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Proposals for Government Program

Strengthening Guarantees of Property Rights and Contract Protection

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The Report has been prepared upon Request N P27-173 of April 2005 (Registration Number ORM-I02-050404-0108), Russian Federation Government Executive Office, for presenting an analytical paper *Strengthening Guarantees of Property Rights and Contract Protection*. This is a follow-up to research performed last March as requested by the Russian Federation Government Executive Office (N P27 – 103, March 2, 2005) to produce an analytical report covering *Elaboration of Proposals for the Russian Budgeting System Proceeding from Targets, Tasks, Parameters, Agency and Inter-Agency Programs in Relation to Regulated Property Relations*. Appropriate proposals were presented in paper *Regulation of Property Relations: Problem Structure, Indicators, Guidelines* by V.Tambovtsev and A.Shastitko (RECEP Reports, N 2 (6), 2005), which contains theoretical basics for program targets, tasks and steps.

The Report incorporates proposals on the structure of the above program and appendices that provide an assessment of the problem field for protection of property rights, as well as analysis of acute problems to be solved for advancing the legal base for servitudes that seem to offer a legal framework most suitable for the Russian juridical system in view of property rights and reflecting modern trends in the economic theory.

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Government Program

Strengthening Guarantees of Property Rights and Contract Protection

1. Introduction

Higher living standards and quality of life, as well as economic growth seem to have been the key features of change in Russia between 1999 and 2004. At the same time, the positive trend obviously lacks stability, which is largely dependent on quality of institutions, primarily those engaged in specification, protection and restoration of violated property rights, control of property rights blurring via actions of the central government and local authorities. The world practice shows that it is those institutions that guarantee long-term *sustainability* for positive changes in the key output parameters of the Russian economy.

The evolutionary non-programmed path for development of institutions protecting property and contractual rights, which means existence of private interests under unprotected property rights, on one side, and the current policy for complete ruble convertibility, on the other, are likely to shift investments in science-intensive industries beyond Russia, lowering competitiveness of Russian economy. This idea defines

the Program strategic target – creation of an effective system for protection of property and contractual rights.

The Program **specifics** are in the attempt to cover practically all facets of economic life, not limiting the effort by engagement of *only* government bodies. Absolutely vital for Program's success is involvement of business and civil society organizations in preparation of appropriate statutory documents, as well as their independent action within the targeted framework.

The Program is also unique due to its sweep over **all types of property**, including **intellectual property**, and all property regimes – **private, community (municipal) and government**. Hence, these aspects are not accentuated in formulation of the Program targets, tasks and steps, except for the cases when a task or a step refers only to one property type or regime.

Conditions essential for Program realization:

(1) Coordinated action of various agencies involved in specification, protection and control of property rights blurring, as well as business associations and civil society organizations. The condition may and should be created by means of a certain organizational framework (see Section 5).

(2) Implementation of comparative advantages of various technologies for specification and protection of property rights (see Appendix 1 for definition of the problem field). The program is *long-term*, so its mechanisms should be resilient to external shocks and the Program components should ensure its accomplishment and comprehensiveness to minimize the risks.

Main risks threatening to block the Program are connected with the *drive to preserve low-level protection of property rights* on the part of some government officials and non-government property subjects, as the low level makes it easier to attain *short-term* economic goals of redistributive nature (for details see Section 4).

Due to Program's scale and complexity, its vertical structure incorporates three levels. Level One defines the *goals*, whereas Levels Two and Three respectively cover the *tasks* and key practical *steps* that should result in conditions for reaching the targets. Steps described within the project context should be developed by federal ministries and agencies, legislative and judicial bodies with involvement and active participation of business and civil society organizations. Horizontally, the Program goals lie in consistency corresponding to stages of the property rights "life cycle": *establishment* of rights, their *implementation* and *transfer*.

2. Program Goals

Due to various reasons, including underestimation of institutions for stable economic development, the current level of property and contractual rights protection by the state fails to create adequate stimuli for economic actors to plunge into the innovation and investment activities, raising efficiency of the long-term use of resources. Holders of poorly protected property rights tend to concentrate on protecting their assets from expropriation rather than on its productive utilization in Russia.

One cannot secure the property rights in absence of a reliable **specification**. At the same time, violation of legitimate property rights (i.e. *de jure* property rights) is pervasive and is seen in utilization of the object of law that is not sanctioned by the law subject. Violation of property rights is so widespread exists because the law enforcement system in the broad meaning operates within a broken balance between expected benefits from the right observance and violation in their favor. Infringement of property rights undermines the incentives to productive activities, whereas high returns on property rights violation stimulate the use and development of redistribution technologies but not creation of value.

The problem earmarks **the Program's first goal: creation of an effective and comprehensive system of property rights specification**.

Property rights specification should include:

- (a) establishment and description (inventory and records) of objects of property right;
- (b) definition of substance for concrete property rights (a set of powers to be allotted to subjects);
- (c) establishment of subject (subjects) of the property right;
- (d) establishment of exclusiveness degree for the appropriate property right, including grounds and mechanism for alienation of rights to appropriate objects;
- (e) setting established parameters within a juridical document to confirm the holder's powers in case of a conflict.

Note that the exercise of the above procedure *should not cause considerably higher costs* of the property rights specifications for their subjects, i.e. emergence of additional administrative barriers. In particular, it implies the need to *normalize operation of registration bodies*, primarily through development and introduction of appropriate *standards for government services* that would incorporate mechanisms of liability for violations on their part.

Specification (establishment) of property rights towards an asset (property) will enable the rights owner to utilize it for reaching his aims. At the same time, appropriate rights may be claimed by other subjects (private persons, non-governmental and governmental organizations). Emergence of such claims brings about the need to defend the subject of legitimately established rights, which outlines **the Program's second goal: effective protection of property rights**.

For any right, effective protection includes:

- (a) prevention of property rights infringement;
- (b) disclosure of property rights violations;
- (c) determination (disclosure) of the property rights violator;
- (d) punishment of the violator and reinstatement of rights.

Items (b) to (d) primarily refer to the law enforcement area. And the current trend to stricter liability for economic offenses is combined with *growing selectivity and arbitrariness in law enforcement*, which implies the need of steps *to enhance the liability of law enforcement officers* for their actions towards economic actors. Continued situation is fraught with significant degradation of investment climate in Russia, with negative consequences for economic growth rate.

The above structure of the property rights protection process and variety of infringement sources prompt **three components (sub-goals)**.

In addition to the above illegitimate claims, productive utilization of property rights may be hampered by *competition*. As it is, competition is a key prerequisite for stable economic development to the extent that it generates incentives for effective use of resources, higher products' quality and lower costs via innovation. However, *unfair competition* is pervasively showing up in misinformation of contractors on supplied goods and services, defamation of rivals, unlawful personalization of goods (trademarks, service marks, product origin, business names, etc), which in the long run produces opposite results affecting the incentives and, consequently, economic activity output. Manifesting itself in the above actions of economic actors in commodity markets to restrain others in receiving benefits from their legitimate property rights, unfair competition employs the means that cause long-term negative effects in the social and economic areas.

That gives rise to **Program's Sub-Goal 2.1 – creation of an effective system to protect against unfair competition**, which involves both protection proper and reinstatement of violated rights.

A key problem related with infringement and blurring of property rights emerges out of actions of government bodies and local authorities. **Firstly**, being the law establishing subject, any time the *state* may pass a law to *legitimize* withdrawal of rights to assets from their private owners, for example, the law on withdrawal of lands required for motor roads, streets, etc (either with or without compensation). **Secondly**, certain government organizations (agencies) may set forth regulations that blur previously specified property rights, restricting the owner's use of those rights, i.e. actually violating them. **Thirdly**, certain government officials may employ the threat of negative action by monitoring or law enforcement bodies to actually take over some property rights, although those will formally reside with the previous owner (a typical case is a business seizure by an

influential official). That implies **Program's Sub-Goal 2.2 – protection of property rights from unsound actions of government bodies and local authorities (restraint of property rights blurring)**.

Broadly speaking, measures to protect violated rights envisaged under Goals 2, 3 and 4 of the Program will not guarantee that some of the rights remain intact, which brings about the problem of *restoring infringed rights*. It is not enough to find out that rights of a person have been violated and take a legal decision on punishment of the offender. There is a need for a complex of additional steps for effective “physical” *reinstatement* of violated rights. In other words, the initial rights owner should be able to continue exercising his rights towards the object with minimum deviation from their original scope, and the object of rights should be have minimum differences from its original condition. So, the **Program's Goal 2.3 is creating an effective rights restoration system**.

