

State Regulation and Mining Law Development in Russia from the 15th Century to 1991

By Alexander Kursky* and Andrei Konoplyanik**

This article describes the history of the formation and development of mining law and state regulation of mining business in Russia from the 15th century to the final days of the USSR in 1991, broken down into three historical periods: before Peter the Great (15th to 17th centuries); 'tsarist' Russia (1700-1917); and the post-revolutionary/Soviet era (1917-1991).¹ Government bodies began to exercise special functions of mining business regulation by the end of the 16th century; and in the beginning of the 18th century special regulatory bodies were created. Subsequently, such functions were relegated to the jurisdiction of certain ministries in the Russian Empire, and then to a number of USSR ministries.

The article reviews the evolution of mining law during the Soviet era (1917-1991), describing the history of concession agreements in Soviet Russia during the short post-revolutionary period of the market economy in the 1920s. The concession regime of this period in Russia contained major elements of production sharing agreements, which came to be used worldwide from the second half of the 20th century.

* Dr A Kursky is Head of Staff, Committee on Industry, Construction and High Technologies of the State Duma (Parliament) of the Russian Federation (since 2003). He can be contacted by e-mail at kurskiy@duma.gov.ru.

** Dr A Konoplyanik is Deputy Secretary General of the Energy Charter Secretariat (since 2002). He can be contacted by e-mail at depsecgen@encharter.org.

¹ The post-Soviet period in the Russian Federation (since 1992) was examined by the same authors in 'State Regulation and Mining Law Development in Contemporary Russia' in *International and Comparative Mineral Law & Policy: Trends and Prospects* (E Bastida, T Wälde and J Warden-Fernández, eds, The Hague: Kluwer Law International, 2005), Chapter 3.5.1, pp 969-1008.

Mining legislation of the Russian State from the 15th to 17th centuries

Beginning of the governmental organisation of mining

At the end of the 15th century under Great Duke Ivan III (1462-1505), Moscow Russia became free from the Tatar yoke once and for all. The foundation for the Russian centralised government was laid. The political system of Russia switched from the estate-representative monarchy to an absolute one. The 15th century for Russia may be considered a turning point in the history of the formation of mining and mining relations and the introduction of governmental control over mining. The documents of that period show that the development of Russia's mining industry in the 15th to 17th centuries yielded to the Western European countries, including German states, Czechia, Italy and England. Nevertheless, as early as during the reign of Ivan III, hundreds of small blast furnaces were in operation in areas of marsh iron ore: on the coast of the Gulf of Finland and in the areas of the lakes of Ladoga and Onega. Under Ivan III, in the territory of the Russian State, copper, tin, lead, silver and goldfields were not yet known. These metals were imported from abroad in exchange for traditional Russian goods. At that time, among mineral products, muscovite mica – Russian glass (known as Muscovy glass) – was the most popular Russian good.

Before the start of domestic mines development, gold and silver, gained from the overseas sales of local raw materials, were actually the only source of precious metals in Russia. Much copper and tin for bells was consumed by the church, which played an important role in Muscovy. Its own ores were not sufficient and non-ferrous metals were imported from other countries.

Aiming at economic independence, the Muscovy rulers, starting with Ivan III, began to develop and support mining and the construction of smelters. Both local and foreign ore experts were engaged in ores prospecting and its extraction on equal terms. The first European mining experts were invited to Russia by Ivan III. In 1488, in his official speech, Ivan III addressed a Hungarian ambassador on his departure from Moscow with a request to send craftsmen 'knowing how to sort ores and subsoil', ie knowing the technology of ore-dressing and metal working. One year later, the Great Duke gave orders to his ambassadors to German Emperor Frederic III to hire experts who knew how to prospect, extract and dress gold and silver ores, and for this purpose gave them 80 sable fells and 300 squirrel fells. Other Muscovy rulers long before the time of Peter the Great persistently recruited foreign mining specialists, sending out requests all over the world.

The chronicle recorded an event that initiated the governmental organisation of ore prospecting. In 1491, Ivan III sent the first Russian official prospecting expedition to Pechora (Northern Ural), which included a

foreigner – Greek Manuel. One year later, the Great Duke sent an expedition, consisting of almost 400 people, to develop the discovered deposit. The discovery of ores gave the greatest pleasure to the ruler: ‘We ourselves started extracting and smelting copper and minting coins of our own silver.’ By decrees of the first Tsars of Romanov’s dynasty, expeditions consisting of hundreds of people were sent to discover silver mines, as well as copper mines and other minerals. In 1617, by a decree of the Tsar, an expedition led by Berteniev and Levontiev was sent to Pechora, which, in 1620, discovered copper ores.

Tsar Ivan IV ‘the Terrible’ (1533-1584) attached great importance to prospecting for iron and gold deposits, as well as other ores. Wars over access to the Baltic Sea required much money and arms. Ivan the Terrible repeatedly sent for mining masters from abroad. In 1547, he commissioned the Saxon Schligg to hire ‘two miners from among other experts’ in Europe. In 1556, he ordered the Novgorod clerks (officials) Yeremeyev and Dubrovsky to find people with knowledge about silver, gold, copper and tin ore: ‘If it has happened to find a captive German knowing how to make silver ore and knows silver, gold, copper, tin and any work: then according to our order such captives should be brought to Moscow.’ Ivan the Terrible also asked the Swedish King John II ‘to cede such area near his border where there is silver ore, and if there is no such place, to send experts to Russia to search for it’. In 1591, Tsar Fyodor Yoannovich sent for miners from Italy to improve the mining of gold and silver ore in Siberia. In 1597, the same Tsar, when sending his courtier Veliaminov to the Austrian Emperor Rudolf, ordered him to call from Italy, at all costs, ‘experts knowing how to discover and extract gold and silver’.

Mining legislative base

In the 15th to 17th centuries, Russia was only ‘absorbing’ the basic notions of mining and the mining law developed in Western European states. However, Muscovy rulers, initiating the prospecting and development of ores, not only stimulated the development of mining relations in Russia, but were also compelled to legalise these relations by special patents (charters) and decrees – the only written forms of mining law of that period.

In the 16th century, charters entitling individuals to prospect and mine minerals were issued by the Great Duke, then by the Tsar to cloisters and private entrepreneurs with an obligation to pay taxes – rarely – and an obligation to protect the borders of the state. The charters constituted privileges to private persons or private laws (*priva lex*). They contained investitures of lands and mines and the right to establish processing facilities;

in other words, they concluded bargains between the ruler and a private person with respect to a 'permit' to profitable mines, including minefields. These types of patent containing in essence a private legal provision are of great importance in the history of the sources of mining law.

As a rule, the patents that permitted prospecting for minerals did not limit the searches to the lands of Muscovy. Miners were permitted to search for ore everywhere, only rarely with a promise to the miner of governmental protection. The first prospecting expeditions in Siberia took place at the same time as the conquering of new lands and the subjugation of the local population.

A special permit for great public services was awarded by Ivan IV in 1574 to the merchants the Stroganovs who, by that time, owned vast lands and salt-mines on the east of Russia (Preduralye, and later beyond Ural), with an obligation to protect the country from possible invasions from the east. The special patent decreed that the Stroganovs were permitted to 'search for copper, tin or lead ores and flammable sulfur and test those ores, . . . with a profit to our treasury . . . and report us of this'.

Privileged patents (exemptions), which exempted the holder from, eg, discharge of salt taxes, also contained exemptions from the courts of local authorities with recourse to the court of the Tsar. Laudatory patents and awards stimulated mining experts to carry out further searches.

The patents did not always specify the succession of the granted privilege to the heirs of a patent holder, and the content of privileges was not uniform. When there was a change of Tsar or accession to the legacy, it was practically always necessary to make a request to have the patent confirmed. Patents for fields of the 16th to 17th centuries did not develop into general law. However, it was these patents along with the privileged patents of Muscovy rulers that paved the way for the formation of the mining laws during Peter's epoch.

Notwithstanding the fact that in the 15th to 17th centuries there were no legislative acts that would directly evidence that the ownership of mineral resources belonged to the Palace (the same as 'the Crown' in Western Europe), all the Muscovy rulers, starting with Ivan III, considered the mineral resources as being owned by the Palace. Peter I secured this principle.

To encourage private mining in this period, the government imposed restrictions on the prospecting and extraction of strategically significant gold and silver ores. Prospecting for such ores was permitted for any person who was interested, but the processing of such ores under the tsars Ivan III, Mikhail Fyedorovich (1613-1645) and Alexei Mikhailovich (1645-1676) was permitted only for the purpose of experiment and for handing over of the ore discovered to the Tsar's treasury. The state monopoly on the extraction of precious

metals was introduced under Alexei Mikhailovich. Thus, in 1676, his last year of rule, Alexei Mikhailovich issued a patent to a group of Russian entrepreneurs, including foreigners Peter Marselius and Jeremy Fandergaten residing in Moscow, to permit them freely to search for and extract ores anywhere (with the exception of gold and silver), as well as natural paints, mica and different types of stone with full assistance from the authorities.

The development of mining was also enhanced by numerous decrees under which official expeditions were sent to territories outside Muscovy for prospecting and development of ores. Licences for ore prospecting were often annexed with accompanying documents (orders/instructions) where the purpose of expedition works was specified and the order to local *voevodes* (local authorities) to assist ore experts was given. Regulatory documents stipulated that mine-owners were obliged to pay one-tenth of their output in kind to the treasury (analogous to later well-known and broadly used internationally (until now) royalties). Special decrees established that some of the extracted and processed ore had to be sold in the territory of Russia (analogous to well-known and broadly used (until now) 'local component' clauses in mineral/petroleum contracts), while some could be exported from Russia.

