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Constitutional Issues of Economic Integration *From the Board* 191

Articles

Enhanced Cooperation under Scrutiny *Federico Fabbrini* 197
Revisiting the Law and Practice of
Multi-Speed Integration in Light of the
First Involvement of the EU Judiciary

First Judgments of the Court of the Eurasian *Alexei S. Ispolinov* 225
Economic Community: Reviewing Private
Rights in a New Regional Agreement

TBT-Plus Rules in Preferential Trade *Boris Rigod* 247
Agreements

Case Review

Competition and Advantage under Internal *Phedon Nicolaides* 271
Market and State Aid Rules: Is There a Gap
in the Law?

First Judgments of the Court of the Eurasian Economic Community: Reviewing Private Rights in a New Regional Agreement

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This article provides a brief summary of the establishment and jurisdiction of the Court of the Eurasian Economic Community, as well as an analysis of the first judgments of the Court rendered in 2012 from the point of view of the general effectiveness of the judicial protection of the rights of private parties on the level of the Eurasian Economic Community. The author draws up certain parallels between the Court and the Court of the European Union from a historical point of view and submits that the Court could definitely be placed among the so-called new-style institutions of international justice. Based on that the author suggests some lessons that the Eurasian Economic Community could learn from the development of the Court of the European Union, its case law and the role it has played in the development of the European Union legal order.

1 INTRODUCTION

At the end of 2012 two events took place in the world of international justice. The first one was the celebration of the 60th anniversary of the Court of Justice of the European Union, one of the most successful and reputable international courts (the first meeting of the Court of Justice of the European Coal and Steel Community took place 2 December 1952), and attracted much publicity and commentaries. The second became a pleasant surprise for a still narrow circle of researchers and practitioners who welcomed entry into force of the first judgment of the Court of the Eurasian Economic Community (29 November 2012).¹ It is possible (and even desirable) to draw up certain parallels between these two events not only from a historical point of view but also due to the fact that both courts

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¹ The Court of the Eurasian Community case *Yuzniy Kuzbass v. Eurasian Commission*, judgment of the Chamber, 5 Sep. 2012, available in Russian at: http://www.rg.ru/pril/70/60/82/Reshenie_ot_5_sentiabria_2012_goda.pdf.

could definitely be placed among the so-called new-style institutions of the international justice,² having common features like compulsory jurisdiction and access of the private litigants to the courts. Moreover both courts are empowered to deal with issues of interpretation, application and validity of the acts of supranational institutions.

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If there is a vast amount of scholarship describing the activity of CJEU, the launch of the Court of the Eurasian Economic Community is still *terra incognita* for Russian academia (let alone for researchers from other countries). The purpose of the present article is to give a short summary of the history of the Court's formation and its jurisdiction, as well as to analyse the first judgments of the Court from the point of view of the general effectiveness of the judicial protection of the rights of private parties on the level of the Eurasian Economic Community.

2 THE ESTABLISHMENT OF THE EURASIAN ECONOMIC COMMUNITY COURT

Officially the Court started its functioning from 1 January 2012 in Minsk, capital of Belorussia. Contrary to the CJEU which spent its first year without any judgments delivered,³ the year 2012 brought not only the first cases for the newly established Court but the first two judgments as well.⁴ Of course it could be explained by the general intensification of international relations in comparison with 1952. But at the same time the leading factor is the access of private parties to the Court of the Eurasian Community which only proves the general trend of the current international justice showing that the private parties are more inclined to go to the courts as they are much less concerned with different political considerations than the states.

It would be rather difficult to talk about the jurisdiction of the Court without a brief description of the Eurasian Economic Community in general. The Community was established in 2000 by five states – Russia, Belorussia, Kazakhstan, Tajikistan and Kyrgyzstan, and one of its main features now is a phenomenon

² K. Alter, *The European Court's Political Power* 265 (Oxford U. Press 2009).

³ D. Tamm, *The History of the Court of Justice of the European Union since its origin*, in *The Court of Justice and the Construction of Europe: Analyses and Perspective on Sixty Years of Case-law* 18–19 (A. Rosas, E. Levits, Y. Bot eds., Asser Press 2013).

⁴ Both first judgments of the Court handed down last year are relatively short (10 and 7 pages correspondingly). The way of the description of the facts of the case, presentation and evaluation of the arguments of the parties, and legal reasoning of the Court look typical for the courts of the former Soviet republics, which in turn is deeply rooted in the style of the USSR courts (even the way of approaching and solving jurisdictional issues which are scattered across the judgments and more concentrated at the very bottom of the text). Certain similarities with the CJEU like secrecy of deliberations and voting of the judges as well as a prohibition of dissenting opinions are simply occasional and also could be better explained by the Soviet judicial culture.

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known as ‘integration with variable geometry’ (using the EU vocabulary), meaning different levels of involvement of the Member States in the process of integration depending on the field of integration concerned. Thus three Member States of the Community (Russia, Byelorussia and Kazakhstan) decided to create a Single Economic Area inside the Community and started to do so with the establishment in 2007 of a Customs Union and successful elimination of all tariff and non-tariff barriers for intra-Union trade by June 2012. For the purpose of proper administration of the Customs Union, the three states set up a special supranational institution – the Commission of the Customs Union (recently transformed into the Eurasian Economic Commission). The Commission is entitled to make binding decisions which shall be directly applicable within the Member States of the Customs Union.⁵

The Court of the Eurasian Community (hereinafter – the Court) was also established by all five Member States but in reality only four of them nominated the judges for the Court (Kyrgyzstan for some reasons decided to refrain from taking part in the Court’s formation in spite of the fact that it signed and even ratified the Statute of the Court⁶). And only the Member States of the Customs Union made a decision (by signing for this purpose a special Treaty⁷ (hereinafter – the Private Litigants Treaty) providing access to the Court for private litigants but only in connection with the decisions made within the framework of the Customs Union.

