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THE LIMITS OF THE JUDICIARY WITHIN THE EURASIAN INTEGRATION PROCESS

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The Eurasian Economic Union (EAEU) has its own judicial body tasked with ensuring the uniform application of EAEU law by member states and institutions. The EAEU Court has a number of important powers; however, it is noteworthy, that such crucial ones as the preliminary ruling procedure and the ability to review actions of member states upon request of the EAEU regulatory body are missing. This paper reviews the missing powers in a search for the reasons behind their removal, and the ensuing ramifications. It also uncovers other limitations of the Eurasian judiciary and its strained relationships with national judiciaries. It is argued, that the EAEU Court will struggle to fulfil its mission without solutions compensating its limited powers.

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A Dedicated Court

When the Treaty on the Eurasian Economic Union (EAEU) came into force in 2015 a new permanent judicial body was created.² The EAEU Court was tasked with ensuring the uniform application of EAEU law by member states and institutions.³ The new Court replaces the judicial body of the now defunct Eurasian Economic Community (EURASEC), and the Customs Union and the Single Economic Space.⁴ The issue of succession is somewhat blurred, however. Initially, the idea was to ensure legal succession between the two courts.⁵ Eventually it was reduced to a provision that the case-law of the EURASEC Court remains in force.⁶

What is important, though, is that there is finally a judicial body dedicated exclusively to one legal order. The previous EURASEC Court was responsible for two legal orders during the short period of its functioning from 1 January 2012 to 31 December 2014: EURASEC on the one hand, and the Customs Union and Single Economic Space on the other hand. Prior to that, the situation was even more complicated as the judicial body of the Commonwealth of Independent States (CIS) in addition to its functions as the Economic Court of the CIS, performed the functions of the EURASEC Court.⁷ According to the former President of the CIS Economic Court, Abdulloev, this situation was logical and well-grounded for the purposes of optimizing the judiciary in the post-Soviet space.⁸ Indeed, the CIS Economic Court has a peculiar status and is not exclusively tied to the CIS. As Shinkaretskaya notes, the CIS Statute does not define it as a CIS body, there is no definite link with (other) CIS institutions, and it acts “on its own”.⁹ However, in our view, vesting such additional authority in a court which operates under different legal acts is logical and well-founded only for reasons of resource optimization, not from the point of view of the integration and proper administration of justice. The judges were forced to resolve disputes and

² Art. 8, 2014 Treaty on the Eurasian Economic Union, available at: <<https://docs.eaeunion.org/en-us>>.

³ Para. 2, 2014 Statute of the Court of the Eurasian Economic Union, Annex 2 to the Treaty on the Eurasian Economic Union, available at: <<https://docs.eaeunion.org/en-us>>.

⁴ ‘O Sude’, (About the Court), available at: <<http://sudevrazes.org/main.aspx?guid=18751>>.

⁵ T.N. Neshataeva *et al.*, *Evraziiskaia integratsiia: rol’ Suda*, (Eurasian Integration: Role of the Court), Statut, Moscow, 2015, p. 131.

⁶ Art. 3, Para. 3, ‘2014 Dogovor o prekrashchenii deiatelnosti Evraziiskogo ekonomicheskogo soobshchestva’, (Treaty on termination of functioning of the Eurasian Economic Community), available at: <www.consultant.ru/document/cons_doc_LAW_170016/>.

⁷ ‘Ob organizatsii funktsionirovaniia Suda Evraziiskogo ekonomicheskogo soobshchestva: Reshenie Mezhgosudarstvennogo soveta Evraziiskogo ekonomicheskogo soobshchestva № 123 ot 27 apreliia 2003 g.’, (On organization of functioning of the Court of the Eurasian Economic Community: Decision of the Interstate Council of the Eurasian Economic Community No. 123 of 27 April 2003), ConsultantPlus, available at: <www.consultant.ru/cons/cgi/online.cgi?req=doc;base=INT;n=22651#0>; ‘2004 Soglashenie mezhdru Sodruzhestvom Nezavisimykh Gosudarstv i Evraziiskim ekonomicheskim soobshchestvom o vypolnenii Ekonomicheskim Sudom Sodruzhestva Nezavisimykh Gosudarstv funktsii Suda Evraziiskogo ekonomicheskogo soobshchestva’, (Agreement between the Commonwealth of Independent States and the Eurasian Economic Community on the functions of the Court of the Eurasian Economic Community carried out by the Economic Court of the Commonwealth of Independent States), Economic Court of the Commonwealth of Independent States, available at: <http://sudsng.org/download_files/statdocs/agreement_cis_evr.pdf>.