Servants of the state authorities – boards (*prikazes*) – were compelled to create additional sources of law by way of numerous instructions and directions. 'Memorandums' of those years contained detailed directions and instructions for explorers, setting off for far-away expeditions, on how to prospect for ores, how to construct field facilities and how to keep records of the smelted metals. The interviewing of inhabitants using all available measures of pressure was permitted.

Foreign participation

Successes of Russians in mining did not escape the attention of enterprising foreigners. Guided by rumours about the enormous reserves of metals (copper, in particular) in the bowels of the Russian land in 1557, a London merchant association established a special Russian company, which strenuously tried to obtain samples of copper and other ores from Russia. In 1567, the agent of the company, Jenkinson, appealed to Tsar Ivan IV with a request to permit the arrangement of iron ore extraction in Russia. Owing to privileges that Englishmen had in relations with Russia, they received the permit, and they were also permitted to build an iron factory on the Vychegda river, where a large, wooded area was allocated to supply the factory with charcoal. Some of the iron had to be sold in Russia, while some was permitted to be exported to England.

Many rich foreigners received charters from Tsar Mikhail Romanov to build smelters. Thus, in 1630, the Dutch merchant Vinius, having explored for minerals near Tula, asked Tsar Mikhail Fyedorovich for a permit to build an iron-smelting factory. At a distance of 12 versts (1 verst = 3,500 ft) from the city of Tula, he built four factories. In 1644, another merchant from Holland – Marselis – received a permit for the building of factories on Kostroma (upper-Volga region) ore mines. In the 1630s, blast-furnace production was initiated at the Tula iron-making factories of Vinius-Akema-Marselis. In an order of Central Moscow Customs (1631), different kinds of iron allowed for export were listed. The chronicles minutely cover the history of opening in 1623 of iron ore deposits in Ural. From 1630, ore mining by the state started in Zauralye (to the east of Ural). Before that, intense surveys were conducted there by miners invited by the Tsar from abroad. The first information on ores was collected in 1618 by an Englishman named John Water. In 1625, several mining officials were sent to the city of Perm and further to Siberia; the officials received a good reward for their work. During the reign of Alexei Mikhailovich Olonetskiye (Karelia), ore mines were leased out to a Dane, Bugenant Rosenbush, who built two smelters.

Governmental authorities regulating the mining industry

Rapid expansion of the country's territory at the end of the 15th century and the annexation of Siberia at the end of the 16th century caught the state structure off guard. A governor-general with large and indefinite powers was sent to the newly acquired oblasts ('oblast' is a historical name of the administrative regions in Russia) 'to be fed' (to earn his living). However, the system of the Moscow principality ruling did not meet the needs of the government of the extending Russian state. The first attempt to create a system of special public institutions was made as early as under Ivan III and continued by Ivan the Terrible.

Originally, under Ivan the Terrible, all management proceedings were concentrated in the Boyar Duma – a consultative-regulatory authority at the Tsar – but later began to depart from the Duma to the *prikazes* (*prikazes* were the Muscovy central, judicial and administrative authorities). The formation of the *prikazes* may be traced in documents dated at the end of the 16th century and the first quarter of the 17th century. The *prikazes* were both collegial and sole institutions, depending on the kind of proceeding. By the end of the 16th century, there were up to 30 *prikazes*, some of which managed mining issues. It was a chaotic system of the central administration being accountable to the Boyar Duma without an exact separation of powers and without clearly determined relations between the institutions.

The *prikazes* can be divided into three groups:

- (1) state *prikazes*, which managed business affairs over the entire territory of Russia;
- (2) territorial *prikazes*, which managed different affairs but only in specific parts of the state;
- (3) mixed *prikazes*, in which state matters were combined with some special matters.

The same kinds of affairs were distributed among a great number of *prikazes*. The organisation and regulation of mining were within the competence of both the palace-financial authorities and the central oblast authorities and special authorities. Formal requests addressed to the highest officials, including petitions with requests for a permit to conduct prospecting and extraction of ores and the building of factories, were received in *Chelobitnyi* (petition) *prikaz*. The powers given to the *prikaz* included the hearing of *chelobitnys* (petitions), which were submitted to the Tsar. After hearing a petition, the Tsar, with his boyars, issued a *ukase* or a *refusal*.

The *Prikaz* of the Central Treasury (*Bolshaya Kazna*) was formed for the regulation of direct incomes of the state – duties. The competence of that *prikaz* included all valuables of the Tsar's court. The Mint was subordinated to it. In 1584, the Masonry *Prikaz* – an administration for the extraction and processing of natural construction materials – was established, and existed for about 200 years. In addition to the supervision of works of architects and layers, the Masonry *Prikaz* incorporated the search inspectorate, engaged in the discovery and survey of new construction raw material deposits.

In 1627, in the *Razriadnyi prikaz*, a 'Big Drawing Book' – the first systematic description of the Russian State with the countries adjacent to it – was created. The description consisted of a map and comments to it where there was evidence of a number of mineral deposits known by that time.

In 1637, the Siberian *prikaz* started working in Moscow to play an important role in the organisation of long expeditions for prospecting minerals in Siberia and other oblasts of Russia. In the materials of the Siberian *prikaz* there are many documents on prospecting for minerals in Siberia and Ural evidencing that during the years of 1623 to 1699 there were 106 expeditions and parties, including 67 intended for prospecting for and extraction of ore deposits. Iron-ore deposits in Ural and silver-lead ores in Transbaikalia were discovered.

The *prikaz* system and legislation during the reign of Mikhail Romanov (1613-1645), despite all their disadvantages, were undoubtedly a step towards the development of statehood after the previous anarchy. The number of *prikazes* increased; their duties became more specific. The officialdom of the Russian empire epoch grew from the unsystematic *prikaz* mining bureaucracy

of the 15th to 17th centuries. Peter's reforms had gradually become mature during the preceding period – during the time of the formation of the centralised Muscovy.

In the reign of Mikhail Romanov, as before, the Judicial Code (Sudebnik) 1550 remained the main legislative document. Gaps in the Judicial Code of 1497 and 1550 were filled by separate decrees, which were supposed to be codified to the compilation of laws. The role of issuing decrees belonged to the *prikazes*, which, for this purpose, appealed to the Boyar Duma, as well as to citizens and self-contained social groups (such as merchants), which appealed to the *Chelobitnyi prikaz*. Sometimes a legislative initiative was introduced by the Zemsky Cathedral – a superior representative body of that era. Judicial codes and decree books constituted one of the sources of the new code of laws of 1649, named the Cathedral Code by Alexei Mikhailovich. In this Code, there were no special sections on mining relations, but certain articles already strengthened the state monopoly on salt-mines and other profitable mines.

Thus, with the help and under the auspices of the government, an industry of ore extraction and metal smelting started to emerge in Russia. In the 15th to 17th centuries, among the explorers and industrialists, a special profession of prospectors and ore experts developed.

Mining legislation of the Russian Empire

Mining (Berg-) privilege and liberty (1719-1782) granted by Peter the Great

The first specialised mining state authority in the history of the Russian state – the Mining *Prikaz* – was established by a Decree of Peter I (1682-1725) dated 24 August 1700. After the establishment in 1712 of collegiums as executive bodies (similar to ministries) instead of the *prikazes*, the Mining *Prikaz* was transformed into the Berg- (Mining) Collegium.

The Decree of Peter I on Mining Privileges dated 10 December 1719 was the key stage in the history of the development of mining legislation in Russia. This Decree determined the principles of mining regalia (sovereign rights to the earth subsoil, which may be assigned for consideration of royalty or free of charge) and mining liberty (principle of equal accessibility to research and use of the subsoil): 'It is allowed to everyone, and each person of whichever rank and dignity is granted with a liberty in any places, both private and foreign lands, to search, smelt, found and clean any metals: gold, silver, copper, tin, lead, iron as well as minerals . . .'

Peter I immediately highlighted key points in all interrelations between the federal and regional authorities, by establishing sole federal authority for mining issues: 'Mining collegium shall be the sole judge for everybody

. . . , governors, voevodes² and other heads must not interfere in mining issues . . . ’

He established the procedure of acquiring the right to subsoil use: ‘Those who have discovered new metals and minerals and who wish to build factories must report to Mining Collegium in writing and send ore samples and ask for the permit to build a factory . . . 250 sazhen³ in length and 250 sazhen in width at the place where ore is discovered must be allocated to a person who has received a charter.’ Therefore, the mining rights were granted to the first applicant (‘first come, first served’ principle) by way of an investiture similar to a Western European concession. At the same time, with the availability of vast undeveloped territories, Peter I was not willing to allot extremely large lots as a claim.