Nowadays, productive activities aimed to generate value, i.e. full-fledged operation of legal rights objects is practically impossible without two-way transfer of rights to objects from one person to another. And such transfer is a key condition for specialization, raising productivity of employed resources and, consequently, growth of public wealth. However, these opportunities are mostly underused due to mass violation of contract-specified rights (contractual rights), which gives rise to **Goal 3 – effective protection of rights during their legitimate transfer to another person (protection of contractual rights)**.

The program resultant indicator of publicly significant success may be expressed in **component 2 of the Economic Freedom Index** presented by the Fraser Institute, Canada, on the basis of expert assessments for over 120 countries including its separate elements: 2A – index judiciary independence, 2B – impartial courts, 2C – protection of intellectual property, 2D – military in politics, 2E – law and order.

Due to the indicator specifics, its numerical values cannot be assigned as targets. At the same time, the Program success may be judged by dynamics of the mentioned components: the *growing value* shows *improvement* in protection of contractual rights.

Since the two-year calculation of the Economic Freedom Index lags from assessment of the actual property rights protection level, other indicators reflecting various aspects of the Program's success may be also employed to make monitoring more timely. The desirable trend is shown in brackets following the indicator description.

Table 1

Partial Parameters of Program Goals

Indicators	Unit of Measure	Planned Period					Long-Term Period		
		2004	2005	2006	2007	2008	2009r	2010	2011
Time for registration of land or immovable property rights against the previous period (<i>reduction</i>)	Days								
Share of unfulfilled court decisions on restoration of infringed property rights (<i>reduction</i>)	%								
Share of trial participants seeking protection and restoration of infringed property rights satisfied by organization of court procedure (<i>growth</i>)	%								
Share of business regulation statutory acts adopted (cancelled) with observance of procedures for evaluating the need for adoption (cancellation) of business regulation statutory acts (<i>growth</i>)	%								
Share of positive responses from the defeated party asked about independence of courts from political influence (government influence) (<i>growth</i>)	%								
Days needed by a new enterprise to start operation since the state registration day (<i>reduction</i>)	Days								
Share of government and municipal enterprises, whose CEOs entered stimulation contracts* for enterprise management (<i>growth</i>)	%								
Number of registrations and contracts providing for personalization rights against 2004 (<i>growth</i>)	%								

Share of repeat violations of property rights (<i>reduction</i>)	%								
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* *Stimulation contract* is the contract defining the nature and scale of the CEO responsibility for economic results of the government (municipal) enterprise under his control

3. Tasks Defining Program Goals

Goal 1. Creation of Effective and Comprehensive System for Specification of Property Rights

Table 2

Efficiency Indicators for Specification of Property Rights

Indicators	Unit of Measure	Planned Period					Long-Term Period		
		2004	2005	2006	2007	2008	2009	2010	2011
Time for registration of land or immovable property rights against the previous period (<i>reduction</i>)	Days								

Tasks to be Solved for Achievement of Goal 1

Task 1.1. Effective Record-Keeping System for Objects of Rights to Land, Immovable Property and Other Assets

Key indicators to assess the Task fulfillment level are the following:

Table 3

Efficiency Indicators of Record-Keeping System for Objects of Rights to Land, Immovable Property and Other Assets

Indicators	Unit of Measure	Planned Period					Long-Term Period		
		2004	2005	2006	2007	2008	2009	2010	2011
Registration costs for land and immovable property, percentage of asset value (<i>reduction</i>)	%								
Mean time for registration of immovable property rights objects (<i>reduction</i>)	Days								
Share of registered plots of land entered into computerized records of state cadastres (<i>growth</i>)	%								
Share of other immovable assets entered into computerized records of state cadastres (<i>growth</i>)	%								
Response time for data requests to state cadastre of immovable property (against 2004) (<i>reduction</i>)	%								

In order to solve the task of creating an effective record-keeping system for objects of rights to land, immovable property and other assets, the following measures are needed:

1. Determine a procedure for coordinating interests of the parties in land management at the stages of project accommodation and establishment of plot boundaries, lowering the procedure corruption level.
2. Specify the procedure for land management works, as well as powers of government bodies within the land management scope. Proceeding from lowering the corruption level.
3. Set up computerized territory-distributed records for land and immovable property objects.
4. Ensure compatibility of land and immovable property records with the land and immovable property registration system.

5. Carry out inventory of land and immovable property objects under control of federal and regional governments, and local authorities.

Especially important seem to be steps within *Group 2*. Their development and execution should provide not only for distinct definition of powers of land management authorities but also establishment of *liability*, as well as *a monitoring framework for their execution*. The problem is not just in high corruption level of current procedures but also in *red tape* and *inadequate competence of some officials* who occasionally try to ignore the existence of the Russian Federation Land Code. Detailed regulation is needed both for powers of appropriate executive bodies and their officials at various levels. Regulations for Structural Units and Duty Regulations must be available with all officials to offer a clear-cut description of the scope of powers, competence, responsibilities and procedure for interaction with other structural units and external organizations. In other words, there is a need for *standards* to cover services rendered by the government.

Overall development costs should make million rubles in 2005-2007*

Task 1.2. Effective System for Registration of Rights to Land, Immovable Property and other Assets

Key indicators to characterize the Task fulfillment level are as follows:

Table 4

Efficiency of the System for Registration of Rights to Land, Immovable Property and other Assets

Indicators	Unit of Measure	Planned Period					Long-Term Period		
		2004	2005	2006	2007	2008	2009	2010	2011
Registration costs for land and immovable property, percentage of asset value (<i>reduction</i>)	%								
Mean time for land registration (<i>reduction</i>)	Days								
Mean time for immovable property registration (<i>reduction</i>)	Days								

* Partial solution of the problem can be made possible via project financing methods within Russian loans from international financial institutions, particularly from the World Bank.

Period for registration for product personalization (trademarks, servicing marks, product origin names) (<i>reduction</i>)	Days								
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Achievement of the Task to create an efficient registration system for land, immovable property and other assets implies a complex of steps including:

1. Improvement of the legal and statutory base (primarily, for the Russian Federation subjects) to outline the procedure for private and public servitudes and ensure comprehensive records and agreement of public, private and government interests (for details see Appendix 3).
2. Amendment and supplementation of current law regulating registration of private and public servitudes (encumbrance) for land plots.
3. Creation of a practicable legal structure “a unified complex of immovable assets” including procedures for record keeping, registration and taxation of such complexes.
4. Creation of a practicable system of registration and record-keeping system for property rights to land and other immovable property objects based on the “single window” principle.
5. Raising reliability of the system for registration of rights to securities circulating in the stock market.
6. Audit of earlier decisions on registration of land and immovable property objects to check absence of legal violations.

Within steps of Group 1 special attention should be given to correspondence of regional legislative acts to federal law. Relevant amendments aimed to raise overall efficiency of this legal structure should be made on the federal level, whereas regional acts must be examined for consistency with federal laws. At the same time, the problem cannot be solved exclusively on the federal level due to varied local specifics. Hence, regional legislative acts should be made most *practicable*.

Steps of Group 3 offer an opportunity for detailed elaboration of the structure for federal, regional and municipal property regimes, as well as for private property.

Partial solution of the problem can be made possible via project financing methods within Russian loans from international financial institutions, particularly from the World Bank.

Goal 2. Efficient Protection of Property Rights

Table 5

Efficiency of Property Rights Protection

Indicators	Unit of Measure	Planned Period					Long-Term Period		
		2004	2005	2006	2007	2008	2009	2010	2011
Index of Intellectual Property Protection (component 2C of the Economic Freedom Index) (<i>growth</i>)	Score								
Share of unsatisfied judgments on restoration of infringed property rights (<i>reduction</i>)	%								
Share of positive responses from the defeated party asked about independence of courts from political influence (government influence) (<i>growth</i>)	%								

Tasks to be Solved for Achievement of Goal 2

Task 2.1. Higher Level of property Crime Detection

Key indicators to characterize the Task fulfillment level are as follows:

Table 6

Detection of Property Crimes

Indicators	Unit of Measure	Planned Period					Long-Term Period		
		2004г.	2005г.	2006г.	2007г.	2008г.	2009г.	2010г.	2011г.
Share of detected crimes against the previous year (<i>growth</i>)	%								
Money equivalent of damage from property crimes, adjusted for inflation (<i>reduction</i>)	Rubles								

Type-wise assessment of property rights protection level (via representative sampling) (<i>growth</i>)	%								
Mean time between report of violated property rights and initial response of law enforcement bodies (<i>reduction</i>)	Minutes								

Achievement of this Task requires changes in operations of law enforcement bodies to ensure better guarantees of property rights to be seen in lower scale and risks of property rights infringement.

