gain access to power.

2. "Dispersed" old regime élites, where divided old regimes which were forced to compete for power equally with strengthened new political actors in the transition period. In the case of "dispersed" élites, a parliamentary system is usually chosen, as this system may be used for new élites to broaden their access to "power resources".

[25] *S. Holmes*, "A Forum on Presidential Powers", EECR, (4/1993), pp. 37-38.
[26] *S. Holmes*, "A Forum on Presidential Powers", EECR, (4/1993), pp. 38-40.
[27] *S. Holmes*, "Back to the Drawing Board", EECR, (1/1993), p. 21.

3. Reformed old regimes, where old regimes have had to reform to retain their access to "power resources", and surviving old regime élites and new political forces enter into power-sharing agreements. In cases of reformed élite, the political structure tends toward presidentialism.[28]

It should be added that among the factors influencing the choice of regime type is the development of the party system in post-Soviet countries. *Shugart* suggests that the less well-formed are parties at the time of constitution-making, the more likely is the establishment of a powerful presidency. This is a way to minimise the risk of unstable cabinets, to give the direct responsibility for policy choices to the president, and to leave the members of the parliament relatively free to serve their constituents.[29]

2.4. Comparative analysis of the Presidencies

From the 15 republics of the former Soviet Union, 12 may be considered as having a presidential form of government. Only Latvia and Estonia have parliamentary systems. However, the constitutional forms of these 12 countries vary considerably, particularly to the extent of the power given to the president. These 12 republics with presidential systems may be divided into groups and sub-groups according to the degree of the power of the president. Table 1 illustrates this division:

Table 1

Pure-Presidentialism	**Semi-Presidentialism**			
	Super-Presidential Type		**French Type**	**Ukrainian Type**
	Asian Version	**Russian Version**		
Georgia	Belarus Kazakhstan Kyrgyzstan Tajikistan Turkmenistan Uzbekistan	Armenia Azerbaijan Russia	Lithuania Moldova	Ukraine

As can be seen from the table, Georgia is the only country among the listed countries with a pure (American) presidential system. All other republics have the semi-presidential form of government. Nine republics from these semi-presidential countries can be grouped into the super-presidential[30] type. In spite of some similarity to the French system, the countries of this group have considerable differences, which are mostly connected with increased powers of the president. For example, in the super-presidential group there can be little possibility of executive-legislative cohabitation as in the French system, even if a parliamentary majority does not support the president. French President cannot dismiss the Prime Minister without the approval of the parliament. Whereas in the super presidential group the legislatures are very restricted in exercising the vote of no confidence against the government, and presidents have more freedom to dissolve parliaments.

[28] *G. Easter,* "Preference for Presidentialism, Post-Communist Regime Change in Russia and the NIS", World Politics, vol. 42, No. 2,1997, pp.184-190.
[29] *M. Shugart*, "Of Presidents and Parliaments", EECR, (1/1993), p. 32.
[30] This term is borrowed from *Holmes*, who uses it to classify the Russian system of presidency. See *S. Holmes*, "Superpresidentialism and its Problems", EECR (Fall 1993/ Winter 1994), p. 123.

As Russia is considered to be a representative of super-presidential type (as well as a typical example of the post-Soviet semi-presidentialism), I will discuss in more detail the process of the establishment and the implementation of the Russian presidential system below.

In June 1991, *Boris Yeltsin* became Russia's first popularly elected president. The Presidency was weak at first, however the situation changed after *Yeltsin's* personal popularity increased following the defeat of the August coup. In November 1991, the Congress ceded to *Yeltsin* special powers to rule by emergency decree for one year. In spring 1992, the Parliament attempted to revoke the president's special powers. For the next eighteen months, Russia's transition was paralysed by an extrication crisis. Both parties of the horizontal power (the legislature and the executive) claimed democratic legitimacy.

Yeltsin decided to break this institutional crisis by decreeing suspension of the existing "Soviet" Constitution and the dissolution of both the Congress and the Parliament. The conflict escalated into violence, at the end of which, *Yeltsin's* decree was forcibly implemented by a reluctant military. *Yeltsin* seized the moment and imposed an institutional choice on the Russian transition.[31]

Yeltsin's draft proposing a strong presidential system was issued for public discussion only weeks in advance of a referendum. At the same time, the political parties were prohibited from expressing their views on the draft Constitution during the parliamentary election campaign, which was held together with the referendum. Therefore, political parties, federal and regional authorities were very much restricted in discussing the draft.[32]

The ratification of the Constitution by the referendum was important for *Yeltsin* to give the Constitution the exceptional legal status by means of a popular vote and to avoid the problem of the non-existence of a legislative body. The Constitution was approved by popular vote in the December referendum. However the presidential elections, that were promised to be held in conjunction with parliamentary elections, were cancelled until 1996.

The new Constitution approved an extremely strong presidential system. Before the referendum *Yeltsin* himself justified such enormous power of the president:

> " I will not deny that the powers of the president outlined in the draft are considerable. What do you expect? How can we rely on Parliament and Parliament alone in the country that is used to czar or "leaders", in a country that does not have well defined interest groups, where normal parties are only now being formed, in a country with very low executive discipline and with wide-spread legal nihilism? In half a year or earlier, people will demand a dictator. I assure you that such a dictator will be found quickly and very possibly in parliament."

According to the Constitution, the president, who is elected directly by citizens for four years, is the head of the state and Supreme Commander-in-Chief of the armed forces. The impeachment of the president is very restricted to the limits of treason and high crimes.
The President controls the composition of the government through the right to appoint the Chairman of the Government subject to consent of the State Duma. Other members of the government are appointed and dismissed by the President without Parliament's conformation. He also presides over meetings of the government. If the Duma rejects the president's nominee three times, he has the right

[31] *G. Easter* (1997), p.194.
[32] *S. Holmes*, "Superpresidentialism and its Problems", EECR (Fall 1993/ Winter 1994), p. 126.

to appoint a chairman of the government, dissolve the Duma and call new elections. The President may dissolve the Duma also when it passes two votes of no confidence within a three-month period.

The President has the right of legislative initiative as well as strong veto power, which may be overridden only by two-thirds of the members of both houses of the Federal Assembly. He has the right to issue ukazi (edicts) and rasparyazhenia (directives) that are binding on the entire territory of the country as long as they do not violate the federal laws he signs and publishes.

Armenia and Azerbaijan have a constitutional design of the presidential system similar to that of Russia and they can be categorised as super-presidential in the Russian super-presidential subgroup.

The Asian version of the super-presidential subgroup represents another form of the most powerful presidencies in the post-Soviet area. In this sub-group there are 5 countries of Central Asia and Belarus. Having constitutional design similar to that of Russia, in these countries, the presidents' powers are even more increased.

In Turkmenistan, Uzbekistan, Kyrgyzstan, Kazakhstan and Belarus referenda have been held. As a result, avoiding the provisions of the Constitution, the presidents have managed to prolong their presidency.

Constitutionally, the Presidents of these republics (like their Russian counterpart) appoint a prime minister with the consent of the parliament and dismiss him without such consent. Presidents appoint and dismiss the ministers without consent of the parliaments. The presidents of the Asian super-presidential type are less restricted in dissolving the parliaments. For example, according to the Kazakh Constitution, the President can dissolve the parliament if there is a "political crisis resulting from of insurmountable differences between the chambers of parliament or parliament and other branches of state power" (Art. 63,2).

The possibility of impeachment is restricted in this type, and the Uzbek Constitution does not provide for it. The procedure of impeachment in the Kazakh Constitution can be considered as an "original" innovation for modern constitutionalism. Although the possibility of impeachment exists under certain and unlikely circumstances, if it is rejected by Parliament at any stage of the impeachment procedure the powers of the deputies initiating the impeachment have their powers terminated (Art. 47,3).

It can be argued that Moldovan and Lithuanian semi-presidential systems are closer to the French one and therefore they can be unified in the French type of semi-presidential group, where cabinets are more dependent upon a parliamentary majority.

Ukraine can be considered as a separate group as a mixture of the super-presidential and French types of semi-presidentialisms. The President has similar rights to Russian President to compose the government; i.e., he appoints the prime minister with the consent of parliament and may dismiss him without the consent of the parliament. He does not need consent of the parliament to appoint and dismiss members of the cabinet. However, the Ukrainian model has important differences, which draws the system closer to the French semi-presidential system. For instance, if parliament adopts a resolution of no confidence against the cabinet, this causes the automatic resignation of the latter. Therefore, both the parliament as well as the president can dismiss the cabinet. In addition, the Ukrainian president has rather symbolic, very weak position in dissolving the parliament. This character makes the Ukrainian presidency differ substantially from all other post-Soviet semi-

presidential types: The president can terminate the authority of parliament only if within thirty days of a single regular session the parliamentary plenary meetings fail to commence (Art. 90).

For a more comprehensive overview of the character of the presidential system in post-Soviet countries, now will be presented a table of the individual characteristics of the presidencies of ex-Soviet states. Specifically, table 2 reflects the executive-legislature relations and presidential power in cabinet formation and dismissal:

Table 2

	Presidential Power On Cabinet Formation		**Separation of Survival in Office**		
Country	Cabinet Formation	Cabinet Dismissal	Parliament	Executive President	Cabinet
Armenia	4	4	1	4	1
Azerbaijan	4	4	1	4	1
Belarus	3	4	1	4	4
Georgia	2	4	4	4	4
Kazakhstan	3	4	1	4	4
Kirgyzstan	3	4	1	4	4
Lithuania	1	3	2	2	2
Moldova	1	3	2	2	2
Russia	3	4	2	4	0
Tajikistan	3	4	1	4	4
Turkmenistan	3	4	1	4	4
Ukraine	2	4	4	4	0
Uzbekistan	3	4	1	4	4

Scoring system:

Powers over:

Cabinet formation

4 - President appoints ministers (including Prime Minister) without need for parliament conformation.
3 - President appoints Prime Minister with the consent of the parliament, and then appoints other ministers on the recommendation (or proposal) of Prime Minister.
2 - President appoints ministers with the consent of parliament.
1 - President appoints Prime Minister with the consent of the Parliament and Prime Minister appoints other ministers with the consent of the Parliament

Cabinet dismissal[33]

4 - President dismisses ministers at will.
3 - President dismisses ministers with the consent of parliament
2 - President dismisses ministers but only under certain conditions.

[33] Cases of president's dismissal by impeachment process are not included in the table.

Separation of survival in office (scored for both parliament and executive. The latter is divided between president and cabinet):

4 - No provision compromising separation of survival.
3 - Survival can be attacked, but attacker must stand for re-election.
2 - Survival can be attacked only in situation of mutual jeopardy.
1 - Survival can be attacked except at specific times.
0 - Survival can be attacked at any time (unrestricted censure or dissolution).

Chapter III - The Case of Georgia - Reaching a Compromise

After the dissolution of the Soviet Union, newly independent Georgia faced the problem of how constitutional institutions were to determine which type of separation of power was best suited to allow a nation, unique in its history and culture, to evolve into a stable and enduringpolitical system in the future.

3.1. Constitutional History

For constitution making Georgia had some historical background including: the brief constitutional history of the independent Republic of Georgia (1918-1921); the seventy-year communist legacy; as well as several years of the post-Soviet period.

In February 1921, the Constituent Assembly of Georgia adopted the first Constitution of the Democratic Republic, which gave a start to the history of constitutionalism in Georgia. Before the adoption of the Constitution, the country gained independence from the Russian Empire when the National Council, which was established in 1917 and in which representatives of different political groups and organisations participated, proclaimed independence on May 26, 1918. In 1919, the Constituent Assembly was elected on the basis of democratic, free, universal and multiparty elections.

The Constitution defined the typical parliamentary form of government. Legislative power was vested in a parliament, elected for 3 years directly by the people on the basis of the proportional electoral system. Executive power was exercised by the government (Art. 66), the chairman of which was appointed every year by the Parliament. The chairman of the government in his turn appointed then the members of the government (Art. 68). An unusual feature for this parliamentary system was that neither Parliament could force the Government to resign by a vote of no confidence nor could the Government dissolve the Parliament. Russian Soviet troops annexed Georgia in February - March of 1921. Before being forced to leave the country and emigrating, the Government of the Independent Democratic Republic of Georgia temporarily dissolved the Constitution.

After sovietisation, Georgia was incorporated into the Soviet Union. In the Soviet period four Constitutions were created, all of which proclaimed the establishment of the one party system and guaranteed the power of the Communist party and Soviets. Georgian Constitutions of the Communist period were with slight alternations mainly the re-written versions of the Soviet Union Constitutions. The Communist party (the only existing political organisation) had a leading role in the society, i.e., it controlled every sphere of the society.
Georgia declared independence once more in April 1990 but gained real independence at the end of the 1991 after the collapse of the Soviet Union. In 1990, the political block "Round Table-Free

Georgia" led by the widely honoured nationalist dissident, *Zviad Gamsakhurdia*, won the parliamentary elections.[34] The old Communist Constitution of 1978 was not cancelled but was changed substantially. In April 1991, the post of Presidency was established, and *Zviad Gamsakhurdia* was elected directly by the people.[35] The President had quite strong power except for the ability to dissolve the parliament.

However, there were many tensions between the opposition and the newly elected President. The opposition accused the President of fostering a personality cult and an authoritarian style of government. At the same time the extreme emotions evoked by him polarised the nation, bringing it to the brink of civil war.[36] In January 1992, *Gamsakhurdia* was forcibly removed from power by a rebel Guard and the paramilitary organisation "Mkhedrioni", with the support of the opposition parties. The ousted President left the country, and the Supreme Council (Parliament) as well the Constitution stopped functioning.

Power was taken by the Military Council. In March, 1992 *Eduard Shevardnadze*, the former First Secretary of the Communist party of Georgia and Former Minister of Foreign Affairs of the Soviet Union, returned to Georgia. Both the internal and international situation required the start of democratic reforms as well as the overcoming of the crisis of legitimacy resulting from *Gamsakhurdia's* overthrow. The Military Council was changed to a State Council, which consisted of the representatives of different political parties, political and social groups under the chairmanship of *Shevardnadze*. The State Council temporarily took legislative as well as some administrative functions.

The State Council, on the basis of the parliamentary election law adopted by it, held parliamentary elections, which took place on October 1992. The interesting feature of these elections was that through the demand of political parties, together with the parliamentary members, the people elected the Chairman of the Parliament.

Before the elections, in February 1992, the Military Council, upon the demand of some political forces, declared the restoration of the Constitution of 1921. The restored Constitution, in spite of its progressive nature, did not work since it did not fit into the institutional and political realities after 70 years of Communist rule.[37] It was impossible to re-establish directly after the Soviet legacy and under a provisional and temporary authority a parliamentary system of government. The country suffered from a "constitutional vacuum".

The newly elected Parliament first adopted a Law on State Authority. Although the law was not the Constitution,[38] it defined for almost three years, as its preamble says: "the authority, arrangements and rule of behaviour of the Georgian high state bodies until the adoption of the new Constitution".

The Law on State Authority did not specify clearly the political system of the country. The position of head of state was established, elected by the parliament, which could also be combined with the position of the chairman of the parliament. The head of state had similar powers as presidents in semi-presidential systems, except for the power to dissolve the parliament and the power of legislative veto. He had the right to propose the composition of the government subject to further conformation by the parliament. He could dismiss the prime minister and ministers without parliamentary conformation and

[34] The parliamentary elections of 1990 in Georgia are considered to be the first multi-party elections in the Soviet Union.
[35] These were the first direct presidential elections in the Soviet Union.
[36] "Country profile: Georgia, Armenia, Azerbaijan", The Economist Intelligence Unit, 1996, p. 5.
[37] *O. Melkadze*, "Talks On Georgian Constitution", Tbilisi, 1996, p.32.
[38] Although it was adopted by two third of the members of the Parliament.

preside over the meetings of the government. On the other hand, the parliament may vote no confidence in the head of state (by two third of the votes) as well as the government (by simple majority of votes).

Such a system primarily fitted to the personality of *Shevardnadze*. *Shevardnadze* was considered as the only appropriate person whose popularity made it possible to take some direct credit from the people. The political parties had been afraid that if *Shevardnadze* had participated in the parliamentary elections as a member of any political party, it would have certainly given that party a strong advantage and deprive a wide spectrum of other political parties from representation in the Parliament. Therefore, they proposed to elect *Shevardnadze* directly by the people as Chairman of the Parliament. As the country had recently had a very poor experience with the President *Gamsakhurdia*, the system of presidency was not established.

However, after the elections it became apparent that *Shevardnadze's* direct election by the people as the Chairman of the legislative body was not sufficient for effectively governing the country, which was in political, economic and even military difficulties. The establishment of the position of the head of state would give him the possibility to have more power and enable him to control and lead effectively the government.[39]

3.2. Drafting of the Constitution

Georgia's post-Soviet transition has been accompanied by political crises, increased crime, economic disaster, chronically unstable central governments challenged by powerful private militias such as the Mkhedrioni, civil war, including two violent secessionist conflicts that emerged in South Ossetia and Abkhazia.

At the same time, the newly independent country was still under the pressure of the Russian imperial forces. The defeat of Georgia in the war in Abkhazia in 1993 resulted in the establishment of Russia's dominant influence in the region. Russia's policy of coercion lately became the main reason for the newly independent Georgia to join then the CIS.[40] In that situation the drafting and adoption of the new Constitution was decided.

In order to prepare a draft Constitution, on 16th of February 1993, the Parliament formed the Constitutional Commission comprised of the members of the Parliament and legal and political experts. The Parliament gave the Commission the task to prepare a concept of the new version of the Constitution of 1921 before the end of June, and the draft Constitution before the end of 1993.[41]

Most of the thirteen drafts, submitted by different parties and political organisations, were based on the semi-presidential system of government with various degrees of power of the president. Two opposition political organisations - the National Independent Party and the Voice of Justice - proposed similar drafts based on the American model. Another opposition organisation's - the Republican Party - draft was based on a parliamentary system.

After intense discussions only two main drafts remained on the agenda: one (official draft of the Commission) supported by the majority of the members of the Commission and the Government, was

[39] Which was chaired by the prime minister.
[40] *D. Trofimov*, "The Conflict in Abkhazia", Crisis management in the CIS, Nomos Verlagsgesellschaft, Baden-Baden, 1992, p. 113.
[41] *O. Melkadze*, "Talks On Georgian Constitution", Tbilisi, 1996, p. 33.

focused on the French semi-presidential system, and, another, submitted by the opposition Republican Party, was based on the parliamentary form of government.

The major arguments of the supporters of the parliamentary system was based on the assumption that there would be a real danger of usurpation of power by the President, with a yet undeveloped party system and democratic institutions as well as the lack of relevant political culture in the country. Thus, as all drafts embraced the principle of popular sovereignty - asserting that sovereignty is based in "the People" - the republicans primary fear was that this very same principle would lead a president to assert his right to rule in the name of the people and above law.[42]

Supporters of presidential power in Georgia had the same arguments as discussed in the chapter 2: the need of the concentration of political power to undertake profound and at the same time tough economic, legal and administrative reforms, especially when the party system was not developed enough to support the radical reforms of the government. The most important argument for strong authority was that dangerous internal and external environment needed fast and timely reaction.

The draft of the Commission gave substantial powers to the president, but quite a few responsibilities. He had much power over the composition of the government. He also had the right to preside over the meetings of the government, as well as the right to appoint a prime minister subject to further conformation by the parliament. He had the right to appoint ministers on the proposal of prime minister without conformation of the parliament. The president had the right to dismiss the prime minister as well as the members of the cabinet also without the confirmation of the parliament.

The cabinet of ministers was defined to be accountable to both the president and the parliament. The president had the right to dissolve the parliament and call new parliamentary elections, if parliament did not confirm the appointment of the cabinet and then did not form a new cabinet, which needed two third votes of the members of parliament. The president had the same right to dissolve the parliament if the latter expressed a vote of no confidence in the cabinet while at the same time not choosing a new cabinet.

According to the draft of the Republican Party the president was supposed to be elected by the parliament. Executive power was exercised only by the government, the head of which could only be a member of parliament. The president submitted a candidate for the head of the government to the legislature for appointment. If parliament did not elect a candidate nominated by president, the parliament was obliged itself to elect the head of government. Parliament had the right to use the vote of no confidence in the head of the government and to elect a new one. The head of the government had the right to submit a question of confidence by himself before the parliament and if parliament did not show confidence in him, he was authorised to demand from the president dissolution of the parliament. The president was obliged to accept such a demand if the parliament did not elect a substitute head of the government within 20 days.

The authors of the drafts could not reach a compromise to submit a single version of the draft to the parliament; however, there were some serious attempts to do so.

In November 1994, all major participants of the drafting process met with foreign experts in Chicago. They could manage to agree on the basic principles that would be the basis for the compromised version of the constitution. This draft is known as the Chicago version.

[42] *L. Lessig*, "Memorandum to A. *Demetrashvili*", Working Papers of the COLPI, June 14, 1994.

The compromised draft of Chicago was based on the semi-presidential system, but with lesser presidential power than was designed in the initial draft of the Commission. According to this draft the cabinet of ministers, which led the executive, would be responsible just to the parliament. The president appointed a prime minister who in turn set up the cabinet of ministers. Then the prime minister submitted the whole personnel of the cabinet to the parliament for confirmation. In the case of the double rejection of the cabinet by the parliament, the latter itself elected the cabinet. In the case that the cabinet was not elected this time also, the president dissolved the parliament and declared new elections. The prime minister had the right to submit to parliament the issue of no confidence. The parliament was authorised to use vote of no confidence only if it simultaneously elected a new prime minister.[43] If cabinet did not receive the confidence and the parliament could not elect a new prime minister, the president dissolved the parliament.

Although a compromise was achieved, participants of the Chicago meeting could not manage to develop results. We could argue that this could be explained by the fact that most participants in the Chicago meeting had no real authority to back the compromise reached. *Shevardnadze* was the key actor, because in reality he was defining the position of the majority of the leading politicians.

Finally, in spite of the refusal of most of the opposition parties, the Commission adopted the draft based on the Commission's old version by a simple majority of the votes. The draft was submitted to the parliament in May 1995.