On the other hand, the Decree was aimed at the intensive development of the mineral resources of Russia. The mechanism, excluding the potential abuse of dominant positions by landowners, who would not like to allow anyone except themselves to develop mineral resources located in the bowels of the landowner’s parcels of land, was incorporated into the Decree. Even though the Decree granted a privilege in acquiring mining rights to landowners, it specified: ‘If a landowner has no wish to build factories by his own then he will have to put up with the fact that others will search for, dig and alter ore and minerals in his land so that the God’s benevolence could not remain underneath the ground.’⁴

Under the Decree, landowners’ rights were protected economically – a landowner was entitled to receive 1/32 of the profit from a miner, and a miner was obliged to pay money for proper firewood and construction wood as agreed with the landowner. The mining privilege fixed the mining tax of 1/10 of a miner’s profit from the granted mine based on the foreign experience: ‘We ask for not more than one tenth of profit as they do in other states . . . ’ Apart from a favourable level of taxation, the Tsar’s Decree fixed other measures of investment support and stimulation, in particular,

2 Voevode – head of military forces, and also of the district, region in ancient Russia.

3 Russian measure of length, 1 sazhen = 213cm.

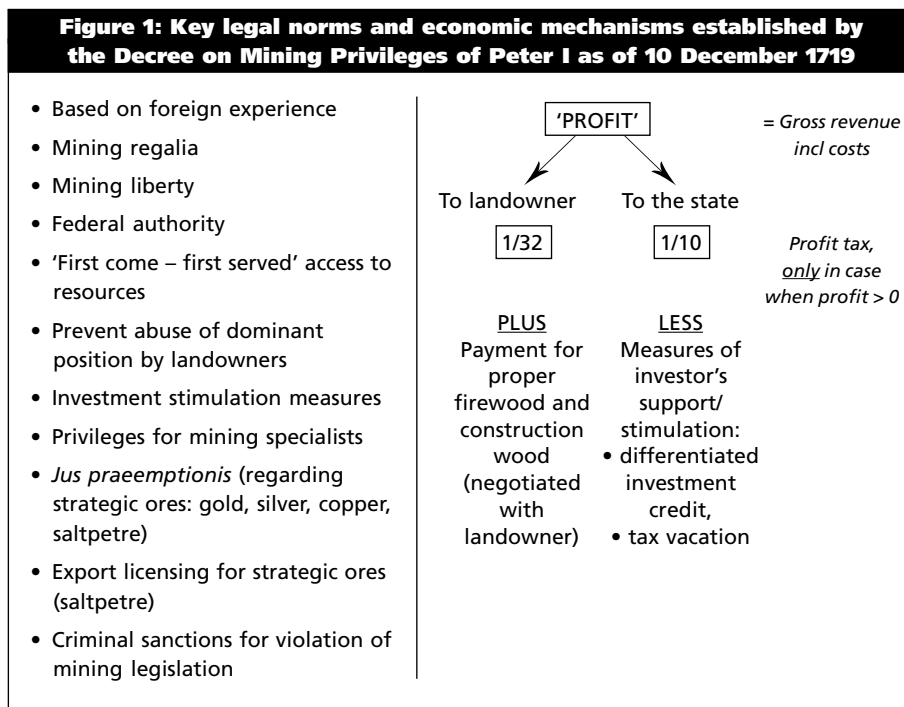
4 A similar mechanism in relation to access to the available capacity of transport systems, aimed at excluding potential abuse of a dominant position by the owners and/or operators of such energy transport systems, is being developed now within the instruments of the draft Energy Charter Protocol on Transit (Art 8). Negotiations on the draft Transit Protocol have not yet been finalised, with access to available capacities being one of the three outstanding issues still to be settled by the Russian Federation and the European Union (see A Konoplyanik, ‘Russian Gas to Europe: From Long-Term Contracts, On-Border Trade, Destination Clauses and Major Role of Transit to . . .?’ (2005) 23 *JERL* 282), although the proposed draft solution for this issue is explained in the Energy Charter Conference document CC299, available on the Charter website: www.encharter.org.

investment credit on favourable terms: 'To those who will want to build a factory credits from the collegium for building shall be provided depending on the quality of ore.' Also tax vacation was provided for a period of the production capacity development: 'but we intend to remit this tenth part for several years should loss be greater than profit during searching for those ores' (this measure was called 'release years'). It evidently results from this legal norm that in the Decree a profit is understood as a gross revenue or proceeds, and a loss is understood as the total of expenses. It follows from this that in the case of zero profitability or non-profitability of the mining industry, a miner was exempt from paying mining tax. The same exemption irrespective of profitability was established by the Mining Privilege for the extraction of strategic raw materials: gold, silver, copper and saltpetre by stipulating the 'first-hand' right to purchase gold at a fixed price by the government in the person of mints (St Petersburg, Moscow, Perm) and local institutions of a monetary chancellery. The Mining Privilege contained the following provision: 'We have the right to buy gold, silver, copper and saltpetre ahead of other merchants. And when there is no money to pay for off-the-shelf gold, silver, copper and saltpetre, then the industrialist shall have a liberty to sell the same at his discretion to any person.' Thus, the first option of purchase of those metals by the treasury – *jus praeemptionis* – was established analogous to the so-called 'right of first refusal' principle that currently exists in a number of industries worldwide.

At that time, saltpetre was used for making gunpowder and had an obviously strategic significance, which is why the Decree contained a clause to license its export: 'Saltpetre that we will not need shall be allowed to be sold, but without a command by the Collegium must not be sent outside the country.'

Key legal norms and economic mechanisms established by the Decree on Mining Privileges of Peter I as of 10 December 1719 are summarised in Figure 1 opposite.

The Mining Collegium was obliged to fix a break-even price as regards purchase for public needs. The Mining Regulations of 1739 fixed a set price for the purchase of gold by the government at the rate of 2 roubles 32 copecks per zolotnik (4.27g). Later on, the price was repeatedly increased (in 1754 and 1763) but this was done only by issuing the emperor's decrees. The government could abandon *jus praeemptionis* and then a gold miner could dispose of gold at his discretion, but its export outside Russia was not permitted either in schlichs and bullions or in coins. A miner was restricted in the execution of such economic transactions with gold as its primary treatment (enrichment) and refinement (parting). These actions were actually a privilege of mints and laboratories of local mining institutions.



Understanding that mining required the wide involvement of specialists, Peter I did not forget about privileges in this aspect either, which would stimulate the development of the ore mining industry: 'Specialists will be exempt not only from money taxes, army and marine services but also from any taxation and will get a salary for a proper work.'

The Mining Privileges Decree provided, in pursuit of public benefit, for criminal sanctions in relation to the violation of mining legislation. 'To those who conceal any discovered ore and do not report of it, or to those who prohibit searches, building of and refuse permit to these factories We declare our cruel anger, undelayable corporal punishment and the death penalty . . . as to the enemy of public benefit . . .'

Such orders and statutes put mining in its proper place. Instead of four to five small metallurgical works existing at the dawn of Peter's reign, by 1724, approximately 30 such works were already operating. In 1761, Russia not only satisfied its domestic needs, but also exported about 50 thousand tonnes of iron. In 1800, by producing 160 thousand tonnes of iron, Russia became a leader in the world having left England behind for a short while.

However, the principle of mining liberty introduced by Peter I conflicted with the feudal law of an absolute estate to such an extent that after Peter's death and the accession of Yekaterina I (1725-1727) to the throne, the decree

(26 September 1727) limiting the liberty of mining fields and allowing the same only for governmental lands was issued. Empress Anna Yoannovna (1730-1740) by a Manifesto dated 3 March 1739 approved Mining Regulations (*Berg-Reglament*) to restore the mining liberty principle. The Mining Regulations remained unamended until 1782, ie with a few exceptions the mining liberty as regards all types of land existed in Russia from 1719 to 1782.

In her Manifesto on Mining Regulations Anna Yoannovna, retaining all the privileges and regulations of the Mining (Berg) Privilegium by Peter I, went further in the direction of stimulating mining activity. She reduced the fee for the use of private lands from 1/32 of profit (3.1 per cent) to two per cent, allowing the Mining Collegium, depending on the economic conditions of a specific field, to exempt any of them from taxes for three to four years. In addition, there was an order in the case of the implementation of large-scale projects to provide a loan, which would have to be repaid when the economy of a mining project allowed.

Introduction of the accession system (1782-1917)

However, protecting the interests of agrarians, Yekaterina II (1762-1796) by a Manifesto dated 30 June 1782, cancelled the mining liberty and restored the accession system once and for all. That system implied that the subsoil belonged to the land: 'Everyone's right of property shall apply not only to the surface of land they purchased or inherited but also to the interior of that land and waters underneath it, to all the precious minerals and the metals made from them.' By cancelling the mining liberty, the Manifesto simultaneously granted a miner his liberty from interference by the mining administration in the economic arrangements of the miner. The Manifesto prohibited the State Chambers and other offices and authorities from interfering in management and the disposal of factories and the mines of private persons.

Up to 1917 the rights of a landowner also applied to the earth's crust. Article 236 of the Mining Regulations of the Russian Empire (1857) provided that private ownership of real property covered not only the surface of the land but also its interior, and that is why ownership applied to all its precious minerals and all metals originating from them. Article 237 continues, 'that is why every landowner is allowed to search for, dig, smelt, found and refine any metals'. As to the accession principle, Russia's legislation was similar to that of England and its colonies, as well as the United States, where a landowner was acknowledged as the owner of the 'entrails' (earth's crust) of his or her land.

At the close of the 19th century, the territory of the Russian Empire was about 20 million km² (without Finland and Poland). The land belonged to different classes of owners, and, subject to this, the land was divided into several classes, which differed in the scope of land rights, and, correspondingly, in the procedure of granting mining rights: state-owned, privately owned, cabinet (the Tsar's private property), *udelniye* (belonging to the members of the royal family), church and cloister, municipal and *posad* (the lands of small towns and suburbs, where historically merchants and manufacturers had been leaving) as well as Cossack lands. State-owned lands made up 32.6 per cent of the entire land of the Russian Empire, in European Russia – 15.4 per cent.