Overall development costs should make million rubles in 2005-2007*

Achievement of the Task requires implementation of the following steps:

1. Establishment of the Federal Offense Registration Bureau (independent of the Ministry for Internal Affairs) in order to rule out failure to register the committed offenses.
2. Elaboration of a system of moral and material incentives for investigators to make them more interested in clearance of property crimes.
3. Establishment of legal norms aimed to protect legitimate interests of rights owners and land plot boundaries still beyond state cadastre registration.

In principle, Step 1 may be replaced by measures raising effectiveness of prosecutors in the appropriate area. However, we believe this is not viable due to long-standing links between prosecutors and internal affairs structures. Beside, such measures would not allow uniting registration and investigation functions within a single agency needed to handle these complicated crimes. At the same time, in absence of adequate registration of offenses, detection of offenses – a general indicator of property rights protection quality – cannot be used due its distorting effect.

* Partial solution of the problem can be made possible via project financing methods within Russian loans from international financial institutions, particularly from the World Bank.

Task 2.2. Ideological Containment of Property Rights Infringement

Key indicators to characterize the Task fulfillment level are as follows:

Table 7

Efficiency of Ideological Containment of Property Rights Infringement

Indicators	Unit of Measure	Planned Period					Long-Term Period		
		2004	2005	2006	2007	2008	2009	2010	2011
Public opinion indicators on issues of private and government property (using sampling data) (<i>to be developed</i>)									

Achievement of this Task requires building an organized upbringing and education system (organized ideology) intended to spread principles of property rights inviolability.

Key steps for achievement of the task:

1. Adjustment of general-purpose education towards development of tolerance to exclusive property rights (especially private property).
2. Adjustment of mass media to tolerance to property differentiation.
3. Coordination of government, civil society institutions and media activities to create an atmosphere of intolerance to violators of legitimate property rights.

The Task seems to be one of the most difficult to accomplish, as it involves the problem of specific national mentality that emerged during the Soviet period and years of the reform. Overwhelming majority of media is holding to a polar “general line” defined by federal TV channels. One should note the Soviet period has developed neglect to the private property institution, as it was a part of government policy. Hence, the Task may be achievable if:

- 1) the idea of tolerance to property differentiation becomes intrinsic to the policies of media expressing political will of the estate,
- 2) tolerance to property differentiation is introduced into the system of values of the *judicial community* (so far, court decisions on widely covered arbitration cases and criminal verdicts prove that the judges have the opposite frame of mind),
- 3) appropriate legislative initiatives emerge, whereas recent motions in the State Duma rather show *intolerance* to property divisions.

Sub-Goal 2.1. Creation of Efficient System for Protection against Unfair Competition

Table 8

Efficient Protection Against Unfair Competition

Indicators	Unit of Measure	Planned Period					Long-Term Period		
		2004	2005	2006	2007	2008	2009	2010	2011
Opinion indicators on various forms of unfair competition within the business community <i>(to be developed)</i>									

Task 2.1 1. Establishment of Adequate Legal and Statuary Base to Regulate Unfair Competition

Key indicators to characterize the Task fulfillment level are as follows:

Table 9

Indicators	Unit of Measure	Planned Period					Long-Term Period		
		2004	2005	2006	2007	2008	2009	2010	2011
Number of unfair competition actions initiated by federal antimonopoly body, total <i>(reduction[*])</i> Including those related to executive authority activities <i>(reduction[*])</i>	Number								

^{*} Provided Federal Offense Registration Bureau is set up.

Achievement of Task 2.1.1 prompts to:

1. elaborate the list of activities practiced by economic actors that may be regarded as manifestations of unfair competition (within work on competition protection bill),
2. establish the size of sanctions (including fines and damages) for each type of unfair competition,
3. ensure appropriate agency belonging in consideration of unfair competition actions within codified procedures, including procedural issues (trial participants, challenges, evidence, expertise, procedural forms, hearings, time limits, expenses, etc),
4. ensure training and advanced training of judges who specialize in unfair competition cases,
5. develop and adopt a statutory act (federal law) to define the procedure for compensation of damage inflicted to economic actors by actions of controlling and monitoring bodies,
6. develop amendments and supplements to the law concerning corporate seizure, protection of minority holders' rights, etc to prevent the above offenses against property rights.

Sub-Goal 2.2. Protection of Property Rights Against Unsound Actions of Government Bodies (Restraint of Property Rights Blurring)

Table 10

Protection of Property Rights Against Unsound Actions of Government Bodies

Indicators	Unit of Measure	Planned Period					Long-Term Period		
		2004	2005	2006	2007	2008	2009	2010	2011
Corporate Seizure Index (assessments by INDEM Foundation, Russia) (<i>reduction</i>)	Score								
Share of business regulation statutory acts adopted (cancelled) with observance of procedures for evaluating the need for adoption (cancellation) of business regulation statutory acts (<i>growth</i>)	%								

Share of positive responses from the defeated party asked about independence of courts from political influence (government influence) (<i>growth</i>)	%								
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Task 2.2.1. Establishment of Effective Mechanism to Prevent Unsound Seizure of a Property Rights Object from a Private Person by Government Body Decision

Key indicators to characterize the Task fulfillment level are as follows:

Table 11

Limiting Unsound Seizure of a Property Rights Object from a Private Person by Government Body Decision

Indicators	Unit of Measure	Planned Period					Long-Term Period		
		2004	2005	2006	2007	2008	2009	2010	2011
Number of lawsuits from citizens and legal entities to the government concerning violated property rights (<i>reduction</i> *)	%								

Task 2.2.2. Creation of a Mechanism to Assess Expediency for Adoption/Preservation of Statutory Acts in Business (Economic) Regulation

Key indicators to characterize the Task fulfillment level are as follows:

* Provided Federal Offense Registration Bureau is set up.

Table 12

Efficiency of Mechanism to Assess Expediency for Adoption/Preservation of Statuary Acts in Business (Economic) Regulation

Indicators	Unit of Measure	Planned Period					Long-Term Period		
		2004	2005	2006	2007	2008	2009	2010	2011
Share of effective federal statutory acts assessed for expediency as per Federal Law <i>On Procedure for Adoption of Statuary Acts for Business (Economic) Regulation (growth)</i>	%				10	20	30	40	50

Achievement of the Task prompts to:

1. finalize and adopt the Federal Law regulating the procedure for assessing expediency for adoption/preservation of statutory acts for business regulation,
2. raise the share of statutory acts governing business activities, which have been appropriately assessed for expediency of adoption (preservation).

Task 2.2.3. Advancement of Legal Defense Quality

Key indicators to characterize the Task fulfillment level are as follows:

Table 13

Legal Protection Quality

Indicators	Unit of Measure	Planned Period					Long-Term Period		
		2004	2005	2006	2007	2008	2009	2010	2011
2A – judiciary independence (within Economic Freedom Index) (<i>growth</i>)	Score								
Impartial courts (component 2B of Economic Independence Index (<i>growth</i>))									
Share of published court decisions (<i>growth</i>)	%				10	20	30	40	50

Achievement of Task 2.2.3 prompts to:

1. raise independence of court decisions from administrative pressure by adjustment of the judge appointment procedure, among other things, by:
 - a) elimination of matching boundaries of judicial districts and administrative territorial entities (subjects of the Russian Federation and Federal Districts);
 - b) expanded participation of civil society representatives in qualification colleges of judges,
2. raise economic independence of the judiciary system by legislative allocation of a budget share for its financing,
3. ensure information openness of the judiciary by publication of all court decisions (primarily via decision placing in the Internet, which requires minor financial expense), considerable shortening of the list of grounds for closed court procedures and restrictions for public access to the courtroom,
4. create a transparent system for court decision registration,
5. raise law-established formalized requirements to candidate judges,
6. enhance the practice of competitive selection for filling vacant judicial positions,

7. raise efficiency of mechanism for making the judge liable for repetitive unsound decisions and decisions nullified by higher courts that violate the court procedure norms, legitimacy and legal rights of citizens, as well as decisions inflicting major damage to economic actors – by expansion of qualification commissions including representatives of civil society organizations,

8. set up arbitration court structures specializing in corporate claims,

9. develop the system of pretrial dispute settlement, including the use of arbitration tribunals and other alternative mechanisms for settlement of civil and administrative disputes, also by means of self-regulating organizations,

10. set up mechanisms for pretrial settlement of disputes between investors and executive bodies,

11. ensure territorial accessibility of courts,

12. develop an effective administrative court system, the first step being speedy adoption of Federal Constitutional Law *On Administrative Courts* (shelved in the State Duma after adoption in the first reading in November 2000). Also feasible should be package introduction of draft *Code of Administrative Court Procedure* and appropriate amendments to draft Federal Constitutional Law *On Administrative Courts*,

13. develop and adopt a standard for state court service (service quality).