The Parliament, like the Commission, became a place of highly intense debates on the draft. The Republicans submitted again their version based on the parliamentary system. The debates took a month without any real result. The government, that supported the official version of the Commission, as well as the opposition parties, did not have the two thirds of the votes in the parliament necessary for the adoption of a constitution. The common fear that united all of the opposition parties was that the Commission draft would give the president the possibility to control the government totally, and at the same time would enable him to be unaccountable for his policies, putting all responsibility on the shoulders of the government. They also did not agree on the right of the president, although quite restricted, to dissolve the parliament.

For the reasons mentioned above the situation was close to deadlock. Surprisingly, the parliament adopted a constitution defining pure presidential power. The question arises how could it happen that such a system which had not been seriously discussed until the last moment of constitution making, was adopted.

When *Bakur Gulua* proposed this idea both supporters and opposition of the government, started to discuss the proposal very seriously. The following arguments and reasons promoted all sides to participate in the bargaining process and finally forced them to reach a compromise.

Some groups within the supporters of the government, realising that they did not have the two-thirds majority in the parliament argued that the only chance for success would be if they submitted the draft for referendum. Because of the popularity of *Shevardnadze* the draft had a great chance to be adopted by referendum. However, lawyers considered that to hold a referendum would be considered an illegal action. At the same time it would be impossible to hold referendum on the whole territory of the country as the central government did not have authority on the territories controlled by the separatists in Abkhazia and South Ossetia. It would give the possibility to the separationists to claim that a constitution adopted without the participation of their regions would not be binding for them. On

[43] This is called "Constructive vote of no confidence", used for example in Germany.

the contrary, in the parliament there were members elected from these regions of Georgia and a constitution adopted by the parliament would have more legitimacy on these territories. At the same time, such a referendum would certainly polarise the political forces of the country increasing political conflict.

For these reasons, the government and primarily *Shevardnadze*, agreed to take part in a serious negotiation process with the opposition to reach consensus on the adoption of the Constitution. The American system seemed to have the strong power of the presidency that was important for government. Presidentialism tended to provide more executive stability.

However, the opposition parties[44] unwilling to agree to the strong presidential power defined by the Commission draft, had also serious reasons to accept the compromise and to comply with the American model of presidency. They realised that the draft, in spite of the violation of the law, would be more likely to be submitted by the head of State to a referendum receiving the necessary votes (Such an example already existed in Russia).

The American model of presidency, based on the principle of the separation of powers and checks and balances, was more suitable for them than the semi-presidential system with the strong power of the president. At least the president would not have the right to dissolve the parliament, and the Parliament would have sufficient authority to block the executive. The opposition suggested that in the American system where the president is considered as the only executive branch with defined powers, he has the full responsibility for any policy undertaken by him.

Having reasons to reach a compromise, the representatives of the government and the opposition started a complex process to close positions within the framework of the pure presidential system.

In fact, the provisions about the presidency were written in three weeks. The parliamentarians were in hurry as according to the Law on State Authority and the Provision on the parliamentary elections, the authority of the parliament would expire soon.

The opposition agreed to give the president almost all the rights defined in the American Constitution.

Shevardnadze, in turn, made the following compromises. In order not to give the president the possibility to avoid full responsibility there was not established the position of the prime minister. The chapter on human rights was made almost on the proposition of the opposition, as well as the chapter regulating the basic principles of the judicial power. Finally, on August 24, the parliament adopted the Constitution.

3.3. Constitutional Design of the Presidential System

The Constitution of 1995 defines the authority of the President in Chapter Four (Art. 69-81). The Georgian President is the head of state, the chief executive and the Supreme Commander in Chief of the armed forces.

He shall be elected as a president for 5 years directly by the citizens. According to the American Constitution Electoral College elects the President for four years (Art. 2.2). The Georgian (Art. 70.1) as

[44] Not all opposition parties agreed on the American model, fore example the National Democratic Party. However, the model was supported by such groups as the Republican party, which has the most number of the parliamentarians among the opposition parties which together with the supporters of the Government were sufficient number to reach the necessary two thirds for adoption of the Constitution.

well as American Constitution (Amendment XXI) restricts the right to serve as president to two terms. Like in the USA, a candidate to the Georgian Presidency should be above thirty-five years old and a resident of the country for at least fifteen years (American version defines fourteen years).

Like his USA counterpart, the Georgian President appoints members of his government with the consent of the Parliament, who are responsible before the President. He is also authorised to remove ministers without such consent (Art. 73.1).

The President can be removed from his office only by the impeachment process for violation of the Constitution, which is confirmed by the Constitutional Court, or for high treason or other capital crimes confirmed by the decision of the Supreme Court (Art. 75.2).

The President of Georgia, like the American one, has the right of legislative veto (Art. 68.4). The difference is that to override the veto, it needs three fifths of all members of the Parliament of Georgia, while in the USA - two thirds in both Chambers of the Congress are needed. The Georgian President, like the American President, has the right to conclude treaties, to negotiate with foreign states with the consent of Parliament.

In Georgia, as in the USA (Art. 2.2), the President nominates the Chairman and members of the Supreme Court, who are confirmed then by the Parliament (Art. 90.1). However in Georgia, acting more in an European tradition, the Constitutional Court was established consisting of 9 members of which three are appointed by the President, three are elected by the Parliament and three are appointed by the Supreme Court.

However, there are also some substantial differences in the constitutional definition of the power of the Georgian Presidency in comparison to the USA presidency. The President of Georgia has the right of legislative initiative. Practically, the President of the USA uses such power as well, but it is not defined by the Constitution and is exercised through the members of the Congress. [45]

The President of Georgia also has the right to issue decrees of equal status to laws during a state of war, later submitting them to the Parliament when the latter holds session (Art. 73.1.). The Georgian Constitution defines the duties of the President as "to guarantee the unity and integrity of the country and the activity of state bodies according to the Constitution" (Art. 69.2). At the same time he has such an important power as to halt or dismiss the activity of representative bodies of territorial units with the consent of the Parliament, if their activities endanger the sovereignty, territorial integrity of the country or the exercise of constitutional authority by the governmental bodies (73.1.). It should be mentioned that the incorporation of such tasks for the president was influenced by the similar provision of the French Constitution of 1958. This is common for post-Soviet presidencies, because of the real danger of conflicts on their territories that need rapid legislative response that is a difficult task for legislatures.

The President of Georgia also sets elections for the Parliament and representative bodies of local governments. This right should be exercised only on the basis of the law. He has also such an important right as to call a referendum at the request of not less than twenty thousand voters or Parliament or on his initiative.

According to the Georgian Constitution, there is no post of vice president, as in the USA model. Still, unlike in the USA, there is the position of the State Minister appointed by the President, who is a

[45] *J. Baron* and *T. Dienes* (eds.), Constitutional Law, 1990, p. 110.

member of the government directing the chancellery of the president and fulfilling separate tasks under the direction of the President (Art. 81.3).

Where the President is unable to perform his duties or in the case of pre-term expiration, the powers of the president are delegated to the speaker of the Parliament and the elections of the new president are held within forty-five days after the expiration of the President's duties (Art. 76.).

As we can see the main features of the Constitutional design of the presidency of Georgia are similar to the American model. The most important ones are that no branch of power can dissolve another power, the executive is exercised exclusively by the President elected by the people, the president has veto power, and there is an impeachment procedure. All three branches of the State power constitutionally are designed to interact on the basis of the separation of powers and checks and balances.

Conclusion

This article attempted to analyse the basic factors influencing the establishment of the pure (American) system of government in Georgia. The main hypothesis relies on the assumption that the pure presidential system in Georgia, established after the adoption of the Constitution of 1995 was the result of the bargaining process of political forces. The compromise outcome of the bargaining process among various factors primarily was the result of:

1. The inability of the main political actors - participants of the constitution making process - to achieve a compromise.
2. The character of the pure presidential system within the framework of which it was possible to reach a compromise.

The purpose of this article was not to prove which system of government is acceptable for Georgia as well as for other post-Soviet countries during the transition period and which institutional choice had a decisive influence on the democratic development of these countries. However it should be mentioned that effective work of any system depends on the good will of the society and all major social institutions of the country, to take part in the process of democratic development, as well as on the ability of the political leaders to have a feeling of necessity of using there power within the certain framework and reaching minimal consensus.

MARIAM TSATSANASHVILI*

ON THE CONCEPT OF INFORMATION**

Information is a Latin word describing the process of "to get knowledge", "to make known". Until the middle of the 20th century information was understood as a "notice", a "notification" transferred by a human through oral, written or other means. An independent concept of information had not yet become a subject of special attention. In the second half of the 20th century, information entered into scientific discourse, but was conceived from different points of view. A large number of scientific literatures with different and mutually exclusive opinions have developed around the phenomenon of information. Definitions of information range from giving it real form to denying its very existence. Such a different approach towards the notion of information has its grounds in the context the latter is given. Concepts of information can be classed as attributive and functional.[2]

An attributive conception of information sees information as an indivisible and internal characteristic of a material object. It has existed, exists and will continue to exist in all elements and all systems of the material world and draws the attention of man and society. Information surrounds us, for all kinds of combinations of elements, "material or mental constructions, are a code about something". Proceeding from this, a cognitive process is the decoding of information existing in real objects.

Supporters of a functional conception see information as indivisible from management, i.e., from self-organising, self-managing systems (technical, biological, and social-cybernetic). They do not recognise the existence of information in inorganic nature. Information is defined by them as the contents of a signal, or a notification[3] received from the outer world by a cybernetic system, which involuntarily fosters the establishment of orderliness out of chaos[4] (this is the process studied by synergetics).

Both conceptions have the common view that information is a real factor. There are others who take the existence of information quite skeptically: "No one has yet seen this undiscovered information, neither as a substance nor as a characteristic… Everywhere we meet with the mutual impact of energy-equipped material objects; nowhere will you discover what we call information. Why? Because it does not exist in nature as ether, fluid, phlogiston or as something else."[5] *Sokolov's* position about verification of information as the denial of objective reality is closely related to this position.

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** Translation from Georgian language by GEPLAC.

1 See. *V. Altukhov*, "Change of Paradigms and Formation of New Methodologies", Obshest. Nauki i Sovremennost, 1993, No. 1; *A. I. Berg*, *B. V. Birukov, N. N. Vorobiov, et al.*, Management, Information, Intellect, Moscow, 1976; *N. Vinner*, Cybernetics or Management and Communication in Animals and Machines, Moscow, 1968; M. V. *Volkenstein*, Entropy and Information, Moscow, 1980; *B. Kastler*, Origin of Biological Organisations, Moscow ,1967; *V. P. Kopnin,* Gnosiological and Logical Basis of Science, Moscow, 1974; *V. I. Korogodin,* "Information and the Phenomenon of Life", *A. N. Pushino*, USSR, 1991; *Stepin, V. S.*, Philosophical Anthropology and Philosophy of Science, Moscow, 1992; *G. Haken,* Information and Self-organisation, Moscow, 1993; *A. S. Sherbakov*, Self-organisation of Matter in Inorganic Nature, Philosophical Aspects of Synergetics, Moscow, 1990, *I. V. Melik-Gaikazian*, Information and Self-organisation: Methodological Analysis, Tomsk, 1995.

2 *B. C. Brookes*, "Measurements in Information Science: Objective and subjective metrical Space", Journal of the American Society of Information Science, 1980, No. 1, pp. 48-55.

3 *D. S. Chernavski*, Synergetics and Information, Moscow, 1990, p.17.

4 *M. I. Setrov*, "Informational Processes in Biological Systems", *Metodolog. Ocherk*, Leningrad, 1975, pp. 123-124.

"Materialisation of information is unsuccessful, for unlike the cognition of actually existing knowledge, notification, communication, or "information" is an abstraction worked out by scientists, which depicts certain realities but it itself remains as a notion just like "the terrestrial axis", "weight of atom" etc.[6] Nevertheless, proponents of this opinion believe that in the exact and natural sciences, the category of information has no homogeneous definition. It takes significance with regard to the context proceeding from the objects whose study is conducted through an informational approach. In this way biological information, mechanical information, and social information have nothing in common except communication and a vague association of reflection. We may say that by this logic, information is "permanent indefiniteness", some kind of "crutch of mind" by means of which we arrive from the relative truth at the absolute truth.

In order to seek some compromise between the denial and the existence of information, one group of authors (*Golzman*, *Korshunov*, etc.) while not denying the existence of information, however, consider that it is the beginning, principal moment and that for this reason we should not try to define it. There are notions that cannot be explained simply (e.g. point, letter).[7] *Moisev* supposes that: 1) It is not that there is no universal definition of information, definition is not even possible; 2) This notion is "historical" in some manner.[8] The necessity to define the notion of information occurred on the later level of the material world. *Berg* assumes, "neither objects, nor energy exist, if not connected with informational processes. Towards the end of 20th century it is not energy, but the concept of information that will take first place in scientific and practical reality".[9] The philosopher *Kopnin* a little earlier had concluded the meaning of information: "Cybernetics, the new field of knowledge, had not even become developed when the use of the concept of information began everywhere, sometimes even without any necessity".[10]

In a number of papers, information is identified with energy - the super field, which *Einstein* considered as an indivisible part of all physical fields and to which he dedicated the rest of his life, without solving the question.[11] In oriental, esoteric meditations on the informational super field, "chi" or "tsi" stands for energy. All objects of the outer world consist of transformations of "tsi". Certain kinds of transformation of "tsi" in animal and human bodies play the role of sort of "life energy", bio-energy (carrier of biological information).[12]

I would first like to demonstrate the error in the view of information as a "general abstraction, "crutch of mind", "permanent indefiniteness" or even as a beginning point.

Life, from DNA molecules to highly developed individuals, is the constant process of energy and substance consumption (assimilation, dissimilation). This process is the consecutive result of controllable and regulative chemical reactions, which is known under the name of metabolism carried out by "something" kept in the cell and by holographic code (programme). This concerns cells that have a reproductive function (capacity). Another group of cells (neurones), with a control function has the characteristic of making inner and outer impacts in the form of impulses of various frequencies and amplitudes. Because of this feature, they remember the trail of impact in the form of a mark ("text") they "assess", or interpret the impact of these marks according to their own need and react in the form

[6] *A. V. Sokolov*, "Information: Phenomenon? Function? Fiction?", *Philosoph. Nauki*, 1990, No. 9.
[7] *M. V. Golzman et al.*, "Information around us", *Informatia i Obrazovanie*, 1990, No. 1, pp. 29-38; *O. P. Korshunov,* "Information: Fiction and Reality", Bibliography, 1996, No. 4, pp. 30-34.
[8] *N. N. Moiseev, Man and Noosphere,* Moscow, 1990, p. 15.
[9] *A. I. Berg, B.V. Birukov, N. N. Vorobiov, et al.*, Management, Information, Intellect, Moscow, 1976, p. 76.
[10] *V. P. Kopnin, Gnosiological and Logical Basis of Science*, Moscow, 1974, p. 37.
[11] *A. K. Maneev*, *Philosophical Analysis of Science Anatomy*, Minsk, 1974, p. 221.
[12] *Sui Ci Huei*, *Secrets and Methods of Life Prolongation*, Leningrad, 1991, p. 32.

of a controlling signal. Under the terms: code, programme, impulse, signal, mark, etc., is meant "something" that stands behind them. These very terms are the carriers of this "something". So this "something" is the characteristic of living organisms (systems) to perceive physical impact in the form of marks, to combine these with a code and work out an answer (impulse), which arranges the reaction to various impacts. These processes - transferring of "something" - take place on all levels of organisation of these systems and even a minor "decline" causes serious violation, mutation, interruption of development, sometimes even the destruction of their viability. It is in order to indicate "something" the scientists have established the name "information" and it has developed into such a multilateral object that has become the subject of discussion in various fields. From a philosophical point of view, the definition of information belongs to one of the founders of cybernetics *N. Vinner*: "Information is information and not matter or energy."[13] Thereafter, separation of information from philosophical categories became quite popular, because explanation and analysis of numerous events using an informational approach was often tried. In the end, information as the measurer of indefiniteness became the measurer of unique distribution of matter and energy in space, the measurer of orderliness, and the measurer of the variety, complexity and orderliness of systems. So information has become an objective reality and it is considered not only as a function of self-regulating systems (functional-cybernetic conception), but also as one of the main functions of materia (attributive conception). In addition, proponents of both conceptions consider the phenomenon of information as objectively existing, as an independent substance, which can be directly perceived, treated, transferred, etc. "Whatever different essence is indicated by this term, in all cases it is an essence, indubitable objectivity, reality."[14]

Korshunov agrees with those scientists who ascertain that there is no such reality about which it should be said: "This is the information and not a mark, code, text or programme…". True, that nobody has yet seen information as a substance, but just because it is ideal. This is the act of cognition, which evokes the feeling of real world. For *Dubrovski* this is a subjective reality.[15] However any definition of this reality in a concrete case is befogged. This is not the result of subjective thinking by authors who have tried to find such a definition: the essence of the ideal, psychological consciousness, has been explored for over 2,500 years and has yet to be explained exhaustively. In the very case we are facing, a wide diapason of opinions - from proving the superiority of absolute idea and the inferiority of a substance to the absolute denial of the ideal world ("Consciousness, idea is also material", "idea comes from brain", "idea - is a field", etc.).

Establishing the relation of information to reality is connected with the definition of the form of information (in this case is not meant the form of expressing the information), which *per se* is grounded on the basis of transcendentality of this phenomenon (information). In other words, there occurs either provocation of logical structures or provocation of language structures. Information is related not to objective reality but to facts (events). Though any fact is the result of provocation of either logical or language structures. Objective reality has no evaluation. No one would say that it is either positive or negative. That is why information is what we use for the evaluation of facts and events. The elements of evaluation are exactly knowledge and data - knowledge which is the characteristic of the outer structure, and data, of the inner structure. So, in total it is the system of coincidences, which is the result of provocation of logical and language structures on the objective world and is conditioned by the transcendent nature of thinking and language.

[13] *N. Vinner*, Cybernetics or Management and Communication in Animals and Machines, Moscow, 1968, p. 92.
[14] *O. P. Korshunov*, "Information: Fiction and Reality", Bibliography, 1996, No. 4, pp. 30-34.
[15] *D. I. Dubrovski*, Problems of Ideal, Moscow, 1983, p. 228.

As far as we consider information from the position of consciousness, we should outline contours, which will bring us closer to the notion of information.

1. Information is a component of people's being. It is not a "mental construction", "permanent indefiniteness", it is a reality, which belongs to the scope of the ideal and determines the development and functioning of all objects of the organic world.
2. Information (as well as all objects of the ideal scope) is not material, though can be fixed on a material carrier.
3. Information is directly connected to the organic structures that are the carriers of spatial-time co-ordination though itself has no space or time.
4. Information is created in the process of receiving and interpreting a code (mark, etc.) by the subject of cognition (recipient). As a physiological basis of such "explosions" of the consciousness *Lieberman* considered a "quantum intracellular computer" that receives and transfers information to the brain through inter sound waves.[16] This is why information is sometimes compared with energy.[17] However such a comparison is quite groundless - a question can be raised about the transformation of energy in the process of receiving information but not about information as energy.
5. In scientific and domestic language the term most suitable for "information" is "knowledge", which is based upon the nature of organic structures - to remember the impact of outer world for its own interests in favour of further impact.
6. Information, despite its multiplicity, is not a pure abstraction or the "indefinite essence". Such a definition could indeed be concretised. In particular, under information is understood not all tidings but the one which is the latest and useful for making a decision. For some time now semantic theory has been developed which studies the idea contained in tidings, the value and the usefulness of these tidings for the consumer. According to this theory, the subjective approach is essential, which is based upon *a priori* readiness of a subject on receiving the tidings and using them for definite purposes. In our opinion, information became part of the legal system exactly due to its nature of usefulness. As regards the value of the information, in the studies of the 1970's it is the means of achieving the goal with which is characterised every activity of a man.[18] Consequently, the value is related to the necessity of information for definite purposes. *Schreider* analyses the problem of information in accordance with semantic theory and considers that, as time passes tidings modify the supply (thesaurus) of an information-receiver.[19] The model of notification of tidings, according to some authors is identified with "reflection", for in materialistic theory, reflection is the characteristic of matter, information was considered as its characteristic of this like (as for example motion). In contrast to the above, *Kopnin* proved that "advancing information up to the rank of philosophical category and replacing reflection with it - will be a step backward and not forward."[20] The problem of relating information with reflection, has once again become a matter of scientific interest. *Ursul* expressed his view, that "information is a variation of reflection".[21] In opposite to this opinion we consider that:

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[16] *E. A. Lieberman,"* Quantum Molecular Computers", Biophysics, 1989, No. 5, pp. 91-97.

[17] *J. M. Menou,* The impact of definition - Towards a research agenda for its definition and management, Inf. Process. Management, 1995, No. 4, pp. 455-477.

[18] *A. A. Kharkevich*, "Value of Information", Problems of Cybernetics, 4th ed., Moscow, 1960; *E. V. Telnikov, Afonin, V. Dmitriev*, Theoretical Basis of Informational Technique, Moscow, pp. 58-61.

[19] *A. V. Nestero*, "Some Considerations on the Law of Russia on Information, Informatisation and Protection of Information", *Scientific-Technical Information*, Series. 1, 1996, No. 4. p. 7.

[20] *V. P. Kopnin*, *Gnosiological and Logical Basis of Science,* Moscow, 1974, p. 121.

[21] *A. D. Ursul, T. A. Ursul*, Evolution, Cosmos. Man. (General laws of the development and conception of antrocosmism), Kishinev, 1986, p. 240.

"Reflection" is some kind of intellectual product of an idea, though not expressed in the form of a word, gesture, sound or other. The subject, to which it is produced, is the carrier of this feature.

"Reflection" is an informational production which displays: itself (for example a lion in a zoo); something different from itself - mark (for example a word "lion"); mark of a mark - a symbol (a mark whose meaning is not understood). The point of intersection of these notions gives the following concept: a reflection represents something different but not like itself (a picture of a lion); scheme that is not like it itself but is the object to think about (a scheme of a lion), a reflection represents something different from itself and from the object of thinking (a symbol of a lion).

In the legal system the model of reflection can be outlined as follows: if a citizen, who has not had any contact with the work of the Constitutional Court, who has first read the law of this body, acquires significant amount of data and fills the thesaurus. In such a case the amount of received data could be defined to some extent. However, if after the publication its authors read it, they will increase their knowledge by much (because they already know the contents).