⁸ F.A. Abdulloev, ‘Razreshenie sporov v ramkakh SNG i EvrAzES sposobstvuet integratsionnym protsessam’, (Settlement of disputes within the CIS and EURASEC promotes integration processes), *Evraziiskaia integratsiia: ekonomika, pravo, politika*, No. 8, 2010, p. 37.

⁹ G.G. Shinkaretskaya, ‘Sud SNG—ne sudebnoie uchrezhdenie?’, (The CIS Court—not a judicial body?), *EZ-Iurist*, No. 42, 2005. All translations from Russian into English are by the author of the present work unless otherwise noted.

give consultative opinions in different legal orders: CIS, EURASEC, and the Customs Union and Single Economic Space. The treaties establishing these legal orders have different aims and contexts, which creates difficulties. The judges, when interpreting treaties, effectively had to apply legal rules, often similar or equally formulated, but following different approaches, methods and concepts, in order to take into account the nature of each of the treaties and their specific aims. An issue of similar character was dealt with by the European Court of Justice (ECJ) in the case *EEA I*, where the possibility for judges to sit concurrently in different courts and to apply similar or equally formulated legal norms was examined. The ECJ decided that such a situation would not allow them to decide cases in a proper manner.¹⁰

The problematic nature of the situation was recognized in a report on the formation of the EURASEC Court as it underlined that the *status quo* did not correspond to the realities of the intensified integration process within the Customs Union and Single Economic Space, and that the creation of a separate and independent judicial body was needed.¹¹ The EAEU legal order has a dedicated court now, and the question is whether it is able to ensure the functioning of that order. It is premature to draw general conclusions on the practical performance of the EAEU Court since it has delivered rulings on only a handful of cases so far.¹² However, an analysis of the written provisions on the Court, and an analysis of certain practices of its predecessor can shed some light on its abilities to perform its functions.

The Powers (or Lack Thereof)

In order to fulfil the ambitious task of ensuring the uniform application of EAEU law, the Court has to possess corresponding powers. The Statute of the EAEU Court establishes that upon request of a member state or an economic entity,¹³ the Court can adjudicate on issues raised about the implementation of EAEU law. Member states can also raise issues concerning the compliance of international agreements within the EAEU with the EAEU Treaty, the compliance of other

¹⁰ Opinion 1/91 of 14 December 1991, *Draft Agreement Relating to the Creation of the European Economic Area (Opinion 1/91)*, [1991] ECR I-6079.

¹¹ '2011 O formirovanii i organizatsii deiatelnosti Suda Evraziiskogo ekonomicheskogo soobshchestva: Reshenie Mezhsudarstvennogo soveta Evraziiskogo ekonomicheskogo soobshchestva (Vysshii organ Tamozhennogo soiuza) na urovne glav pravitelstv № 75 ot 15 marta 2011 g.', (On the formation and organization of activities of the Court of the Eurasian Economic Community: Decision of the Intergovernmental Council of the Eurasian Economic Community (Supreme Body of the Customs Union) on the level of heads of governments No. 75 of 15 March 2011), Eurasian Economic Commission, available at: <<http://www.eurasiancommission.org/docs/Download.aspx?IsDlg=0&ID=2608&print=1>>.

¹² The cases decided in 2015 is available at: <<http://courteurasian.org/page-24051>>, and cases of 2016 – are available at: <<http://courteurasian.org/page-24161>>. For the analysis of the first case see A.S. Ispolinov, 'Pervoe reshenie Suda EAES: reviziia nasledstva i ispytanie iskusheniem', (The first ruling of the EAEU Court: revision of the legacy and trial by temptation), *Rossiiskii iuridicheskii zhurnal*, No. 4, 2016, pp. 85-93.