For detailed discussion of raising independence of the judiciary see Appendix 2.

Sub-Goal 2.3. Creation of Effective System for Restoration of Infringed Rights

Table 14

Efficiency of Infringed Rights Restoration

Indicators	Unit of Measure	Planned Period					Long-Term Period		
		2004	2005	2006	2007	2008	2009	2010	2011
Share of unfulfilled court decisions aimed to restore violated property rights (<i>reduction</i>)	%								

Task 2.3.1. Creation of Effective System for Restoration of Infringed Rights

Key indicators to characterize the Task fulfillment level are as follows:

Table 15

Efficiency of Mechanism for Execution of Court Decisions

Indicators	Unit of Measure	Planned Period					Long-Term Period		
		2004	2005	2006	2007	2008	2009	2010	2011
Share of court decisions unfulfilled within established time limits (<i>reduction</i>)	%								
Mean time for execution of arbitration court decisions (<i>reduction</i>)	Дней								

Creation of an effective mechanism for execution of court decisions prompts to:

1. improve the law on executive procedure, enhancing liability of marshals for non-fulfillment and untimely fulfillment of court decisions,
2. create mechanism for access to information and other instruments required for the marshals to execute a court decision,
3. create an effective procedure for damage assessment, including the list of expenses entered into the calculated damages within restoration of rights via a court procedure,
4. optimize the operations of the marshals, with possible modeling after the US Marshals Service.

Goal 3. Effective Protection of Property Rights during their Legal Transfer to another Owner

Table 16

Effective Protection of Property Rights during their Legal Transfer to another Owner

Indicators	Unit of Measure	Planned Period					Long-Term Period		
		2004	2005	2006	2007	2008	2009	2010	2011
Share of unfulfilled courts decisions on restoration of infringed contractual rights (<i>reduction</i>)	%								
Indicators of business community opinions on quality of contract protection by court (<i>to be developed</i>)									

Tasks for Achieving Goal 3

Task 3.1. Development of Judicial System and Quasi-Judicial Structures for Settlement of Contract Disputes

Key indicators to characterize the Task fulfillment level are as follows:

Table 17

Efficiency of Contract Dispute Settlement via Judicial and Quasi-Judicial Mechanisms

Indicators	Unit of Measure	Planned Period					Long-Term Period		
		2004	2005	2006	2007	2008	2009	2010	2011
Mean time for delivery of a court decision on a contractual dispute in: Arbitration court (<i>reduction</i>) Quasi-judicial structures (<i>reduction</i>)	Days								
Share of contractual dispute trial participants satisfied with organization of the proceedings (<i>growth</i>)	%								
Share of positive responses from the defeated party asked about independence of courts from political influence (government influence) (<i>growth</i>)	%								

Key steps to achieve the Task:

1. Elimination of matching boundaries for judicial and administrative territorial districts.
2. Creation of an administrative justice system to handle settlement of disputes between citizens and nongovernmental organizations and the government.
3. Improvement of the system for court decision execution (see Task 2.3.1).
4. Development of the arbitration system including information support and personnel training.
5. Raising economic protection and professionalism of the judiciary (see Task 2.2.3).
6. Promotion of corporate behavior codes.

4. Program Risks

Being a complicated and long-term project, the Program is subjected to a variety of risks that can be split into the following groups:

- risks of Program poor quality;
- risks of Program low-quality performance.

Risks of Program Poor Quality

The group incorporates a multitude of risks intrinsic to the preliminary stage (*ex ante risks*), among which the following seems to be most significant:

- absence of pattern
- insufficiency (inadequacy) of incentives
- premature presentation

Absence of pattern seems to be the key risk arising from formalistic approach to elaboration of the Program steps (distribution of their preparation over appropriate agencies) and insufficient involvement of main beneficiaries, business civil society organizations that possess own analytical capacity.

Absence of pattern may also directly hinge on the fact that government workers and representatives of business community **are not interested** in normalizing the situation in the area of intellectual and contractual rights protection, as currently they obtain “administrative revenues” in substantial amounts.

Absence of pattern could be neutralized in case the state leadership demonstrates political will and augments the Program in its initial stages by plenipotentiaries from the business community and civil society, providing them with a casting vote. For example, the process could be founded on a tripartite commission involving authorized representatives of the government, business and civil society, which would be able to invite independent experts for elaboration of the Program steps, drawing up draft statutory acts, etc (see Section 5).

Special attention should be given to the likely **direct resistance** of some government workers to measures aimed at raising independence of the judiciary as a whole, whereas a segment of the judiciary is expected to oppose development of alternative mechanisms for settlement of civil and administrative disputes.

Involvement of various interest groups into the project should generate a major threat of **delaying the process of** the Program discussion and adoption.

Risks of Poor Performance

Low-quality risks incorporate a subset of *ex post risks*.

The risk of perfunctory performance by delaying the Program execution and other methods is quite obvious due to the same reason. There is **a conflict of interest** involving certain government officials who derive profit out of chaotic property rights using their official duties in the field.

The risk could be neutralized by organization of comprehensive public control over Program implementation, including political parties (for example, via the parliamentary investigation mechanism), in case major roadblocks emerge. Also vital is consistency of the country leadership in its desire to streamline the property rights issue, including a considerable rise in the judiciary independence from the executive branch.

5. Program Elaboration Procedure

The above poor quality risks prompt the following procedure for the Program elaboration.

The process should be headed by a joint government-public Commission to incorporate representatives of all branches of power, business community and civil society. The Commission members should be delegated by the President, Government, both chambers of the Federal Assembly, Supreme Court and Supreme Arbitration Court, major business associations (The Russian Union of Industrialists and Entrepreneurs, Chamber of Commerce and Industry), major civil associations (Public Chamber, Civil Forum). The Commission operations are supported by its Secretariat.

The Commission should organize elaboration of separate measures and monitor (asses) the quality of finished draft statutory acts, organizational project papers, etc.

Critically important is to make project development independent of agency belonging, so that these were drawn up **jointly** by representatives of all interested parties (government, business, and civil society) included into working groups on specific tasks or steps upon proposals of the Commission members.

Approved by the Commission, the final draft of the Program should be adopted in the form of a Federal Law.

Appendix 1. Problem Field for Property Rights Protection

Owners, i.e. property rights protection objects may include: (1) physical persons (families), legal entities (companies) including (2) small businesses, (3) medium and large businesses. The property rights threat sources under items (1) – (3) may cover: (1) physical persons; (2) criminal groups, legal entities (companies) including (3) small businesses, (4) medium and large businesses, as well as (5) local authorities, (6) regional executive authorities, (7) federal executive authorities.

Hence, the problem field could be structured as follows:

Property Rights Threat Sources

<i>Protection Objects</i>	1	2	3	4	5	6	7
1	1.1	1.2	1.3	1.4	1.5	1.6	1.7
2	2.1	2.2	2.3	2.4	2.5	2.6	2.7
3	3.1	3.2	3.3	3.4	3.5	3.6	3.7

For example:

1.2 – violation of property rights of a private person or family by an organized criminal group (e.g. property extortion or robbery);

2.4 – violation of property rights of a small business by a large company (e.g. obtrusion of a contract to limit efficient use of the small business’s assets);

3.5 – violation of property rights of a medium business by local executive authorities (e.g. endless checks by fire inspection);

3.7 – violation of property rights of a large business by a federal government body (e.g. initiating criminal proceedings against the owner in order to change ownership).