Hence information is connected with reflection. Where the process of reflection occurs informational processes also take place. For reflection it does not matter whether a tiding is used for the solution of any question, while for information it does matter. In studies dedicated to the problem of reflection it is evident[22] that information is closely linked with practice. In this regard, information is an "active", "working" part of knowledge reflection. Even though information is closely connected with reflection and intersects with it, it does not coincide (entirely) with it. While reflection can exist independently, information does not exist without reflection. Moreover, information is connected with active reflection. Only a completed informational production can be actively reflected upon. Reflection is the element of information receiving.

Actually, the process of reflection occurs by the impact of one subject on another. This impact takes place with notification. In order to have the process of reflection actually conducted, except for the subject or object to be reflected on or already reflected on, the process of notification is also necessary. A subject who observes the outer world and judges logically, creates the notification. In cybernetics notification is understood as a process through which is transferred the relevant information.[23] Notification as a consequence of outer world observance, except for correct information, can contain three kinds of mistakes: "systematic", "mirage", and “mist".

An object is a system of an infinite amount of informational elements, whereas a subject can observe only a finite amount of elements. That is why the consequence of observation is not always the same, in other words the consequence of observation can be exact only to a certain degree ("systematic mistake"). A subject cannot observe all elements, e.g., it may be not able to see something (clearly) ("mist"), or as an opposite, observe something that is not a reality ("mirage"). All three kinds of informational mistakes are the result of particularities of the restrictedness and discreteness of understanding, the essence of an individual as well as of the cognition of information by a human. Besides observation and cognition, information can be perverted even in the process of application. Such perversion of information is researched by *Nesterov*. During the application of information, a subject may create pseudo-information or misinformation either purposefully or unintentionally.[24]

[22] *Z. Rovensk, A. Uemov*, et al., Machine and Idea (Philosophical Essays on Cybernetics), Moscow, 1960; *G. I. Sherbetski Systemic Character of Information*, Minsk, 1978; *E. A. Sedov*, "Interrelation of Energy, Information and Entropy in the Processes of Management and Self-organisation", *Information and Management*, Moscow, 1985.

[23] *M. M. Rassolov*, Problems of Management and Information in the Field of Law, Moscow, 1991, p. 130.

[24] *A. V. Nesterov*, Computer Methods and Means of Deep Processing, Analysis and Synthesis in Generally Accessible Documents, Novosibirsk, 1991, p. 214.

Misinformation (or false information) can be invented, "fogged" or perverted, whereas pseudo-information (not produced) - imperfect, spread or incomprehensive. Proper evaluation of tidings reflecting the pseudo-information and objective reality has a special significance for the evaluation of evidences in judicial proceedings. Proceeding from this logic, it can be concluded that information as contents has three levels at the moment of reflection - semantic, syntactic (superficial) and paradigmatic (rather profound). All three levels participate in the proper formulation of an idea. However, if there is no paradigm, or in other words reflection occurs on semantic and syntactic levels, then the reflection is inferior. Although information is nevertheless reflected (understood) without paradigm and is used by this or that measure, it is still related to the goal of an individual that should be envisaged in the process of evaluation of information.

Consequently, information as reflection is only a metaphor and as substance - a fiction. Information is an objective reality though comparative reality, which, despite the form of expression, exists in the form of tiding, data and, for the purpose of definite usefulness, is connected with the consciousness of a subject.

The process of information cognition (notification) has characteristics that make it the object of study of various sciences:[25]

1) characteristic of fixation - information can be fixed on this or that carrier;
2) characteristic of transfer, without fixation - produced information transferred by electronic or mass media;
3) characteristic of transmission - ability of transferring the information from one carrier to another, or ability of transferring produced information to the material carrier;
4) characteristic of distribution and multiplication - ability of fixing the information on various carriers simultaneously;
5) characteristic of usefulness - ability of application for the purposeful activity;
6) characteristic of polypotentiality - ability of using coded information for various actions, solution of various questions by the same information;
7) characteristic of formation (source) - information may be created by an individual, formed by social systems. We may separately deal with artificial formation by means of computer systems. Philosophical and sectional definitions of information clarify that information is "something" that comprises the subject-field of legal relations. Beyond this something, legal vocabulary has established the contents - in most cases in the legal acts - for a term similar to information is used tidings, whereas a datum is fixed in the titles of approximately all laws related to this sphere (laws on the protection of data). In respect to notification, this is the process during which circulation of information takes place and it is understood as the objective side of legal relations.

Consequently, from the legal point of view, information is understood as tiding, data, which is the matter of legal relations in the process of notification (receipt, processing, keeping, transfer etc.). When defining the place of information in the legal system all the factors with which this event is characterised should be taken into account, in the process of notification of tidings and data between the state and physical persons. In the legal viewpoint a primary object of consideration shall be the tidings or data that as a consequence of private and public legal interests is in the public circulation and gives necessary information for the cognition of real circumstances.

[25] *I. V. Melick-Gaikazyan*, Information and Self-organisation: Methodological Analysis, Tomsk, 1995, p. 32.

ALEXANDER BARNEWITZ*

PROTECTION OF DOMESTIC INDUSTRIES UNDER THE WTO AGREEMENT ON SAFEGUARDS

1. General Safeguards under WTO Regime

On 6th of October 1999 Georgia signed the protocol for accession to the World Trade Organization. As the final step in the three-year fast-track accession it remains for the Georgian Parliament to ratify the Agreement. Membership will increase competition for domestic producers and reduce opportunities to protect them. The WTO Agreement, however, like most international trade agreements provides for "safety-valves" and "insurance" provisions in the form of safeguard mechanisms which reduce the pressure on domestic industry and without which, in some instances, political acceptance of the accession would not be possible. Generally speaking, these provisions and measures allow the withdrawal or suspension of trade concessions entered into by an agreement in order to protect or "safeguard" domestic industry. They are referred to here as "safeguard mechanisms".

WTO provides for two categories of measures. First, temporary measures that can be taken under certain circumstances and second, measures of a permanent character that constitute exceptions to the general obligations under WTO.[1] The most important temporary mechanisms provided for by WTO are:

- emergency actions to protect industries seriously injured by import competition. Each country may take a "safeguard" action by imposing either an import quota or duties on imports of a product if increased imports are injuring or threaten to injure domestic producers. (Article XIX of the GATT – Emergency Action on Imports of Particular Products, WTO Agreement on Safeguards, further SG-Agreement);
- a country may impose anti-dumping duties or countervailing duties against unfairly traded imports from one or more countries that have materially injured or threaten to materially injure a domestic industry (Article VI of the GATT - Anti-Dumping and Countervailing Duties, WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, further AD-Agreement and the WTO Agreement on Subsidies and Countervailing Measures, further SCM-Agreement);
- developing countries may introduce import restrictions to protect the balance of payments and safeguard a country's external financial position (Article XVIIIB of the GATT - Import Measures for Balance-of-Payment Reasons);

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[1] See, *B. M. Hoeckman, M. M. Kostecki*, The Political Economy of the World Trading System: From GATT to WTO, 1995, pp. 161, 162.

Georgia has not yet enacted a comprehensive set of legislation on safeguard mechanisms. Only Article 7 of the Georgian Law "On Customs Tariffs and Duties" regulates very roughly "extraordinary customs duties" stipulating three kinds: (a) specific, (b) anti-dumping, and (c) countervailing. It is a matter of fact that these provisions are not sufficient to properly apply the GATT Agreements. This is one of the reasons why Georgia has indicated that it would not invoke any anti-dumping, countervailing or safeguard measure against members of the WTO until it has notified and implemented appropriate laws in conformity with the provisions of the WTO Agreements on the Implementation of Article VI, on Subsidies and Countervailing Measures, and on Safeguards.[2]

In this context, it is worth considering whether the introduction of such "safeguard legislation" is recommendable for countries in transition like Georgia. On the one hand, the probability that measures would ever really be taken is very low. This is because the preparatory investigations and the application of the measures require extensive administration, research and legal input. The administrative burden is such that measures have been applied only in a few cases by economically comparable countries. It has to be underlined that nothing in the WTO requires Members to implement such laws and experts tend to advise against exercising this WTO option.[3] Accordingly not all members of WTO have introduced respective legislation.[4] On the other hand transitional countries such as Latvia and Kyrgyzstan have enacted laws and regulations on Anti-Dumping/Countervailing- and Safeguard Measures in the context of their WTO accession. This might reflect the expectation that the pure possibility of applying these measures on the basis of WTO-consistent laws can already provide a certain degree of protection of the domestic market in dissuading foreign producers from using "unfair trade" measures. The adoption of these laws might also reflect requests from interested industry sectors and is therefore politically motivated.

This article restricts itself to a detailed description of the principles of the SG-Agreement because it is most likely that these measures will turn out to be the only form Georgia will apply. The reason is that Anti-Dumping (AD) measures require intensive investigations not only in the country itself but also abroad and might be therefore very difficult to administer for Georgia. The difficulties are connected with the determination of 'dumping' prices in comparison with the price structure of the injuring product on the domestic market and the implication of the reproach of unfair trade practice, something which often has long-lasting consequences and involves expensive dispute settlements. Additionally, Georgia as a relatively small market might not very often be the target of dumping strategies that justify the application of AD measures. Other safeguard measures of GATS (General Agreement on Trade in Services) are either very similar or still in an embryonic stage. Other measures listed in the WTO Agreement as safeguard measures in response to balance of payment difficulties or for the establishment of a new industry are unlikely to be invoked, because compensation would have to be provided to exporters injured by such actions. Measures concerning textile and clothing industry and agriculture are due to their specific character only considered shortly.

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[2] Draft Report of the Working Party on the Accession of Georgia to the WTO, document WT/ACC/SPEC/GEO/12 from 2 July 1999, No 73.

[3] Compare with respect to Anti-Dumping measures *B. M. Hoeckman, M. M. Kostecki*, The Political Economy of the World Trading System: From GATT to WTO, 1995, p. 192.

[4] With regard to legislation concerning the WTO Agreement on Safeguard Measures the following picture for the WTO members can be drawn up: As of November 1998, 81 Members had notified the WTO Safeguards Committee of their domestic safeguards legislation. Thirty-six Members had not submitted notifications as of that date. Of the 81 Members submitting notifications, 46 notified that they had no specific legislation relating to safeguards, 19 notified new legislation, and 16 notified pre-WTO legislation still in force. Of the 62 Members notifying either no safeguards legislation or pre-WTO legislation still in force, 19 indicated that new legislation was being considered or drafted. Of the Members notifying that they had no specific legislation, 13 indicated that the WTO Agreement has the force of law in their territory.

2. The Agreement on Safeguard Measures

2.1. Article XIX GATT and the Uruguay Round

The "Safeguard Article" of GATT, Article XIX, allows WTO Members to impose temporary import protection in contravention of the obligations in their GATT schedules. The pre-conditions for its application were stringent until the reform during the Uruguay Round and required the occurrence of increased imports, that resulted from unforeseen developments, which were the result of trade liberation and that caused serious injury to domestic producers. Moreover, measures had to be applied in a non-discriminatory manner and compensation was to be offered. Therefore relief-seeking countries favoured other safeguard instruments such as voluntary export restrictions (VER's), illegal under GATT if Governments negotiated and enforced them, and Anti-Dumping measures. As a consequence before the entering into force of the WTO Safeguard Agreement, Article XIX GATT '47 was evoked only in 150 official actions until 1994.[5]

The GATT participants sought therefore within the WTO-Agreement to establish a new system for safeguard measures that could on the one hand restrict application of VERs and AD-measures and on the other hand facilitate the application of safeguard measures based on Article XIX GATT '47. However the resulting Uruguay Round WTO SG-Agreement suggests that the negotiators could not agree whether their objective was to reduce the number of trade-restricting actions or to make them legal under WTO. The exclusion of the admissibility of VERs implements the first aim, but the softening of the conditions for the application of Article XIX GATT reflects the second purpose.[6]

2.2. The Uruguay Round "Safeguard Agreement"

Among the main changes introduced by the "Agreement on Safeguards" to render the application of safeguard measures under Article XIX GATT more attractive are: the introduction of the possibility to apply discriminatory quantitative restrictions; and the exclusion of retaliatory actions by other members of WTO in the case where no compensation was granted during the first three years after the introduction of a safeguard measure. Essentially Safeguard Measures according to the Agreement may only be taken under the following conditions:

- imports have increased so much as to cause or threaten to cause serious injury to an domestic industry competing with imports,[7]
- public notice about the investigation and publication of a report.[8]

2.2.1. Increase of imports

Article XIX GATT requires that imports should have increased as a result of "unforeseen circumstances" a pre-condition that is not contained in the SG-Agreement. According, the general interpretative note to Annex 1 A of the Agreement Establishing the WTO, the provisions of the SG-

[5] An excellent overview on the recent application of all safeguard mechanisms together with a short explanation of the WTO Agreements is given in the Internet Site of the Japanese Ministry of Trade and Industry, http://www.miti.go.jp/report-e/gCT9906e.html.

[6] *J. M. Finger*, Legalized Backsliding: Safeguard Provisions in GATT, p. 322 in: The Uruguay Round and the Developing Countries, edited by *W. Martin, L. A. Winters*, 1996.

[7] See Article 2 (1) SG-Agreement.

[8] See Article 3 (1) SG-Agreement.

Agreement take precedence over the General Agreement to the extent of that conflict between provisions and the criteria might be superseded. However, the present case might not necessarily be seen as a conflict but rather as a pure omission and according to the Vienna Convention[9], Article 31, par. 1, that states that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning or be given the terms of the treaty in their context and in the light of its object and purpose and the WTO appellate body"[10], Article XIX and the SG-Agreement must be read together – in other words, the requirement of the Article stands though the SG-Agreement is silent on these matters. In any case, in practice the criteria have been broadly interpreted. The Working Party report on "the Withdrawal by the United States of a Tariff Concession under Article XIX", the only GATT precedent on this matter, states that "the term unforeseen developments should be interpreted to mean developments after the negotiations of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated".[11] This implies that the criteria are easy to meet.

The increase of imports must not be considered in absolute terms. It is also sufficient that imports have increased relative to domestic production.[12] Difficulties for the determination of increased imports might occur with respect to the question of which foreign importers and which domestic producers are taken into account when determining the figures. The same criteria might be applied for the determination of the "Domestic Industry"-criteria.[13] Also the reporting period might play a role: in most cases a period from three to five years is used.

2.2.2. Injury Requirement

One of the most difficult requirements to meet for the application of the SG-Agreement is the "serious injury" test. Serious injury is defined in the SG-Agreement so as to mean a significant overall impairment in the position of a domestic industry[14], whereas the threat thereof is defined as a serious injury that is clearly imminent. There are no stringent rules for determining serious injury, but "serious" injury is interpreted to imply a more stringent test than "material injury" as required by the AD- and SCM Agreement.[15] It is important that the authorities take into account and evaluate all relevant factors of an objective and quantifiable nature mentioned in the SG-Agreement bearing on the situation of the domestic industry, such as the rate and amount of the increase in imports of the product, the share of the domestic market taken by increased imports, and changes in the level of sales, production, productivity, capacity utilisation, profits and losses, and employment.[16]

The following examples for the interpretation of the "serious injury" criteria are based on the AD-Agreement, because the terms overlap. The EU for example had in one case, the "*Japanese*

[9] The Vienna Convention on the Law of Treaty (1969).
[10] WT/DS2/AB/R, 29 April 1996.
[11] GATT/CP/106, report adopted on 22 October 1951.
[12] GATT, Analytical Index: Guide to GATT Law and Practice, updated 6th ed. (1995), p. 518 and Article 2 (1) SG-Agreement.
[13] Compare point 2.2.3.
[14] See Article 4 (1a) SG-Agreement.
[15] See, for example, *J. H. Jackson*, The World Trading System: Law and Policy of International Trading Relations, 2nd ed. 1997, p. 190.
[16] See Article 4 (2a) SG-Agreement.

Ballbearings Decision"[17], stated following factors to be taken into consideration in order to evaluate the injury:

- the increase over a period of eight years in imports from Japan,
- the reduction in production suffered by the community producers in the areas mostly affected, and
- the damage caused to the Community producers in the shape of redundancies and short-time working for the staff of the undertakings concerned and reduction in profits or the appearance of losses for the firms involved.

In another case decided by the EC authorities, evidence of increased market share, considerable undercutting, decline in capacity utilisation, were all used to suggest injury. On the other hand, there was a favourable trend in profitability for Community producers, employment falling for some time was accounted for by rationalisation and the Community producers had maintained a high market share. The Community authorities balanced all these factors and concluded that there was no material injury.[18]

A report by the Anti-Dumping Authority of Australia addressed the question of the extent of injury required to meet the material injury test. The Authority concluded that "material" should be considered in terms of its opposite, that is not immaterial, insubstantial or insignificant, greater than that likely to occur in the normal ebb and flow of business. It concluded further that material injury would be considered as a diminution of an industry's profits while it was unlikely that injury would be considered material unless imports comprise or threatened to comprise a significant share of the market.

The fact that material injury may be difficult to define does not mean that a finding cannot be scrutinised on appeal. In the GATT Panel Report on New Zealand, *"Imports of electrical transformers from Finland"*, the Panel rejected the New Zealand contention that "any given amount of profit lost" by the complaining firm was "injury" to a domestic industry and went on to conclude that New Zealand had not been able to show any injury in that case to its transformer industry.[19]

An affirmative determination must not be made unless the investigation demonstrates the existence of a causal link between increased imports of the product concerned and serious injury or threat thereof. These criteria serve mainly to avoid industries pressuring governments to take safeguard action merely because the industry is facing an adverse situation and is in a declining phase.

2.2.3. Domestic Industry Determination

The "domestic industry" that must be confronted by a "serious injury" is defined in Article 4, par. 1 (c) SG-Agreement as the producers of the like or directly competitive products which are operating within a territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products. To answer the question of what has to be understood under domestic industry first the criteria of the "like product" or the "directly competitive product" that are produced by the domestic industry have to be determined and only then the term "major proportion of domestic industry" can be interpreted.

[17] OJ C71/3,4.
[18] OJ L16, 22.01.1991, p. 34, recitals (15) to (19).
[19] *C. Stanbrook, Ph. Bentley*, Dumping and Subsidies, 3rd ed., 1996, p.113.

The SG-Agreement provides no definition of the term “like product”, however for that purpose the definition in Article 2.6. AD-Agreement can be taken into consideration as it concerns the same case. The “like product” is there defined as a product that is alike in all respects, or in the absence of such a product, another product which has characteristics closely resembling those of the product under investigation. Like products are generally regarded as those which fall within the same tariff classification.[20] The Council Regulation of the EC 384/96, for example, places in its Article 1, par. 4 great emphasis on physical similarity. If two products are different they will not be considered as like products even if they are in competition. However, goods with distinct physical characteristics, which compete for the same consumer market, were regarded as similar, for example, different types of alcoholic sprits. In the report of the panel on the Korean safeguard measure on imports of certain dairy products, both raw milk and milk powder were regarded as “like”, as these two products are directly competitive when used as inputs for the manufacturing of dairy products, such as flavoured milk, fermented milk and ice cream. Also in some other recent cases, notably the Liquor Taxes cases, the Panels and the Appellate Body emphasised the importance of a market-based approach to the determination of “like products”. In particular, the Panels insisted that “like products” are a “subset” of those products that are directly competitive with and substitutable for each other.[21]

The identification of the domestic industry that the investigating authorities should examine should either proceed from (a) the domestic producers as a whole of the product that is identical or similar to the imported product under investigation, or (b) from those producers whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products. The decision whether to define the affected industry broadly or narrowly often has a significant effect on the outcome of the investigation. Generally, the more narrow the definition of the industry, the greater the likelihood of an affirmative injury determination. Accordingly, the legislation of the EC requires for an anti-dumping investigation that a ”major proportion“ of the EC-industry is confronted by dumping. This term is put more concretely in Article 5, par. 4 of the Regulation No 384/96 and Article 7, par. 8 of Regulation No 3284/94 stipulating that an investigation will not take place unless the investigation is supported by those Community producers whose collective output constitutes more than 50 per cent of the "like product". Second, no investigation shall be initiated when Community producers expressly supporting the complaint account for less than 25 per cent of total production.

2.2.4. Procedural Aspects

In a panel the burden of proof is on the party challenging the legitimacy of a safeguard measure. The defending party should provide effective refutation once the complaining party makes a *prima facie* case.[22]

The application of Safeguard Measures can be separated into two different procedures. On the one hand there is the domestic investigation procedure, in which it has to be determined that the conditions of the SM-Agreement are fulfilled, and after which the competent authority of the WTO

[20] See supra note 16, p.104.
[21] Compare for the whole issue of the “like product” definition: *M. Bronckers, N. McNelis*, Rethinking the “Like Product” Definition in WTO Antidumping Law, Journal of World Trade 33 (3), pp. 73-91.
[22] See note 36, down, p. 45.

Member decides for the introduction of protective measures. On the other hand there is the fulfillment of the informational duties with respect to the Members of WTO.

The domestic investigation procedure should provide for public notice of hearings and other appropriate means for interested parties to present evidence, including on whether a measure would be in the public interest.[23] In practice, as already mentioned above, some WTO Members have enacted statutory instruments in order to shape the procedure according to the rule of law. In particular, these acts stipulate periods for the different levels of the investigation procedure. The EU "Safeguard Regulation",[24] for example, foresees a one-month period for the formal initiation of a safeguard investigation after an application by a EU Member State is submitted to the EU Safeguard Committee[25]. The investigation procedure must be terminated and the appropriate measures taken within nine months from the beginning of the investigation[26], and, if there is no justification for a safeguard measure, the Commission must conclude that this is so within the nine-month period referred to above and it must terminate the investigation within a month thereafter[27]. The Latvian Legislation on Safeguard Measures introduced similar time periods.[28]

If the competent authority of a WTO Member decides in favour of the introduction of a safeguard measure, it must give written notice before the introduction of a measure, as far in advance as may be practicable, to the other WTO Members. In particular, those members having a substantial interest as exporters of the product concerned shall be afforded an opportunity to consult with the applying country in respect of the proposed action.[29]

Information collected in an investigation might be of advantage to a competitor. Therefore, it shall be treated as confidential in this case, and only be disclosed with the permission of the party submitting the information.[30] If the party supplying the information shows good cause for keeping the information confidential, the investigating authorities may not disclose it without the permission of that party. Parties submitting confidential information must nevertheless prepare public summaries that are sufficiently detailed to permit a reasonable understanding of the substance of the information.