¹³ The EAEU Treaty defines an 'economic entity' or 'market participant' as a "commercial organization or a non-profit organization operating with generation of profit, an individual entrepreneur, as well as a natural person whose professional income-generating activities are subject to state registration and/or licensing under the legislation of the Member States" (Para. 2(20) Protocol on General Principles and Rules of Competition, Annex 19 to the EAEU Treaty, English version available at: <<https://docs.eaeunion.org/en-us>>).

member states with EAEU law, the compliance of the decisions of the main regulatory body—the Eurasian Economic Commission (Commission)—with EAEU law, and challenge an action (or inaction) of the Commission.¹⁴ These procedures can be respectively classified as infringements, actions for annulment, and failures to act.

A positive feature is the retaining of the procedure established within the EURASEC Court, where economic entities, including foreign ones, can raise issues of compliance of a Commission decision that directly affect their economic rights, with the EAEU Treaty and/or international agreements within the EAEU. The same can be done in regard to an action (or lack thereof) of the Commission.

However two procedures that were available in the EURASEC Court are absent: 1) the ability of the Commission to refer member states failing to comply with EAEU law to the Court; 2) the preliminary ruling. These two procedures are important for many reasons, among which are the necessity to ensure the uniform interpretation and application of Union law and that without them member states can avoid fulfilling their obligations.

In the case of infringements, only member states can bring actions against other member states for non-compliance (which is a novelty compared to EURASEC), not the Commission. The Commission is deprived of such a function, which, however limited, was available before.¹⁵ If after the Commission’s monitoring of compliance with international agreements, which formed the legal basis of the Customs Union and Single Economic Space, there were reasons to believe that one of the parties had not complied with such agreements or Commission decisions, the Commission Council could inform the relevant party and establish a timeframe to address the infringement. If the decision was not complied with, the Commission Council had the right to refer the issue to the EURASEC Court. The Court could also introduce reasonable interim measures to ensure compliance with the decision or to prevent possible further infringements. The chance of reaching this stage was small since the Commission Council adopted consensus decisions and the infringing member state could block any such decision. If the issue appeared before the Court, as noted in the literature, it was not clear what “reasonable interim measures” would look like.¹⁶ Further, if the Court’s decision was not complied with, the issue was to be referred to the EURASEC Supreme Council with unanimous decision making. Regardless of these limitations, the Commission could react to the infringements by member states, which it no longer can.

¹⁴ Para. 39, Statute of the EAEU Court.

¹⁵ ‘2011 Dogovor o Evraziiskoi ekonomicheskoi komissii’, (Treaty on the Eurasian Economic Commission), ConsultantPlus, available at: <http://www.consultant.ru/document/cons_doc_LAW_121990/>.

¹⁶ Shinkaretskaya 2005.

In the EU, there is a comparable supranational procedure in Article 258 of the Treaty on the Functioning of the European Union (TFEU).¹⁷ Usually, infringements by member states are in the form of the non-implementation of obligations under EU law or adoption of domestic legal acts, which contravene to the obligations within the organization.¹⁸ The existence of an obligatory and exclusive judicial body for these kinds of cases makes the EU different from many other international organizations, and this procedure is the most important tool to ensure the implementation of EU law. The lack of procedure in the EAEU is a clear rollback in supranationality and a return to the common practice in international public law where compliance with international contractual obligations is decided between parties to respective agreements.¹⁹ This does not promote effective judicial control or functioning of the EAEU legal order. Moreover, as many years of EU experience suggest, a member state rarely brings an action against another member state to the ECJ, as it is a sign of malevolence and there is the risk of analogous actions against them in the future, and member states prefer political dispute resolution.²⁰ However, the actions brought by the European Commission against member states are common and member states tend to comply with the decisions of the ECJ against them.²¹

The other procedure that has been abolished with the advent of the EAEU, arguably the most important one, is the preliminary ruling. This procedure is a system of judicial oversight within the judicial systems of member states in cooperation with an organization's court. When the issue of the interpretation of law of the organization appears before a national court, such a court can stay the case and make an inquiry to the court of the organization for an interpretation. In the EU, when a national court is the court of final instance, it is obliged to refer to the ECJ with such an inquiry.²² After the ruling is delivered, it is sent back to the national court, which rules on the case in hand. Therefore, national courts and the court of organization are integrated into a single system of judicial oversight.

In the EURASEC Court the preliminary ruling procedure, however limited, was available. Even though it was used only once there,²³ EU practice suggests that the ECJ and the national

¹⁷ Consolidated version of the Treaty on the Functioning of the European Union, *OJ C 326*, 26.10.2012, pp. 47-390.

