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Russia/Eurasia Committee Newsletter Комитет по праву России и стран Евразии



Moldova



Russia



Kazakhstan



Turkmenistan



Armenia



Uzbekistan



Ukraine



Azerbaijan



Belarus



Georgia



Tajikistan



Kyrgyzstan

In this Issue:

What Life is All
About: *The
Politics of
Russian
Succession Find a
Convenient
Target in Yukos*

Ukraine:
*Improving the
Conditions for
Enterprise
Development and
the Investment
Climate for
Domestic and
International
Investors*

Dear Committee Members,

We hope you will enjoy the new, colorful format of our Russia-Eurasia Newsletter. My thanks to Vice Chair Anna Sokolova, Newsletter Editor Katya Gill and Section Super Geek Mike Burke for pulling it together.

The articles in this issue include a valuable analysis of Ukraine's legal environment for economic development prepared by Irina Paliashvili and her firm for the OECD. While this Newsletter contains the Executive Summary of this report, the entire document may be found on our website,

http://www.abanet.org/intlaw/committees/regional_comparative/russia_eurasia/home.shtml.

The second article is one I recently published in the *Russia/Eurasia Executive Guide* dealing with a specific aspect of the Yukos affair. If it stimulates discussion/controversy on our web page

http://www.abanet.org/intlaw/committees/regional_comparative/russia_eurasia/home.shtml or by direct email, it will have served its purpose well. Please note that our Newsletter will be emailed to our Committee Listserv each time there is material to share.

One of our Committee's responsibilities is to prepare an annual update of legal developments in the 12 countries for which we are responsible. This update is published annually in the Year in Review issue of the ABA's *International Lawyer*. Holly Nielsen, who has been in Moscow for ten years, has agreed to prepare the update for developments in Russia and to coordinate contributions from Committee Members into a single coherent article in time for the January 15 deadline. Please consider having your work published in the *International Lawyer*. While we have Russia and Ukraine covered by Holly and Irina, there are ten more countries for which brief two or three page updates would be welcome. Please note that this year the Year in Review covers both 2003 and 2004. Please contact me at BeanMoscow@aol.com if you would like to be one of the authors of our Year(s) in Review issue.

In reorganizing the Russia-Eurasia Committee we have agreed to accept all contributions for our newsletter and website. We believe every lawyer regularly produces written work, which can be shared with the profession. Please forward any materials you would like to have included in our newsletter and posted on our refurbished website

http://www.abanet.org/intlaw/committees/regional_comparative/russia_eurasia/home.shtml directly to me.

Continued on p. 2.

There are four Committee programs in various stages of planning in which any Committee member may volunteer to participate. For the 2005 Spring Meeting of the Section (to be held April 13-17) we have proposed a Yukos related program, "The Use and Abuse of Law: Russia's Yukos-Khodorkovsky Affair." We have also been asked to propose programs for the 2005 Annual Meeting in Chicago (August 4-7) and for the Section's Fall Meeting to be held in Brussels next October. In connection with the Brussels meeting we are also considering a pre- or post-meeting trip to Moscow or Kiev or both where we would also present a Committee program. Please consider participating in one or more of these programs by contacting me immediately at BeanMoscow@aol.com.

The International Section of the Florida Bar has asked the Committee to assist with a program they will be presenting in Miami (March 18-22, 2005). Committee member Lucius Smejda is Chairman of this warm weather program. More details will be forwarded shortly via our Newsletter.

All Committee members are encouraged to take an active part in our programs and to contribute regularly to our publications. We welcome your suggestions and participation in our programs. Please contact me or Anna Sokolova (Anna.Sokolova@azbar.org) or both of us with your ideas and whenever you have information you would like to share with members of the Russia-Eurasia Committee.

Best regards,

Bruce

Ukraine: Improving the Conditions for Enterprise Development and the Investment Climate for Domestic and International Investors in Ukraine

The Russian-Ukrainian Legal Group, P.A. Washington DC-Kiev/Dr. Irina Paliashvili

The Organization for Economic Cooperation and Development (OECD), with the support of the European Union, is currently conducting a multi-year project on investment and enterprise development in Ukraine. This Project builds on the results of the OECD's previous reviews of the legal framework for investment in Ukraine conducted in 2001 (*Investment Policy Review*) and in 2002 (*Progress in Investment Reform*), and takes into account the most recent developments in Ukraine's legal and business climates. As part of this Project, the OECD commissioned a Survey of international and domestic businesses operating in Ukraine, drawn from different sectors of the economy and different regions of the country (the *Survey*), to identify issues of concern to these businesses regarding key issues of legislation, the legislation's interpretation and legislative gaps affecting investment and enterprise development in Ukraine.