2.2.5. Duration and different Kinds of SG-Measures

SG-Measures should not last more than four years and might be extended for another four years if the industry is adjusting. However, the principle is that SG-measures should only be applied for such period of time that is necessary to prevent or remedy serious injury.[31]

There is no requirement to demonstrate the existence of an unfair trade practice in a safeguard action. Unlike anti-dumping duties and countervailing duties, which are applied only to imports from specific

[23] See Article 1 (1) SG-Agreement.
[24] Council Regulation (EC) No 3285/94 of 22 December 1994 on the common rules for imports and repealing Regulation (EC) No 518/94 (OJ 1994) No L 349, p. 53.
[25] See Article 6 (1a) of the EU Safeguard Regulation.
[26] See Article 7 (3) of the EU Safeguard Regulation.
[27] See Article 7 (2) of the EU Safeguard Regulation.
[28] See Latvian Law "On Safeguards"; Article 6 (1) and Article 8.
[29] See Article XIX (2) GATT Agreement.
[30] See Article 3 (2) SG-Agreement.
[31] See Article 7 (1) and (2) SG-Agreement.

countries, the remedy granted in a safeguard action applies to all imports irrespective of its source. This principle of non-selectivity is not stringent, however, as quota rights might be allocated on a selective basis, if the Committee on Safeguards accepts that imports from certain WTO Members have increased "disproportionately" and the measures are imposed "equitably" to all suppliers of the product.[32]

Addition remedies are available such as import quotas, a tariff-rate quota (in which imports are subject to increased duties if the total volume of imports exceeds a certain level), or increased duties (Article 5 SG-Agreement).

Economic criteria may be used to choose the appropriate measure. For example, the Australian authorities, in a case concerning increased imports of pig meat, considered criteria such as the necessity of keeping in contact with the changing world market, distortions within the producing industry, and the high administrative costs of quantitative restrictions and favoured therefore an increase of *ad valorem* tariffs. If a tariff is imposed, the level and duration must be such as to achieve a delicate balance between remedying serious injury caused by increased imports and facilitating adjustment.

A special regime applies to developing countries. If individual market shares of developing countries are less than 3 per cent of total imports, and the aggregate share of such countries is less than 9 per cent of total imports, they are exempt from safeguard actions. For the administration of notification and consultation duties, a special Committee on Safeguards is established at the WTO and the duties and rights are regulated in detail in the SG-Agreement.[33]

2.3. Other Forms of Safeguard Measures

2.3.1. WTO Agreement on Textiles and Clothing

This agreement allows the application of "transitional safeguards" on textile and apparel imports. To apply such safeguards, a WTO member must make a determination that a particular product is being imported into its territory in such increased quantities as to cause serious damage or actual threat thereof, to the domestic industry. The serious damage must be the result of a sharp and substantial increase in imports, either actual or imminent, of the product from the country or countries at issue, and not the result of other factors, such as technological change or changes in consumer preference. Prior to imposing safeguards, the importing country must seek consultations with the importing country or countries. If consultations fail to resolve the dispute, the importing country may apply safeguard measures for up to three years. The measure must be progressively liberalised, if it is applied for more than one year.

2.3.2. The Agreement on Agriculture

With regard to the still closed nature of agricultural markets the Members of WTO have agreed on safeguards in this sector that can be invoked rather efficiently with a low quantitative threshold and a minimum quantum of conditionality. Therefore the Agreement on Agriculture provides for no injury

[32] See Article 5 SG-Agreement.
[33] See Article 12 SG-Agreement.

requirement, as it is foreseen in the other agreements that deal with remedy actions. A safeguard measure can only be used for those agricultural products that have been subject to an ordinary customs duty. Moreover, the converted measures must be designated with the "SSG" symbol in the country's schedule. This reflects the fact that WTO members insisted that the "tariffication" instrument introduced in the Uruguay Round, i.e., to convert non-tariff measures such as quota into a tariff-only protection, could only be used by participants in the Uruguay Round, while the newly acceding countries should not be entitled to establish tariff equivalents for agricultural products. The final treatment, however, depends on the formula with which each country acceded to the Agreement on Agriculture.

If these above mentioned two requirements are fulfilled, imports that exceed specific trigger quantities or are priced below trigger price levels can be restricted by imposing additional duty, that is calculated according to the conditions laid down in the Agreement.[34]

3. Conclusion

The changes introduced in the Uruguay Round into the Agreement on Safeguards have not immediately led to a more frequent application of Article XIX of the GATT, apparently because of the still stringent requirement of a serious injury that does not meet the expectation of the industry for fast relief with regard to increased imports.[35] But in the preparation of the Seattle Ministerial WTO meeting none of the involved parties has shown an interest in renegotiating changes to the present Agreement on Safeguards and to further ease its application. Therefore, SG measures remain and can be designed for exceptional situations.

However more members are resorting to safeguard measures. Nineteen safeguard investigations were notified to the WTO from January 1995 to December 1998, of which five have so far resulted in the implementation of definitive safeguard measures and as many as five safeguard measures were notified to the Committee of Safeguards during the first three months of 1999 alone.[36] Traditionally, under GATT 47, recourse to safeguard measures had been exercised by developed countries. However, developing countries, (i.e., Argentina, Brazil, Egypt, India and Korea), have accounted for the majority of safeguard investigations initiated under the WTO framework to date. Other developing countries up to now have not applied Article XIX and the Safeguard Agreement because they had bound high tariffs and could raise their tariffs without violating their GATT obligations.[37]

Georgia and the other transitional countries of the post-soviet area are in a different situation as they do not accede to the WTO as developing countries with high bound tariff rates. They also do not have the advantage to impose new tariffs or quotas for balance of payments reasons albeit under the less onerous conditions of Article XVIII of the GATT. It is therefore understandable that these countries are showing an increasing interest in recourse to the safeguard provision of WTO Agreement that grants them the possibility under extreme situations to impose protective measures for their injured producers.

[34] See Article 5 of the Agreement on Agriculture.
[35] See supra note 1, p. 171.
[36] *Y.-S. Lee,* in Journal of World Trade 33(6): 27-46, 1999, Review of the first WTO Panel Case on the Agreement on Safeguards, underlines the growing significance of safeguards and highlights several practical aspects of the SG-Agreement.
[37] *J. Schott*, Safeguards, in: OECD Documents, The New World Trading System, 1995, p. 113.

SIEGFRIED LAMMICH*

THE BAR IN GERMANY**

1. Foreword

This article is intended to provide Georgian readers with general information on the bar in Germany. The author has selected a number of topics related to the subject that are intended to meet potential interests of readers.

The legal basis for practising the profession of advocate and the organisation of the bar is currently determined by the law of 1st of August 1959, "Federal Regulation on the Bar" (*Bundesrechtsanwaltsordnung* - BRAO), which has undergone several amendments since its enactment. This law also applies to the new federal *Laender* (i.e. the regions of former GDR) under the law of 9th September 1994 "On the new Regulation of Professional Practising of Advocates and Patent Advocates".

In Article 1 of BRAO, which has a programmatic purpose without particular legal consequences for any advocate, the advocate is defined as "an independent body of justice". Commentaries on BRAO suggest that this definition of the nature of an advocate as a body of administration of justice, requires not only that he shall rigorously protect the rights of his client but also imposes the obligation to act in public interest. An advocate is considered as an independent and equal body of justice together with the courts and public prosecutors. The "independence" of an advocate provided for in Article 1 of BRAO primarily means its independence from the state. An advocate's activity is not subject to state control and the obligation on public servants about unconditionally serving state interests is not applicable to any advocate.

Article 2 of BRAO defines that an advocate exercises a "liberal profession" and his activity is not considered to be an "entrepreneurial" one. From this provision, it follows that the main objective of an advocate is to promote the administration of justice and prevails over the objective to serve own financial interests. The financial interest of an advocate must not hinder the main purpose to act as "a body of justice" and, at the same time, appropriately and duly instruct his client and protect the latter's interests.

Article 3 of BRAO stipulates the advocate's right to act as "an independent representative and advisor" in all legal relations. His right to appear with regard to all types of legal issues before the Courts, Arbitration Courts or any other institution may be restricted only under a federal law. Clause 3 of Article 3 of BRAO emphasises the right of each individual to choose freely an advocate who will be his advisor and representative in the Courts, Arbitration Courts and institutions within the limits of the existing legislation.

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2. Access to practise law

According to Article 4 of BRAO, access to practise law as an advocate may have a person, who in accordance with the federal law of Germany "On Judges" has obtained the right to fulfil the position of a judge. Citizenship of Germany in this case is not a prerequisite, i.e., foreigners (practically this concerns members of EU countries) may acquire the right to practise law as an advocate. The law does require the right to fulfil the position as a judge from those persons who applied to practice law on the territory of former GDR before September 1996 and who graduated from a law school of former GDR and practised law there. Also exempted from above requirement are persons who were law professors in the universities of former GDR and who after Germany's re-unification were refused employment in the institutes of higher education and for this reason have moved to law practice at the bar.

In accordance with the currently valid provisions of the 1961 federal law on judges, acquisition of the right to serve as a judge is achieved in two stages. Graduation from a law school and success in an examination is required at the first stage. The minimum duration of this study (that majority of students exceed) is 3.5 years, of which 2 years are to be spent at a German university. The first stage concludes with the examination (as well as the second state exam in jurisprudence - see below), which is conducted by the examiners of special examination institution under the supervision of the Ministry of Justice of the respective *Land*. This institution may invite as examiner in addition to professors of the respective university persons of appropriate qualification (e.g., judges, advocates *i.a.*). After success in the first exam in jurisprudence, the candidate is required to do a two-year practical training on the second stage. During this training period the candidate learns how to apply the knowledge acquired in the first stage in different institutions of justice and other bodies (e.g., courts, prosecutor's office, administrative body, bar, etc.) in practical terms. The training ends with second state examination administered by the above-mentioned institutions. Success in the second state exam in jurisprudence is a precondition to be appointed as a judge, or to become a member of the advocate and several other legal professions.

3. Admission to the Bar

Another legally defined precondition for practising law is admission to the bar, which is granted on the basis of a person's application to the administration of justice of the respective federal *Land*. Anyone who meets the above-mentioned professional criteria may require admission to the bar. Application can be refused only in cases explicitly provided for by law. For instance, a person is not to be admitted to the bar if he is deprived of the right to public service by the decision of a criminal court; or if he performs an activity incompatible with the advocate's profession; or he performed an activity that is unworthy for a person who practices law as an advocate or he combated the free and democratic public order of Germany in a "criminal" way; as well as in other law-defined cases. In the case of an application's refusal the applicant can submit a claim to the respective advocates judicial chamber (which operate under the regional appeal courts of the *Laender*). Cases where application for admission to the bar is, in the opinion of a candidate, unfairly refused by the administration of justice seldom occur in practice. For instance, during 1995 there were only 103 claims against refusal of application for admission to the bar and the number of people admitted to the bar that year was over 5,000).

In the application, a candidate names the general court in which he intends to practice law. In this respect as well the application may be refused only in cases explicitly defined by the law. This is for example the case where a candidate would like to practise law in the district were he has worked as a

judge for the previous five years; or where his spouse is a judge in this district, etc. In such cases, too, refusal of the application by the administration of justice may be contested in court.

The law specifically defines that the reason for refusal of admission to the specific court may not be that there is no need at the respective court to have more advocates. At the beginning of 1999, a total of 97,876 advocates were practising in Germany, of which 139 were not citizens of Germany; this represents an increase of 6.9 % compared to the previous year (the number of foreign advocates rose by 25,2%). Whereas the number of judges and prosecutors has been falling in the previous years the number of advocates has increased by approximately more than 6% each year. By the end of 1997, the number of authorised advocates was 262% more than the number of judges (20,999) and 1359% more than the number of prosecutors working in Germany (5,211).

A big number of admitted advocates do not in fact practice this profession. The provision of the law prohibiting any connection between admission of candidates to the bar with the real need for advocates and the provision granting the right to practice law to everyone who completes both stages of law study with the respective state exam, means that a number of persons are legally advocates but at the same time are engaged in other professions or become advocates later and due, to limited demands made on them, are left as "jobless advocates".

4. Practice in the advocate profession

An advocate may practise his profession independently (an independent advocate) in a law firm comprising several advocates or in an office association. The law firm is nowadays the basic organisational form in which several advocates practice law jointly. Characteristics of the law firm is joint appearance in relations with the public (e.g. common official attribution, in which reference is made to all advocates who are members of the firm), a common office and the joint relations to the clients. Legal relations exist between clients and the law firm and not with the individual advocates and fees, consequently, are paid to the firm and not to individual advocates. The fees are distributed between the member advocates on the basis of a joint agreement. Additionally, all members carry joint liability for the damages caused by a single partner.

In 1991 (no later data was available) 40% of advocates were employed in law firms of which 40% were employed in firms of 2 advocates, 23% in firms of 3, and 13% in firms of 4. More than 10 advocates were employed in 1,1% of firms. Furthermore, a tendency of establishing rather bigger firms is emerging.

In order to practice law, several advocates may establish one office association. This is done in cases where they have a common office and split office-related costs on the basis of an agreement. Formally, they are considered as individual advocates and the fee is paid to the respective advocate instead of to the office association.

5. Basic principles and remuneration for practising law

According the provisions of the BRAO the principal basis of the advocate's profession is professional independence. An advocate shall not assume any obligation that violates his professional independence. The law provides for other principal obligations as well, including:

- the obligation to keep secret everything about which he has been informed while performing his professional duty; this does not apply to the facts that are public or that do not require secrecy due to their low importance.
- the obligation of objectivity; this requires that the advocate shall refrain from deliberate release of wrong information or depreciating statements which are not motivated by the actions of other persons or the particular situation;
- the prohibition of the protection of adverse interests;
- to take necessary care about values entrusted to him;
- the duty to permanently improve professionalism and knowledge.

In Germany's professional circles there is heated debate on the matter of whether an advocate has the right of self-advertisement at all and, if so, to what extent. According to the existing legislation, such advertisement is permissible at a very restricted extent. Under Article 43 b of BRAO, an advocate has the right to advertisement only if he provides objective information about the form and contents of his professional activity and if the advertisement is not designed for the conduct of a particular case. A large amount of court practice with regard to this problem, which will not be reviewed now, shows that separation of "objective information", for example concerning the opening of a law office, from the advertisement concerning the acceptance of specific cases often creates significant difficulties in practice.

An accepted form of advertisement may be emphasis on the advocate's profile (e.g. administrative law, taxation, labour or social law). The Advocates' Chamber issues the right to use such indications to advocates (Fachanwalt) who have acquired significant knowledge and experience in those legal fields.

As for the payment for legal practice, Article 49 b of BRAO stipulates that fees for service, save in exceptional cases, cannot be less than those stipulated in the federal regulation on fees (tariffs) for advocates. As an exception, taking the client's circumstances (e.g., his financial) into account, an advocate may charge lower fees or serve for free. Furthermore, the law clearly prohibits so called agreements on success fees, in other words arrangements where the amount of the fee depends upon the success of the case or upon the amount of disputable sum. Commentary on the reasonableness of these restrictions, emphasises the goal of these restrictions that the client should not have to give preference to the "low-cost advocate", but to the advocate who he thinks will best deal with the case. The law does not prohibit advocate and client from agreeing upon a higher fee than provided for by the regulation on fees, provided that the excess amount does not depend on the success of the case. However, such agreements must be concluded in a written form before the transfer of solicitation takes place.

The most recent statistical data on the incomes of professional advocates (or the advocates practising advocates profession) available for the author is from 1994. According to this data, average incomes (profit = income - company costs) of advocates practising in the old federal *Laender* are 140,000 DM prior to deduction of taxes. In the new federal *Laender* (the former GDR) the average is 88,000 DM. In evaluating this statistical data one should keep in mind that the average income of independent advocates (practising individually) is lower than average income of the advocates united in firms. The average income of the latter was 106,000 to 182,000 DM and of independent advocates unified in office associations 99,000 DM. The incomes of advocates depends upon the field of their specialisation: competition and cartel law (265,000 DM); environmental and energy law (250,000 DM); banking law (239,000 DM); corporate law (233,000 DM); labour law (230,000 DM). The lowest average incomes were those of advocates specialising in the following fields: social law (97,000 DM); immigration and refugee law (116,000 DM); public law (107,000 DM); criminal law (121,000 DM).

In order to allow Georgian readers to make comparisons it is useful to consider data on the average income of some professional groups of physicians: generally in 1993, the average income of physicians was 191,000 DM (in the former GDR - 101,000 DM), of physicians of general medicine - 153,000 DM (in the former GDR 103,000 DM), specialists for internal diseases - 187,000 DM (in the former GDR - 83,000 DM).

6. Organisational forms of the bar

From the position of advocates as bodies of justice follows a connection to the state as the responsible body for administration of justice. State tasks are assigned to the bar itself, for instance, supervision over the members of the bar. Performance of this function is based on the principles of self-government within the legal framework defined by the State. In order to fulfil social-legal functions, the following are legally defined organisational forms: chambers of advocates, chambers of advocates under the Federal Supreme Court as well as federal chambers of advocates. Each of these chambers is an association subject to public law. Their activity is subject to state control, however this control is restricted and is limited to the supervision over fulfilment of tasks imposed by law and the charter of advocates' chambers and particularly by the Advocates' Chamber. Moreover advocates' chambers are the professional self-governing bodies of the bar.

Further, notice should be made of the associations of advocates that are not indicated in the law. These associations are legal entities under civil law and their objective is to promote all professional and economical interests of advocates. Membership of advocates' associations that could be called “advocates’ trade unions” is voluntary.

Chambers of advocates are established according to the territorial jurisdictions of the regional appeal courts. Moreover, in districts where over 500 advocates are admitted, the administration of justice may establish additional chambers of advocates. In 1996, there were 28 chambers of advocates in Germany. An advocate admitted to a district of the regional appeal court district by law becomes the member of the chamber of advocates of the respective district as a consequence of the admission (mandatory membership).

Bodies of the advocates' chamber are:

- Board whose members (generally 7) are elected at the general meeting of the chamber of advocates out of the members of the chamber for a term of 4 years. The elected advocate may refuse membership of the administration only in cases clearly stipulated by law. Members of the administration perform their official duties without being paid (which means that they do not have salary and only official costs can be reimbursed). Administration functions include: provision of advice and instructions with regard to professional activity to the members of the chamber; resolution of conflict between the members of the chamber or between members and clients; control over the performance of duties imposed on the members of the chamber; nomination of plenipotentiary members of examination commissions, etc.;

- Presidium (small board) elected by the administration out of its own members. The presidium regulates matters of administration that are assigned to it according to BRAO or by decision of the board. The President of the chamber, who is the member of the presidium, represents the chamber in the court as well as outside it;

- General meeting is the supreme body of the advocates' chamber. The President of the chamber calls the meeting. In addition, the president is obliged to call the meeting if 1/10 of the members of the chamber requires it. The meeting is tasked to elect the board, stipulate the amount of membership fees, provide socially security and dependants' allowance to advocates and many more.

The Federal Chamber of Advocates is the chief organisation of advocates' chambers. The supreme body of the Federal Chamber of Advocates is the general meeting where each chamber of advocates has one vote.

7. Advocates' jurisdiction

BRAO also provides for the activities of advocates' jurisdiction, which is the legal basis for judicial control of advocates. Courts of justice for advocates (advocates' courts of the first and second instances and the federal court on the affairs of advocates) are considered as special state courts which are authorised to make decisions on the professional activities of advocates. Two types of proceedings are included in their competence. First, proceedings related to administrative procedures with regard to the licensing of advocates' activity and other administrative issues; second, proceedings with regard to discipline of advocates (in this case, the first instance is the administrative court, in the second instance, the advocates' court of second instance and in the third, the federal court of advocates).

First instance courts of advocates are established in accordance with the territorial principle of the chambers of advocates. The Administration of Justice invites members from members of advocates' chambers for a period of 4 years. Members of the court are appointed on an honorary basis. While working as judges of the courts of advocates they are considered as professional judges which means that norms and advantages (immunity of judges, independence of judges etc.) regulating judges' activity are applicable to them. Costs related to the fulfilment of their functions are not compensated by the state but by advocates' chambers.

The administration of justice appoints members of second instance court of advocates for a period of 4 years, from professional judges of the Supreme Court of the respective *Land*. Furthermore, and unlike the judges of first instance court of advocates, a hearing of the bodies of advocates' chamber is not mandatory. These judges are remunerated from the state budget.

The Senate under the Federal Supreme Court dealing with cases involving advocates is comprised of 4 professional judges of the Federal Supreme Court (chaired by the President of the Federal Supreme Court) and three advocates with the status of a juror that are invited by the Administration of Justice from a list of candidates proposed by the Federal Chamber of Advocates. The instance of the justice of advocates basically reviews cases according to the rules of annulment and revision.

1995 statistical data give an opportunity to review the principal trends of the activity of the system of the justice of advocate. In that year a total of 365 cases was submitted to the courts of justice of advocates. From this number, 103 cases were about inclusion of advocates in the registration list, 65 cases dealt with refusal of admission or deprivation of the right to practise as an advocate, and 34 cases with claims about fines levied by the advocates' chamber.

GIVI AMIRANASHVILI*

LEGAL AND POLITICAL ASPECTS OF PEACEKEEPING OPERATIONS**

The disintegration processes in the former USSR and Eastern Europe should be considered as the main event of the last decade of the 20th century After the collapse of the Warsaw Pact (CMEA), global geopolitical changes, including the suspension of rivalry between two opposing political systems weakened military-political relations.

In 1993-94, there were about 50 large conflicts, both old and new, throughout the world. These resulted in 26.3 million refugees, and about 4 million deaths. 90 per cent out of these 4 million victims belonged to the peaceful population.

The majority of current conflicts are inside states, not between them. The end of the "cold war" removed the fence that prevented the development of the conflict in the former USSR as well as in other countries. As a result, religious or ethnic wars broke out throughout the territories of the newly independent states. These wars are characterised by extreme violence and cruelty.