A landowner was entitled to exploit a deposit himself or admit another person to his land to be occupied in mining without the need to request a permit. The only thing was that he was obliged to submit a declaration to a local mining administration containing information on the area of the entrails, the type of mineral, subsoil user and source of financial assets. In relation to gold, silver and platinum, in addition to these requirements, there was an obligation to provide advance notice to the government of the start of development. Without this notice, extraction was acknowledged as unlawful and was punished according to criminal law. The number of persons whom a landowner was able to permit to develop precious metal fields was limited. This special holder of mining rights was expected to comply with the criteria established by the law. The general rule was that the term of providing mining rights to private lands was limited to 12 years but could be extended to 30 years for the construction of a processing plant and smelter. In specific cases, the term of use of minerals could be extended by the Ministry of State Property after submittal of a petition addressed to the Tsar.

Private mining work was permitted on state-owned lands too. In relation to these lands, there was an option for the government to provide mining rights. The struggle between two essential principles – mining liberty and accession – lasted in Russia for almost 150 years and in many territories of the Russian Empire the mining liberty principle was in force with respect to a number of minerals. Consequently, Paul I (1796-1801) by a Decree dated 24 August 1798 permitted every person interested in extracting black coal in Moscow and Donetsk basins to do so under a voluntary agreement with a landowner, but in the case of the non-availability of that agreement, under the Mining Privilege by Peter I. In general, taking into account a wide variety of land categories and land titles, the mining rights system was complicated enough. At the same time, mining relations were adjusted by very detailed Mining Regulations adopted in 1832, which were routinely updated. By 1912, the Mining Regulations consisted of three books and included 1,460 articles.

Yekaterina II in the Manifesto of 1782 rejected the *jus praemptionis* (first option purchase) for gold and returned to the procedure of charging a mining tax of 1/10 on gold, not on profit but on the quantity of smelted metals. A miner acquired the right to dispose of the extracted gold as from the moment of its extraction. In fact there was a provision under which it was permitted to export abroad only a gold coin received in exchange for metal delivered to the mint. But the coin was not in free circulation abroad, it was re-smelted and re-assayed, which involved additional expenses for the owner of such coins.

The Mining Regulations issued in 1832 fixed the amount of the mining tax on gold, silver and copper in kind at the rate of 15 per cent of the smelted metal from smelters and mines on state-owned lands and ten per cent from smelters and mines owned by proprietors. The Mining Regulations issued in 1857 introduced a differentiated taxation procedure for the gold mining industry in the state-owned lands in Siberia. All gold mines were divided into four groups subject to the quantity of annual output. Tax rates varied between five per cent for group I (output under 32kg) and 20 per cent for group IV (output above 160kg).

The Mining Regulations of 1857 reinstated the standard under which all gold extracted from private mines on state-owned Siberian lands was to be handed over to the government. The above-mentioned *jus praemptionis* of the treasury continued to exist only in respect of mines located on privately owned lands.

In general it should be noted that by the beginning of the 20th century the existence of such a legal institution as the first option purchase, or the requirement of the compulsory delivery of gold to the treasury, was explained by fiscal purposes since this method of collection of mining tax was best for the government. However, these institutions significantly slowed down the circulation of gold in the state. As a result, the Mining Regulations of 1893, when introducing the public tax on trade, created the procedure of free circulation of gold for enterprises paying that tax. Gold miners were enabled to deliver gold for processing to state-owned enterprises and laboratories and receive gold in bullions or use the previous procedure. The government sanctioned the establishment of private gold-smelting enterprises.

Governmental mining regulation system

In the 19th century, the governmental mining regulation system continued to develop. In 1802, Emperor Alexander I (1801-1825) established a ministries system. In 1802-1806, mining fell within the Ministry of Commerce. In 1806, the Mining Department was established within the framework of the Ministry

of Finances, which, in 1811, was transformed into the Mining and Salting Department, then, from 1863, into the Mining Department of the same Ministry. From 1873 to 1905, the Mining Department had been affiliated with the Ministry of State Properties, which was in charge of the exploitation of state-owned lands and other natural resources. In 1882, for the first time, the Geology Committee was constituted in the Mining Department. In 1905, the Mining Department was passed to the Ministry of Trade and Industry.

The entire territory of the Russian Empire was divided into 12 mining oblasts, each of which included one or several provinces. Depending on specific conditions, in oblasts several mining districts were created in which mining administrations were formed. The Mining Department developed staff and budgets, adjusted the activity of districts, determined their borders and altered them when necessary.

The responsibilities of the mining administrations included 'supervision over strict observance of laws and orders of the government in all sections of mining administration; general supervision over technical correctness of mining works in cases specified by law; maintenance of proper economy and the highest level of technical support at state-owned factories; care about development and improvement of factory production and searching for new methods of that,' and so on.

All state-owned mining factories and mining industries were under the jurisdiction of the Ministry of Trade and Industry. The Ministry had sufficiently wide responsibilities and powers aimed at the provision of effective and mutually beneficial activities of state-owned and private factories. The Ministry had a special budget, the purpose of which was to promote the exploration of minerals and to render financial and technical assistance not only to state-owned but also to private functioning enterprises. The Ministry was responsible for supervision over the carrying out of an effective tax policy, for the creation of a normal competitive environment and the carrying out of foreign economic activity in the interests of the state.

Mining legislation of Soviet Russia and the USSR

Military communism and market economy (NEP) period

A new stage of development of Russia's mining legislation began after 1917. The Decree of the Council of People's Commissars of the Russian Soviet Federative Socialist Republic (CPC of RSFSR) dated 30 April 1920 revoked the private ownership of the 'surface of the land and its entrails'. Land and the earth's crust (entrails) could only be given for use.

The following procedure of use and disposal of entrails areas was established:

- All the acts and agreements concerning the rights to the earth's crust on the part of any persons and private companies were declared invalid.
- The exploitation of mineral resources and the distribution of the extracted minerals, as well as the general management of and supervision over mining operations, were transferred to the jurisdiction of the Mining Board of Supreme Soviet for National Economy (SSNE).
- The extraction of generally found minerals was transferred to the jurisdiction of regional Soviet authorities.
- Plots where minerals were discovered and which were worthy of execution of exploitation works on them were alienated and given for use to 'appropriate institutions and persons for development'.

To develop this Decree, the All-Russian Central Executive Committee of RSFSR as a legislative body provided for by the Constitution of RSFSR of 1918 adopted 'Regulations on Mineral Resources and their Development' on 7 July 1923.

This statute contained 34 articles. By way of comparison, the mining legislation of the Russian Empire in 1912 consisted of three books and included 1,460 articles. It is obvious that after the collapse of the state machine of the Russian Empire as caused by the Bolsheviks a majority of the previous legislation addressed to government bodies and authorities could not be consolidated into the legislation of RSFSR, and the legislator had no time for a detailed development of principles aimed at the Soviet authorities' system, which was undergoing formation.

The general provisions of the Constitution of 1918 existing at that time specified that 'mineral deposits contained in the entrails of the earth within the bounds of RSFSR constitute the property of RSFSR', ie entrails and their resources, were owned by the state.

Disposal of the earth's crust for mining purposes, organisation of geological investigations and exploration, general management and regulation of the mining industry, supervision over mining works and the protection of mineral resources fell within the jurisdiction of the Central Mining Administration of the RSFSR SSNE.

All citizens and legal entities of the RSFSR had the right to be engaged in mining. This right could be granted to foreign nationals and legal entities but in each individual case a permit from the RSFSR CPC was required, and 'execution of mining works by state-owned organisations shall be subject to the same rules as execution of the same by private companies and persons'.

The Law of 1923 set forth the procedure for the acquisition of rights to the execution of all the stages of exploration work. The mining liberty principle was applied to prospecting work not requiring any material

disturbance of the integrity of the entrails. Prospecting work, with the exception of searches for radioactive ores, 'might be executed everywhere without any special permits thereto' but these rights were not exclusive because 'execution of prospecting work by one miner does not constitute an obstacle for execution of the same within the same area by another miner'. That Law guaranteed discoverers of deposit acquisition the exclusive rights to explore (determine a detailed configuration of deposit, description of mineral reserves and its economic value) based on a special application. The duration of such a right to exploration was limited to five years.

The right to exploration was granted to a miner having discovered a deposit by the Central Mining Administration on the basis of the miner's application. The law regulated the procedure of the mining lease and land allotment for subsoil use (exploration and extraction of minerals). The plot of land was allotted in compliance with local regulations under the Land Code of the RSFSR. A miner who received the allotment was entitled to develop all the deposits of the mineral for the extraction of which he had been granted with the allotment (claim), as well as all the other minerals. A claim was granted to a miner until the full extraction of the field's mineral was achieved, ie without a limitation of term. The claim right conferred to a miner might be assigned to another person from among those having the right to mine but not otherwise as by a written authority from the Central Mining Administration. In the case of renunciation by a discoverer for any reason from field development, the right to its development was conferred to another person by way of public tender, the conditions of which were determined by an authorised public body.

The Law of 1923 regulated interrelations between a miner and user of lands and owners of neighbouring claims. A miner was conferred with the right to servitudes, with which neighbouring lands were burdened, for the construction of facilities necessary for 'water drain, drawing of air to a mine and building of roads'.