¹⁸ J.H.H. Weiler, 'The Transformation of Europe', *The Yale Law Journal*, Vol. 100(8), 1991, p. 2419.

¹⁹ A. Evans, 'The Enforcement Procedure of Article 169 EEC: Commission Discretion', *European Law Review*, No. 4, 1979, p. 443.

²⁰ P. Craig & G. de Búrca, *EU Law: Text, Cases, and Materials*, 5th edn, Oxford University Press, Oxford, 2011, p. 433.

²¹ A. Sweet, 'The European Court of Justice, State Noncompliance, and the Politics of Override', *American Political Science Review*, Vol. 106(1), 2012, pp. 204-213.

²² Art. 267, TFEU.

²³ 'Reshenie Bolshoi kollegii Suda EvrAzES', (Decision of the Grand Chamber of the EURASEC Court), 10 July 2013, *Biulleten' Suda Evraziiskogo ekonomicheskogo soobshchestva*, No. 2, 2013, pp. 7-17. For an analysis, see A.S. Ispolinov, 'Naviazannyi monolog: pervoe preiuditsial'noe zakliuchenie Suda EvrAzES', (An imposed monologue: first preliminary ruling of the EURASEC Court), *Evraziiskii juridicheskii zhurnal*, No. 8(63), 2013, pp. 21-30.

courts of EU member states use this procedure regularly.²⁴ Attempts of member states to circumvent certain EU legal obligations are frequently challenged in their own national courts. Through this procedure, individuals become, to a certain extent, agents monitoring member states' compliance with EU legal obligations.²⁵

The goal of the EU preliminary ruling procedure is similar to the whole mission of the EAEU Court, which is to preserve the uniform interpretation of the law and the effective functioning of the legal order itself. However, this procedure also goes beyond that stated purpose to also protect individual rights. Through this procedure, the national courts of EU member states and the Court of Justice of the EU (CJEU) are integrated into one system of judicial supervision. Even when there are limits of direct access of individuals to the CJEU, the supremacy and direct effect of EU law enables any individual or organization to challenge the actions of their own member states using EU law.

The removal of the preliminary ruling procedure in the EAEU Court makes national courts completely disintegrated from the Eurasian judicial system. This will inevitably lead to differing practices and make the job of the EAEU Court to ensure the uniform application of Union law extremely difficult.

Reasons Behind the Reduction in Powers

It could be argued that the member states have adopted a critical approach to the practice of judicial review on a supranational level along the lines of critical approaches to judicial review in general.²⁶ However, such critical accounts are based on the notion of democracy, that is, people and their elected and accountable representatives. Thus, it is argued that judicial review threatens democracy and is both fundamentally unfair and politically dangerous, as unelected and judges who are not directly accountable gain considerable power. In theory, the idea that member states themselves can interpret EAEU law would be closer to such accountability. However, how democratic are the member states in question themselves?

It is more likely that this is just one instance of a range of power-preserving measures by member states. There are many reasons why member states would want to limit the powers of the EAEU judiciary. One of them is the activist attitude taken by the previous EURASEC Court from

²⁴ *Court of Justice of the European Union Annual Report 2014: Synopsis of the Work of the Court of Justice, the General Court and the Civil Service Tribunal*, Publications Office of the European Union, Luxembourg 2015, pp. 113-114. Altogether 8710 references for a preliminary ruling, which is almost equal to all direct actions (8901).

²⁵ Weiler 1991, p. 2419.

²⁶ See e.g. J. Waldron, 'A Rights-Based Critique of Constitutional Rights', *Oxford J Legal Studies*, Vol. 13(1), 1993, pp. 18-51.

the very start, borrowing from the ECJ.²⁷ The court's practices even lead Ispolinov to describe it as a "new-style institution of international justice".²⁸ He claims that one of its very first judgments—*Iuzhnii Kuzbass*²⁹—was the first case of judicial activism in the post-Soviet space.³⁰ In this case, treaty interpretation was more extensive than the textual provisions suggest. In particular, while the relevant EURASEC legal acts did not explicitly provide the EURASEC Court with powers to declare Commission's decisions void, the Court decided otherwise. It declared the Commission's decision void, decided on the time when it became void, and made the judgment applicable not only to the parties of the dispute, but *erga omne*. Following that, it is probably not surprising that the new EAEU Court has been explicitly banned from deciding on such issues, and Commission decisions remain in effect until the Commission implements the ruling.