The Leyden University Centre of Social Conflicts Studies has listed 160 serious or potentially serious internal and international conflicts: 32 of these were qualified as "real wars", during which more than 1,000 people died; 69 conflicts were qualified as retarded ones, where violence was manifested episodically and less intensively; and 59 as serious disputes, where one side threatened to use force or even demonstrated it.

During internal conflicts and peacekeeping operations, regular armies are confronted by opposing forces and rebellions and armed citizens, who are often disorganised but still cause disorder. These wars, in many cases, are guerrilla wars, without any obvious fronts: it is the peaceful citizens who suffer most during these conflicts.

Another characteristic of these conflicts is the destruction of state institutions, particularly the legal and police systems. This causes paralysis of administrative structures, disorder in legal activities, civil chaos, and destruction. Conflicts are accompanied by violations of human rights and freedoms and international humanitarian law.

1. Peace-keeping Operations, as one of the International Peace-keeping and Security Measures

In situations where there is no apparent solution to the problem, international society is able with the agreement of the parties to the conflict to arrange for peacekeeping operations (military, police and civilian personnel) to go to the crisis region to ensure peace.

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** Translation from Georgian language by GEPLAC.

The UN has created and developed peacekeeping operations as one of the measures to ensure international peace and security. Since 1948, over 750,000 military, civilian police personnel and thousands of other civilians have served in UN peacekeeping operations. More than 1,500 peacekeepers have died while serving in these missions. In 1998, the UN peace-keepers were awarded the Nobel Peace Prize for their activities in the field of peace-keeping.

During first 40 years of UN activities, 13 operations were created in order to ensure peace. Since 1988, the UN has launched 30 new operations. The total deployment of United Nations military and civilian personnel has reached almost 70,000 from 77 countries. As the number of peacekeeping operations has increased, so too has the cost of United Nations peacekeeping. The UN's annual budget for peace keeping was USD 3.6 billion in both 1994 and 1995. The UN's military expenses in the former Yugoslavia alone were USD 3 billion in this period.[1]

Each Member-State has to contribute its mite, but it should be pointed out that as of March 1997 members-states owed the UN total of USD 1.9 billion, of this, USD 1 billion was owed by the USA.

Peacekeepers are paid by their own governments. Countries volunteering personnel to peacekeeping operations are reimbursed by the UN at a flat rate of about USD 1,000 per soldier per month. The UN also reimburses countries for equipment. But reimbursements to these countries are often deferred because of cash shortages caused, as mentioned above, by Member States' failure to pay their dues.

The "traditional" principles of peacekeeping activities have been replaced by complex, integrated operations that require a combination of political, military and humanitarian activities. Police officers, electoral observers, human rights monitors and other civilians have joined military personnel under the United Nations flag to help implement negotiated settlements of conflicts, encouraging former opponents to build a peaceful future together.

Modern peacekeeping operations are much more complex and require greater efforts. Some of them cover:

1) observing democratic elections;
2) observe the situation in the field of human rights and freedoms;
3) refugee repatriation control;
4) disarmament of opposing parties;
5) rebuilding of the infrastructure destroyed during the war; and
6) humanitarian assistance.

Previously, peacekeeping operations generally used to be carried out based on the long-term negotiations between the recognised and legitimate parties. Now, it does not always happen this way. Keeping and ensuring peace under these conditions is more complex and expensive, rather than where the objectives are to observe cease-fires and to control the buffer zones between the parties involved in the conflict. Current peacekeeping activities are conducted in situations of permanent danger.

A significant change has been the use of UN forces to protect humanitarian operations. Another change is the variation in UN operations at different places. In particular, during the "cold war", the peacekeeping activities provided by UN were of a military character and usually resulted in their dispersion after a negotiated cease-fire just before the conflict was settled. In fact the main objectives

[1] Report of the Secretary General on the work of the Organization, Doc. 50/1 1995, August, p. 6.

were to establish the conditions for settlement of the conflict and to facilitate negotiations. At the end of the 1980s, a new type of peacekeeping operation was developed. These operations were carried out after the failure of negotiations but under the mandate to support the parties in implementing the conditions the parties had agreed and signed in order to regulate the conflict.[2] These kinds of operations were carried out in Namibia, Angola, Cambodia and Mozambique. In most cases they were effectively carried out.

Conflict settlement through negotiations provides not only a military conclusion, but also covers a wide range of civil issues. As a result, the UN was asked to implement a wide range of follow-up tasks:

1) observe fire cease;
2) re-grouping and demobilisation of troops;
3) reintegration of military personnel into civil activities and destruction of their weapons;
4) elaboration and implementation of de-mining programmes;
5) repatriation of refugees and displaced persons;
6) provide humanitarian aids;
7) control activities in existing administrative structures;
8) establish new police forces;
9) human rights monitoring ;
10) support the elaboration of constitutional, legal and electoral reforms and supervision of these;
11) organise and holding of elections;
12) support to the co-ordination of economic revival and renewal activities.

2. Essence of Peacekeeping Operations

To clarify the essence of peacekeeping operations, the following definitions are useful:

The UN peacekeeping operation is a procedure, which includes the use of the armed forces or military observers from the member-state countries. The Security Council initiates these, in order to ensure international peace and security.[3]

The objective of peacekeeping operations is aimed at avoiding military activities, establishing buffer zones, keeping cease-fires, or promoting of public order.

These definitions have common specifications. These operations are carried out under the aegis of UN and aim at specific goals; in particular; to keep the truce concluded between confronting parties instead of fighting against the armed aggressor.

For a peacekeeping operation to succeed, it needs a clear and practicable mandate, effective command at headquarters and in the field, as well as the sustained political and financial support of member states, and - perhaps most importantly - the co-operation of the conflicting parties. The mission must have the consent of the Government in the country where it is deployed - and usually of the other parties involved - and must not be used in any way to favour one party against another. The strongest “weapon” of the peacekeepers is their impartiality.

United Nations troops carry light arms and are allowed to use minimum force only in self-defence, or if armed persons try to stop them from carrying out the orders of their commanders.

[2] Report of the Secretary General on the work of the Organization, A/50/60, 03.01.95, p. 6.
[3] *V. I. Batjuk, USA – Economy, Policy and Ideology (Russ.), 1996, No. 12.*

This is the background to the new type of operations undertaken by the UN in Bosnia-Herzegovina and in Somalia. The UN still remains a neutral and objective arbiter between the sides and has no authorisation to stop the aggressor (if any identified) or make sides end military activities. These are not like the operations that were carried out before, as military operations continue and there is no agreement signed between the opposing sides, in order to define a peacekeeping operations mandate. An analogous case is the concept “security regions” on the territory of Bosnia-Herzegovina. In this case, the UN is authorised to carry out humanitarian activities to achieve identified and local objectives, and not directed towards ending a war.[4]

The same took place during UN operations directed at Serbia (October and December 1992). Larger operations were carried out in Somalia, where the UN forces (mainly those of the US), attacked the military groups fighting against each other, which were preventing the provision of humanitarian aid to the population.[5]

The UN peacekeepers cannot ensure peace where there is no wish for it. However, if the sides involved in the conflict provide commitments to solve the obstacles between them by peaceful means, UN peace-keeping operations might play a catalyst role and assist them in the creation of a so-called “breathing space”, which can create a more stable and safe environment to reach and carry out solid political resolutions.

The Security Council provides peacekeeping forces soon after the parties have concluded a truce and ceased firing. These forces are sent by the Security Council for a set period (for a month or some months), which might be prolonged by the Security Council if required. The UN used these forces in Africa (Congo) and the Middle East (during the conflicts between Israel and Lebanon, Syria and Egypt). They still remain in Southern Lebanon, at the frontier of Israel, in Cyprus, and in many other places in all corners of the world.

The UN forces have had a variety of names: “UN Defenders”, “UN Field Personnel”, “UN Legion”, “International Police Forces”, “Special Armed Forces”, “UN Operations in Congo”, “UN Peace-keeping Armed Forces in Cyprus”, etc.

On 18 February 1965, the UN Assembly first introduced the terminology “peace-keeping operations” (“peace-keeping”). UN peacekeeping operations should not be identified with “peace enforcement” and other forms of military intervention. On several occasions, the Security Council has authorised Member States to use "all necessary means" - including force - to deal with armed conflict or threats to peace. Acting with such authorisation, Member States formed military coalitions in the Korean conflict in 1950 and, in the 1990s, in response to Iraq's invasion of Kuwait.

The Security Council (in the absence of a representative from the USSR) adopted a resolution, to carry out some military actions in Korea under the flag of UN. Basically, in 1950-53 a war between North and South broke out. Soviet aviation and Chinese volunteers supported the North, but the US and a number of western countries supported the South. It was one of the first armed conflict zones between two systems in the “cold war”.

These kinds of operations differ from those of peacekeeping ones. The UN's peacekeeping operations are based on an agreement between conflicting parties in order to promote further progress, but in the case of “peace enforcement” operations, the Member States are authorised by the Security Council, to

[4] Report of the Secretary General on the work of the Organisation, A/50/60, 03.01.95, p. 6.
[5] *L. Aleksidze*, Contemporary International Law, 1994, p. 310.

take all necessary measures to achieve a stated objective. This has happened several times in Korea and the Gulf) and later, in Rwanda, Haiti, Bosnia-Herzegovina and Albania. Currently it is being carried out throughout Yugoslavia.

3. Peace-keeping Operations and the UN Charter

The articles of the UN Charter concerning international peacekeeping provide a basis for peace-keeping and "peace enforcement" operations, but the forms of interference vary.

The UN Charter does not include concepts like, "peace-keeping operation" or "peace operation". It is small wonder. The Charter was written during the Second World War under the cannons' roar. Taking into account the conditions of the time, the creators of the Charter could not stand apart from the reality around them. Obviously, they could not have foreseen the modern demands. For the authors of the UN Charter, the main danger for peace was possible military aggression by big states, the key leaders of these states aspired to world hegemony and in particularly, a restored and revengeful Germany and Japan were taken into consideration.

The provisions of Chapter 7 of the UN Charter were addressed against these kind of states and provided for military sanctions against an aggressor, to be carried out based on the resolutions of the UN Security Council and through the efficient leadership of the military-headquarters committee.

It was assumed that there would never be any doubt or discord in the international community in identifying the real aggressor. History has shown the weakness of this assumption. After the Second World War many military conflicts took place, and in most cases, the UN members took various positions on the identification of aggressor and victim (there was only one exception, the Iraq invasion of Kuwait).

Moreover, the international society had to deal not only with inter-state, but also intra-state armed conflicts, that, like in Rwanda, are not very different from many "classic wars" in the violence of the battles. Since these problems were not reflected in the UN Charter in an appropriate manner, the international society had to improvise in order to find a necessary decision in each concrete case largely through trial and error. Certainly there has been much discord among the UN Member States, especially concerning issues such as:

- the authority of peace-keeping operations in general, because there is nothing about this in the UN Charter;
- the role of a military-headquarters committee while conducting these operations;
- the role of a Secretary General and Security Council in managing these operations;
- the role and responsibilities of big states that are given mandate by the UN during peace-keeping operations;
- sources of financing for UN peace-keeping operations;
- limits to intervention of the international society in domestic affairs of any sovereign state while carrying out peace-keeping operations;
- differentiating between the concept of "peace-keeping operations" and "peace enforcement".[6]

[6] *V. N. Fedorov*, UN and Problems of War and Peace, Moscow, 1998.

The introduction of the UN Charter states that military force can be used only in accordance with common interests. Articles 43 and 47 stipulate that the command of the international peacekeeping forces must be based on special agreement. These agreements, established under Article 43 are subject to ratification by the signatory states in accordance with their respective constitutional processes.

4. Peace-keeping Operations and Regional Conflicts

At present, there are a great number of so-called "forgotten regional conflicts", to which the international community (and chiefly the big states) does not pay much attention: these countries are Rwanda, Liberia, Somalia, and Sri Lanka. Local political forces are incapable and where international forces have not been actively involved in these conflicts they have lasted much longer (i.e. the war in Sudan is continuing over 30 years). However, the UN observers in Liberia and Rwanda cannot stop the military violence.

There are two ways to end the violence:

1) The parties involved in the conflict agree on some issues concerning the end of conflict and invite the UN as an arbiter and observer (in this case, UN carries out peace-keeping operations);
2) or big countries (under the UN mandate) interfere in the conflict forcing an end to military activities. In this case, a “peace enforcement” operation is carried out.

The main point, in our view is that the opposing parties do not try to conclude a peace agreement. Another significant problem is inability of the Member States to supply the relevant and sufficient resources to solve the problem. Sometimes, the Security Council has charged peacekeepers with solving key issues, but the states did not provide the means. For example, in 1994, the Secretary General informed the Security Council that peacekeeping commanders would need 35,000 troops to deter attacks on the “safe areas” in Bosnia and Herzegovina created by the Security Council. Member States authorised 7,600 troops and it took a year to provide them.

In Rwanda in 1994, faced with evidence of genocide, the Security Council unanimously decided that 5,500 peacekeepers were urgently needed. But it took nearly six months for Member States to provide the troops, even though 19 Governments had pledged to keep 31,000 troops on a stand-by basis for UN peacekeeping.

Since March 1997 the following countries have done the most to provide forces: Pakistan (1,725 soldiers), Bangladesh (1,155 soldiers), Russian Federation (1,144 soldiers), Jordan (1,101 soldiers), Poland (1,094 soldiers) and India (1,082 soldiers). The small island nation of Fiji has taken part in virtually every UN peacekeeping operation, as has Canada.

Even non-UN Member States have contributed; Switzerland, for example, provides money, medical units, aircraft and other equipment to peacekeeping.

Previously peacekeeping forces aimed at a very moderate goal (provision of assistance to a cease-fire). Currently, modern peacekeepers are in charge of providing:

1) police functions;
2) assisting refugees;

3) supplying the population of the conflict zone with food and necessities;
4) the holding of fair elections and regulation of activities in the fields of national security, foreign affairs, social security, financial and information spheres (the UN operation in Cambodia).

The UN can really be proud of the peacekeeping operations conducted until recently, namely: Namibia and Cambodia, El Salvador and Haiti, Angola and Tadjikistan. This is an incomplete list of the regions and countries where the UN observers and troops supported cease-fires (or decreased the scale of conflict) and the process of normalisation of the situation. The Cyprus operation ("green line") appears to be the most productive among them, however, it cannot achieve a final resolution of the conflict.

Fifteen Member States of the Security Council create and identify peacekeeping missions, 5 of these - China, France, Russia, Great Britain and the US - have a power of veto over peacekeeping operations.

The governments that send forces on a voluntary basis, co-ordinate the conditions of their participation including the issues concerning orders and control procedures. They have absolute power over the military forces under the UN flag and provide for the withdrawal of the troops if required. Peacekeepers wear their national uniforms, but, in order to identify them as UN forces, they wear either a blue beret or helmet and insignia.

5. Peace-keeping Operations and the New World Order

In many cases, a state's participation in peace-keeping operations is related to its national interests, which also reflects its readiness, willingness of the forces in the country, their disposition to the opposing parties, and their interrelations. Very often, a negative attitude towards the opposing sides make this or that state's officials refrain from participating in peace-keeping operations.

The bipolar world no longer exists. A group of the great states has taken its place, and they have carried out the rearrangement of the world according to their responsibilities providing for the regulation of local conflicts.

These zones might be conditionally divided into two categories: special responsibility zones those of big countries and collective responsibility zones of some of the big countries.

For example, the special responsibility zones for the US are: Central America and the Caribbean Basin and also the Middle East. For the big European states such as France - Equatorial Africa, and for Russia - the former USSR territories.

The territory of former Yugoslavia serves as an example of a zone of collective responsibility, where some big states (USA, UK, France, Germany and Russia) try to resolve this conflict. The Korean peninsula is another area of collective responsibility, where the USA, Japan, China and Russia participate in the process of solving the problem. Big states are in charge of resolving local conflicts, as a rule they are acting under the aegis of the international organisations, namely: UN, NATO, OCSE, CIS, ASEAN and so on.[7]

The settlement of the crisis in Yugoslavia and Bosnia was a US initiative as evidenced by the on-going process and the Dayton Agreement. We do not agree with Russian specialists and politicians, when they accuse the USA of trying to achieve hegemony. They should remember that the process of

[7] *V. I. Batjuk*, USA – Economy, Policy and Ideology (Russ.), 1996, No. 12.

conflict resolution in the Dniester region (Moldova), Abkhazia (Georgia), Karabakh (Azerbaijan), the former Osetia (Georgia) and Tadjikistan is going on under the dictate of Moscow.

In this respect the Georgian government's submission to the Security Council concerning peace-keeping status for Russia and CIS countries should be noted, even though *Boutros Boutros Ghali*, the UN Secretary General, did not accept it at the time. He claimed that if only one or two countries are represented it does not mean that they are a CIS multinational force. They will never be given power to carry out peacekeeping operations under the UN flag.[8] We absolutely agree with this statement. However, *Ghali's* position in regard to Georgia soon changed. It coincided with the resolution adopted by the government of the US to end the Haiti military regime an idea also advocated by the UN. The US started some activities in Haiti to re-establish democracy and legal governmental bodies. Soon after, the Security Council adopted resolutions 937 and 940, which authorised the use of CIS peacekeeping forces on the territory of Georgia under the aegis of UN and OCSE (evidently mainly Russian forces) as well as the use of military forces in Haiti that were mainly Americans.

The adoption of resolutions concerning security of Georgia and Haiti led to a polemical debate. "The Times" touched on this problem – bringing the troops in Haiti was the result of an arrangement between the big states. In order to receive support for the actions in Haiti the US supported Moscow to bring a peacekeeping mission into Georgia under the aegis of the UN.[9] *Henry Kissinger* directly claimed this in the "Washington Post" – the government of the USA had made a mistake and had established a precedent that might be used by Russia against its so-called foreign neighbouring countries.[10]

Currently in Georgia there is a large dispute following the introduction of "peace enforcement" on the Bosnia model in Abkhazia. First, it should be mentioned that the Bosnia model is a larger concept. It covers a wide spectrum of issues that are intimately related to the Bosnia-Herzegovina state-political arrangement, which is designed as a confederation-state based on the Dayton Agreement proposals for the Bosnia-Croatia Federation and the Serbska Republic). Georgia refuses to accept this.

The use of Bosnia principles should imply violation of human rights, of freedoms, and of the adequate mechanisms already provided for by international co-operation. It is one thing to carry out "peace enforcement" in Bosnia and another is to use it in Georgia. The territory of the former USSR (except the Baltic countries) is still under the influence of Russia based on the geopolitical arrangement between the West and Russia. In this regard, the existence of Russian military bases in Georgia and in Abkhazia should be noted. The issue of the "peace enforcement" operation is scheduled for discussion at the Security Council where Russia will certainly use its right to veto the issue (pleading geopolitical interests). If we imagine that NATO was to provide this operation, as it did in Yugoslavia then it would find itself involved in military activities against Russia. This must not happen. It is one thing is to carry out "peace enforcement" operations (which are of an experimental kind) in the middle of Europe supported by the international community but it is another thing to conduct these operations in Abkhazia, where any military action (even air action) is immediately connected with the security of the Russian military bases. Therefore, it seems impossible that the international community will step in this direction when NATO operation in Kosovo has not yet ended and its question has not been finally settled. So, aside from other factors, to consider providing a "peace enforcement" operation in Georgia is unrealistic. The question is: can Russia, under this mandate, carry out this operation, or make Abkhazians through the use of force, agree to the return of refugees to Abkhazia and continue peace

[8] Isvestia, 06.04.94.
[9] The Times, 01.08.1994.
[10] Washington Post, 25.09.1994.

negotiations? Firstly, if Russia were seriously interested in this matter, it would settle the problem without any further military actions or complications. Secondly, any forced reaction from the Russian side towards Abkhazia would escalate political relations between the government and opposition, which provide significant military and political support to the separatists' government. Also, the northern-Caucasian aspect should also be taken into consideration. Providing a “peace enforcement” operation in Abkhazia would escalate anti-Russian feelings in northern Caucasian republics and create new and serious problems for Russia. For these reasons Russia definitely will not take the risk.

So, at this stage, establishing a Bosnia model of “peace enforcement” in Georgia seems unrealistic to us. But this does not mean that in the not too distant future the issue will not be raised on the agenda.

Those who support the dominant role of the US strictly defend the position that a lack of direct interest in the post-soviet states should not mean that the USA should leave these countries and provide Russia with monopolistic power to keep peace and security in its neighbouring countries.

The political scientist *C. Maince* (who has often criticised the policy of *Clinton* and *Bush* administrations) considers, that within the frame of the changed international conditions a rearrangement of the spheres of influence among big states should take place. The US will keep a dominant role among the western countries; and Russia will have an analogous role within the territory of former USSR. India will become a leader in South Asia, China and Japan in the rest of the Asian continent. In *Maince's* view, this would reflect the new realities of the modern world.

It seems to us that these developments are only temporary kind and we believe that, in the XXI century, the principle of zone rearrangement to resolve conflicts, will give a place to a truly collegiate, common position that will support the international humanitarian aspiration.

6. Classification of Peace-keeping Operations

The UN has elaborated a large spectrum of conflict resolution and means of control.

The director of the Council of NATO Information Systems and Operations, NATO Deputy Director *B. Getz* gives the following classification of peace-keeping actions: 1) preventive diplomacy; 2) peacemaking; 3) peace-keeping; 4) collective peace enforcement; 5) peace-building.

Preventive diplomacy activities seek to reveal potential conflict zones and prevent military activities. These activities include activities such as accumulation of the information on the real situation, advice, preventive activities and sanctions, and inspection. Preventive diplomacy seeks to establish conditions for dialogue between the confronting parties, and early warning in case conflict breaks out.

Avoidance of conflict is the most effective and cheapest way to deal with them. Experience teaches us, that passivity costs millions of human lives and requires billions of dollars.

The first "preventive stationing", which established a significant precedent, was carried out in 1993 based on the Security Council Resolution No. 795 of December 1992. Troops were sent to the former Yugoslav Republic of Macedonia to reduce the increasing scale of conflict and to prevent a large-scale war throughout Europe. Currently about 1,100 “blue helmets” are there.

Political Issues Department is responsible for providing preventive activities and peacekeeping operations. The department has the following functions in this sphere: first, it is in charge of control,

analysis and further evaluation of political situations. The department also defines potential and existing conflicts. It develops diplomatic policy and finally, it supports the Secretary General in political activities (through a General Assembly or Security Council mandate for preventive diplomacy, peacekeeping operations and in the field of peacemaking).