The final section of the Law of 1923 fixed a fee for use of the subsoil. This fee was 0.5 rouble in gold per year for one *dessyatina* of the claim area if the deposit was not explored in detail, and one rouble in gold (0.774g) if the deposit was leased and thereby already proven. For extraction a royalty of not more than five per cent of the price of the production was charged additionally. The exact amount of the royalty for the mined output was fixed by the SSNE as agreed with the People's Commissariat of Finances.

Taking into account that a small provision of the Law of 1923 did not allow for the providing in detail of all possible situations requiring

governmental regulation, the Law authorised the SSNE and the Central Mining Administration in certain cases, as agreed with the concerned authorities, to issue appropriate rules, instructions and regulations on application of this Law.

USSR Mining Regulations 1927

The 'Regulations on Mineral Resources' 1923 were in force up to 1927 when they were superseded by the more detailed Law, 'Mining Regulations of the USSR' (the 'Mining Regulations').

The Mining Regulations contained seven sections:

- (1) General provisions.
- (2) On institutions managing the mineral resources.
- (3) Classification of mineral deposits.
- (4) Procedure of acquisition of the right to development of mines
 - (a) Deposits not yet discovered.
 - (b) Discovered deposits.
- (5) On surface areas necessary for mines.
- (6) Interrelations between neighbouring miners.
- (7) On mining supervision.

The Regulations confirmed the prohibition of private ownership of mineral resources as secured by the USSR Constitution of 1924.

The Mining Regulations were similar to the Basics of Mining Legislation. They established general principles of access to mineral resources and determined a common procedure for mining. For further development of the Regulations, the publication of applicable mining laws of the Soviet Republics (constituting the USSR) was planned. The exclusive competence of the USSR was stipulated as to access to the radioactive ore deposits, development of which was declared a state monopoly. The Supreme Soviet for National Economy of the USSR and Supreme Soviet for National Economy of Soviet Republics were the institutions managing mining in accordance with the distribution of powers as established by the Mining Regulations. The disposal of generally found and therapeutic minerals might be transferred from the competence of SSNE of Soviet Republics to the competence of other bodies of Soviet Republics.

Mining, which included all kinds of activity relating to prospecting, exploring and development of mineral deposits as well as appropriate preliminary work, was designated as the subject of regulation of the Mining Regulations. The extraction of peat and underground water did not relate to mining and was not regulated by the USSR Mining Regulations and mining laws of the Soviet Republics. The right to mining was granted to all legal

entities and persons, including foreign ones. However, the latter were required to be granted a special permit from the USSR CPC certifying their admission to mining works in the territory of the USSR.

The Mining Regulations did not define the notion 'the earth's crust' but the term 'minerals' was defined as 'solid, liquid and gaseous components of the earth's crust, which may be mined for industrial purposes by means of extraction and separation of them whether they are in the subsoil or outcrop'. The natural accumulation of minerals was considered as a deposit. According to the degree of investigation of the earth's crust, a classification was introduced in accordance with which 'all the mineral deposits were divided into "already discovered deposits" and "undiscovered deposits"' (Article 15), which predetermined a different legal status for deposits depending on their level of investigation.

Accumulations of generally found minerals were considered as 'already discovered' deposits, irrespective of the execution of prospecting and estimating works with respect to them, as well as such accumulations of other minerals, the availability of which was established by the formerly executed exploration or mining works. All the other areas of the earth's entrails, the presence within the limits of which of deposits required confirmation by prospecting and exploration works, were considered as 'undiscovered deposits'. Thus, the classification terms introduced in the Regulations essentially defined two main stages of resources development: the first stage (undiscovered deposits) covered prospecting and exploration work and the second one (already discovered deposits) covered supplementary exploration and development works.

For prospecting for 'undiscovered deposits' at the economically undeveloped territories an informative order was provided for – prospecting works with the exception of stipulated cases were allowed over the entire territory of the USSR 'without anybody's permit and irrespective of a landowner's consent'. No fee for the acquisition of the right to prospect and explore was charged. In the above-mentioned stipulated cases, namely, for territories occupied by industrial and military objects, nature conservation zones and on lands in somebody's economic use, the licensing procedure for prospecting work was provided for. Licences for prospects were issued by the mining authorities of the USSR SSNE or of the Soviet Republics SSNE. These licences, issued for the period of one year at the most, determined the area of prospecting works without specifying the term of their execution. If the work was not executed or was interrupted for the period to exceed the time provided for by the legislation of the Soviet Republic, the prospecting licence was cancelled and in order to resume the work a new licence had to be obtained.

As to prospecting for oilfields, a number of the following exclusions from the common procedure was established:

- obtaining a licence was mandatory;
- the area of prospecting territories was limited to 50-150 hectares (0.5-1.5 km²); execution of works outside this area was not allowed;
- prospecting in the allotted area for other minerals was not allowed;
- the licence was issued for a period of no longer than one year, etc.

To acquire the rights to exploration work, obtaining a licence was obligatory. The oil exploration licence, valid for two to four years, determined a compulsory annual minimum of expenditure. In the case of twice failing to meet such a minimum, a miner was deprived of the right to prospect.

The 'discovered' deposits by their national and economic importance were divided into three groups: of all-union importance, of Republican importance and of local importance. The Regulations determined the competence of the state authorities according to the levels of regulation applicable to this division. The 'discovered' deposits were granted for supplementary exploration and development on a contractual basis. Such contracts determined the kinds and scope of the work, the terms of its execution, a minimum annual output and amounts of capital investments. Depending on the degree of preparedness (extent of exploration) of the deposit, a miner might be exempt from a compulsory minimum output for the period of five years. Royalty rates were determined according to the *ad valorem* principle, ie as a royalty from actual output. Their fixed amount for certain minerals of different regions was established by the mining laws of the Union Republics at the rates of not more than five per cent for oil and three per cent for all other minerals.

The Mining Regulations contained a number of discriminatory elements for the private sector. Thus, while for state-owned mining enterprises the fee was charged in accordance with the quantity of the minerals actually mined, for the rest of the miners the fee was based on the quantity of mined minerals but not below the quantity provided for by the compulsory work programme under the contract.

The contract contained other essential conditions, such as ownership rights for buildings and constructions erected by a miner, a right to transfer the appropriate rights to third parties including by mortgaging, and other rights and obligations of parties including the procedure of dispute settlement and other terms and conditions were determined. In other words, it was a terminal and compensatory contract typical for relations under civil law.

Essential principles of the subsoil legislation and the Mineral Resource Code 1976

Until the adoption in 1976 of the 'Essential Principles of Subsoil Legislation of the USSR and Union Republics,' the Mining Regulations of the USSR remained the basic legislative act in the field of mining relations. But as early as 1936 with the adoption of the new USSR Constitution and the introduction of the principle of free-of-charge land and subsoil use those natural objects were withdrawn from civil circulation. This predetermined a significant difference in the 'Essential Principles of the Subsoil Legislation of the USSR and Union Republics' and the Republican laws developed on their basis (in particular, the Mineral Resource Code of the RSFSR) from the Mining Regulations.

The 'Essential Principles of Subsoil Legislation' consisted of 11 sections and 51 articles. The 'Subsoil Code' adopted in 1976 was basically the same in structure and contents as the 'Principles'. In accordance with the USSR Constitution in force at that time, the exclusive state ownership of mineral resources considered as 'a common property of all the Soviet people' to be granted only for use was proclaimed. All the mineral resources of the USSR constituted a unified state fund of mineral resources consisting of both used and unused parts of them. Competence of the USSR and Union Republics was regulated in the field of the mining relationship to be understood as the social relations in the field of subsoil use and conservation. Governmental regulation in the field of subsoil use and conservation was vested in the Councils of Ministers and Executive Committees of local Councils of People's Deputies as well as in the special state authorities. The separation of powers between them was not stipulated in the law.

After the liquidation of the private mining industry, mining relations management was built up in a strict compliance with the principles of the administrative command system. The State Authorities (Ministries) combined the functions of normative regulation and directive management of the economic activity of subordinate mining enterprises. Practically every industry-branch ministry (of ferrous, non-ferrous metallurgy, coal, oil industry) acted as a giant firm in which individual mining enterprises acted as subdivisions. Since access to the subsoil was free of charge the profit from the development of deposits with high rental properties was withdrawn to the budget and was partially used to cover losses from the development of marginal fields. Such organisational form selected by heads of the Soviet Union in the late twenties was completely adequate in the early thirties to the objectives of quick mobilisation of resources, rapid industrialisation and achievement of advantages from savings due to the economy of scale ('concentration effect'). Despite high transaction costs, this system met the

requirements of extensive economic growth on the basis of the enormous natural resources of the country: few people have any doubt regarding the size of the minerals and raw materials base of the former USSR, which has basically passed to the present (post-Soviet) Russia.

‘The basics of the Subsoil legislation of the USSR and Union Republics’ and ‘RSFSR Subsoil Code’, dated 1976, formally secured the practice of the previous 40 years in managing the mining industry. All economic levers of mining relationship control were totally excluded from them. Essentially only access to the subsoil was designated as the subject of the mining legislation regulation.

Only after the adoption of RF Subsoil Law ‘On the Subsoil’ at the stage of market reforms in 1992, did the use of the subsoil became chargeable again as one of the basic principles of subsoil use. After the adoption of the above law, the right to use the subsoil, chargeable by mining entities, was introduced into civil circulation once more.