Accordingly, in April and May of 2004, at the OECD's behest, the Russian-Ukrainian Legal Group organized a series of interviews with international and domestic small, medium and large businesses operating in Ukraine, to identify the legal issues of greatest concern to them. The Survey, combined with a comprehensive review of Ukraine's civil, company, antimonopoly and other business laws and regulations, was compiled into this present

See "Ukraine," p.4.

What Life is All About: *The Politics of Russian Succession Find a Convenient Target in Yukos*

Bruce W. Bean

Leading Kremlin hard-liners have recently revealed new insights into both the nature of democracy in Russia and the early stages of the presidential succession battle already smoldering inside the Kremlin. President Putin's second term ends in 2008; for the ambitious men close to the source of all power in Russia it is none too soon to start showing the boss who is tough enough to be designated his successor.

Over the past year we have grown accustomed to the tough-guy reports from General Prosecutor Vladimir Ustinov on the hard-liners' current project to keep Mikhail Khodorkovsky, former Yukos CEO and Public Enemy No. 1, out of Russian politics forever. The Kremlin's goal of impoverishing and imprisoning Khodorkovsky to keep him from becoming a political force after his inevitable ten-year prison sentence is obvious. But it is illuminating to see who else now feels the need to maintain a high profile in this game.

New Political School of Thought

Speaking in London last month, Defense Minister Sergei Ivanov reassured us that the Khodorkovsky trial, apparently a major national security matter for that closet legal scholar, was "proceeding correctly, in accordance with eastern democracy." Being otherwise unfamiliar with "eastern democracy," I now understand that one of its basic tenets is the selective prosecution of potential political rivals who are "guilty" of the legal use of legal corporate tax loopholes.

Also last month, after Ustinov had confirmed that the freeze on Yukos' assets and bank accounts would not be lifted to give it the opportunity to pay the \$3.4 billion tax judgment for the year 2000, we learned that the shares of Yuganskneftegaz, the Yukos subsidiary that accounts for 60 percent of its production, had been seized by bailiffs. Minister of Fuel and Energy Viktor Khristenko announced that shares of Yugansk, "will be sold in a short time to an interested party." Khristenko did not say who was "interested," but we might guess that interest will be expressed by yet another political dark horse, Igor Sechin, the secretive leader of the Kremlin hard-liners, who has just assumed the chairmanship of Rosneft. Rosneft is the state-owned oil company that the Russian government tried to auction off in 1998. The government canceled the auction because no bids were submitted.

Not to be outshone by Ustinov, Ivanov and Khristenko, Oleg Vyugin, head of the new Federal Financial Markets Service, followed up with his own Delphic thoughts. The Yukos-Khodorkovsky affair, Vyugin said, "is a good lesson. It shows you have to be careful with taxes. It has to be understood that sooner or later you get what's coming to you. That's what life is all about."

"To Make an Omelet, One Has to Break Some Eggs"

In a further exegesis on the ideological basis of Ivanov's "eastern democracy," Vyugin explained that tax evasion is punished severely everywhere in the world. "And authorities never take into account the fact that by doing so they may be destroying a firm." Well, there we have it. That explains why Yukos bank accounts and assets remain

See "Yukos," p.5.

Ukraine. continued

Report.

Based on the results of the Survey, this Report focuses on Ukraine's new Civil and Commercial Codes, company laws, antimonopoly legislation and other areas of law that are most important for the investment climate in Ukraine. Together with the Survey, this Report played an integral role in framing the issues that were later discussed at a Roundtable conference held on 19 May 2004 in Kiev (the *Roundtable*), focused on how best to improve the situation for enterprise development and the investment climate for domestic and international investors in Ukraine. Indeed, the Roundtable's findings very closely tracked the observations and suggested courses of action described and laid out in the Survey and in this Report.

The Roundtable discussions highlighted the importance of this Project. Roundtable participants described the present-day legal situation in Ukraine as needing crucial and timely improvements in order to satisfy the requirements of the domestic business sector and attract needed foreign investments. Following up on the ideas and comments expressed in the opening remarks by the representatives of the OECD, the Delegation of the European Commission, the Ministry of Justice of Ukraine and the Verkhovna Rada of Ukraine, all Roundtable participants agreed that establishing a transparent, stable and fair national legal system is essential to attracting a stable flow of foreign investments into Ukraine's economy as well as ensuring equitable "rules of the game" for all businesses.