The International Court of Justice can play an important role to prevent conflicts. Although, it should be mentioned that the role of the international law is limited to the sphere of disputes by the status of the International Court of Justice. Particularly, legal jurisdiction is not compulsory for states, it is facultative, i.e. the court can discuss disputable issues only if both parties agree.

Early warning systems were in place in Bosnia, Somali and Rwanda. Despite this, the national institutions and international community could not do anything to stop the escalation of conflict. So, the real challenge is not only early warning but also transformation of the information and knowledge into preventive action.

A suggestion for the creation of a rapid reaction brigade under the aegis of the Security Council has been referred to the General Assembly, aimed at the preventive stationing where a crisis is thought to be inevitable.

The Netherlands is taking active steps in this direction. Recently the government has conducted large preliminary studies and the Dutch say that the brigade will be deployed until peace-keeping forces enter the region and it will leave the conflict zone as soon as those forces come. The rapid reaction brigade could be used in three cases:

1) To prevent the spread of conflict where crisis is inevitable;
2) during the period between making a decision to carryout peacekeeping operations and before the arrival of peacekeeping forces;
3) in conditions of extraordinary humanitarian needs.

In all the cases mentioned above, the brigade should have the potential to use arms to protect itself and to take necessary measures in place if required. The brigade is created by the Security Council, afterwards, it can be managed by the Secretary General or a person specially nominated by him.

“Peacemaking“ is addressed soon after a conflict starts and it is aimed at the resolution of the conflict. Meetings are held to elaborate the required terms to conciliate the confronting parties in order to ensure peace. Peace-making actions are very often closely connected with peacekeeping and activities provided to end the military operations between the confronting parties. They provide humanitarian aid and its further distribution, advise and assist in the settlement of social-political and ecological problems. These kinds of operations were carried out in Angola, Tadjikistan, Afghanistan and Burundi. The UN peace-making activities in Guatemala, Sierra-Leone and Yemen were successful.

The problem of peacekeeping operations was emphasised at the beginning of this article. We would like to add and point out three aspects, which obviate the need of getting consent from the parties. Here we are talking about protection of the peaceful population throughout established "safe areas" and providing humanitarian operations in the course of on-going military activities. The third aspect is influence on the parties to the conflict in order to speed up the achievement of national reconciliation.

Clear examples are the activities carried out in Somalia and Bosnia-Herzegovina. In both cases, peacekeeping operations were given an extra mandate providing for the use of force.[11]

Requests for providing these kinds of operations have increased and widened after ethnic tension and oppression developed in areas that had somehow been under control during the "cold war".

Recommendations on widening peacekeeping measures mean providing the population with food and carrying out humanitarian assistance. For example, in the former Yugoslavia the Security Council provided peacekeeping forces to control Sarajevo airport and establish a corridor. They were actively involved in Somali where they were authorised to carry out a humanitarian mandate in order to unite all peacekeeping forces. Disarmament and de-mining ensured the supply of products to the local population. In Somalia peacekeeping forces were ordered to carry out both roles through the UN mandate. The personnel, supplies and logistical assistance of such operations should correspond to the problems they aim to solve, especially if the Security Council based on its charter allows the use of forces. Recently, the number of the missions and the difficulties they face has increased.

As for leadership and management of peacekeeping operations three levels should be pointed out:

a) common political leadership, the prerogative of the Security Council;
b) executive bodies and authorities under the Secretary General leadership;
c) for leadership in place a head of the mission (either a special representative, head of the forces or military observer), authorised by the Secretary General is responsible.

Collective peace enforcement activities, it is used in accordance with the Chapter 7 of the UN Charter. As this issue has already been touched, we will not return to this again.

Peace-building activities or post-conflict peace-keeping activities of the international community provide assistance in the process of formation of national military forces, advises on military issues in the process of democracy and supports the formation of the necessary structures and organisations. In order to carry out UN operations successfully, post-conflict peace-building operations are provided soon after they have been realised. These operations aim to eliminate the underlying causes of the conflict and they also provide humanitarian assistance and activities to strengthen and re-establish the administrative structures, including:

1) special humanitarian aid (food supply, rehabilitation and short-term assistance);
2) demobilisation and reintegration into peaceful life of the combatants and other sub-unit members (Salvador, Nicaragua), provision of special short-term programmes for primary needs (products, professional preparation and other);
3) demilitarisation of the police and creation of civil police forces;
4) setting-up of courts and other state institutions and their further strengthening, assistance in the field of protection of human rights and freedoms;
5) reconstruction of physical infrastructure, including destroyed bridges, roads, railways, electricity transmission;
6) provide activities to strengthen confidence, to reconcile the former opposite sides in order to prevent war.[12]

[11] Report of the Secretary General on the Work of Organization, Document A/50/60, S/1995/1, 03.01.95, p. 9.
[12] General Assembly, Joint Inspection Group, A/50/853, 22.12.95, p. 9.

The UN peacekeepers, after ceasing the military activities and demobilisation of the troops, are actively involved in operations to assist peace-building, strengthening democracy, and national reconciliation in the country. For example, in Salvador the UN military observers provided protection of human rights and freedoms and assisted both sides in the process of land distribution for demobilised soldiers. They observed elections in Salvador. In Mozambique, in October 1994, the first fair elections were held with the assistance and support of the UN. The processes of strengthening peacekeeping activities continue successfully in Cambodia and Haiti.

7. Peace-keeping Operations and NATO

Recently, NATO has paid special attention to peacekeeping activities. The legal basis is given in the UN Charter (regional treaties) and in the NATO-Treaty. Hence, when taking part in UN peace-keeping operations, NATO acts in compliance with the UN Charter, i.e. it should settle conflicts by peaceful means and provide the Security Council with information regarding peace-keeping actions; most importantly the enforcement policy can be provided only with Security Council permission.

The North Atlantic Council and other Committees, through effective communication systems, regular collective training, and practical military actions provide a rapid decision on conducting military activities in order to warn of conflicts as well as carrying out the activities to avoid escalation of the conflict.

For better co-ordination of NATO policy, the American military combines its military objectives and other goals to provide peace-keeping activities and bring all activities into a common strategic plan, as well as providing structures of leadership, control and communication, and research.

In order to counter criticism of the contemporary strategy, it is worth highlighting one of the problems, such as participation in the process of elaboration common European strategy in order to ensure peace and security collectively by OCSE, NATO and UN.

R. Maince who supports a realistic approach towards the planning of UN activities and who as well suggests a fundamental revision of US foreign policy doubts that the 5 permanent Member States of the Security Council, those which have a power of veto, will be able to agree to any policy on the territory of the former USSR and within the conflict zones in Europe (where the current situation in Yugoslavia serves as a bad example). Diversity in aims particularly those of Russia and China might impede the adoption of a constructive resolution by the Security Council.

In our view, when the issue concerns the resolution of the Security Council, the question arises whether the resolutions of the Security Council in each case have a legal basis? Or, where are political and legal limits of resolutions adopted by the Security Council? Does there exist any structure that might control the legality of resolutions of the Security Council? – Of course not. The reality is that the peacekeeping operations serve the interests of the big states and cannot contradict pseudo strategic or national interests that sometime oppose international efforts to solve the conflict rapidly. Briefly, we can remember Russia's role in the course of the Abkhazia conflict and not only in Abkhazia but also during conflict in the territories of its immediate neighbours Russia is acting in its own interests.

For as long as the veto principle exists (we consider it out of date, because it was adopted to deal with a reality of the former times) it can only serve the interests of the big states. The resolutions made by the Security Council are and will be the results of this agreement. We continue to hope that the big

states' responsibilities in the field of protection of common peace and security, humanitarian issues, as well as adherence to principles of developing democratic institutions and ideals will avoid unfair (one-sided) resolutions.

8. Peace-keeping Operations and the UN Structure

The co-ordination of the Secretariat must be improved to make the respective departments under the Secretary General leadership act as a whole body. Within this framework three departments dealing with political, humanitarian and peace-keeping issues have created a block-scheme for further activities providing for the exchange of information, advice, and joint activities including the co-ordination of their activities and the implementation of operations on the ground. This mechanism covers activities related to control and early warning analysis; evaluation of options for preventive activities; establishing the facts; planning and implementation of operations on the ground; and further analysis. 12 officials of the Secretariat are involved in the activities of planning and implementation of large and complex operations.

The recommendations of the united inspection group are interesting in this respect:

1) to provide the General Assembly with the practical ways and means to be involved in preventive diplomacy;
2) to provide regular meetings at the Security Council to discuss the potentially contentious situations;
3) to identify ways the Economic and Social Council could predict social-economic problems, which can cause crisis and to elaborate strategy to avoid conflicts;
4) to establish special working groups or committees of the Security and Social and Economic Councils;
5) to use the International Court of Justice to solve conflicts by peaceful means, including a non-official liaison service.

Structural changes will require the international community to renew reforms, especially, to enlarge the Security Council. Germany and Japan aspire to become permanent members and take part in peacekeeping operations.

The former UN Secretary General *Boutros Boutros Ghali* in his annual report made an address concerning three very important problems: first of all, to provide UN personnel with security and protection on the ground, when lightly armed peace-keepers or humanitarian personnel are the subject to threat, when they are taken hostages or killed. In these cases the international community must provide measures to avoid such activities. Secondly, the financial problem should be addressed by improvement of the UN's finances. Thirdly new ways of developing the organisation need to be found. Only through uniting our efforts can we realise the aspirations of the UN Charter. We welcome the significant steps taken towards the UN becoming a more creative organisation from the intellectual point of view, financially more stable and with more effective management. Yet shortcomings persist: inadequate mandates; insufficient finances and material resources; and non-fulfilment of commitments by Member States. Each has been a subject of criticism for some time.[13]

[13] *Boutros Boutros Ghali*, Facing the New Challenges, Report on the Work of the Organization, 1995.

9. Conclusion

I believe that the UN played a significant role in the course of "cold war" to balance positions between East and West. However, times have changed and current events throughout the world are deteriorating, and this is particularly apparent in the settlement of the international conflicts. The UN has had to start reform. The vacuum between the UN Charter and activities to be carried out to implement it, is the main reason for late reaction to events.

In the cold war period, the arms race, frozen relations between West and East, and distrust made it impossible to elaborate a common position providing for the settlement of international conflicts and the use of peace-keeping forces.

The practice of using peacekeeping forces must be improved. As we can see, recruitment of "blue helmets" and their further deployment in conflict zones is behind time. The separation of opponents and setting forces between them only takes place when the conflict has been through a special phase when one of the two opposite sides is in a winning position. Deploying forces at that time to separate the parties definitely will not bring final settlement of the conflict through peaceful means: it can only be a short-term action. The risk of a renewed outbreak of conflict increases as the weaker side rebuilds as happened in Bosnia-Herzegovina. In order to avoid this, we propose that the UN force an aggressor or peace-breaker by means of negotiation, economic sanctions, and enforcement to return to the pre-war position, re-establish the *status-quo ante* and sit at the table for negotiations. It is only then that peacekeepers should be deployed to conflict zones.

We consider the approach of using NATO military formations and the idea of creation the UN rapid reaction group to be crucially important. We support the project of the government of the Netherlands and consider that the creation of the rapid reaction brigade would fill the gap between the resolutions adopted by the Security Council and their further implementation. The brigade must be authorised to use force if the situation warrants it.

The question of adding a special article to the UN Charter suggested by the Japanese and Brazilian governments providing for the procedures of peacekeeping operations as well as for the mechanism and proficiency of the bodies responsible for carrying out peacekeeping operations, seems timely if not overdue.

NATO's responsibilities in the settlement of international conflicts must increase. As we mentioned above, it has demonstrated that it is perfectly equipped and has well trained mobilised forces to play an effective role. NATO's effective structure gives it the chance to use them operatively. If NATO had not taken a strict position towards Bosnia-Herzegovina, including an ultimatum and bombing Serbian positions, God knows when the bloody conflict in Bosnia would have finished. The Dayton-Treaty is the result of NATO efforts. NATO forces were responsible for this treaty and have a power of action in case the Treaty is violated. We consider it expedient to conclude an agreement (pact) between UN and NATO (as a regional military institution) further to regulate the issue on the use of NATO forces in order to settle conflicts in future.

With that end in view we should apply the International Court of Justice more often. Its jurisdiction should be equally binding, not facultative, for all the states. Even in cases where just one of the parties makes a reference to the court, the case must be examined anyway.

Establishing adequate funding to support peacekeeping forces is critical if financial crisis while operations are underway is to be avoided. It is well-known how much is needed for financing peace-

keeping forces (in particular, the President of the US submits a proposal to the Congress to provide the US peace-keeping contingents with funds and to resolve this issue will certainly depend on Congress' good will). We consider the creation of a fund to be the way of eliminating the problem. This should be financed mainly from the UN Economic Council, Special Economic Institutions (including the International Bank of Reconstruction and Development, International Monetary Fund) or other donors. Other ways of creating a fund should not be excluded.

The Military-Staff-Committee that consists of the Chiefs of Staff of the permanent members of the Security Council or their representatives must be strengthened to better provide assistance to the Security Council , in particular, through establishing a rapid reaction group.

Currently the UN needs to be involved more actively to carry out the aims of the Charter. The question of the world's new rearrangement tops the agenda, now that Eastern Europe is liberated and new states have been established on the territories of the former USSR and Yugoslavia.

In the end, I am absolutely sure that the UN, based on its structures and institutions, will enter the XXI century as a united body of the world community and will provide activities to protect not only states, but also each citizen and every national minority living there.

JAN STREBNIOK*

NEW RUSSIAN FOREIGN INVESTMENT LAW

On 14 July 1999 the long-awaited Federal Law "On Foreign Investments in Russia ("Law") entered into force and replaced the old law of 1991 of the same name. The new Law is a result of more than 2 years of hard discussions and struggle between the State Duma and the Federation Council on the one hand and the President of Russia on the other.

The main idea of the Law was to encourage and protect direct foreign investment which is seen as being a preferable form of investment in comparison to "speculative" portfolio investment.

An analysis of the new Law on foreign investment shows that considerably flaws remain.

The new Law does not appreciably improve the rights of foreign investors in Russia compared with the previous foreign investment law. The text of the new Law does not contain significantly differences from the draft was rejected on 18 May of this year by the Federation Council.

The most important novelties, when compared to the law of 1991, in three new areas are as follows:

1. Grandfathering clause stipulated in Article 9;

2. Definition of direct foreign investment versus priority investment project given in Article 2;

3. Provisions relating to the registration of companies with foreign investment and branches of foreign legal entities.

1. The Grandfathering clause

One of the primary obstacles on the way of foreign investments in Russia remains the instability of its legal system, in particular, the constantly changing tax legislation. A potential investor, who worked out a business plan based on the current legal conditions, may find that subsequent unanticipated adverse changes in law turn a profitable project into a loss.

The grandfathering clause represents the "key" element of the new and is intended to provide stable business conditions for an investment especially in regard to the economic law (stable taxes, banking, customs regulations) for a certain period of time.

Article 9 of the new Law restricts the availability and extent of "grandfathering". The new version of the Law restricts "grandfathering" to "priority investment projects" and to companies of whose charter capital at least 25% is owed by a foreign person or company. Also, the grandfathering clause of the new Law has more exceptions than the previous draft, for example, the grandfathering clause does not protect an investor from:

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- customs duties introduced for the protection of the economic interests of Russia;

- excises and VAT on goods manufactured in Russia;

- charges to the Pension Fund.

Also, the period of time during which relief is afforded by the grandfathering provision is limited to a maximum of 7 years.

The grandfathering clause leaves many issues open to the discretion of the Government. The Government is to define the criteria of what is to be considered an adverse change in law. By implication, until such criteria are developed, investors will be unable to take advantage of the grandfathering clause. The Government may also determine the periods for recoupment of investment by "differentiating" different periods for different types of projects. The government may extend the 7-year period for priority investment projects and draw up a list of such priority projects.

The list of exceptional cases is limited to priority investment projects in manufacturing, transportation or the creation of any other infrastructure where the amount of the foreign investment is at least 1 billion roubles. In such cases the Russian Government is authorised to extend the protection of the grandfather clause beyond years.

The grandfathering clause does not cover changes in law undertaken in order to project constitutional order, state safety, public health and morals, as well as rights and lawful interests of other persons. This provision, and especially the reference to the "interest of other persons", is very open for administrative interpretation.

2. The law defines direct foreign investment as:

- acquisition by a foreign investor of at least 10% of shares or interest in charter capital of a Russian commercial organisation, which is established under the Russian Civil Law;
- investing in fixed assets of a foreign branch;
- leasing transactions for at least 1 million roubles of the customs value.

Probably, having realised that acquisition of shares does not necessarily mean investing into company's capital, the Law suggests that special incentives-such as protection of grandfathering clause-will be given to investors carrying out an investment project which includes business plan and feasibility study in relation to direct investment.

Above mentioned special benefits stated in the Law are applied to investors conducting "priority investment projects", which are defined as investment projects with a total amount of foreign investment is not less than 1 billion roubles (but not less than the equivalent of USD 41 050 903 119) or the minimum interest (contribution) of the foreign investors in the charter capital of a Russian commercial entity is not less than 100 million roubles (not less than the equivalent of USD 4 105 090).There is further condition, which is that a project will not be considered a "priority investment project" unless it is included in the list of priority investment projects to be created by Russia Government. If a project qualifies as a "priority investment project", it will be entitled to benefits in accordance with the customs and tax legislation of the Russian Federation.

3. Provisions relating to the registration of companies with foreign investment

The new Law has left unchanged the provision of paragraph 2 of Article 22. Now the registration with foreign investment can be denied for the protection of constitutional order, state safety, public health and morals, rights and lawful interests of other persons.

This provision actually contradicts the Civil Code and rules applicable to the registration of "purely" Russian companies. Their registration can be denied only if founding documents or procedure or setting up a company does not comply with the law.

4. Antimonopoly legislation

We believe that the attempts to introduce some special rules applicable only to foreign investors in the new Law on foreign investment are unjustified. The rules of compliance with antimonopoly legislation and liability for their violation are fully provided by a special law-the Law on competition and restriction of monopolistic activities on commodity markets ("the Law on competition"). The Law on competition equally applies to Russian and foreign investors (see Article 2). Unlike other laws, e.g. the Law on joint stock companies or the Law on privatisation, the Law on competition does not provide for the possibility of other laws stipulating special rules to cover relationship with foreign element. Apparently, there are no grounds to believe that foreign investors need any special antimonopoly regime.

The notion of "restrictive business practices" is not generally known to the Russian antimonopoly legislation and cannot be introduced by the Law on foreign investments having a different subject matter. However, the Law on competition provides for a liability for similar offences, such as abuse of dominant position (Article 5) and agreements (agreed actions) that restrict competition (Article 6). Since Article 5 does not contain an exhaustive list of the forms of the abuse of a dominant position, there is no practical need for the new Foreign Investment Law to describe in details a particular case of potential abuse - establishment of an enterprise or a subsidiary followed by selfliquidation. This provision only causes investors concern and gives rise to the suspicion that the legislators intend to introduce special restrictions for foreign investors which are not applicable to Russian companies.

5. Conclusion

It is widely known that many jurisdictions do not have special laws on foreign investments, although rules applicable specifically to non-residents can be found in other laws and regulations. If foreign investors are treated equally by the law (at least in principle), then a special law on foreign investment has no subject matter and is unnecessary. Foreign investors' involvement in the economy is then governed by general legislation applicable to all investors with special rules related to non-residents being incorporated into appropriate laws.

The existence of foreign investment law can, however, be justified where such law is a convenient form in which to set out particular incentives and benefits to be used to encourage foreign investment.

Even in this case, however, a foreign investment law should only supplement and not substitute or duplicate national legislation and regulations applicable to all as is the case with the Law "On Foreign Investments".

It appears that the new Law attempts to reach a balance between the two approaches to the regulation of foreign investment described above.

In itself, the new law on foreign investments does not really create any special regime for foreign investors and generally tends to put them on the same footing as local investors. On the other hand, it reflects, to some extent, the idea that significant foreign investment cannot be attracted unless some special benefits and guarantees are given to them without providing very clearly or at what these are to be.

Given that the Law is to replace the 1991 Law on Foreign Investments, another important issue to be addressed is whether it improves the legal status of foreign investors as compared with the existing law. In our opinion, the new Law does not go much further in this regard from its predecessor with some exceptions, although its definitive and descriptive sections are redrafted on the basis of current understanding of foreign investment activities.

Any foreign investment law will be valuable for investors only if its provisions can be applied and enforced directly. Most sections of the new Law have no direct and refer to other laws: either legislation already in effect or laws to be passed in the future.

In summary, therefore, the new Law on foreign investments has no clear subject and concept of regulation, and for this reason is not a consistent document. It attempts to describe what investors can do rather than the state what is prohibited. The new Law does not substantially improve or clarify foreign investors' status as compared with the 1991 Law, and cannot be directly applied to a number of major issues of their activity.

MAMUKA JGENTI*

THE EXTERNAL RELATIONS OF THE EUROPEAN COMMUNITY

Today, the European Union (EU) consists of 15 Member States and the European Community (EC) has direct influence on its 300 million citizens. This new supranational organisation plays a key role in the formation of a new world order and to understand the idea of this organisation, one should underline, that the Community is not an organisation founded solely for economical reasons. The priority issue of the Monet-Schuman plan was the peacekeeping in Europe, in the continent, where two world wars took place.

In April 22, 1996 was signed and in May 1, 1999 entered into force the Partnership and Cooperation Agreement between the EC and Georgia. According to the Georgian Parliament Decree of September 2, 1997 whole legislation of Georgia adopted as from September 1 1998, must be compatible with European law. The legal aspects of the Community's external relations are briefly described and analysed in the present work.

Chapter I - Treaty-making procedure

In the present Chapter, I will deal with the procedure for the conclusion of international agreements by the EC, as provided in Art. 300 EC.

In first place, it must be noticed, that the procedure of Art. 300 is obligatory for all kind of international agreements of the EC. Until the Maastricht Treaty, a different procedure was defined in the former Art. 113, which was consolidated by the Maastricht Treaty in Art. 228 (Art. 300 of the Amsterdam Treaty).