Studies of concessions history in Russia and the USSR

Policy of granting concessions during the NEP period (1920s)

After the revolution in 1917 and victory in the Civil War, the overcoming of devastation became the main problem for the new Russian Government. In order to develop industry and agriculture, up-to-date equipment was required and to achieve the above goal the government had to find the most effective solutions. The governing body of the country, and first of all the head of the government, Vladimir Lenin, understood that it was possible to use the interest from foreign capital in the use of Russia’s natural resources. After the devastating First World War, Western Europe underwent a critical deficit in raw materials. It was necessary to admit foreign capital to Russia and use it to overcome the devastation. Under the conditions of political instability it was possible to do this only by offering certain incentives and guarantees to potential foreign investors. That is why the Russian Government turned to an economic tool, which was popular at that time – concessions (see box).

In December 1920, Lenin wrote:

‘In order to restore the world economy it is necessary to use Russian raw materials . . . it is acknowledged by Canes in his book called “Costs of Peace” . . . The Soviet Government . . . has a plan for reconstruction of the whole world economy . . . We put forward . . . a world program while considering concessions in respect of the world economy . . . We are winning over all the states ravaged by the war . . . In the Decree on Concessions we speak on behalf of all the humanity with an economically

Historical development of concessions

Concessions are a basic form of granting the rights to mine minerals in the countries of the continental law family. In Europe they emanated from the Roman institute *precarium* (the Russian analogue is *pozhalovanie* (investiture)). A concession as a special type of agreement between the host state and the foreign investor for minerals extraction had been known since the late 19th century, but the first really well-known one is dated as 1901, when the first (successful in the long term, but only third in a row) concession for oil prospecting and production in Persia was granted to William D'Arcy for a period of 60 years.

The major development of concession mechanisms was related to Middle East oil. The first petroleum agreement to be signed in the Middle East was between the British Baron Julius de Reuter and the Persian Shah Nasr-ed-Din on 25 July 1872. It granted de Reuter a 70-year exclusive concession to explore for and produce oil, gas and other mineral resources except for silver, gold and precious stones, as well as the right to operate railways and trams throughout Persia. Another concession, including exploration for and production of oil, was bought by Reuters in Persia in 1889. But both concessions stimulated a wave of protests in Persia itself and strong resistance from the Russian Empire. In any event they proved very costly owing to unsystematic and unsuccessful attempts to discover oil. Both concessions were ultimately annulled.

Perhaps the best-known concession historically is the D'Arcy concession in Persia, which gave birth eventually to British Petroleum. On 28 May 1901, His Imperial Majesty Muzaffar al-Din Shah signed a concession granting William Knox D'Arcy 'a special and exclusive privilege to search for, obtain, exploit, develop, render suitable for trade, carry away and sell natural gas, petroleum, asphalt and ozokerite . . . for a term of sixty years'. The concession granted to D'Arcy covered all of Persia except five northern provinces near the Russian border.⁵

perfect program for reconstruction of the world economic forces on the basis of the use of all the raw materials wherever they would be.'

The concession's peculiarity lay in the fact that it was a civil law agreement and the stability of its terms and conditions might be defended in court as well as beyond the national jurisdiction. It is evident that although private companies were as a rule the investors in concessions, their interests might be protected where necessary by the whole power of the state.

As per the RSFSR Constitution of 1918, the legislative power in the RSFSR was exercised within their competence by three authorities (in the line of diminishing power): All-Russian Congress of Soviets (Vserossiyskiy S'ezd Sovetov), All-Russian Central Executive Committee (ACEC) (Vserossiyskiy Tsentralniy Ispolnitelnyy Comitet) and Council of People's Commissar (CPC) (Sovet Narodnykh Komissarov). The latter was authorised to issue decrees and orders on governmental regulation, which were compulsory for all. The most important of these were approved by ACEC, thus acquiring the force of the law.

⁵ See A Konoplyanik, 'Energy Security and the Development of International Energy Markets' in *Energy Security: Managing Risk in a Dynamic Legal and Regulatory Environment* (B Barton, C Redgwell, A Ronne and D N Zillman, eds, IBA/OUP, 2004), pp 47-84).

The attitude of the Russian State to granting concessions to foreign companies was unambiguously determined less than a year and a half after seizing power in November 1917. Early in February 1919, while making a draft decree of the CPC on granting concessions for the great northern railroad, Lenin wrote: 'The CPC . . . admits concessions to representatives of foreign capital in general as principally permissible in the interests of development of the productive forces.' The issue of concessions was in the focus of the attention of the Chair of the CPC at the end of 1920 and the beginning of 1921 and did not drop out of his sight until his death. Only two lines are dedicated to the issue of concessions in one of Lenin's last works, 'On Cooperation,' but in essence they have put the policy of granting concessions at the centre of the new economic policy (NEP) of the country: 'The practical purpose of our new economic policy is to receive concessions,' wrote Lenin on 6 January 1923, one year before his death in January 1924.

On 23 November 1920, the CPC adopted the ordinance (Decree) No 481 'General Economic and Legal Terms and Conditions of Concessions'. On 6 December, the brochure 'On Concessions' was published in Russian and other languages (for circulation abroad), which contained the text of the Decree, maps and descriptions of concession objects: forest objects in Siberia and in the north of the European part of the country, mining objects in Siberia (including, in particular exploration and development of deposits of iron ore, coal, copper, complex ore, graphite, pyrites, tungsten and tin), and food objects in the south-east of the Republic. By a Decree of the CPC dated 1 February 1921, the issue of oil concessions in Baku and Grozny was approved. The issue of a concession for Kamchatka was discussed.

The Decree on Concessions by the CPC of RSFSR dated 23 November 1920 played a special role (not yet appreciated in full) in the development of Russian mining law. The text of the Decree was comparatively short and included a preamble and six articles. The preamble stated:

'More than a year ago the Council of People's Commissars, as a practical problem, put on a waiting list the attraction of technical and material facilities of the industrially developed states both with a view to restore in Russia one of the main raw materials base of the whole world economy, and to develop productive forces in general, undermined by the world war. The process of reconstruction of the Russia's productive forces and at the same time of the world economy may be speeded up by many times by attracting foreign, state-owned and public utility institutions, private enterprises, joint-stock companies, cooperatives and working organizations of other states to mining and processing of Russia's natural resources. Raw materials famine and excess of capitals

in some European countries, especially in the United States of America, insistently induced the foreign investors to turn to the Government of the Soviet Republic with specific proposals to apply the foreign capital on some or other terms and conditions for use of the natural resources of vast oblasts of the RSFSR.'

The normative part of the Decree contained requirements limiting the circle of persons with whom the government might enter into concessions. The concessions 'may be concluded with reliable, trustworthy foreign industrial companies and organizations'. The same paragraph contained a resolution of the CPC 'to publish the following general economic and legal terms and conditions of concessions and to list concession objects'. The Decree had no list of objects (establishments) proposed for concession. This list was distributed a month later in December 1920 in a specially published reference brochure 'On Concessions'.

Six final articles of the Decree contained compulsory terms and conditions of concessions:

- (1) A concessionaire shall be given a fee by way of the product share as stipulated in the concession agreement with the right to export abroad.
- (2) In the case of application of special engineering developments in big sizes a concessionaire shall be granted with trading privileges (namely, procurement of machinery, special agreements for large orders, etc).
- (3) Subject to the nature and conditions of a concession prolonged periods shall be granted to ensure a full indemnification of a concessionaire for risks and costs of technical facilities invested in the concession.
- (4) The Government of the RSFSR shall guarantee that the property of a concessionaire invested in the venture shall not be subject to nationalisation, seizure or requisition.
- (5) A concessionaire shall be granted with the right to hire employees and office workers for his ventures at the territory of the RSFSR in compliance with the Labour Laws Code or a special agreement ensuring observance with respect to them of certain working conditions protecting their life and health.
- (6) The Government of the RSFSR shall guarantee to a concessionaire the impermissibility of unilateral amendments to concession terms and conditions by any orders or decrees by the government.

It is worth noting the content of Article 1 of the Decree formulating the 'production-sharing' principle, ie partition between the government and a concessionaire of the products output, part of which, per the Decree, was to be transferred to the concessionaire as 'a fee' and to cover costs incurred by him. Thus, analysing the terms and conditions of concessions offered by the government of the RSFSR, and later of the USSR, to foreign capital, on the

one hand, and types of agreements (applied in the world practice) between international corporations and host countries, on the other, we come to the conclusion that agreements concluded by Russia/USSR in the 1920s did not in essence constitute concessions. The term ‘concession’ describing the practice of contractual relations with foreign companies in Soviet Russia during the NEP period has little in common with the type of agreement applied at that time in world practice and bearing the same name. The Russian concession of the 1920s is neither a traditional concession nor a modernised one in its international interpretation. Furthermore, it was not a concession at all, but a contract, because it did not have the main feature of concession-type agreements of that time – it did not transfer ownership for the developed natural resources (subsoil) to a concessionaire. Consequently, the Russian concession of the NEP period is nothing more than a fixed expression formed at that period when there were merely no other types of agreement between an investor and a host state.

The Russian concession (in particular the oil concession as is evident from specific conditions of the agreements in Baku and Grozny) of the 1920s had features of a particular type of a contract, namely a ‘production-sharing agreement’ (PSA), which, as considered, appeared in Indonesia for the first time in the world oil industry only 45 years later – in the early 1960s. A variant of this Russian contract of the NEP period conformed to the current model of the PSA with one-step production-sharing, widely applied, for instance, in Lybia.