Such judicial activism, even though potentially irritating for member states, is not something that could promote such tremendous changes as removing the preliminary ruling procedure altogether. However, activism which is not well grounded and involves direct confrontation could be more than irritating. An example of the first (and the last) preliminary ruling action could serve as an illustrative example. A request for a preliminary ruling was made by the Supreme Economic Court of Belarus. However, it almost immediately withdrew the request. Nevertheless, the EURASEC Court decided to open the proceedings as it had a right to do so.³¹ However, the EURASEC Court's argumentation was peculiar: "as, if decided otherwise, it would not meet the requirements of procedural economy and might lead to an unjustified delay in adjudication of the case".³² It is very unclear how exactly procedural economy would be affected and why a delay would take place at all. It has been suggested in a text co-authored by one of the judges involved in the case that this approach was taken from the ECJ's Rules of Procedure (a draft at the time).³³ The EURASEC Court's statement can only be understood in light of the explanation given by the drafters of the ECJ Rules of Procedure, and particularly the following norm (in the formulation of the final version of the Rules of Procedure): "The withdrawal of a request may be taken into

²⁷ About 'judicial activism' of the Court of Justice, see M. Dawson, B. De Witte & E. Muir, *Judicial Activism at the European Court of Justice*, Edward Elgar Publishing, Cheltenham, 2013.

²⁸ A.S. Ispolinov, 'First Judgments of the Court of the Eurasian Economic Community: Reviewing Private Rights in a New Regional Agreement', *Legal Issues of Economic Integration*, Vol. 40(3), 2013, p. 225.

²⁹ 'Postanovlenie Bol'shoi kollegii Suda EvrAzES', (Resolution of the Grand Chamber of the EURASEC Court), 8 April 2013, *Biulleten' Suda Evraziiskogo ekonomicheskogo soobshchestva*, (2013) No.1, pp. 47-52.

³⁰ A.S. Ispolinov, 'Reshenie Bol'shoi Kollegii Suda EvrAzES po delu Iuzhnogo Kuzbassa: naskol'ko obosnovan sudeiskii aktivizm?', (Judgment of the Grand Chamber of the EURASEC Court on the Iuzhnyi Kuzbass case: how justified is judicial activism?), *EvrAziiskii iuridicheskii zhurnal*, No. 5(60), 2013, p. 22.

³¹ Art. 37(1)(v) 'Reglament Suda Evraziiskogo ekonomicheskogo soiuza', (Rules of procedure of the Court of the Eurasian Economic Union), ConsultantPlus, 12 July 2012, available at: <<http://courteurasian.org/doc-14143>>.

³² 'Reshenie Bolshoi kollegii Suda EvrAzES', (Judgment of the Grand Chamber of the EURASEC Court), 10 July 2013, *Biulleten' Suda Evraziiskogo ekonomicheskogo soobshchestva*, 2013, No. 2, p. 11.

³³ Neshataeva 2015, p. 179.

account until notice of the date of delivery of the judgment has been served on the interested persons.”³⁴

This provision retains the right to deliver a judgment notwithstanding the withdrawal of a request for a preliminary ruling. The drafters explain this provision in terms of procedural economy “since a number of similar cases may have been stayed, either by the [ECJ] or by national courts or tribunals, pending the forthcoming judgment”.³⁵ In that case not delivering a judgment could lead to dealing with every case that has been stayed, which would cause a delay in the progress of those cases. However, the drafters underlined that such a withdrawal must happen “at a very advanced stage of the proceedings, when the date of delivery of the judgment has been communicated” and when “the [ECJ’s] deliberations will have been completed”. Conversely, in the case of the EURASEC Court, the withdrawal request was made at an early stage, only two weeks after the request for preliminary ruling was accepted.³⁶ As noted in the dissenting opinion of judge Smirnov, there was no proof of similar cases stayed in national courts pending the forthcoming judgment; and no proof that the proceedings before the Supreme Economic Court of Belarus could be delayed.³⁷ Claims, such as lack of explanation of the withdrawal request, that the EURASEC Court had already involved a number of experts, do not seem to be enough. Therefore, it is more likely that the Court, having had the very first preliminary ruling request, wanted to seize the opportunity and establish its authority. A number of activist provisions in the final ruling (e.g. that the ruling was “directly effective” on the territory of all member states) reinforce this position.