Another point to mention is that Art. 300 itself cannot be used by the Community as a legal basis for the conclusion of agreements[1] and its provisions are of pure procedural character.

The Treaty is largely silent as to the internal effects of the agreements. It only provides in Art. 300 (7) that agreements are binding and the rest had to be determined by the Court of Justice.

A terminological point should be made at the outset. Art. 300 refers to agreements and not to treaties or conventions. However, that is of no legal significance. In international law various concepts are used for indicating contracts between States or international organisations, but the 1969 Vienna Convention on the Law of Treaties does not attach any significance to those differences in terminology. Hence, may be deduced that the Community may conclude conventions and treaties as well as agreements.

It is very well known that in most areas of Community law-making the Commission has the exclusive right of initiative. That is no different when it comes to the conclusion of agreements. But of course the Commission cannot make a full proposal as in the case of legislation before the negotiations have

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[1] See the opening sentence of Art. 300 (1), which starts by "Where the Treaty provides for the conclusion of agreements…"

even started. For that reason, the Treaty refers to “recommendations”, which the Commission shall make to the Council. As a matter of fact, those recommendations are usually not published, but sometimes the Commission does issue discussion papers on the development of relations with certain Countries and international organisations in advance of the opening of a negotiation. The recommendation is not published because it includes details of strategy and tactics in the negotiation, which are recommended not to be made public.

The Council of Ministers shall authorise the Commission to open negotiations and it can issue directives. These directives are not to be understood as an instrument of law making mentioned in Art. 249. The term is used as instructions to the Commission on how to conduct negotiations. Again, those directives are not published, however, very often the general information on the directives leaks out to the press.

The Commission in consultations with “special committees” conducts negotiations. The committees consists of representatives of the member states (MS), who are usually present in the negotiations, but who do not have the right to negotiate themselves.

During the negotiations, Commission must search for a solution, which first of all will make it possible to conclude an agreement, but also will be acceptable for at least majority of member states. Although the Commission is doing its best to exclude any objections, there were cases when MS expressed their negative positions.

As an example, I would like to point out two cases. The first one is the so-called “Blair House” agreement, where it was undeniable that the Uruguay Round could be successful only if an agreement could be reached with the US on agriculture. That is why, the Commission entered into unofficial negotiations with the US delegation, resulting in 1992, in the above-mentioned agreement. That was much to the distaste of some MS, France in particular, but at the end of 1993, France gave up its resistance.

The second example concerns bananas. After the adoption of the common market organisation, in 1993, a number of Latin-American countries brought complaints against the Community in the GATT. These complaints resulted in a report, which found the Community to be in breach of its commitments. Again, the Commission started negotiations and in March 1994, one month before the final conclusion of the Uruguay Round, the “framework agreement” was reached with those countries. Although, the Commission could easily predict the possible negative reaction of the MS, it still decided to make the agreement part of the Community’s tariff commitments in the Uruguay Round. For obvious political reasons none of the MS was in a position not to sign in Marrakech, the WTO Agreement, only for the sake of bananas.

The initialling and signature of the agreement usually conclude negotiations. In most cases the contracting parties merely agree, by their signature, to submit the agreement for further approval by their competent authorities.

Since, the Council of Ministers is the institution competent for concluding an agreement, it is also the Council which decides on its signing. When doing so it will appoint the person (often a minister of the country holding the presidency of the Council) authorised to sign. Of course, where an agreement is a mixed[2] one, it must also be signed on behalf of each MS.

[2] E.g. the PCA between the EC and Georgia is a mixed agreement.

Art. 300 includes the procedure of requesting the Court of Justice to give its opinion. In Opinion 1\75[3] the Court stated that the request may be made only before the conclusion of the agreement. In Opinion 1\94[4], it was clarified, that by conclusion is meant the entrance into force of the agreement in question, in other words, if the agreement is only signed, the Court still may be requested to give an opinion. It results from Opinion 2\94[5], that under certain conditions a request can also be made where even the decision to start negotiations is not yet taken.

In its case-law, the Court of Justice took a view that the rejection of already valid agreements will have undesirable consequences in relations with other contracting parties, and that the issuing of non-legally binding "simple advice", may harm the Court's prestige.

Agreements are concluded by the Council, acting by a qualified majority, except where unanimity is required for the adoption of internal rules in the same area as covered by the agreement.

It is necessary to distinguish between the two meanings of the term "conclusion". On the one hand, the term signifies the internal process, by which the institutes declare that a particular agreement should be accepted by the Community. On the other, it signifies the international act by which the Community expresses its definitive consent to be bound by the agreement. Without the first step, the expression of Community consent to be bound would be invalid in Community law. Without the second, other contracting parties would not know whether the Community had decided to enter into the agreement in question.

Nowadays, the mentioned distinction has no significance, since the Council adopted the practice of concluding agreements by way of "decisions".

Despite some important changes towards the extension of the role of the European Parliament (EP), the so-called "democratic deficit" is still visible as regards the procedure of the conclusion of an international agreement.

CHAPTER II - Does the EC Treaty provide the necessary legal basis for the Community external relations?[6]

Does the Community, which itself is an international organisation founded by the Treaty has the right to conclude the agreements with third states and International Organisations?

The first try by the Court of Justice to resolve these issues linked with the ERTA case. In this case the Court of Justice stated that the EC has a legal personality as provided by the Art. 281. In this regard ought to be noticed that for being recognised as the subject of international law it is not enough to grant itself by the provision of the constitutive treaty such recognition, not just for international organisations but for states as well.

Despite the weak argumentation given by the Court of Justice, at the end of the day we may see that there are no further problems as regards this issue. The EC already concluded countless agreements with other States and International Organisations.

[3] Opinion 1\75 OECD Understanding on a Local Cost Standard (1975) ECR 1355.
[4] Opinion 1\94 WTO-GATS and TRIPS (1994) ECR – I 5267.
[5] Opinion 2\94 Accession of the Community to the European Convention on Human Rights (1996) ECR- I 1759.
[6] The main provisions of the EC Treaty, concerning the external relations are appended (Appendix 1).

There is one area where the external capacity of the Community may continue to pose problems and that is the Community's membership of International Organisations. Until now the Community is a fully-fledged member of only the World Trade Organization (WTO) and Food and Agriculture Organization (FAO)[7].

For the Community's accession to the FAO changes to the FAO Constitution had to be made, providing for the alternative exercise of membership rights by the Community and by the member states depending on their respective competencies. When those amendments were under discussion, the legal office of the United Nations delivered its views on Community participation in the UN system:

"These matters are clearly within the purview of the FAO member states and we of course are not in any position to comment on any policy decision which the FAO membership chooses to make on such matters. We would, however, express concern where such decisions to be taken out of the FAO context and used to justify attempts in the United Nations to encroach on the principle of "one state one vote", contained in Art. 18 of the Charter of the UN. Our concern therefore relates to the UN as a political organisation and is both legal and practical. It must be understood that whatever changes FAO makes to its constituent instrument cannot be invoked in the future as a precedent in the United Nations context".

In one of the cases[8] the Court of Justice declared that the international agreements form an integral part of Community law. Such agreements may be divided into two categories[9]. The first consists of agreements between the Community acting alone and one or more non-EU member states. The second category consists of the so-called mixed agreements, that are agreements between, on the one side the Community and its MS acting jointly and the non-EU member states or International Organisations on the other. The first type of agreement is concluded, when its subject-matter falls entirely within the treaty-making competence of the Community, while it is necessary to conclude mixed agreement, where the subject-matter falls partly within the competence of the Community and partly within that of the MS.

Considering the limited size of the present paper, I won't be able to touch some questions as are e.g. that of EC law sources and the position of international agreements in the hierarchy of EC legislation.

Remembering the key role of the Court of Justice in the formation and development of the EC external relations, I will try to analyse very briefly the fundamental aspects of the case-law, concerning the legal aspects of EC external relations.

The focus will be on the basic classic jurisprudence on this matter: the ERTA case, Opinion 1\76 and Opinion 1\94.

It is fundamental to follow a certain logic structure in the presentation of this subject, even if that has as a consequence that sometimes I will have to divide the analyses of certain cases into two or even more sections. Nevertheless, for the sake of clarity the review will be divided into three essential parts:

[7] The fundamental bibliographical source used in the preparation of this chapter has been the following: *T. Tridimas, P. Eckhout*, "The External Competence of the Community and the Case-law of the Court of Justice: Principle versus Pragmatism", 1994, Yearbook of European Law 143.

[8] Namely, *Haegeman* v. Belgium, case 181\73 (1974) ECR 449.

[9] Although the Court of Justice admitted the third category-agreements between the MS and non-member states. It accepted that such agreements may form part of EC law, and may be binding for the Community, only when special circumstances are present. For better illustration see, *T. C. Hartley*, The Foundations of EC Law, 4th ed., 1998.

Part I will deal with the exercise of the Court's advisory jurisdiction in the procedure of negotiation and conclusion of international agreements by the EC, as provided for in Article 300 (6).

Part II concerns the question of express and implied external competencies of the Community.

Part III will focus on the debate on whether certain competencies of the Community are exclusive or should be considered to be concurrent with the ones of the Member States.

Preliminary remarks on the notions of power and competence

- Although the concepts of competence and powers are frequently treated as interchangeable they reflect different realities;
- the notion of competence refers to areas of possible action or domains of activity;
- the notion of power refers to the legal instruments available or to the possible procedures to be followed in the exercise of a specific competence.

Nevertheless, neither the Treaty nor the case-law of the Court concerning external relations draws the distinction between the two concepts with any consistency. Therefore, for practical purposes, I will use them interchangeably.

How the Court can be asked to rule on problems of competence

The question of division of competence between the EC and the MS can be examined by the ECJ or the Court of First Instance (CFI) in any type of proceedings brought before them. Typically, they will arise in:

- The exercise by the Court of its consultative jurisdiction under Art. 300 (6) of the EC Treaty;
- in disputes between the Institutions and the MS under Art. 226 or Art. 230 of the EC Treaty.

They can also arise:

- In disputes between the Institutions under Art. 230;
- in preliminary references.

I. The advisory jurisdiction of the Court under Art. 300(6) EC

Art. 300(6) EC provides as follows: "the Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of the Treaty."

This jurisdiction has an exceptional character since the ECJ is not exercising its normal judicial function but an advisory one, delivering an opinion and not a judgement on an abstract point of law.

The opinion of the Court is binding. A finding that an agreement is incompatible with the Treaty means that it cannot enter into force, unless the Treaty is revised in accordance with Art. 48 of the Treaty on the European Union (TEU).

The list of institutions entitled to ask for the opinion of the Court does not include the European Parliament.[10] This may give rise to problems: for instance, the EP may think that a proposed agreement falls within one of the categories requiring its assent, while the Commission and the Council may hold that they only have to obtain its opinion. In such a case, it seems that the only option open to the EP, as the law stands, is to challenge the act concluding the agreement under Art. 230.

So far, the Court has delivered few opinions under Art. 300. In most of these cases it had to rule on the matter of whether the Community or the MS were competent to conclude the agreement. These constitute the core of the fundamental foundations of Community Law on external relations.

II. Express and implied external competence

1. The legal basis for the express competence

Certain provisions of the Treaty provide expressly for the conclusion of international agreements by the EC:

- Art. 133 facilitates the conclusion of tariff and trade agreements in the context of the common commercial policy;
- Art. 310 empowers the Community to conclude with third states or international organisations association agreements;
- the Single European Act (SEA) added new Treaty making-powers to the EC in the field of research and development (Arts. 164 and 170) and the environment (Art. 174-176);
- new express competencies were also provided for by the TEU in the field of development co-operation (Art. 177-181) and economic and monetary policy (Art. 111).

2. The basis for implied competence

A long line of case law of the ECJ has developed the doctrine that whenever the Community has a particular competence in the internal sphere a parallel competence arises in the external one. I will look at the most important Court judgements in this context.

a) The ERTA judgement[11]

The problem here concerned whether authority to conclude the European Road Transport Agreement (ERTA) was vested with the Community or with the MS.

Essentially, the agreement related to the same subject-matter as Council Regulation N 543/69, adopted in March 1969, with a view of establishing common rules applicable to transport to or from the territory of a MS or passing across the territory of a MS.

The Council decided that the MS would conduct the negotiations and proceed to the conclusion of the agreement.

The Commission, on the other hand, argued that the agreement could only be signed by the Community and not by the MS as such since, in matters falling within the substantive scope of

[10] See the previous chapter.
[11] Case 22/70, Commission v. Council (ERTA).

Regulation N 543/69, authority to enter into international agreements had passed from the MS to the EC.

The traditional view held until then was that the Community only possessed treaty-making power where expressly provided in the Treaty, notably in Articles 133 (113)[12] and 310 (238).

But the Court went beyond the limits of express competence by stating that "in the absence of specific provisions in the Treaty relating to the negotiation and conclusion of international agreements in the sphere of transport policy ... one must turn to the general system of Community law relating to agreements with non-member states".

The next step of the Court was to conclude that it followed from Art. 281 (210) EC (which confers legal personality to the EC) that the EC enjoyed the capacity to enter into international agreements over the whole field of objectives laid down in Part One of the Treaty.

The ECJ then proceeded to explain that the authority to conclude such agreements may result not only from an express attribution of competence by provisions of the Treaty, like Articles 133 (113) and 310 (238), but that it may equally flow from other provisions of the Treaty and from steps taken, within the framework of these provisions, by the Community Institutions.

Finally, the Court gave its view on the manner and circumstances in which a combination of Treaty provisions and steps taken within their framework by the Institutions can have the effect of divesting the MS of their power to act externally and supply the EC with a Treaty-making authority:

The ECJ stated that, whenever with a view to implementing a common policy, the EC adopts provisions laying down common rules, the MS no longer have the right to undertake obligations with third countries that may affect these rules. Essentially, the Court held that, to the extent that the common rules in question come into being it is no longer possible to separate the implementation of those rules in the internal and in the external sphere.

Having in mind that Art. 3(f) EC mentions the adoption of a common transport policy as one of the objectives of the Community and that Reg. 543/69 implements this policy in the internal sphere of the EC the parallelism of competence must apply. The coherence of the Community legal system requires that it should be solely the EC to be able to lay down rules in this field and assume and carry out all external contractual obligations in relation to third countries.

I have to underline that in this case the ECJ did not opt for the theory of automatic parallelism between internal and external competence. It held that the external authority derived from the lying down of common rules designed to implement a common policy provided for in the Treaty. It seems, thus, that the internal competence must have been exercised for the external one to arise. This would be the object of further clarification in subsequent jurisprudence of the European Court, particularly in Opinion 1/76.

Further down I will deal with the matter of determining whether the Court considered that in this case competence of the Community was an exclusive or a concurrent one.

[12] Since the Articles were renumbered by the Treaty of Amsterdam the old numbers are inserted in brackets after the new ones.

b) The Kramer case[13]

This case concerned the North-East Atlantic Fisheries Convention of 1959 to which most of the MS and some third countries were parties. The Convention's purpose was to ensure the conservation of sea resources.

Once again the question to examine was whether the MS had the power to undertake commitments in that field or whether this power had been transferred to the EC.

The Court maintained the position that it had held in ERTA that the capacity of the EC to enter into international agreements could arise not only from express conferment by the Treaty but might also flow implicitly from other provisions of the Treaty, from the Act of Accession and from measures adopted by the Institutions.

Again, the ECJ recalled the fact that the Community has legal personality as it is provided by Art. 281 (210). The fact that this provision is placed in Part Six of the Treaty, applicable to the whole field of Community activity, means that in its external relations the Community enjoys the capacity to enter into international commitments over the whole field of objectives defined in Part One of the Treaty.

The reasoning of the Court followed several steps:

First, it pointed out that the adoption of a common agricultural policy is one of the EC's objectives as it is provided in Art. 3(e)EC.

Secondly, it stressed the fact that under Art. 38 (32) EC and Annex 11 of the EEC Treaty fisheries products are submitted to the same regime as that applicable to agricultural products, notably to the rules of Articles 33-38 EC (39-46).

Thirdly, it recalled that to attain the objectives set out in Art. 33 (39), the Art. 37 (43) confers on the Council the power to adopt regulations, directives and decisions, which the Council did by adopting two regulations in 1970.

From all this the Court concluded that the Community had the power to adopt, at the internal level, the necessary measures to ensure the conservation of sea resources and that the only way to ensure such conservation effectively and equitably would be through a uniform system of rules binding on MS and non-MS equally, which could only be done through an international convention.

In other words, the attainment of a Community objective requires that it should be the Community and not the MS to act in the external sphere. The ECJ, therefore concluded that the Community had implied competence in this field.

However, given that the Community had not yet fully assumed its competence in this area, since the transitional period provided for in Art. 102 of the Act of Accession had not by then elapsed (only then the subject-matter in question would become a Community-alone field), the contested measures adopted by the Netherlands were accepted.

[13] Joined cases 3, 4 and 6/76.

c) Opinion 1/76 [14]

The issue here concerned the question whether the Community or some of the MS could join another supranational organisation of which also Switzerland would be a party in the area of inland waterway transport.

In answering to the question of competence of the EC to conclude such agreement, the Court fundamentally recalled the doctrine it had laid down in Kramer that the implied powers could give it that competence.

The Court was, nevertheless, much more precise in its decision by stating that whenever Community Law gives the institutions of the Community power within its internal sphere to attain a particular objective, the Community also has the authority to enter into international commitments necessary for the attainment of that objective.

Basically, in this case it was fundamental to ensure that Switzerland would also participate in this scheme and an internal measure adopted by the Community would not suffice for this purpose. The participation of the Community in this international agreement was a necessary condition to attain one of the community objectives that of regulating transport by inland waterways. Here, the Court spells out clearly the argument of necessity, implicit in ERTA and Kramer.

The Court reversed the view it had put forward in the ERTA case by stating now that the external competence of the Community is not dependent upon internal measures having actually been taken. Consequently, the Community was considered to have external competence in this field even though no internal measures dealing with transport by inland waterway had yet been promulgated. The EC has external competence by implication even if the internal competence has not been exercised.

To sum up, the fundamental test now laid down by the ECJ is the following: the Community will have external competence in a particular field, even if no internal measures have been adopted in that field in the internal sphere- provided that the participation of the Community in a given international agreement covering that same domain is a necessary condition for the attainment of one of the Community's objectives.

d) Opinion 2/91[15]

The issue before the ECJ was whether the Community had the competence to participate in an ILO Convention concerning safety in the use of chemicals at work.

The Court recalled its ruling in Op. 1/76 and applied it to the facts of the case stating that the field covered by this Convention fell within the social provisions of the Treaty which constituted Chapter I of Title Ill on Social Policy.

Then, referring more specifically to Art. 137 (118) of the EC Treaty, which provides that the Council has the power to adopt minimum requirements, by means of directives, the Court concluded that the EC enjoyed internal legislative competence in the area of social policy. Since Convention No. 170 of

[14] Opinion 1/76 (1977) European Laying-up Fund for Inland Waterway Vessels, ECR 741.
[15] Opinion 2/91 on Convention No. 170 of the International Labour Organisation concerning safety in the use of chemicals at work, (1993) ECR I-1061.

the ILO covers the same area it results from the doctrine of implied powers that the Community is bestowed with the capacity to act internationally in this domain.

A different point, that I will deal with later on, is whether this can be considered as being an exclusive competence of the EC. We will see that the ECJ did not consider it to be so.

e) Opinion 1/94

The principle of parallelism cannot be understood as widening the external competence of the EC from a substantive point of view. In all the cases considered above the subject matter of the agreement coincided with an internal competence of the Community. That was not the case with the GATS agreement annexed to the Agreement establishing the WTO.

The Commission argued that the EC's participation in the GATS was necessary to ensure the coherence of the internal market and that whenever Community Law conferred on the Institutions internal powers for the purpose of attaining specific objectives the external competence flowed implicitly from those provisions, if the Community's participation was necessary to achieve one of the objectives of the Community.

The Commission followed the logic of the Court's decision in Op. 1/76. The ECJ held a different position sustaining the specificity of Opinion 1\76, in which the control of navigation in the Rhine could not be attained without the participation of Switzerland, which only an international agreement could guarantee, autonomous rules adopted by the EC not being enough.

Thus, bearing in mind the necessity of this agreement**,** the external competence could be exercised even if no previous internal measures had been adopted by the Community institutions.

The Court held that this type of reasoning could not be applied in the case of services. The ECJ stressed that the attainment of freedom of establishment and freedom to provide services for nationals of the MS was not linked to the treatment afforded by the Community to third country nationals or to the treatment given in non-MS to Community nationals.

The objective of the Treaty provisions on this matter is only to ensure free movement to the Community nationals and not for other categories of persons. One cannot therefore infer from the internal competence of the Community concerning its own nationals an external competence to conclude an agreement with third countries to liberalise first establishment and access to service markets, which is not an objective of the Community.

In short, in this case there isn't the element of necessity of the agreement in order to achieve a particular objective of the EC. The consequence of this is, of course, that the EC does not have an implied power to conclude the GATS agreement.

The Court applied the same type of reasoning concerning the TRIPS Agreement concluding that the harmonisation of intellectual property law taking place at the Community level pursued the objective of achievement of the internal market and so was not connected to any external purpose of regulating Intellectual Property in a wider international scale.

III. Exclusive competence of the EC or concurrent competence with the MS

The Treaty follows the principle of specific attribution of competencies so that the Community has only those powers that are attributed to it either by express Treaty provisions or by implication. This can be inferred from Art. 5, par. 1, which provides that "the Community shall act within the limits of the powers conferred upon it by this treaty".

In the EC Treaty we can find legal basis for exclusive competence of the Community concerning the common commercial policy and the common fisheries policy. Essentially, there are two provisions that one should bear in mind: Art. 133 of the EC Treaty[16] and Art. 102 of the Act of Accession of 1972. These cases reflect an exclusive competence of the Community arising from a Treaty provision.

Besides this type of situation an external exclusive competence may also arise as the result of the exercise of an internal competence.

In here, I will examine each one of these cases in turn.

IV. Exclusive competence arising directly from a Treaty provisions

1. Opinion 1/75

The Court was concerned with the compatibility with the EC Treaty of a draft agreement drawn up under the OECD. The first step of the ECJ was to 'conclude that the agreement fell within the scope of the common *commercial* policy and that therefore the Community had exclusive competence to conclude it, since the common commercial policy envisaged in Arts. 133 (113) and former Art. 114[17] was conceived in the context of the operation of the Common Market for the defence of the common interests of the Community. The possibility of the MS keeping their freedom to act in that sphere was in itself unacceptable.