The Roundtable participants also identified the improvement of the implementation of laws in practice as a point of concern, for writing a law is just the first step in a long process. Until a law can be effectively, fairly and consistently implemented, it is not yet a useful part of the legal system. This last issue is crucial, because foreign investors, as well as domestic businesses, are interested not only in a law's

contents, but also in the results that flow from a law's passage, effective implementation and application. It is for this reason that the recommendations flowing from this Project do not just begin and end with identifying laws that need to be amended or passed. Rather, it will be an ongoing process of identifying legal problems that should be repaired, developing laws, procedures and mechanisms to fix those problems, and then following through to the laws' practical implementation. These tasks will require close cooperation and collaboration between the private sector and the Ukrainian government, with attendant support and guidance from experts from the OECD, the EU and other international organizations. It is for this reason encouraging that many Ukrainian government representatives have already acknowledged the importance of this Project and expressed their readiness to work cooperatively in implementing its recommendations.

The Roundtable identified four separate areas of Ukrainian law that appear ripe for legislative improvement:

- civil legislation (specifically, the Civil and Commercial Codes);
- company law;
- antimonopoly law; and
- other areas of law and regulations that create unnecessary legal obstacles or hidden charges on doing business.

The specific findings of the Survey, Roundtable and Report were as follows:

Civil Legislation

On 1 January 2004, Ukrainian civil legislation underwent a fundamental transformation. The adoption of new Civil and Commercial Codes signified a new age for the national legal system, as these two

See "Ukraine," p. 6.

Yukos, continued

frozen, preventing the company from organizing payment of the \$3.4 billion tax judgment. This confirms that the government does intend to destroy Yukos, Russia's most modern, westernized firm, which accounts for 20 percent of Russia's crude oil exports and employs 105,000 tax-paying employees.

In a radio interview Mr. Vyugin noted that the current assault on Yukos should serve as a lesson to business to pay taxes "properly." Contrasting Russia's current market economy with the good old days of the USSR, Mr. Vyugin observed: "Now that we live in a market economy, one can always find a chance to evade taxes. So the important thing is for the government to impose new rules, and in most cases this is done by teaching lessons."

The intentional bankrupting of Yukos to teach Khodorkovsky new tax rules is certainly a pedagogical technique unique to eastern democracy. If this is what happens "in most cases," are there yet some situations where the Duma may impose new rules through legislation? Apparently, the Khodorkovsky trial is intended to be the new version of the show trials of those good old days.

While the Kremlin's KGB alumni have previously been described as among the "best and the brightest" of the Soviet regime, their approach to explaining new tax policy to Yukos suggests that this crop of the best and brightest does not shine quite so brilliantly in Russia's market economy. Destroying Yukos, whose shares are 80 percent below their high of last October, to teach a lesson to Khodorkovsky and, by the way, to the

60,000 other Yukos shareholders, tells us that the struggle to succeed Putin has already become quite desperate.

Unintended Consequences

Some of the drawbacks of the approach reflected in Oleg Vyugin's philosophy may be seen in Russia's plans for offering its debt in the international capital markets.

With the price of crude oil at historically high levels for more than four years, Russia's five consecutive balanced budgets and a trade surplus George Bush could only hope for, it is good fiscal stewardship for Russia to consider a significant Eurodollar offering. Prospects for Russia's return to the international debt markets first turned distinctly positive last October when Moody's, a month prior to buying 20 percent of Russia's Interfax, upgraded its rating of Russia to "investment grade." This doubtless triggered serious consideration of a debt issue in the Ministry of Finance, since the market expected Standard & Poor's and Fitch to quickly follow suit. However, the arrest of Khodorkovsky just days later and the subsequent tax problems at Yukos developed even more quickly. Because the capital markets require at least two of the three major rating agencies to concur on a rating before the market will accept it, no Russian debt could be offered. As the scope of Prosecutor Ustinov's abuse of law and legal process in the Yukos fiasco became evident, no upgrade of Russian sovereign ratings occurred.

Four months ago rumors again appeared in the press that S&P was about to upgrade Russia, but in July, nine months after the

See "Yukos," p. 7.