Firstly, the idea of structuring suggests that different objects may defend their property rights from different perpetrators with help of non-matching protection technologies or measures:

A1) on their own *ex ante* (technical devices, physical strength, preventive measures against possible violation);

A2) on their own *ex post* (“physical” return of lost property, return of rights);

B1) buying services of private security organizations *ex ante*;

B2) compensation of loss by insurance *ex post*;

C1) government protection *ex ante* (containment of property rights violation);

C2) government protection *ex post* (restoration of rights via judicial system).

Each method features non-matching efficiency against various violations of property rights (see below), as well as differing expenses (and, consequently, differing effectiveness). Hence, each square of the offered problem field structure will have its own set of *a priori* effective measures for property rights protection,

Secondly, each of 21 squares has a matching set of typical forms for property rights violation and/or blurring:

α) “physical” (forcible) violation of property rights (e.g. property theft or robbery);

β) unfair competition on the part of private organizations (violated rights for using property and assets);

γ) violation of rights to use property on behalf of controlling and monitoring bodies, including law enforcers (administrative barriers, illegitimate law enforcement);

δ) forcible business seizure, including

δ1) change of owner,

δ2) acquiring influence on the owner.

In this way, for the entire Line 1 violations of Type (δ) are of no practical significance, whereas Type (γ) violations are possible in a highly restricted form. On the contrary, for Line 4 of no importance are violations of Type (α), etc.

Finally, for we each typical property rights violation/blurring (α) - (δ) we may pinpoint subjects (organizations) able to perform effective prevention:

(α) subject of property rights on his own; specialized security organizations; government (law enforcement agencies, judiciary); NGOs

(β) a larger firm; government (Federal Antimonopoly Service, judicial system)

(γ) all executive bodies (dismantling of administrative barriers and launching legitimate controlling and monitoring procedures); lawmakers (streamlining of regulation procedures, institution of control body liability for damages to objects of control, etc); judicial system (objective consideration of claims to the government); NGOs (shaping the public opinion, enhancing negation position of private parties versus government)

(δ) lawmakers (streamlining behavior of executive bodies at all levels, institution of liability for procedure violation, etc); judicial system (objective consideration of claims to government); NGOs (shaping the public opinion, enhancing negation position of private parties versus government)

The judiciary may acquire the ability for execution of the above functions if it becomes independent from executive bodies (for details see Appendix 2).

On the whole, the presented classifications are thought to be useful for development of specific Steps within the Program Goals.

Appendix 2. Certain Problems of Judicial System Development

The Report's intent is to define key points aimed to (1) optimize the judiciary performance, (2) raise professional level of the judiciary, and (3) improve quality of court decisions. All these make *sine qua non* conditions for creating an effective system of guarantees and property rights protection in the Russian Federation. But for a clear-cut picture of the *status quo* we need to outline major problems intrinsic to the judicial authority.

1. **Courts of general jurisdiction and arbitration courts.** The vulnerabilities are quite obvious and require no lengthy explanation, which prompts the need just for their recital.

1.1. **Low qualifications** of most judges who had been trained during the Soviet period, naturally in the Soviet law. Nowadays judges have to act in an utterly different socio-economic environment. Education shortcomings often hamper their performance and tell on the quality of decisions (causing a great number of appeals against decisions of courts of original jurisdiction).

1.2. **Absence of system for specialized training of judges.** Until recently, neither the Soviet Union nor the Russian Federation could boast focused education institutions for training judges. The trailblazer is the Russian Academy of Justice established by the Supreme Court and Supreme Arbitration Court of the Russian Federation for specialized training of the judiciary. The five-year period may be added to the juridical record of service required by the Russian Constitution for receiving the judge status. Should this innovative step be implemented, it may have positive effect, as the graduates will become judges with no burden of the past experience. Apart from basic training, the Academy performs the important function of advanced training for judges. Unfortunately, rare Russian judges find it important to obtain new knowledge and tend to neglect the opportunities offered by the Academy. The problem has become so acute that as early as in 2001 the Supreme Court and Supreme Arbitration Court of the Russian Federation introduced draft Federal Law *On Amendments and Supplements to the Russian Federation Law "On Status of Judges in the Russian Federation"* to the State Duma. Among other things, the bill **suggested minimum one-year mandatory professional retraining for candidate judges and converting advanced training from the right into obligation.** The bill vividly demonstrates that the judiciary elite is aware of low level of many judges, recognizing that amendments to the Law *On Status of Judges in the Russian Federation* could make a major contribution to the Russian judiciary reform.

1.3. **Previous experience** cannot but affect the specifics of judicial work, with the Russian judges visibly illustrating the thesis. A considerable portion of the judiciary received their current status upon several years of law enforcement or prosecutor experience. It explains the notorious *prosecutorial bias* of the Soviet and Russian judges, as many of them advanced from police and prosecutor uniform to the judicial robe with no retraining at all. Another striking fact is almost complete absence of former defense attorneys within the judicial corps. At the same time, in many other countries, where a judicial position makes the pinnacle of the juridical career, many judges may boast years of defensive practice, which substantially improves their performance. But the Russian judiciary seems to believe that defensive experience is harmful and hampers administration of justice.

1.4. **"Procedural revolution"**. Year 2002 has made life of Russian judges much more difficult, with the new Code of Criminal Procedure coming into force and adoption of the new Code of Arbitration procedure and Code of Civil procedure. The judges were compelled not only to scrutinize the new rules of legal procedure but also try to give up traditional methods. The troublesome adaptation period is believed to be almost over, but we think that elation is somewhat premature. Highly appraised by the Council of Europe, the new Codes (specifically the Code of Criminal Procedure) surely bring a hope of procedural democratization. However,

the judiciary staff remains intact, making inertia quite potent and positive innovations change their shape. In this way, the obviously democratic wider court powers at the preliminary inquiry stage have grown into the dismal *Basman justice*.

1.5. Matching districts make courts dependent on executive bodies. Administrative territorial districts still coincide with judicial district to present a keystone shortcoming of Russian justice. This is especially significant for general jurisdiction courts (for arbitration courts such matching is less pervasive), which brings about financial and organizational dependence on the executive branch, devaluation of the very notion of independent court, “telephone justice”, biased court decisions and distorted judicial mentality. At the Russian-American Roundtable on April 27, 2005 Yu.I.Sidorenko, Chairman of the Judicial Council, offered a striking story: governor of a Russian Federation subject instructed all territorial magistrates to take part in the V-Day demonstration IN THEIR ROBES. Of course, the magistrates preferred to comply...

1.6. Absence of the administrative justice in Russia harbors immense problems. Disputes between citizens and government bodies should not be considered within general rules of the civil procedure. The current practice violates the principle of the parties’ equality since one of them is a government body or its official. General jurisdiction courts are flooded with civil disputes, with the application response figures recently down by almost 20 percent (from 86 to 66). The judiciary is lacking judges specializing in administrative cases, which cannot but affect the proceedings quality and time. Supervisory experience also proves the quality to be far from ideal. Meanwhile administrative cases are snowballing, indicating that only institution of a separate administrative justice system may enhance legality guarantees towards government bodies and officials. The aim could be reached by setting up an effective mechanism for nullification of illegitimate and unsound actions and decisions that violate citizen rights and liberties, a mechanism that would defend citizens and their property from erroneous and sometimes arbitrary actions of government officers.

The debate on institution of specialized administrative courts in Russia has been quite lengthy. For example, the matter was on agenda within adoption of the Russian Federation Constitution of 1993 and Federal Constitutional Law *On Judicial System of the Russian Federation*. So, Russia's Constitution sets forth that judicial power is realized by means of constitutional, civil, administrative and criminal proceedings. In 1994 the State Duma legislative plans mentioned draft Federal Law “*On Administrative Justice*” but its advancement was suspended. In September of 2000 the Supreme Court initiated draft Federal Constitutional Law “*On Federal Administrative Courts in the Russian Federation*”, adopted by the State Duma in the first reading in November 2000. The bill was also halted but recently hope has emerged that the process would go ahead, since the Supreme Court of the Russian Federation prepared a procedural extension for draft Federal Constitutional Law *On Federal Administrative Courts in the Russian Federation* under working title *Code of Administrative Procedure*. The work extensively employed practice of German administrative courts over entire administrative justice vertical – from administrative courts of original jurisdiction and higher provincial administrative courts (on the example of Land Rheinland-Pfalz) to Supreme Federal Administrative Court in Leipzig. The German Regulations for Administrative Proceedings were translated into Russian for use in preparation of draft statutory acts for the national system of administrative justice. As a result, the working group headed by V.I.Radchenko, First Deputy Chairman of the Supreme Court, with participation of reputed administration experts, representatives of the State Duma, Chief State-Legal Department of Presidential Executive Office and Constitutional Court, has elaborated draft Federal Law tentatively titled *Code of Administrative Procedure of the Russian Federation*. Unfortunately, the bill is still on hold, although it was approved by Presidential Council on Improvement of the Justice System and is absolutely ready for consideration by the State Duma.