For example, in July 1923, when discussing a draft letter to Sinclair with conditions for a proposed granting to him of an oil concession at Sakhalin, the Politbureau (Presidium) of the Central Committee of the then All-Russian (Bolshevick’s) Communist Party had indicated some key obligatory determinants of the proposed concession:

- (1) to determine the programme of works (POW);
- (2) dependent on the POW, to fix an investment volume;
- (3) to establish a fixed production-sharing agreements with a state portion equal to 30 per cent of gross production;
- (4) majority in the governing board and the right to establish a board of directors;
- (5) control over the financing of the whole enterprise;
- (6) percentage from net profit (ie dividends);
- (7) immediate loan to the Soviet government;
- (8) orders to be placed at Russian manufacturing plants; and
- (9) 30-40 years of duration for the concession.

(At the end of the letter it was to be indicated that the concession agreement could be signed only after normal relations between the USSR and the United

States were reached, which were in practice normalised only ten years later – in 1933, when diplomatic relations between two countries were established).

As mentioned above, it is commonly accepted that the first successful concession in world practice was issued in 1901 (D'Arcy concession), thus giving the birth to so-called 'traditional concessions'. After 20 years, so-called 'concessions' (in essence – production-sharing agreements/contracts) appeared in Soviet Russia, and only 27 years later the first modernisation of existing agreements took place in world practice – in 1948 Venezuela introduced a 50 per cent corporation profits tax into concessions already existing in the country. That is how so-called 'modernised concessions' have appeared. But it appears from the above that it was Soviet Russia that was the first to modernise the only type of agreement (existing at that period) between the host country and a foreign company for the development of natural resources. Unlike Venezuela, Russia did not improve the conditions of concessions within the framework of the existing type, but switched over to an essentially new type of agreement based on rental relations and having the features of subsequent production-sharing contracts.

Article 4 of the Decree on Concessions guaranteed that 'the property of a concessionaire invested in the venture shall not be subject to nationalisation, seizure or requisition'. Under mass expropriation, which took place in 1917-1920 in Russia, such a clause was undoubtedly essential.

Article 5 took into account the principles of the constitutional system of the RSFSR – the declaration of the rights of working and exploited people. That is why the Decree specifically stipulated the application of the RSFSR labour legislation in case of recruitment by a concessionaire of Russian workers and employees.

Article 6 of the Decree played a key role in the understanding of the attractiveness of the Russian concession for a foreign investor. This article formulated a 'stabilisation clause' (also known as a 'grandfather's clause'). This legislative regulation did not allow the worsening of the investors' conditions under the concession by subsequent amendment to the host country's legislation.

In the 1920s, the Russian (later Soviet) Government was the apparent world leader in the establishment of regulations on concessions between the state and foreign investors. Lenin repeatedly spoke about the popularity of the idea of concessions. He explained that concessions were not at all the way of destructive exploitation of natural resources but more a way to attract capital for a complex development of the territory on the basis of development of its natural resources and with the application of advanced foreign experience, and that without concessions and without the attraction of foreign capital it would be impossible to raise the country from devastation.

Lenin (in December 1920 and April 1921) said:

‘The Soviet government invites foreign capitalists to obtain concessions in Russia. What is a concession? It is an agreement of a state with a capitalist undertaking to supply or improve the production (for example timber production and rafting, coal, oil, ore production, etc) with payment to the government of a share of the output and gaining of other share as a profit . . . A concession is some kind of a lease. A capitalist becomes the leaseholder of a part of the state ownership under the agreement for a certain term but does not become the owner. The ownership shall continue belonging to the state . . . Under such conditions the development of capitalism does not pose any threat and increase in products constitutes benefit for workers and peasants . . . without making any denationalisation the workers state shall lease certain mines, woodlots, oil-fields and others to foreign capitalists in order to receive from them supplementary equipment and machinery allowing us to speed up the restoration of Soviet large-scale industry.

...

If there is a question on whether concessions are economically profitable or unprofitable then we can emphasize that the economical profitability is of no doubt. Without concessions we will not be able to implement our program and electrification of the country; without them it is impracticable to restore our economy within ten years.

...

If we fail to carry out the policy of granting concessions and attract the foreign capital to concessions then it is no use speaking about serious practical measures for improvement of our economy position. It is impossible to seriously put a question on immediate improvement of the economy position unless the policy of granting concessions is applied.

...

Observance of scientific and technical rules and regulations and reasonable use . . . are required . . . Where do these notions come from? They come from the Russian and foreign legislations. Thereby we eliminate any fears that these rules are made up by ourselves because otherwise no capitalist will begin talking to us. We take what is in the Russian and foreign legislations. If we take the best thing in the legislation and any foreign legislation, then on this basis we have an opportunity to ensure the standard, which is now being achieved by a leading capitalist. This is a well-known business standard and it is taken from the capitalistic practice. On the basis of capitalistic relations we ought to prove the applicability of these conditions for capitalists,

advantage of these conditions to them and at the same time we have to be able to derive benefit from it for ourselves, too. Otherwise any talk about concessions is a twaddle . . . For example, in respect of oil we have begun to obtain materials from the Russian, Romanian and Californian legislation.'

Emphasising the political and economic arguments in favour of concessions, Lenin gave priority to political arguments, repeatedly justifying them in his numerous speeches concerning this issue. There was only one leitmotif in all his speeches under those specifically historical conditions: a concession did not represent finding peace with capitalism, but the continuance of war under new economical conditions. 'With such way of posing a question of concessions we will easily convince the giant majority of the Party comrades that concessions are necessary.'

It was supposed to gather political fruits even from the negotiation process on concessions – the attraction of international capital was expected to break the ice of hostility with other states with respect to Soviet Russia, thereby it was proposed to play on the contradictions between different groups of the Western States.

In December 1920, Lenin said:

'The issue on concessions with respect to political reasons . . . it is necessary to use oppositions and contradictions between two imperialisms, between two groups of capitalistic states by setting them against each other. Until we win the whole world we must keep to the rule: we ought to know how to use contradictions and oppositions between imperialists.

. . .

The main interests in negotiations on concessions were political ones . . . economically this question is absolutely secondary and all its essence lies in political interest. Proposal of concessions or enticement with concessions is beneficial for us. A concession implies some or other reconstruction of peace agreements, restoration of trade relations; it implies opportunity for us to start direct purchasing in large quantities of the machinery necessary for us. We don't believe for a second in lasting trade relations with imperialistic powers: it will be a temporary break.'

Thus, despite self-contradictions in the justification of the policy of granting concessions, the Soviet Russia of that time was almost half a century ahead of the rest of the world in forming an economic mechanism (progressive for those times) of interrelations between a host country and a foreign company in the extractive industries (mining) by having selected and creatively processed for it all the best things from the legislation of the main natural resource-producing countries. In the 1920s, Soviet Russia, under the 'colonial'

structure of its export, started with the offering of wood, mining and food concessions and railroads with the subsequent involvement of factories and plants in concession practice. Concessions were mainly granted in remote areas; the government selected their place thereby solving the problem of developing the territories. Concession terms and conditions were individual in every region and they took into account foreign experience, which was considered advanced in those times.

It is important to note that the subsequent practice of applying concessions did not sufficiently justify hopes, although there was good reason to count on the mass attraction of foreign investments. From 1922 to 1927, at the peak of conducting NEP, 2,211 concession offers were made; 163 out of those offers led to the conclusion of concessions (slightly more than seven per cent of applicants). Out of 145 concessions made within 1922-1926, 25 concessions were on mining. The scheme was distributed according to which a nationalised but idle plant was to be taken into concession, with the establishment of a joint stock company, the shares of which were to be distributed between a foreign investor and the Soviet Government. The investor was vested with an obligation to reconstruct and increase production. The term of the mining concessions was 20 years. The plant of the English company 'Lena Goldfields' at gravel gold deposits in the region of Bodaibo in Yakutia (operated in 1925-1929) and the concession of the American businessman Harryman on Chiaturskoye manganese field in Georgia (USSR, 1925-1928), which gave 33 per cent of its global production, were the largest concessions. By 1928, 68 concession enterprises with 20 thousand employees operated in Russia. Concessionaires in Russia produced 25 per cent of the oil and up to 40 per cent of the gold. The export of mining and wood concessions in 1924-25 provided hard currency proceeds for the USSR of 11 million roubles, in 1925-26 the figure was 16 million and in 1927-28 it was 18 million roubles.

Within the subsequent five years, the Soviet Union planned to place 750 to 1,000 million dollars of foreign investment in the national economy on terms beneficial for concessionaires. In 1928, the USSR CPC adopted a special ordinance on the promotion of the policy for granting concessions. That ordinance determined the tentative plan for granting concessions, which incorporated approximately 100 units including a number of plants in the mining and fuel industry.

However, later on in the USSR, the reliance on own forces prevailed, and in the late thirties practically all concessions ceased to operate (the last one, the coal concession in Sakhalin, existed up until 1944). As a rule, the anticipatory termination of concessions was effected on the basis of agreement between the parties.

In the 1920s, Soviet Russia not only granted concessions but took a concession itself for the coal field on the island of Spitzbergen with a view to supplying its arctic steam fleet with coal and to secure its presence on this island developed by Russian coast-dwellers, but transferred in 1920 by the Entente powers to the jurisdiction of Norway. Under the terms and conditions of the Paris treaty of 1920, the parties thereto, to which later the Soviet Union acceded, were entitled to develop the natural resources of Spitzbergen.