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Ukraine, continued

legislative acts became the new basis for the development of some of the key legal spheres in Ukraine. There is a downside to this, however, because any defects in the Codes will be magnified in their importance through the promulgation of subordinate legislation built upon them. That is the reason why the Civil and Commercial Codes must be unambiguous, clear and flawless, and consistent with each other.

Months of experience in using the Codes suggest that they are in need of significant improvement. The potential for conflicts, both internal to the Codes and among the Codes and other laws, is substantial. The Survey and the Roundtable focused on the following major problems with the Codes:

Each Code contains provisions that conflict with other provisions of the same Code. As examples, private sector representatives cited conflicting requirements for the form that contracts should take and conflicting rules on identifying the moment various types of contracts take legal effect.

Substantial conflicts exist between many provisions of the Civil and Commercial Codes that regulate the same issues. For example, some corporate forms recognized in the Civil Code are not recognized by the Commercial Code, and vice versa.

Numerous conflicts exist between provisions of the Codes and subordinate laws. For example, the Civil Code requires a contract, to which a legal entity is party, to bear the legal entity's corporate seal in order to be valid. This requirement undermines the effectiveness of Ukraine's new laws on the subjects of electronic documents and digital signatures.

Some good ideas contained in the Codes cannot be implemented in practice because of gaps within the subordinate legislation. For example, the Civil Code requires that purchases of land be registered with a government agency, in accordance with an unnamed law, before a buyer can obtain title. Such registrations

theoretically should help to bring order to the country's real estate market, simplify the process of title searching, etc. However, no government agency has yet been empowered to register such purchases of land, and no law on the procedure for registration has been passed.

The above problems hinder the normal operation of businesses in most spheres of the economy, rendering the legal system incapable of regulating certain relationships and protecting the interests of participants in the economy. Moreover, the large number of legislative gaps in Ukrainian civil legislation gives broad grounds for regulatory agencies and courts to interpret the meanings of the laws and facilitates corruption among the regulators and unfair competition among business competitors. In this regard, the Commercial Code appears to present an obstacle to the development of the free market in Ukraine because its nature and methods of regulation do not support Ukraine's nascent market economy.

For the above reasons, Ukrainian civil legislation requires improvements. The Roundtable focused on:

- how best to resolve conflicts between provisions of the Codes that regulate civil relationships, considering whether conflicts among the Civil Code, the Commercial Code and subordinate legislation should be decided in favor of the Civil Code or the Commercial Code; and
- how best to enact into law the implementing legislation referred to in the Civil Code, which has not yet been passed, most importantly, the bill on private international law (which covers conflicts of laws rules) currently pending before the Supreme Rada.

Several Roundtable participants argued that the Codes

See "Ukraine," p. 7.

Yukos, continued

upgrade by Moody's and the arrest of Khodorkovsky, S&P and Fitch reaffirmed Russia's non-investment grade ratings, and Fitch subtly noted that the possible bankruptcy of Yukos "hurts the investment climate in Russia."

The Kremlin's presidential contenders, whose commercial instincts are so undeveloped that they do not understand why capital flight from Russia is increasing or why the capital markets have not responded to Russia's ever-improving economic results, at least now have the philosophical and ideological basis for explaining this conundrum. As a great philosopher of eastern democracy has told us:

Ukraine, continued

were essentially contradictory in their natures. It was noted that the Civil Code, while containing some problems, can be improved; on the other hand, the Commercial Code embodies concepts that simply do not work within a market economy. It was generally agreed that the conflicts and inconsistencies between the two Codes are so numerous as to make it impossible to bring them into compliance with each other.

It was suggested that the Commercial Code could perhaps be transformed into an act that regulates only legal relations between the State and private companies. Another participant expressed the belief that setting up separate legal regulations for each of the private and public sectors would be dangerous, and that both State-owned and private businesses should be subject to the same legal regulations. Incidentally, this was a point also raised in the Survey. The representative from the Delegation of the European Commission argued that Ukraine should move towards a unified system of legislation, as the EU is doing, with the aim of both eliminating conflicts among legislative acts and simplifying the process of

"Sooner or later you get what's coming to you. That's what life is all about."

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enforcing laws – which is currently one of Ukraine's primary problems. Another participant pointed out that the Civil Code is already an all-encompassing document, echoing a sentiment expressed by respondents to the Survey. Thus, the Commercial Code was not needed at all and should be abolished.