2. Execution of Court Decisions. A court decision in your favor does not mean that the thorny struggle for restoration of the right is over. You are in for the execution stage that is not less intriguing than the court proceedings. Those who faced doings of Russian marshals will

never wonder why the execution procedure gives rise to so many reprimands and appeals. Note that special structures to enforce court decisions exist not in every country. For example, Germans get amazed hearing that court decisions need enforcement. They cannot imagine that a decision may be neglected, so that a special enforcement body is required. The US Marshals Service is well known beyond this country for its efficiency and quality of operations. Although a special enforcement body exists in Russia, execution of court decisions is deplorable. And the problem does not lie in the law inobservance but boils down to the law imperfections. According to Article 46 of the Russian Federation Constitution, every citizen is guaranteed judicial protection of his rights and liberties. Judicial protection mirrors the entire judicial system for protecting rights and legitimate interests of natural persons and legal entities. But juridical protection means not only a court decision but also its execution. Decision of arbitration court will not solve your problems but will entail more of them. Experts believe that judicial practice has taken the wrong path, opening the gate for abuses within execution of court decision. The key problem is in inefficiency of the court decision execution mechanism, as there are many loopholes in the law that allows return of the enforcement order to the collector, for example, in absence of the debtor organization address or information on its available funds and other valuables. Another ground is absence of assets or other income that can be used for debt collection, provided that marshals cannot discover any. Hence, debt collection via a court order seems ephemeral. Quite many problems arise in connection with marshals' assessment activities, especially about the procedure stage and performer for such assessment.

There is a lot of misunderstanding concerning enforcement by means of court orders under amicable agreement, especially if the amicable agreement is long-term. If such an order has been presented to the marshals, the execution period will make two months, whereas the amicable agreement may envisage a longer repayment period. In case the debtor begins executing the amicable agreement voluntarily and the soothed collector fails to present the court order for enforcement, upon six months he may forget about demanding enforcement and the debtor may as well stop executing the court decision. Besides, in real life it is very difficult and sometimes impossible to verify whether the amicable agreement has been executed.

Gaps in execution procedure law give rise to red tape. For example, the law omits time limits for defaulted banks and credit organizations to return presented enforcement orders after they have been marked for failed collection due to absence of funds on the debtor's account. In one of its decisions Arbitration Court of Moscow City actually recognized that the effective law permits banks and credit organizations to hold presented enforcement orders during several months and return them to collectors when the executive procedure period is almost over.

Certain regulations of executive procedure are vague and require interpretation. For example, it is seen in the Russian Federation Constitutional Court Decision N 150-O of July 6, 2005, which says that in disputes on executive procedure the considering court has a free hand not only to *choose* but also to *interpret the regulation*.

As far as the *Law on Executive Procedure* is concerned, it badly suffers from intrinsic discord, primarily in view of time limits that are often non-observable (realization of arrested assets makes two months plus three days for initiating executive procedure and five days for voluntary execution, whereas the entire execution procedure should take the same two months). A lot of differences exist between two basic acts – the *Law on Executive Procedure* and the *Law on Marshals*, which generates numerous legal collisions. Special regulation is needed for debtor status of the government, with specification of liability for the entire government and its official.

Difficulties typical for working with executive documents refer not just to imperfections of the *Law on Executive Procedure* and *Law on Marshals*. The *Law on Executive Procedure*, which offers guidance for marshals, has not been supported by appropriate amendments and supplements to other federal laws and statutory acts of the Russian Federation. For example, unlike tax authorities, a marshal has no right to suspend operations with debtor accounts in banks

and other credit organizations. In absence of information about debtor accounts, for arresting funds, the marshal has to forward an appropriate request to the territorial tax authorities. However, the tax bodies use the Letter of State Tax Service of June 17, 1998 to reject such requests on the grounds that the Law directly rules that information shall be presented not on the debtor accounts but on the banks and other credit organizations where these accounts have been created. In their turn, banks and other credit organizations often refuse to disclose data on debtor accounts and relevant sums referring to Article 857 of the Civil Code (banking secrets) and Article 26 of the *Law on Banks and Banking Activities*, which contains a confidential list of subjects eligible to receive information on debtor accounts and banking operations. And the Marshals Service is not in the list. As a result, marshals have no chance to promptly execute the collection.

The Russian Federation Criminal Code offers three elements of offence aimed to ensure penal protection of claimant's interests under civil cases. These are Article 177 – gross evasion of debt repayment; Article 312 – illegal actions towards assets distrained, arrested or subject to confiscation; and Article 315 – failure to execute a verdict, a court decision or another court act. Article 312 of the Criminal Code is somewhat practicable but Articles 177 and 315 are functionally dead due to their vague wording and reluctance of the police to accept cases from marshals. The police either refuse to initiate investigation or return documents to marshals for data verification. As a result, there are no criminal cases initiated or transferred to the court, with penal norms for execution of civil decisions remaining unworkable.

Since decision in the claimant's favor is much less significant than its execution, prompt amendments are needed for the executive procedure law to eliminate its substantial collisions (Federal Law *On Executive Procedure* has never been amended, whereas amendments to the *Law On Marshals* in 2000 were minor). Other federal laws and statutory acts also need amendment and supplementation. Otherwise, courts at all levels will lose their viability, with justice resulting in a *paper decision* and Russia's constitutional feature of a law-based state will turn into fiction.

3. International Commercial Arbitration. Currently, development of the Russian statehood, civil society and its key institutions is accompanied by an unstable judicial system, which boils down to flawed law enforcement in settlement of economic disputes, including those involving foreign parties.

At the same time, the judiciary keeps demonstrating considerable self-sufficiency and maintains vivid orientation to an unfamiliar function of “legality control” (which actually should belong to the executive branch). Due to this reason the recent procedural laws clearly display high-level resistance of state courts to the arbitration tribunal institution, primarily in relation to international commercial arbitration.

In Russia, internationally accepted institution of international commercial arbitration, alternative to the state courts in settlement of foreign economic disputes, faces grave problems. Russian businesses and their supporting lawyers lack required knowledge and skills in relation to international standards in arbitration (reference) proceedings, as well as access to information required for proper handling of cases.

These shortcomings give rise to numerous mistakes and ensuing speculations:

- Entering foreign contracts, Russian organizations accept adverse provisions on dispute settlement. The situation is vividly illustrated by *pathological arbitration clauses*, which enable the parties to apply both to state courts and arbitration tribunals. Although not recognized by arbitration agreements all over the world, such *clauses* in the long run permit passing the case to a foreign state court.

- Mistakes are committed during arbitration proceedings in foreign territories and during application to state courts of these countries concerning cancellation, recognition and execution

of arbitration decisions. For example, there was an attempt to produce *new evidence* in the form of a Russian court decision on invalidity of an unexecuted contract, in relation to which an international arbitration decision had already been taken (1997 decision of the Swiss Supreme Court on a case involving the Novokuznetsk Aluminum Works). There have also been refusal to take part in arbitration abroad contrary to Russian and foreign procedural law, which caused decision against Russian organizations (*Kalmneft v. Glencore*, High Court of Justice, England, 2001).

- Arbiters and lawyers for international commercial arbitration in Russia and abroad are selected at random.

- Russian judicial and arbitration practice, including application of documents under *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* of 1958 (UNCITRAL), mostly fails to comply with international principles and approaches.

- There have been biased practices towards arbitration. In absence of any kind of legal basis and contrary to the position of the Russian Federation Constitutional Court (Constitutional Court Decision of December 9, 2000), for two years courts in some Russian regions have been accepting and answering claims on cancellation of arbitration agreements.