In a second moment the Court stated that the fact that the MS supports the financial burden inherent in the execution of the agreement does not have any repercussion in the exclusivity of this competence. In other words, the fact that there has not been a transfer of the financial obligations related to the agreement to the Community institutions does not mean that the competence shall be considered as being shared with the MS, who continue to support the financial burden of the agreement. The competence belongs exclusively to the Community.

2. Opinion 1/78[18]

Here, the ECJ was concerned with a draft agreement being negotiated in the UNCTAD.

The Commission's view was that the agreement came within the Community's exclusive competence and the Council claimed that it fell partly within the competence of the EC and partly within the competence of the MS and that therefore both should be called to conclude it.

[16] Art. 133 EC contains a non-exhaustive list of measures that may integrate the notion of common commercial policy. The ECJ has interpreted this notion as a dynamic one which must take into account developments in the international economic and technological environment. See Opinion 1/78, par. 44.
[17] Abrogated by the Treaty of Amsterdam.
[18] Opinion 1/78 International Agreement on Natural Rubber (1979) ECR 2871.

The Court considered that the subject matter of the agreement fell within the scope of Art. 133 (113). However, it took a particular view concerning the way the agreement was to be financed.

In fact, at that stage of the negotiations there was still no decision as for whether the agreement would be financed by the Community budget or by contributions of the MS. As a consequence, the Court stated that if the burden of the agreement came to be financed by the Community budget the Community would enjoy an exclusive competence in the matter but, on the other hand, if the financial burden was to fall directly on the MS that must imply the participation of these in the negotiation and conclusion of the agreement.

Many authors have strongly criticised this position of the Court, accusing it of inconsistency with the view expressed before in Op. l/75 and of allowing financing to determine exclusivity. It is, however, possible to find a line of coherence between the two opinions.

Opinion 1/75 points out that MS cannot claim concurrent competence in a particular field by reason of the fact that they undertake the financial obligations arising from an agreement. Nevertheless, that may occur whenever, like in Op. 1/78, the financial provisions occupy a central position in the structure of the agreement.

3. Opinion 1/94

The issue here was the competence of the Community to conclude the Agreement establishing the WTO.

The Uruguay round negotiations were conducted by the Commission on the part of the Community and also by the MS. When the Agreement was about to be signed in April 1994, however, the Commission did not agree with the decision of the Council that both the Community and the MS were to sign it.

The Commission held the position that the whole WTO Agreement fell within the exclusive competence of the Community by virtue of Art. 133 (113) of the Treaty. The Commission supported this argument in the broad interpretation of the scope of the common commercial policy often held by the ECJ.

Alternatively, the Commission considered that this resulted from the doctrine of implied powers. The essential debate concentrated on the GATS and TRIPS Agreements. I will first examine the Court's reasoning as regards GATS.

The Court started by referring to the new trends in international trade and the fact that the area of services has become the fundamental sector of the economy in most developed countries. It followed from that trend that, as a matter of principle, trade in services could not be excluded from the scope of Art. 133 (113).

But, the Court immediately limited the possible extent of this conclusion by examining the provision of Art. 133 (113) and its possible applicability to trade in services in the context of the overall scheme of the Treaty.

The ECJ analysed the definition of trade in services given in Art. 1 (2) of the GATS and remarked that it comprised four modes of supply of services:

1) Cross-frontier provision of services, not involving any movement of persons;

2) Consumption abroad, where the consumer moves to the territory of the WTO MS in which the supplier is established;

3) Commercial presence, where the supplier of a WTO MS establishes itself in the territory of another WTO MS;

4) The presence of natural persons, enabling a supplier from WTO MS 1 to supply services in WTO MS 2.

The Court held that only cross-frontier provision of services, with no movement by the consumer or the supplier, only of the service itself, thus similar to trade in goods, was covered by the common commercial policy.

As regards the other three forms of supply of services, the ECJ found that they could not be interpreted as falling within the scope of Art. 133 (113). The reason for that was that, in relation to natural persons, the Treaty distinguishes in Articles 3 (b) and 3 (d) between, on the one hand, a common commercial policy and, on the other hand, measures concerning the entry and movement of persons and also, and most importantly, because of the existence in the EC Treaty of specific chapters dealing with the free movement of natural and legal persons. These aspects could not therefore be considered as comprised within the scope of Article 133 (113).

The conclusion of the Court was therefore that the Community enjoyed exclusive competence as regards cross-frontier provision of services, which can be regarded as falling within the scope of Art. 133 (113) EC, but not regarding the other forms of supply of services. Hence, the competence had to be shared between the EC and the MS.

Concerning the TRIPS Agreement, once again the Commission argued that it could be concluded solely on the basis of Art. 133 (113), since intellectual property rights were inextricably linked to the trade in goods and services.

The Court accepted this argument but only as regards measures designed to prevent the free circulation of counterfeit goods**,** which are the only ones that present this inseparable links with the goods themselves.

Concerning the remaining intellectual property rules, the ECJ held that their adoption pursued objectives strictly connected to the achievement of the internal market and not the goal of regulating international trade in a world-wide scale.

The conclusion was therefore that the provisions of the Treaty did not give to the EC an exclusive competence to conclude GATS and TRIPS. It remained to be seen however whether this competence could arise as a result of the exercise of an internal competence.

V. Exclusive external competence arising as the result of the exercise of internal competence

1. ERTA judgement

In this judgement the Court had said that "each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules ... *the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules ...* ".

It seems to me that the exercise by the Community of its internal competence in a given field has, not only the effect of giving rise to a parallel competence in the external sphere, but also a blocking effect on the eventual concurrent competence of the MS: once the Community adopts common rules the MS may no longer undertake obligations which may affect these rules or alter their scope.

This principle, known as the principle of pre-emption is based upon common sense: the Community's internal legal order would be hopelessly undermined if the MS were able to put in question Community rules by unilaterally entering into international agreements which may very well contradict those rules.

a) Opinion 2/91

Here, the ECJ made it clear that the blocking effect or pre-emption of Community competence takes effect not only where the Community has adopted rules within the framework of a common policy (where the Community rules have completely or exhaustively regulated a particular domain), in accordance with the statement in ERTA, but any type of rules adopted by the EC.

Even where Community legislation is not complete or exhaustive the principle of pre-emption might apply.

Basically, the subject matter of the ILO Convention concerned an area which was already, to a large extent, covered by Community rules aimed at achieving a higher degree of harmonisation concerning safety of workers.

The ECJ conducted the fundamental test aiming at determining whether the provisions of the ILO Convention would or not affect the rules adopted pursuant to Art. 137 (118) EC. It concluded as follows:

If the EC decides to adopt rules less stringent than the ones in the Convention, the MS may, in accordance with Art. 137 (118) adopt more stringent rules for the protection of working conditions or apply the provisions of the ILO Convention.

If the EC adopts more stringent measures than the ones in the Convention there is nothing to prevent the full application of Community Law by the MS in accordance with Art. 19 of the ILO Statute.

Therefore, given that one way or the other the MS cannot put in question the minimum standards adopted in accordance with Art .137 (118) EC, the Court concluded by stating that the conclusion of the Agreement leading to the signature of the ILO Convention was a matter that fell within the joint competence of the MS and the Community.

The Court emphasised that the participation of the MS in the conclusion of the agreement was all the more necessary since, at the existing state of development of International Law and according to the ILO statute, the Community did not have the power to itself conclude ILO Convention No. 170.

The Court seemed to admit, as a matter of principle, that it is possible for an agreement to fall within the exclusive competence of the EC but to be concluded by the MS, acting as trustees. This, the Court confirmed in case C-316/91, EP vs. Council (Fourth Lome Convention case), ECR 1994.

b) Opinion 1/94

The Commission argued, that the Community had exclusive competence to conclude GATS and TRIPS, as a result of the operation of the doctrine of implied competence and the principle of pre-emption. It based its view in ERTA, Kramer and Op. 1/76.

It is worth recalling, at this point, that in ERTA the Court required for the exclusive competence to arise in the external context that the internal competence not only existed but that it had actually been exercised. In Op. 1/76, the ECJ was pleased with the simple existence of the internal competence, even if it had never been exercised.

Therefore it now seems that the fact that no rules have been adopted, in a particular domain, in the internal sphere does not prevent the implied competence of the Community in the external field from being created, but it has as a consequence that the pre-emption effect does not place, the result being that the competence will not become exclusive.

In any event, the Court returned to a rather cautious position concerning external exclusive competence of the Community, closer to ERTA than to Op. 1/76. The Court, no doubt, accepted the idea that the EC has competence to define the treatment to be afforded to third country nationals in the Community in the framework of the powers attributed to it under the Treaty chapters on establishment and services. However, the Court made clear that the Community only acquires exclusive external competence if the provisions concerning third country nationals are included in EC legislation, or if such legislation confers on the Community the power to negotiate with third countries, which wasn't the case with GATS.

Still regarding GATS, the Court also refuses the two residual arguments invoked by the Commission:

Concerning the attempt of the Commission to justify the existence of an exclusive external competence of the EC on the basis of Art. 95 (100a) EC, the Court stated that this provision could only provide the Community with such competence to the extent that an internal competence of harmonisation had been exercised which was not the case.

Concerning the possibility of founding the competence of the Community in Art. 308 (235), the Court simply states that it cannot alone serve as a basis for an exclusive external competence of the EC.

Nevertheless, the ECJ admits that to the extent that the Community has included into its legislation provisions relating to the treatment to be afforded to non-Community nationals in the EC, or if it has conferred upon its institutions the power to negotiate over these matters with third countries, the Community acquires an exclusive external competence in those domains.

Despite this very limited concession to exclusivity, the Court retained the position that the service sector, in other words GATS, remained as a domain of shared competence between the EC and the MS.

The same type of reasoning was followed concerning the TRIPS. The possibility of applying here the 1/76 solution was brutally rejected by the Court by firmly declaring that the effectiveness of the internal Community legislation relating to intellectual property does not necessarily have any link or requires any follow-up by measures adopted in the external sphere in the same field.

The arguments of Articles 95 (100a) and 308 (235) were also summarily refused. The partial character of harmonisation operated by the EC in the domain of IP does not justify the recognition of a Community exclusive external competence in the field.

The final conclusion of the Court is the same as in the case of GATS: in the absence of justification of an exclusive external Community competence, the competence to conclude the agreement must be shared between the EC and its MS.

At the end of the work, I would like to conclude by stating, that one must keep in mind that the agreements may be concluded only by the European Community and not by the European Union. The EU has no legal personality and may not be a party to an international convention.

Appendix 1

Article 300 (ex Article 228)

1. Where this Treaty provides for the conclusion of an agreement between the Community and one or more States or international organisations, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The Commission shall conduct these negotiations in consultation with special committees appointed by the Council to assist it in this task and within the framework of such directives as the Council may issue to it.

In exercising the powers conferred upon it by this paragraph, the Council shall act by a qualified majority, except in the cases where the first subparagraph of paragraph 2 provides that the Council shall act unanimously.

2. Subject to the powers vested in the Commission in this field, the signing, which may be accompanied by a decision on provisional application before entry into force, and the conclusion of the agreement shall be decided on by the Council, acting by a qualified majority on a proposal from Commission. The Council shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of internal riles and for the agreements referred to in Article 310.

By way of derogation from the rules laid down in paragraph 3, the same procedures shall apply for a decision to suspend the application of an agreement, and for the purpose of establishing the positions to be adopted on behalf of the Community in a body set up by an agreement based on Article 310, when that body is called upon to adopt decisions having legal effects, with the exception of decisions supplementing or amending the institutional framework of the agreement.

The European Parliament shall be immediately and fully informed on any decision under this paragraph concerning the provisional application or the suspension of agreements, or the establishment of the Community position in a body set up by an agreement based on Article 310.

3. The Council shall conclude an agreement after consulting the European Parliament, except for the agreement referred to in Article 133(3), including cases where the agreement covers a field for which the procedure referred to in Article 251 or that referred to in Article 252 is required for the adoption of internal rules. The European Parliament shall deliver its opinion within a time-limit the Council may lay down according to the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act.

By way of derogation the provision subparagraph, agreements referred to in Article 310, other agreements establishing a specific institutional framework by organising cooperation procedures, agreements having important budgetary implications for the Community and agreements entailing amendment of an act adopted under the procedure referred to in Article 251 shall be concluded after the assent of the European Parliament has been obtained.

The Council and the European Parliament may, in an urgent situation, agree upon a time-limit for the assent.

4. When concluding an agreement, the Council may, by way of derogation from paragraph 2, authorise the Commission to approve modifications on behalf of the Community where the agreement provides

for them to be adopted by a simplified procedure or by a body set up by the agreement: it may attach specific conditions to such authorisation.

5. When the Council envisages concluding an agreement which calls for amendments to this Treaty, the amendments must first be adopted in accordance with the procedure laid down in Article 48 of the Treaty on European Union.

6. The Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of the Treaty. Where the opinion of the Court of Justice is adverse, the agreement must enter into force only in accordance with Article 48 the Treaty of European Union.

7. Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States.

Article 302 (ex Article 229)

It shall be for Commission to ensure the maintenance of all appropriate relations with the organs of the United Nations and of its specialised agencies.

The Commission shall also maintain such relations as are appropriate with all international organisations.

Article 303 (ex Article 230)

The Community shall establish all appropriate forms of cooperation with the Council of Europe.

Article 304 (ex Article 231)

The Community shall establish close cooperation with the Organisation for Economic Cooperation and Development, the details of which shall be determined by common accord.

Article 308 (ex Article 235)

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

MOST IMPORTANT LEGAL ACTS ADOPTED IN THE THIRD QUARTER OF 1999

I. LAWS ADOPTED BY THE PARLIAMENT OF GEORGIA

20.07.99	Law on Changes and Amendments to the Law of Georgia on the Securities Market	SM[1] No. 2255 34(41) pp. 3-4
20.07.99	Constitutional Law on a Change to the Constitution of Georgia	SM No. 2221 35(42) pp. 2
20.07.99	Constitutional Law on an Amendment to the Constitution of Georgia	SM No. 2224 35(42) pp. 2
25.07.99	Organic Law on Changes and Amendments to the Organic Law of Georgia on the Elections of Georgian Parliament	SM No. 2248 35(42) pp. 2-3
20.07.99	Organic Law on Changes and Amendments to the Organic Law of Georgia on the Elections of the President of Georgia	SM No. 2251 35(42) pp. 3
22.07.99	Organic Law on Changes and Amendments to the Organic Law of Georgia on the Supreme Court of Georgia	SM No. 2285 36(43) pp. 2
22.07.99	Law on Changes and Amendments to the Civil Procedure Code of Georgia	SM No. 2214 36(43) pp. 2-3
23.07.99	Law on Changes and Amendments to the Criminal Procedure Code of Georgia	SM No. 2254 36(43) pp. 3-7
22.07.99	Law on an Amendment to the Customs Code of Georgia	SM No. 2301 37(44) pp. 2
22.07.99	Law on Imprisonment	SM No. 2263 38(45) pp. 2-19
22.07.99	Organic Law on Changes and Amendments to the Organic Law of Georgia on Courts of General Jurisdiction	SM No. 2282 38(45) pp. 21-22
23.07.99	Law on Changes and Amendment to the Customs Code of Georgia	SM No. 2243 38(45) pp. 22-23
23.07.99	Organic Law on an Amendment to the Organic Law of Georgia on the Courts of General Jurisdiction	SM No. 2257 38(45) pp. 22
23.07.99	Administrative Procedure Code of Georgia	SM No. 2352 39(46) pp. 2-8
23.07.99	Law on License Fees	SM No. 2347 39(46) pp. 8-10
22.07.99	Criminal Code of Georgia	SM No. 2287 41(48)

[1] "Sakanonmdeblo Natsne" is the Georgian law gazette.

22.07.99	Law on Participation of Georgia Armed Forces in Peace-Keeping Operations	SM No. 2292 39(46) pp. 12-13
22.07.99	Law on Changes and Amendment to the Law of Georgia on Foreigners' Temporary Entry into, Stay in and Departure form Georgia	SM No. 2305 39(46) pp. 11
22.07.99	Law on an Amendment to the Law of Georgia on State Fees	SM No. 2307 39(46) pp. 10
22.07.99	Law on Communications and Post	SM No. 2329 40(47)
22.07.99	Law on Amendments to the Law of Georgia on Normative Acts	SM No. 2329 40(47)
23.07.99	Law on Promotion of Small Enterprises	SM No. 2341 40(47)
23.07.99	Law on Seizure of Property for Urgent Public Needs	SM No. 2349 40(47)
23.07.99	Law on Compensation for Damages, Caused by Dangerous Substances	SM No. 2350 40(47)
23.07.99	Administrative Code of Georgia	SM No. 2352 32(39)
08.09.99	Law on Changes and Amendments to Some of the Legislative Acts of Georgia	SM No. 2361 43(50) pp. 3
08.09.99	Law on Changes to the Law of Georgia on Notary	SM No. 2363 43(56) pp. 3-4
08.09.99	Law on Changes and Amendments to Some of the Legislative Acts of Georgia	SM No. 2365 43(50) pp. 4-5
08.09.99	Law on Changes and Amendments to the Law of Georgia on State Fees	SM No. 2367 43(50) pp. 5
08.09.99	Law on Changes and Amendments to the General Administrative Code of Georgia	SM No. 2372 43(50) pp. 5
09.09.99	Law on Changes and Amendments to the Law of Georgia on Advertising	SM No. 2378 43(50) pp. 9
09.09.99	Law on Licensing of Designing and Construction Activities	SM No. 2374 43(50) pp. 6-7
09.09.99	Law on Protection and Promotion of Breast Feeding, on the Use of Formula	SM No. 2380 43(50) pp. 15
09.09.99	Law on Changes and Amendments to the Administrative Code of Georgia	SM No. 2382 43(50) pp. 15
09.09.99	Law on Changes and Amendments to the Tax Code of Georgia	SM No. 2386 43(50) pp. 16-17
09.09.99	Law on a Change to the Law on Georgia on Copyright and Related Rights	SM No. 2388 43(50) pp. 17
09.09.99	Law on Changes and Amendments to the Civil Procedure Code of Georgia	SM No. 2398 43(50) pp. 19-20

09.09.99.	Law on Changes and Amendments to the Law of Georgia on License Fees	SM No. 2405 43(50) pp. 21-23
09.09.99	Law on Changes and Amendments to the Law of Georgia on Oil and Gas	SM No. 2392 43(50) pp. 18

II. ORDINANCES OF THE PRESIDENT OF GEORGIA

11.07.99 Ordinance of the President of Georgia No 433 on the Distribution of Responsibilities in the Field of Foreign Trade in the Interrelations with the World Trade Organisation (WTO)

12.07.99 Ordinance of the President of Georgia No 434 on the Measures for the Improvement of Taxation and Registration of Light, Medium and Heavy Distillates of Oil

26.09.99. Ordinance of the President of Georgia on the Measures for the Development of Information and Communication Technologies

02.08.99 Ordinance of the President of Georgia No 469 on the Measures for the Fulfilment of the Requirements of the WTO Agreement on Sanitary and Phyto-Sanitary Measures in Connection with Georgia's Accession to the World Trade Organisation

04.08.99 Ordinance of the President of Georgia No 470 on Incorporation of Georgia into the Formation of the UN System of Permanent Readiness

20.08.99 Ordinance of the President of Georgia No 487 on the Measures for the Fulfilment of the Recommendation of the Parliamentary Assembly of the Council of Europe and the Resolution of the Committee of Ministers of the Council of Europe

20.08.99 Ordinance of the President of Georgia No 491 on the Approval of the Statute of the Qualification Attestation of the Judges of Supreme Court

26.08.99 Ordinance of the President of Georgia No 508 on Additional Measures for Promoting the Operation of the Georgian National Commission on Securities

08.09.99 Ordinance of the President of Georgia No 531 on Establishing the Special Foundation for the Development of Agriculture and Food Industry of Georgia

09.09.99 Ordinance of the President of Georgia No 533 on the Accession of Georgia to the Agreement Establishing the Commission of the Council of Europe

15.09.99 Ordinance of the President of Georgia No 537 on the Concept of Industrial Policy of Georgia

18.09.99 Ordinance of the President of Georgia No 554 on Financial Security of Legalisation of the Documents Issued in Georgia for Forwarding Abroad and Certified or Endorsed through a Notary's Office

III. DECREES OF THE PRESIDENT OF GEORGIA

19.07.99 Decree of the President of Georgia No 871 on Accession to the (Revised) Convention of October 3, 1985 on "Protection of European Architectural Heritage"

10.08.99 Decree of the President of Georgia No 970 on Appointment of the Qualification Examination of Judges

04.08.99 Decree of the President of Georgia No 949 on Appointment of the Parliamentary Elections

20.09.99 Decree of the President of Georgia No 977 on Accession to the Additional Protocol of the Convention on Extradition of Convicted Persons

09.09.99 Decree of the President of Georgia No 1096 on Permanent Representation of Georgia at the Council of Europe

IV. DECREES OF THE PARLIAMENT OF GEORGIA

23.07.99 Decree of the Parliament of Georgia No 2320 on Ratification of the Statute of the World Post Union

20.07.99 Decree of the Parliament of Georgia No 2317 on Participation of Squad of Georgian Peace-Keepers in Peace-Keeping Operation of NATO in Kosovo

23.07.99 Decree of the Parliament of Georgia No 2321 on Ratification of the Agreement on Parcels

23.07.99 Decree of the Parliament of Georgia No 2322 on Ratification of the Agreement on Registered Letters

23.07.99. Decree of the Parliament of Georgia No 2323 on Ratification of the Agreement on Money Orders

23.07.99 Decree of the Parliament of Georgia No 2324 on Ratification of the Agreement on World Post Convention

22.07.99 Decree of the Parliament of Georgia No 2289 on Ratification of the Convention on the International Transportation of Cargoes

22.07.99 Decree of the Parliament of Georgia No 2290 on Accession to the Protocol of the Convention of the International Transportation of Cargoes

08.09.99 Decree of the Parliament of Georgia No 2358 on the Accession to the Statute of the State Group of Fighting against Corruption (GRECO)