Ultimately, the majority of the Roundtable participants agreed that the Civil Code must be amended and that this can be done without undue difficulty. In contrast, the Roundtable participants cited the Commercial Code's decided tendency towards re-establishing a command economy, for example, its empowerment of the government to dictate the actions of companies and to deprive companies of various benefits and privileges when they do not comply with government demands, should be abolished.

Company Law

The OECD's 2001 *Investment Policy Review: Ukraine* noted several weaknesses in Ukraine's company law

[Continued on next page.](#)

Ukraine, continued

regulation, embodied in the Law on Enterprises and the Law on Companies. Ukraine has repaired some of these problems by annulling the Law on Enterprises. Yet, serious problems with Ukraine's company laws continue to disrupt the economic life of the country. In the OECD's 2001 *Investment Policy Review: Ukraine*, the observation was made that it would be desirable to: "develop entirely new legislation for various types of businesses based on relevant provisions of the draft civil code". That, too, has been accomplished by passing the new Civil Code.

Nonetheless, the businesses surveyed feel that Ukrainian company laws can still be improved. Based on comments gleaned from the Survey, the Roundtable focused on the following three issues:

- how to resolve overlapping and uncoordinated provisions of the Civil and Commercial Codes that regulate the same issues; clarifications of ambiguous terminology; and problems with the effective application of many of the Codes' important provisions;
- the possible removal of incongruous provisions and legislative gaps in the Law on Companies, which is the primary Ukrainian law regulating companies; and
- the possible removal of impractical and unreasonable provisions found in the Codes.

All of these problems hinder enterprise development and business operations in Ukraine. They often create bureaucratic obstacles to the free operation of companies, open the door to unscrupulous competitors using legal loopholes to compete unfairly and create a fertile ground for corruption to grow within government agencies and the courts.

At the Roundtable, the following legislative improvements were considered as means to promote enterprise development and operation in Ukraine:

- analyzing company law, especially where regulated by the Codes, to identify both internal contradictions within individual laws and conflicts between different laws. While the Report identifies many of the most important contradictions and conflicts, further study and time would be necessary to do a thorough inventory of all desirable revisions;
- repealing the Commercial Code, which currently contains internal contradictions and conflicts with other laws regulating the company law sphere; and
- taking the OECD's 2001 *Investment Policy Review: Ukraine* recommendation to "develop entirely new legislation for various types of businesses" one step further than was done when these provisions were added to the Civil Code. As has already been successfully accomplished in Russia, separate, new laws should be enacted in Ukraine to regulate each of the most important corporate forms, for example: joint stock companies, limited liability companies, full partnerships, etc. Each such law should accord with the provisions of the Civil Code (as the subordinate Law on Companies often fails to do now) while also providing further details on the workings of the separate types of corporate forms. (Please note that, although the OECD's 2001 *Investment Policy Review: Ukraine* noted that a bill on joint stock companies was due to be submitted to Parliament "shortly", that bill has still not been passed).

In general, the Roundtable participants agreed that the contradictions between, and discrepancies within, the provisions of the different legislative acts in the company law sphere were especially harmful to enterprise development and the

[Continued on next page.](#)

Ukraine, continued

investment climate in Ukraine. Thus, the laws need to be brought into harmony with each other. The Roundtable participants concluded that the most effective means of accomplishing this would be to adopt specialized laws regulating each of the several different kinds of companies.

In this regard, it was pointed out that the current version of the bill “On Joint Stock Companies” still lacks several key provisions. For example, measures to protect minority shareholders’ rights still need to be added. Another legal expert added that, as a rule, Ukrainian bills undergo substantial amendment between their introduction to Parliament and their eventual adoption, and that when they ultimately become law, they often do not much resemble their original wording as bills.

The Roundtable participants also identified practical problems caused by regulations affecting the authorized funds of companies, problems with the foundation of corporate branches and limited liability companies, the minimal regulation of joint stock companies in the Civil Code, and discrepancies between legal requirements for founding companies and how these requirements are in fact implemented (as highlighted in the Survey).

Antimonopoly Law

Fair competition is essential to any healthy market economy. Antimonopoly laws seek to ensure that businesses are monitored in the interests of limiting monopolistic and anti-competitive developments, for enterprises develop best and operate most efficiently in an atmosphere of free and fair competition. To promote such competition, the anti-competitive tendencies from economic concentrations, unfair trade practices and coordinated actions among businesses must be restrained.