State of development of the concession in post-Soviet Russia

The state of development of the concession in the Russian Federation today is absolutely insignificant for reasons of an irrational character. The development of the legal system regulating modern concessions began in the early post-Soviet period. In July 1993, the Supreme Council of the Russian Federation (RF) adopted the Law of Concessions with Foreign Investors. But the law never came into effect because it was rejected by the President of Russia.

The adoption of the new Constitution of RF in the same year, as well as a number of other events, provided the basis for new development of the Concessions Law. A new Bill submitted to the State Duma of the first convocation (1993-1995) prepared this time both for Russian and foreign investors was not approved by the Duma. After heated discussions, the State Duma of the second convocation (1995-1999) adopted the Bill in April 1996 in its first reading. Since then this Bill has been repeatedly revised by representatives of the legislator and the government, owing to difficulties of a conceptual and legal character. Only in 2005 did the Law on Concessions pass through the RF Federal Assembly and come into force – but without the mining section. At the final stages of drafting, natural resource development was excluded from the law, which now applies mostly to infrastructure projects and public services. Therefore, today's Russian investment legislation does not allow the use of the specific mechanism of concessions (concession agreements, in contrast to PSAs) in natural resource development because it does not contain legal mechanisms for their application in these industries.

Concessions cannot be applied as special regulations for subsoil use: nowadays the 'Law on the Subsoil' of the Russian Federation has no reference to them. However, it was not always like this. A little over ten years ago, namely on 21 February 1992, one of the authors (who at that time was a recently appointed Deputy Minister for Fuel and Energy of RF in the first liberal Russian 'Gaidar's' government) had to speak on behalf of the government in the Supreme Council of RF during the adoption of the Subsoil Law in its original wording, convincing the deputies of the need to introduce

Table 1: Evolution of Article 12 'contents of a licence for subsoil use' of the Law 'On the subsoil' with regard to concessions	
Wording of the Law	Wording of the article related to concessions (italics added by the authors)
Version as of 21 February 1992 No 2395-I	A licence for a right to use the subsoil shall secure listed terms and a type of contractual relationships as to the subsoil use, including on terms and conditions of a <i>concession, production sharing agreement, and service contract (with and without a risk)</i> , as well as it might be added by other conditions which do not contradict to the present Law.
Version with addenda 26 June 1992 # 3134-1	Has not been changed.
Version with addenda as of 3 March 1995 # 27 - F3	A licence for the use of the subsoil shall secure listed terms and a type of contractual relationships as to the subsoil use, including an <i>agreement on a condition of production sharing, a service contract (with and without a risk)</i> , as well as it might be added by other conditions which do not contradict to the present Law.
Version with addenda as of 10 February 1999 # 32 - F3	A licence for the use of the subsoil shall secure listed terms and a type of contractual relationships as to the subsoil use, including a <i>service contract (with and without a risk)</i> , as well as it might be added by other conditions which do not contradict to the present Law. A licence for the use of the subsoil <i>on conditions of production sharing agreements</i> must contain relevant terms and conditions stipulated by said agreement.
Version with addenda as of 2 January 2000 # 20 - F3	Has not been changed.

one more article allowing the application of concessions, production-sharing agreements and other types of contractual relations of subsoil use. As a result, the second part of Article 12 appeared in the first version of the Subsoil Law (dated 21 February 1992), reading that 'a license for a right to use the subsoil shall secure listed terms and a type of contractual relations as to the subsoil-use including on terms and conditions of a concession, a production-sharing agreement, and a service contract (with and without a risk) . . .' The same wording remained in the version of the Subsoil Law dated 26 June 1992. But in the version of this Law of 3 March 1995 the term 'concession' was withdrawn from the article and did not appear in subsequent versions (dated 10 February

1999 and 2 January 2000) – only a production-sharing agreement and a service contract (with or without a risk) remained the types of contractual relations with respect to subsoil use (see Table 1).

In the opinion of the authors, if, in November 1994, the State Duma did not adopt the law ‘On Production-Sharing Agreements’ (PSA) in its first reading, the reference to PSAs as a licensed type of subsoil use would also have been withdrawn from the Subsoil Law. At that time, there was an active discussion between the authors of the Bills ‘On Concessions’ and ‘On Production-Sharing Agreements’ (one of the authors had the honour to lead both these groups), on the one hand, and a number of deputies and representatives of the Ministry of Natural Resources (MNR) – the authors of the Subsoil law – on the other hand, concerning the applicability in the country of more than one economic and legal system of subsoil use (in this case not only the licensing system, already existing at that moment and constructed on the principles of administrative law, but also a system that would include concessions and PSAs and would be constructed on the principles of civil law).

The package of civil Bills (consisting of the Production Sharing Agreement (PSA) law and the new version of the Law on Concessions) submitted for first reading to the State Duma in November 1994 had a different fate: the Duma voted for the PSA and against concessions (as stated above, the previous version of the law on concessions for foreign investors only was adopted by the Supreme Council of RF in its third reading but rejected by the President in August 1993). On the one hand, the Bill’s fate was influenced partially by antagonism between the Duma and the Government of that time (the Bill ‘On PSA’ was introduced alternatively with the similar (but only in name, not in substance) Bill prepared by the Administration of the President). And on the other hand, influence came from the famous heritage of the communist propaganda in accordance with which the idea of concessions for the majority of Soviet people was developed in terms of ‘the cursed heritage of the colonial past’. Even those communists who were elected to the State Duma did not know (or did not want to know?) about ‘Lenin’s concessions’ of the NEP period of Soviet Russia. Thus, in 1994, the Duma rejected the half of the Bills prepared for the development of Article 12 of the Subsoil Law, thereby rejecting the concessions and only adopting (partially – in order to spite the President because the memory of Parliament in relation to the October 1993 confrontation between them was too fresh) the Law of PSA.

Since then, the concession Bill has been changing from one plan of the Duma’s lawmaking works to the other one and it has been steadily subjected to sluggish work, the essential completion of which has not been seen until

the 2005 when the totally redrafted (and without the section on natural resources development) concession law was finally adopted and came into force. But this legal analysis is a topic for another day.

Selected bibliography

- S S ABAMELEK-LAZAREV, *Vopros o nedrah i razvitiye gornoy promyshlennosti v XIX stoletii*, (Saint Petersburg, 1902).
- A KONOPLYANIK, 'USSR Oil Concessions Policy Alternatives: The Lessons from USSR History and Modern Western Practice'. *Energy Exploration & Exploitation*, 9-1 & 2 special issue, 'Commercial Prospects for Soviet Energy,' 1991, pp 29-49.
- A KONOPLYANIK, 'Dogovor koncessii: vozmozhnoe mesto i rol v investicionnom zakonodatelstve Rossii', pp 77-92 in *Neftegaz, energetika i zakonodatelstvo, 2001-2002. Informacionno-pravovoe izdaniye TEK Rossii (yezhegodnik)*. (Moscow, Nestor Economic Publishers, 2001).
- A KONOPLYANIK, 'Koncessii ot D'Arcy do Kozaka – evolyuciya ponyatiy', *Neft i kapital*, No 9, 2002, pp 6-10.
- A KONOPLYANIK, 'Concessions: From D'Arcy to Kozak'. OGEL at www.gasandoil.com/ogel, 2003, vol 1, no 1.
- A N KURSKY, 'Zakonodatelstvo o nedrah: ot zakona do kodeksa', *Neft Rossii*, No 2, 2003, pp 74-78.
- V I LENIN, *Polnoe sobraniye sochineniy*, 5th edition, (Moscow, 1970).
- O KONCESSIYAH. Dekret Soveta Narodnyh Komissarov ot 23 noyabrya 1920 goda. Tekst dekreta. Ob'ekty koncessiy. Karty. (Moscow, Gosudarstvennoye Izdatelstvo, 1920, 23 s).
- V P ORLOV, *Stanovleniye i razvitiye geologii i gornogo dela v Rossii. Specialnyi istoricheskiy vypusk zhurnalov 'Mineralnye resursy Rossii. Ekonomika i upravlenie' I 'Geologiya nefti I gaza'*. (Moscow, Geoinformmark, 2000), pp 18-25, 38-41.
- A I PERCHIK, *Gornoe pravo*. 2nd edition. (Moscow, Izdatelskiy dom 'Filologiya tri', 2002).
- N A PUCHKOV, *Gosudarstvennoe regulirovanie zolotodobychi v Rossii (XVI-XX): Uchebnoe posobiye / pod red. O D Kuznecovoy*. (Moscow, Khronograph, 1999).
- S R TIHOMIROVA, *Gornye otnosheniya v Rossii na rubezhe XV i XVII vekov. Trudy kafedry gornogo prava Rossiyskogo gosudarstvennogo universiteta nefti I gaza. Vypusk 1*. (Moscow, Neft I gaz, 2001).
- K N TRUBECKOY, G L KRASNANSKIY, A N KURSKY, E I PANFILOV, *Gornoe zakonodatelstvo Rossii: vchera, segodnya, zavtra*. (Moscow, Izdatelstvo Akademii gornyh nauk, 2000).
- USTAV GORNIY V 2-H TOMAH. T. VII Svoda zakonov Rossiyskoy Imperii. (Petrograd, 1914).