Therefore, the assertive attitude of the EURASEC Court coupled with the overreaction of the member states have led to the disastrous situation the whole legal order is currently in.

Further Limitations

This situation is not limited to the elimination of the preliminary ruling procedure and the denial of the Commission’s right to bring member states to the Court. There is a provision, according to which the Court does not have power to create further responsibilities for EAEU institutions in addition to those explicitly provided in the treaties.³⁸ Arguably, this rule intends to

³⁴ Consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012, *OJ L 265*, 29.9.2012, as amended on 18 June 2013, *OJ L 173*, 26.6.2013.

³⁵ ‘Comments to Art. 101’, Draft Rules of Procedure of the Court of Justice, available at: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-05/en_rp_cjue.pdf>.

³⁶ The request for preliminary ruling was accepted by the EURASEC Court on 22 April 2013, the applicant withdrew the request on 6 May, see ‘Reshenie Bolshoi kollegii Suda EvrAzES’, (Judgment of the Grand Chamber of the EURASEC Court), 10 July 2013, *Biulleten’ Suda Evraziiskogo ekonomicheskogo soobshchestva*, 2013, No. 2, pp. 7-17. The applicant repeatedly requested a withdrawal on 21 June 2013. See the dissenting opinion of judge Smirnov of 10 July 2013 in *Case 1-6/1-2013*, (on file with the author).

³⁷ Dissenting Opinion of 10 July 2013 in *Case 1-6/1-2013*, p. 3.

³⁸ Para. 42, Statute of the EAEU Court.

limit the ability of the Court to define the implied powers of an organization, to a large extent the way the CJEU did for the EU,³⁹ and the International Court of Justice for the United Nations.⁴⁰ Further, the Court's decisions do not change and/or invalidate the norms of EAEU law or national law which are in force, and the Court does not create new ones.⁴¹ Compare this to the belief of one of the judges that the Court is actually able to create new legal rules.⁴² Neither of these provisions existed in the EURASEC Court.

More general provisions regarding the Court do not help to ameliorate the situation. There is no provision similar to the EU's exclusive jurisdiction.⁴³ It is also stipulated that the Court's interpretation of the EAEU Treaty on request of the member states or institutions is consultative and does not deny the right of member states' joint interpretation.⁴⁴ The Statute of the Court does not designate explicit powers to the Court so that it can issue penalties. Moreover, it is left to the parties of a dispute to determine the form and manner of execution of the Court's decision.⁴⁵ If a judgment is not implemented, a member state can apply to the EAEU Supreme Council "for measures required for its [implementation]".⁴⁶ The EAEU Treaty does not clarify the procedure which follows specifically in this case, making the EAEU Supreme Council's general rule of consensus applicable.⁴⁷ As it consists of the heads of member states, it can be concluded that when an EAEU Court decision is not implemented by a member state, the head of that state can still vote on the measures to be adopted by the Supreme Council to ensure implementation.

Finally, the independence of the judges is under question. To be fair, the EAEU Court has gained the right to draft its own budgetary proposals and to dispose of financial means,⁴⁸ which

³⁹ See e.g. the following cases: Judgment of 16 July 1956 in *Case C-8/55, Fédération Charbonnière de Belgique v High Authority*, [1956] ECR 245; Judgment of 15 July 1960 in *Case 20-59, Italy v High Authority*, [1960] ECR 325; Judgment of 19 February 1960 in *Case 25-59, Netherlands v High Authority*, [1960] ECR 355; Judgment of 26 June 1959 in *Case 31-59, Acciaieria e Tubificio di Brescia v High Authority*, [1960] ECR 71; Judgment of 31 March 1971 in *Case C-22/70, Commission v Council (ERTA)*, [1971] ECR 263; Judgment of 14 July 1976 in *Joined Cases 3, 4, and 6/76, Kramer*, [1976] ECR 1279; Opinion 1/76 of 26 April 1977 *Laying-up Fund for Inland Waterway Vessels*, [1977] ECR 741; Opinion 1/78 of 4 October 1979 *International Agreement on Natural Rubber*, [1979] ECR 2871; Opinion 2/91 of 19 March 1993 *International Labour Organization*, [1993] ECR 1061. See also M.M. Martin Martinez, *National Sovereignty and International Organizations*, Kluwer Law International, The Hague, 1996; V. Engström, *Constructing the Powers of International Institutions*, Martinus Nijhoff, Leiden, 2012.