For these reasons, Ukraine has created a legislative basis for protecting competition and established an

independent state body responsible for this sphere of law – the Antimonopoly Committee of Ukraine (АМС). Antimonopoly law in Ukraine thoroughly regulates many aspects related to protecting and monitoring competition in Ukraine. It also provides a mechanism for preventing and eliminating monopolistic and unfair competitive acts. Many large, medium and sometimes even small foreign and domestic enterprises doing business in Ukraine have faced the practical consequences of Ukraine’s robust antimonopoly laws more than once. For many such companies, dealing with the AMC has become a part of their day-to-day business life in Ukraine.

After reviewing the comments contained in the Survey, the Roundtable identified a few issues as requiring significant reform:

- clarifying ambiguous and limiting overbroad definitions of violations;
- reviewing the rules against coordinated actions and economic concentrations; and
- eliminating conflicts between certain provisions of Ukraine’s Commercial Code and its antimonopoly laws. For example, Article 30 of the Commercial Code seems to ban coordinated actions between companies outright, whereas the antimonopoly laws only subject such actions to regulatory review, and only in certain instances (where the parties to the actions in question meet certain thresholds for size, turnover, etc.). And Article 126 of the Commercial Code calls for Antimonopoly Committee regulation of all acquisitions of control over Ukrainian companies, whereas the antimonopoly laws again regulate only transactions that meet certain thresholds.

Aside from the above issues, the Roundtable participants generally felt that Ukraine’s antimonopoly laws reflected the philosophies expressed in European Union and other Western antimonopoly laws fairly

[Continued on next page.](#)

Ukraine, continued

well. However, at least one Roundtable participant reported that staffers at the Antimonopoly Committee have expressed reservations regarding Ukraine's low thresholds for antimonopoly review of certain transactions, and a belief that the laws in this sphere were somewhat overbroad. Roundtable participants shared reservations about the Commercial Code, and noted that the Antimonopoly Committee's internal policy was to ignore the Commercial Code where it conflicts with the antimonopoly laws and to prevent other government agencies from attempting to enforce it.

Miscellaneous Hidden Charges and Unnecessary Obstacles

Many other Ukrainian laws create obstacles to enterprise development and require businesses operating in Ukraine to incur unanticipated costs (hidden charges). These unnecessary obstacles and hidden charges generally exert a negative influence on the investment climate in Ukraine, creating an impression that the government is: (i) creating rules that serve little purpose and (ii) hiding the true cost of doing business in the country.

The Survey's results confirmed the existence in practice of the obstacles and hidden charges described below, all of which were discussed extensively by the Roundtable.

The "90 days rule." Ukraine imposes severe fines and sanctions when a Ukrainian business fails to receive hard currency proceeds from sales (in case of export contracts), or goods (in case of import contracts), under its international contracts within 90 days of the due date. Moreover, the fines are not limited to the amounts that the Ukrainian business in question failed to receive within 90 days, meaning that the imposition of fines continues indefinitely and can exceed the original unreceived amount by many times. Creation of a procedure permitting a resident to prove its innocence of capital flight; lowering and limiting (establishing a cap on) fines for violating the law and

comprehensively clarifying various ambiguities concerning said rule might all be desirable actions.

Corruption and Over-Regulation. The level of corruption in Ukraine remains high. While preparing a strategy to combat corruption in Ukraine is beyond the scope of this Project, the Roundtable participants nonetheless felt it necessary to emphasize that the problem of corruption in Ukraine damages the overall business climate and hinders enterprise development. To illustrate, one of the Roundtable participants offered an extremely disturbing description of how this Roundtable participant was at one point "invited" to meet with three government tax and law enforcement officials, who all demanded that the Roundtable participant's business pay more taxes – despite the fact that it was already up to date on all of the taxes it was required to pay by law.

Additionally, Ukrainian law heavily regulates certain types of business activity. For instance, the businesses surveyed cited Ukraine's numerous state inspections and reporting requirements to State agencies as particularly burdensome. Essentially every business interviewed as part of the Survey echoed this point. Indeed, even the government acknowledges the problem. A representative of the State Committee for Regulation & Entrepreneurship pointed out that their Committee routinely receives complaints from many businesses concerning the great number of licenses and permits that companies must obtain in order to do business in Ukraine. The average Ukrainian company undergoes in the neighborhood of 20 different inspections by various regulatory agencies, every year. The bill on the licensing system in the sphere of commercial activity, currently being considered by the Ukrainian Government, may help alleviate this problem. Roundtable participants were invited to provide comments on this bill.