- Russian statesmen and judges are acquiring a distorted idea of arbitration, which is believed not to meet law requirements and play a minor role in creation of an adequate investment environment.

A key reason for such state of affairs is elementary lack of information and continued isolation of Russia from worldwide practice of international commercial arbitration.

So, Russian bookshops and libraries have no original or translated books and reference periodicals used in the world as a foundation for international commercial arbitration theory and practice. Russian businessmen and lawyers are deprived of timely access to reliable information on foreign arbitration and procedural law, or current judicial practices in cancellation, recognition and execution of arbitration decisions (including those with Russian participation).

4. Political aspects and public interest. Apart from the abovementioned issues, quite detrimental seems to be the political aspect of decision execution, the excessively broad interpretation of the arbitration (public) clause. Besides, the Supreme Arbitration Court has repeatedly declared its stand (Judge Neshtayeva, for example) meaning that any decision of international commercial arbitration may be found contradictory to the Russian Law in view of public interests.

Hence, the following tasks seem to be most urgent:

1. Regular advanced training of judges as a prerequisite of judicial career.
2. Establishment of a system for specialized training of judges.
3. Initiating a debate on negative consequences from matching judicial and administrative territorial districts, with possible solution of the problem and elimination of judiciary's dependence on the executive branch.
4. Amendment of the effective *Law on Executive Procedure* and optimization of marshals operations (with possible use of the US Marshals Service practices).
5. Pursuit of ways to ensure execution of international arbitration decisions in the Russian territory.
6. Depoliticization of courts, which is the short cut to independence of the judiciary.

Appendix 3. Public Servitudes: Reality and Problems

The notion of servitude has been known since Ancient Rome where it meant the right of limited use over the property of another. The Roman law has also brought in the current division of servitudes into *personal servitudes* established in favor of a person (e.g. a devise, obliging the heir to extend habitation to a person in the inherited premises); *real servitudes* encumbering certain assets, usually immovable (e.g. right of way or laying communications across another plot of land); *private servitudes* set forth by agreement of parties; and *public servitudes* instituted by executive bodies or municipal authorities within their jurisdiction. Division of servitudes into positive and negative has not preserved its meaning, as in Roman law a negative servitude meant restraint from certain actions that hamper the power of ownership, which is currently achieved if negatory demands are to be extended.

On the federal level public servitudes are regulated as follows. Apart from Article 277 of Russian Federation Civil Code the rights of servitudes are contained in Article 23 of the Land Code, Articles 21 and 23 of the Forestry Code, Article 43 of the Airspace Code, and Articles 43 and 44 of the Water Code. Besides, certain provisions are present in the Town Planning Code.

The privatization law also includes norms to be accounted for during encumbrance of assets (e.g. public servitudes towards land) and abridgement (e.g. towards community facilities). Quite active seems to be regional lawmaking in public servitudes, with appropriate statutory acts adopted in many subjects of the Russian Federation.

A public servitude means self-restraint on the part of the owner, which is established by a law or another statutory act of the Russian Federation, subject of the Russian Federation or a local government if necessary for the interests of the state local authority or local population without seizure of land. Dedication of a public servitude is carried out with the account of public hearings.

Public servitudes may be established for:

- 1) passage across a plot of land;
- 2) use of land for repairing community, engineering, electrical and other lines and networks, as well as of transportation infrastructure facilities;
- 3) placing land and geodesic marks, as well as arranging approaches to their locations;
- 4) drainage work on a plot of land;
- 5) water intake and cattle watering;
- 6) cattle driving across land plots;
- 7) haymaking and pasturage on plots of land within periods corresponding to local conditions and traditions, except for the lands within forest reserves;
- 8) use of land for hunting and fishing at a closed water basin, collection of wild plants within established period and procedure;
- 9) temporary use of land for survey, research and other works;
- 10) free access to the riverside and coastal strip.

Servitudes may be permanent and timed.

The exercise of servitude should be minimally burdensome for the appropriate land plot.

The owner of the land encumbered by servitude is entitled to reasonably charge the persons in whose favor the servitude has been established, if federal laws do not specify otherwise.

If public servitude makes the use of land unfeasible, the landowner or user may demand seizure, including the buyout, of the land plot, with the appropriate government body or local authority compensating the damages or extending an equal land plot and damage compensation.

If establishment of a public servitude causes substantial difficulties for land use, the owner may demand a reasonable fee from the appropriate government body or local authority.

Persons whose rights and legitimate interests are affected by a public servitude may defend their rights in court.

In accordance with Federal Law *On State Registration of Immovable Property Rights and Immovable Property Contracts*, servitudes are subject to state registration.

Public servitude also has another meaning, i.e. a right to use an asset of another in public interests. The right does not belong to everyone but is usually assigned to a certain person, in most cases to an organization that acts in the public interests. For example, the right may be extended to a power network for laying a cable or overhead power line across land of another. Another possible right holder is a land management or geodesic organization that needs to place a land or geodesic marks. Community services also use the right (although in absence of proper legalization) for digging their pipes within yards of high-rise buildings.

Public servitudes also emerge in limited economic rights of owners. For example, the law prohibits storing firewood, stacking hay, burning fires or sprinkling crops under power lines. Sanitary protection zones along banks of the river used for potable water intake account for interests of the water-supply organization. To this end, owners of riverbank lands cannot use the zone for dumps, cattle-breeding facilities, machine yards, fuel and lubricant storages and similar facilities. The point is in water quality and health protection; although some believe that a sanitary protection zone allows the Water Supply Department to save funds that would have been spent on extra water treatment effort.

The law obliges persons to refrain from certain activities with no compensation envisaged. But if the person is subjected to intrusion by an external organization, he may be eligible for some compensation.

Hence, a public servitude should be understood as limitation of immovable property owner rights aimed to create conditions for an external organization performing community (public) functions under protection of the state.

If we accept this definition, how should we qualify the right to use other's property by indefinite number of persons? In order to find an answer, we should proceed beyond the property rights framework. Property rights imply that the right of use is based on the right of ownership or the right of possession (if ownership and possession are separated). The right of use on such conditions is known as the right of title. But the huge scope of user rights has no right of title at all (e.g. the right of recreation use of forest resources). Untitled use may also be a right, although less protected than titled. Jurists attach little importance to this issue but untitled right does remain a right.

As well as in many other countries, ecological limitations on landowners in Russia are not compensated. A similar rule exists for planning limitations. As for servitude-related encumbrances, a lot of aspects remain vague. It would seem tempting to assume that public servitudes are not subject to compensation. However, such general rule is hardly viable. For quite a long period there has been a gradual departure from the regulation that requires only compensation for damages during laying various lines across other's lands. Both with and without law support, the affected landowners demand that the engineering organization should compensate the loss of profit arising from their limitations on land use. Hence, it seems reasonable to elaborate criteria for compensation in such cases.

Currently legislative regulation of servitudes in Russia suffers major defects, **one of them** being the lack of a unified approach. The law is insufficiently systematic, requiring more general provisions and a single executive mechanism that could be set up most likely by the Russian Federation Civil Code. However, the Code's Chapter 17 turned to be paralyzed for a long time by a hanging Land Code. Besides, its civil norms, although basically significant, happened to be quite superficial and insufficient for effective regulation of servitudes as a special group of real rights. As a result, there are numerous contradictions in solution of servitude right matters with help of various statutory acts. Collisions occur everywhere – from servitude definition to grounds for its emergence and termination.

Current judicial practice only proves absence of effective civil law regulation, since the judges fail to use the servitude law. In a paper on legislative regulation of servitudes in Russia, L.V.Shchennikova refers to certain decisions by district courts in the city of Perm after adoption of Part One of the Russian Federation Civil Code (with Chapter 17 ineffective). So, Industrial District Court was considering a dispute between garage owners. Brothers K. had built adjacent garages with a single entrance. Later one brother died, and, upon acquiring the inheritance, his son placed two cars in his garage, blocking the passage for his neighbor. The latter went to the law demanding a garage passage of 90 cm from the wall to the car. The neighbor relative failed to install his own door because of the water spring used by all cooperative members. With no use of the *servitude* definition and appropriate norms, the court obliged the defendant “to place his cars so that a 90-cm passage existed between the wall and the car, unblocking the use of the garage by claimant citizen K.”. Of course, the decision was not related with the substance of servitude as a real right, and was not followed by registration within the procedure established for registration of the immovable property rights. In this case, the court-established right of passage did not become for the claimant a subjective real right of stable character, and for the defendant – a property encumbrance. Thus, the decision seemed to have been an intermediate measure without any civil law support.