⁴⁰ See the following case-law: *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, 1949 ICJ Rep. 174; *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, Advisory Opinion of 13 July 1954, 1954 ICJ Rep. 47; *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, 1962 ICJ Rep. 151. See also J. Klabbers, *An Introduction to International Institutional Law*, Cambridge University Press, Cambridge, 2009; Engström 2012.

⁴¹ Para. 102, Statute of the EAEU Court.

⁴² T.N. Neshataeva, 'K voprosu o sozdanii Evraziiskogo soiuza: integratsiia i nadnatsionalizm', (On the issue of establishing the Eurasian Union: integration and supranationality), *Zakon*, No. 6, 2014, pp. 106-119.

⁴³ Art. 344 TFEU. See also *Opinion 1/91*; Judgment of 30 May 2006 in *Case C-459/03, Commission v. Ireland*, [2006] ECR I-4635.

⁴⁴ Para. 47, Statute of the EAEU Court.

⁴⁵ Para. 102, Statute of the EAEU Court.

⁴⁶ Para. 114, Statute of the EAEU Court.

⁴⁷ The only exception to this rule in the Supreme Council is the procedure of termination of membership, where the decision is taken by a "consensus minus the vote of the Member State declaring its intent to terminate its membership in the Union" (Art.13, Para. 2, EAEU Treaty).

⁴⁸ Para. 5, Statute of the EAEU Court.

somewhat boosts its independence. However, the Court has lost the right to approve its own rules of procedure, which is now done by the EAEU Supreme Council.⁴⁹ The judges are no longer elected by the Parliamentary Assembly (the institution does not exist anymore), but are proposed by member states and appointed by the Supreme Council.⁵⁰ Member states can also terminate the duties of a judge upon certain conditions.⁵¹ This may interfere with the autonomy of the judges and, therefore, undermine the supranationality of the EAEU Court. Such actions are not possible in the CJEU as its judges can only be removed by a unanimous vote of the judges themselves (excluding the judge under consideration) and Advocates General.⁵²

Some Issues of National Judiciary

As stated above, national courts have been completely disintegrated from the Eurasian judicial system. An essential part of the ability of the Court to ensure the functioning of the EAEU legal order is the way national judiciaries perceive its authority. In this respect it is interesting to turn to the Constitutional Court of Russia, which has already voiced its differences in approaches to the Eurasian judiciary.⁵³ For instance, it has stated that on Russian soil the norms of the Customs Code of the Customs Union, which have now become part of the EAEU, should be implemented according to its own interpretation.⁵⁴ However, importantly, the jurisprudence of the Constitutional Court of Russia on other international courts could affect the authority of the EAEU Court. Thus, the ruling concerning the European Court of Human Rights (ECtHR) is significant.⁵⁵ According to that ruling, the Constitutional Court maintains that Russia can set aside international obligations if it is the only option to prevent the violation of the principles and norms of the Russian Constitution. When formulating its own position, the Constitutional Court heavily relied on the rulings of constitutional authorities of Germany,⁵⁶ Italy,⁵⁷ Austria,⁵⁸ and the UK,⁵⁹ which were critical of the ECtHR. However, the Constitutional Court went beyond that. First, the Constitutional Court referred to the Vienna Convention on the law of treaties, in particular Article 31(1) which

⁴⁹ Para. 13, Statute of the EAEU Court.

⁵⁰ Para. 9, Statute of the EAEU Court.

⁵¹ Para. 13, Statute of the EAEU Court.

⁵² Art. 6, Statute of the Court of Justice of the European Union.

⁵³ 'Opređenje Konstitucionnogo Suda Rossiiskoi Federatsii', (Decision of the Constitutional Court of the Russian Federation), No.417-O, 3 March 2015, available at: <<http://doc.ksrf.ru/decision/KSRFDecision190708.pdf>>.

⁵⁴ See 'Opređenje Konstitucionnogo Suda Rossiiskoi Federatsii', (Decision of the Constitutional Court of the Russian Federation), No. 1050-O, 2 July 2013, available at: <<http://doc.ksrf.ru/decision/KSRFDecision136123.pdf>>.