These problems of over-regulation and corruption, unfortunately, go hand-in-hand, for the greater the

[Continued on next page.](#)

Ukraine. continued

“red tape”, the greater the opportunity for unethical government functionaries to offer to cut the red tape for a fee – another point on which both the Survey respondents and the Roundtable participants were in essentially unanimous agreement.

Financing. Many Ukrainian businesses have problems obtaining financing for their projects through bank loans and equity floatations. Banks rarely loan money for more than a one-year term. They also dislike accepting movable property as security for loans, due to a lack of clarity in the rules on pledging and registering pledges of movable property contained in Ukraine’s new Law “On Securing Creditors’ Claims and Registration of Encumbrances”. Meanwhile, the stock market remains poorly developed and in need of improvement. As a result, respondents to the Survey pointed out, financing business activities through equity floatations was not a real option in Ukraine. Both of these problems require attention.

Notarization. Many respondents to the Survey complained about the burdens Ukraine’s notarization requirements place on their respective businesses. Many actions performed by Ukrainian companies in their day-to-day business require the involvement of notaries. Sometimes the reason for such involvement is not clear; often, the fees involved are unreasonably high, with no correlation between the price of notarization and the amount of work involved in the notarization. Transaction costs in many cases equal 1% of the value of the transaction described in the document being notarized, and many ordinary, day-to-day transactions, for example, leasing premises for more than one year, require notarization.

Other Problems. The above four examples of obstacles and hidden charges are far from the only important ones. But a detailed investigation of every such hindrance to enterprise development is beyond the scope of this Project. Nonetheless, two particularly troublesome problems should be highlighted: a poor system for adopting and implementing laws and

problems with taxation. How laws are adopted and how businesses are taxed both exert great influence on business, and improvements in both of these processes would have immediate benefits on the Ukrainian economy. Every businessman interviewed as part of the Survey specifically named Ukraine’s tax system as a primary obstacle to Ukraine’s investment climate and promoting enterprise development.

In conclusion, the Roundtable produced the following main findings:

Ukrainian civil law would be improved by abolishing the Commercial Code, and with it its conflicts with the Civil Code and subordinate legislation, and considerably amending the Civil Code.

Ukrainian civil law also contains many other conflicts between its fundamental acts, which must be eliminated.

In the sphere of company law, the activities of joint stock companies and limited liability companies should be regulated in separate legislative acts.

Ukrainian antimonopoly law seems to be one of the most advanced branches of Ukrainian legislation. However, antimonopoly regulation still needs to be made more predictable and its scope made more focused in order to avoid creating unnecessary regulatory obstacles to doing business in Ukraine.

Miscellaneous hidden charges and unnecessary obstacles abound in Ukrainian law. Close cooperation between private parties, the OECD, EU, international organizations and the Ukrainian government, especially Ukraine’s Ministry of Justice and the State Committee for Regulation & Entrepreneurship, will be required if these hidden charges and obstacles are to be removed. In this respect, the OECD and other international organizations are ready to provide comments on drafts of legislative acts, to advise the

[Continued on next page.](#)

Russia/ Eurasia Committee

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Ukraine, concluded.

Ukrainian government on further steps it can take to improve the implementation of Ukrainian legislation and to render any other assistance that the Ukrainian government thinks helpful.

Clearly, given the scope of the work that remains to be done, the Project will need to be an ongoing effort. Fortunately, the Roundtable participants are all aware of this need and have expressed their willingness to continue to support this Project.

About the Russia/Eurasia Committee

The geographic scope of this committee encompasses Russia, Ukraine, Belarus, Moldova, Caucasus, and central Asia. The committee considers various current, substantive issues related to this area including among others, business regulations, tax, customs and trade law, intellectual property rights, and nuclear nonproliferation. The Russia/Eurasia Committee Newsletter endeavors to provide relevant information pertaining to current developments in Russia and Eurasian States law and practice, as well as other information of professional interest to its members and other readers

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Mark Your Calendars!

The Section of International Law's 2005 Spring Meeting will be held in Washington, DC from April 13 to April 16, 2004. This is a MUST-ATTEND meeting for international lawyers. Visit the Section's homepage, <http://www.abanet.org/intlaw>, for more information.