In another case considered by the Perm District Court of the Perm Region, a citizen received a land plot under the right of ownership for construction of a house. However, in several months the owner found a cable trench along the entire plot length, which made the house construction within his plan unfeasible. Cable laying turned to be functionally essential for neighbor buildings – a residence and a retirement home built by the *Rossiia* farming cooperative. Interestingly, the court decision obliged the Kultayevskaya Village Administration, which had allocated the plot for house construction, to modify the land ownership certificate by indicating encumbrance of the plot due to power cable entrenchment. In other words, Russian courts still prefer to avoid private-law regulation of property relations, using public law methods, essentially violating the property right proclaimed infeasible by the Russian Federation Civil Code. In this situation, the servitude norms would have produced a different decision, placing the parties in equal positions.

The need for servitude norms is also seen in the case also tried by the Industrial District Court in the city of Perm. The parties were landowners belonging to Gardening Association N 85 of the Regional Bacteriological Laboratory. The defendant had constricted the walkway separating his garden from that of the claimant lady, hampering the passage. Referring to a decision of the Association General Meeting, the claimant demanded widening the walkway up to 50-60 cm in width by seizure of the defendant's territory. Upon consideration, the court chose to neglect any kind of civil law norms and obliged the defendant to restore the walkway to a minimum 50-cm width along the full length of the territory separating the plots. The court also ruled that the defendant should not prevent the walkway use by other members of the Association.

Similar to the former cases, in the latter instance the court settled the dispute as guided by its sense of justice, traditions and general principles, including fairness, but not by civil law norms aimed to protect the rights of owners and other real right holders. Currently the courts are equipped with Chapter 17 of the Civil Code but it seems insufficient for law practice.

Shchennikova believes that civil law regulation of servitude relations within the Russian Federation Civil Code should be made more fundamental. The task could be achieved by a special *Servitudes* chapter in the Code. Lengthy adoption of the Land Code with possible inclusion of the servitude norms could give rise to doubts about such need. But the adopted Land Code contains a single article (Article 23) that governs only public servitudes, which makes these doubts irrelevant. The servitude chapter of the Civil Code should formulate all basic provisions covering this group of real rights for persons who are not owners. By taking up the key role in regulation of servitude relations, the Civil Code would gather general norms and basic provisions, enabling other statutory acts (including Codes) to envisage special norms accounting for specifics of real rights to immovable property in various areas.

The second shortcoming of servitude regulation in Russia is closely linked with the first one, being the absence of distinct servitude definition. In particular, some insist that servitude means exclusive right for limited use of the adjacent plot of land under a mandatory agreement, and this definition obviously arises from Chapter 17 of the Russian Federation Civil Code. The servitude seems to make both use of plot by another owner and limitation of ownership for immovable property in the interests of other owners (owners of neighbor land plots). At that, servitude may arise both from agreement and the law. Hence, other servitudes may and should be established by lawmakers in the interests of civil relations parties.

Servitude is also defined as limitation of the estate neighbor right and limitation of ownership by foreign laws, e.g. by civil codes of France and Germany. Some Russian civil law experts believe that these two approaches should be united by a new servitude definition by the Russian Federation Civil Code to rule out the need for repeat definitions in other statutory acts. Being the first among equals, the Civil Code would make servitude uniformly interpreted by all other Russian Codes. The definition could run as follows: *servitude is encumbrance of land plot or other immovable property that may present both limited powers for its use by another owner (owner of neighbor land plot or other immovable property) and limitation of one's own powers.*

Russian civil law specialists believe that **the third** major drawback in legislative regulation of servitudes is connected with dispersion of their types over different statutory acts, which makes the entire system blurred. The Water Code actually replicates the Civil Code provisions on servitudes towards use of water sources, and the Land Code – towards land servitudes. The situation distorts the uniform structure of potential servitudes, which is needed by estate owners for reference. The entire picture is deemed necessary, and it could be provided by general provisions of the Russian Federation Civil Code that could formulate broad-based approaches to distinction of servitude groups (permanent and temporary servitudes, obvious and non-obvious servitudes). A special article *Types of Servitudes* could envisage possible capacities – right of way, passage, haymaking, pasturage, water intake, cattle watering and other uses of water resources, right of construction, engineering, drainage and other works. The unified approach to definition of types and their unified classification would help other statutory acts in construction of specific servitudes, e.g. for forestry.

The fourth negative aspect deals with lack of grounds for servitude emergence in the civil law. Articles 274-276 of the Civil Code bring up a conclusion that the main ground is agreement backed up by a court decision in case of dispute between owners. In fact, there are more grounds, among them acts of government bodies and local authorities (Part 2, Article 21 of the Forestry Code) and devise (legatory). It seems wise to include the general list of servitude grounds into a separate article of the Russian Federation Civil Code, which would be titled *Servitude Grounds* and include ground types – agreement, direct law regulation, court decision, government and local authority acts, and devise.

Being the key ground for servitude, the Civil Code should explain agreement in greater detail. It should be defined as *servitude agreement*, with distinct establishment of main conditions (subject, price). Also important is to legislatively set forth a list of documents needed for

entering such an agreement. A special article is deemed reasonable to indicate cases of gratuitous relations under the agreement on servitude. The term of agreement should be also regulated.

Currently, entering a servitude agreement requires an ordinary written form and mandatory state registration. Note that Paragraph 3 of Article 274, Russian Federation Civil Code, contains no special condition for a mandatory written form, which follows from general provisions of the Civil Code on the contact form. The Civil Code should set forth special rules for the servitude agreement from, which could be a mandatory notarial form. Russia's pre-Revolutionary history testifies to huge role of notaries in the servitude matters, with a separate category of *notarial servitudes* widely practiced. It is hard to overestimate the role of notaries in legal assistance to citizens. Hence, the notarial practice may and should vigorously promote servitudes in Russia, helping citizens in defense of their rights towards limited use of adjacent land plots in order to prevent a court procedure.

Drawback **number five** in present servitude regulation seems to be incomplete normative regulation of grounds for its termination. As is known, Article 276 of the Russian Federation Civil Code is titled *Termination of Servitude*. The lawmakers provided for two causes that the owner of servitude-encumbered land may use to demand servitude termination. One is discontinuation of grounds for servitude establishment, and the other – inability of the landowner to use the plot for its purposes. Meanwhile, the scope of grounds for servitude termination developed by civil law during many years is much wider. The title *Termination of Servitude* obliges lawmakers to mention all possible grounds for termination of this type of real rights. Number one should be loss of service land or other immovable property. Number two is merger of owners of the dominant and service land plots. Number three could make servitor's unilateral abandonment of his rights. Finally, servitude could be discontinued by cancellation of the servitude contract. The two available causes for servitude termination could be used as a basis, adding certain additional grounds, e.g. failure to pay the established fee within a calendar period. Specific causes may be mentioned in other statutory acts, which expand on Civil Code provisions. Anyway, servitude termination should be verified by a special cancellation stamp on the servitude registration entry in the Unified State Registry.

The sixth aspect deserving close attention of legislators is the role of law in establishment of so-called neighborly relations between owners of immovable property. The existent prohibitive norms used to limit ownership rights in the interests of other neighbor owners are far from sufficient. There is every reason to tap French experience whose Civil Code contains many provisions beginning with words "It is prohibited to..." Russian law may also set forth bans in relation to the *view* (neighbor land plot), drainpipe directed towards the neighbor, planting trees beyond a certain distance to the neighbor plot, windows or orifices in the neighbor wall, lifting water out of the source in excess of specified volume. Such norms could be introduced into Russia's land Code, but the lawmakers failed to go beyond Article 23 that contains only general provisions. We believe it grossly insufficient, bearing in mind the huge role servitudes are to play in relation between land users.

Russia's servitude right has a great future that could and should be built by the civil law covering this type of real rights, whereas absence of an appropriate regulation in this sphere will bring about:

- violation of property rights
- arbitrary behavior of registration bodies
- abuses on behalf of the government and local authorities, etc.

Indistinct and blurred regulations will inevitably cause arbitrary interpretation and boil down to violation of owners' rights.