⁵⁵ 'Postanovlenie Konstitucionnogo Suda Rossiiskoi Federatsii 21-P', (Resolution of the Constitutional Court of the Russian Federation), 14 July 2015, available at: <<http://doc.ksrf.ru/decision/KSRFDecision201896.pdf>>.

⁵⁶ GFCC, Order of the Second Senate of 14 October 2004 - 2 BvR 1481/04 (regarding *Gorgulu v. Germany*, ECHR (2004)); BVerfG, 29.05.1974 - 2 BvL 52/71 *Solange I*.

⁵⁷ Judgment of the Italian Constitutional Court of 19 November 2012, No. 264/2012 (regarding *Maggio and others v. Italy*, ECHR (2011)); (regarding *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, 2012 ICJ Rep. 99).

⁵⁸ VfGH Decision of 14 October 1987, B 267/86.

⁵⁹ Judgment of 16 October 2013 UKSC 63 (regarding *Hirst v United Kingdom (No 2)*, ECHR (2005)).

establishes that a treaty must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.⁶⁰ Following this provision, the Constitutional Court claimed that an international treaty is obligatory to the parties in the sense which could be understood using this rule of interpretation. The court continued that if the ECtHR, when interpreting a provision of the European Convention on Human Rights, attributes to a term a meaning different from an ordinary one, or if it interprets contrary to the object and purpose of the Convention, a state has the right to refuse to implement a judgement against it as going beyond the obligations voluntarily accepted when ratifying the Convention. This is a far reaching statement, which presupposes the ability to set aside not only interpretations of international courts, but international obligations in general. It can easily be used with regard to interpretations made by the EAEU Court in the future.

But the Constitutional Court went further, stating that a judgment of the ECtHR cannot be considered obligatory if an interpretation of a provision of the Convention, made in defiance of the general rule of interpretation, would disagree with the imperative norms of general international law (*jus cogens*). The Constitutional Court considers sovereign equality and related rights, as well as non-interference in domestic matters as ‘undoubted’ norms *jus cogens*.

There are several issues with this point of view. It is not entirely clear if the interpretation violating *jus cogens* is one of the cases of possible ‘wrongful’ interpretation, particularly relevant for the case in hand, or the only one. Either way, sovereignty and non-interference, if considered part of *jus cogens*, could be interpreted quite broadly. The norms of *jus cogens* are far from clear in international law.⁶¹ Even so, sovereign equality and non-interference are not usually listed as part of *jus cogens*. Generally speaking, it remains a mystery why the *jus cogens* argument was made at all. To some extent it evokes the *Kadi* case, where the General Court of the EU tried to use the *jus cogens* argument, which was eventually ignored by the ECJ.⁶²

Conclusions

Without doubt, it will be a hard task for the EAEU Court to ensure the uniform application of EAEU law. This follows from the removal of the preliminary ruling procedure, which has left the Court without a powerful vehicle of interpretation of law and has isolated it from national courts. The uniform understanding and application of EAEU law by national courts is a major issue now,

⁶⁰ Art. 31(1), 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

⁶¹ See e.g. A. Orakhelashvili, *Peremptory Norms in International Law*, Oxford University Press, Oxford, 2008, p. 40.

⁶² Judgment of 30 September 2010 in *Case T-85-09 Kadi v Commission*, [2010] ECR II-5177; Judgment of 18 July 2013 in *Joined Cases C-584-10, C-593-10 and C-595-10 Commission and others v Kadi Appeal* [2013] ECLI:EU:C:2013:518. For additional information on *Kadi* cases, please refer to M. Avbelj, F. Fontanelli, G. Martinico (Eds.), *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial*, Routledge, London-New York, 2014.

since no other tool in the current EAEU judicial mechanism is available to fill the void. One can hardly speak of an integrated judiciary in the Eurasian space. Further, member states can more easily get away with violations of the Eurasian legal order, since the Commission can no longer bring them to the Court. This and a number of other limitations regarding the independence of the judges and their interpretative powers leave no assurance that member states will uphold their obligations on an everyday basis. The example of the jurisprudence of the Constitutional Court of Russia shows other obstacles in the way of the Court's ability to achieve its objective. It must be said that the resulting situation is caused by all the parties, which has led to the deterioration of the whole legal order—a situation which does not particularly benefit any of them. Therefore, solutions to the problem must be found, and it is clear that it must be done not in a confrontational manner, but in engaging in closer cooperation and dialogue.

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