In accordance with the Statute of the Court each Member State shall nominate two judges who shall be appointed by the Parliamentary Assembly of the Community.⁸ Due to the fact that Kyrgyzstan still refrains from the nomination of the judges (but at the same time makes its own contribution to the Court’s budget), the Court now consists of eight judges (and only six of them, nominated by three Member States of the Customs Union, can deal with complaints of the private litigants). Almost all the judges of the Community Court have been

⁵ Paragraph 1 Art. 5 of the Treaty establishing the Eurasian Economic Commission contains the following provisions: ‘The Commission is entitled within the limits of its competence to make decisions which shall be binding for the Parties and non-binding recommendations. The decisions of the Commissions are an integral part of the legal framework of the Customs union and the Single Economic Area and shall be directly applicable within the territories of the Parties’.

⁶ The Statute of the Court was approved by the decision of the Interstate Council of the Community on the level of the heads of the Member States, 5 Jul. 2010, and then ratified by all Member States.

⁷ The Treaty on submission to the Court of Eurasian Communities of the applications of undertakings and on specifics of the Court’s proceedings in relation to such applications.

⁸ The Assembly of the Eurasian Community has purely advisory functions such as the Parliamentary Assembly of the European Communities, except a few issues like the appointment of the judges to the Court.

highly-profiled national judges in the past.⁹ Both cases of the last year have been settled by the Court sitting in a Chamber of three judges (one judge from each Member State of the Customs Union). The judgments delivered by the Chamber have been recently upheld by the Appeal Chamber of the Court (the Appeal Chamber consisted in this case of the remaining three judges from the Member States of the Customs Union).¹⁰

3 THE JURISDICTION OF THE EURASIAN COURT

In accordance with Article 13 of the Statute the Court shall ensure uniform application of the founding treaties and the acts of the institutions of the Eurasian Community having jurisdiction on the following matters.

First, the Court has compulsory jurisdiction over all disputes between the Member States of the Community as well as disputes between institutions of the Community and Member States, acting in this case like a traditional international court.

Second, the Court is empowered to give advisory opinions regarding the issues of interpretation and application of the treaties constituting the legal framework of the Community (hereinafter – founding treaties) and of the acts of the Eurasian Economic Commission (and only the Commission). A list of referencing parties in this case includes the Member States, their highest courts and institutions of the Community (like the Interstate Council and Parliamentary Assembly).

Third, special attention should be paid to Article 3 of the Private Litigants Treaty providing the Court with a right to give preliminary rulings concerning application of the treaties to national courts.

Only the highest courts of the Member States are entitled to raise questions before the Court during the hearing of cases involving private undertakings if the issue of application of the Community law could seriously influence the outcome of the proceedings. One important detail – if a private undertaking taking part in domestic proceedings before the highest national court, whose decisions are not subject to appeal, asks the court to raise the issue before the Court of the Community, the domestic court must stay the proceedings and refer the case to the Court. The Court will rule on the issue referred to it and then the domestic

⁹ Six judges came from the highest courts of the Member States, one judge from Tajikistan worked a chairman of the city court of the capital of the country, and one judge from Russia was a high official of the Federal Customs Service.

¹⁰ The Chambers of the Court as well as the Appeal Chamber shall be established for each separate case by the Grand Chamber consisting of all judges of the Court.

court in the main proceeding would apply the Community law relying on the guidance provided by the Court.

At first sight this preliminary rulings procedure seems very similar to the preliminary rulings procedure of the Court of Justice of the European Union (which plays a key role in the development of the EU legal order). But still there are a few but crucial differences:

- (a) First of all it is worth noting that in accordance with Article 267 of TFEU any domestic court could raise questions before the Court of Justice if it believes that it could help in the proper adjudication of the case. As it was already mentioned above in the case of the Court of the Eurasian Community, the list of references is restricted by the highest courts of the Member States.
- (b) Moreover, domestic courts of the EU could raise questions concerning not only the interpretation and application of the Union law (similar to requests for preliminary rulings to the Court of the Eurasian Community), but also regarding the validity of acts of the institutions, bodies, offices or agencies of the Union. In contrast, in the Eurasian Community the highest courts of the Member States can request the Court to give preliminary rulings concerning only the treaties and the acts of the Commission. In addition, in the EU where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal *must* bring the matter before the Court of Justice of the EU. Similar provisions exist in the Private Litigants Treaty of the Eurasian Community. But if we combine this with the general restriction on the acts that can be the subject of preliminary rulings, and the fact that only the highest courts of the Member States are empowered to request preliminary rulings, the present author submits that in reality the Eurasian Court will have jurisdiction to issue preliminary rulings in only a limited number of cases.¹¹ One should also keep in mind here the history of the relationship between the Court of Justice of the EU and the courts of the Member States. The highest courts of the Member States have shown themselves reluctant to approach the CJEU with requests for preliminary rulings. Some of them never raised questions before the CJEU even in cases where they must do it. Among the explanations

¹¹ For instance, Russia's highest courts (the Constitutional Court, the Supreme Commercial Court and the Supreme Court of common jurisdiction) are highly selective in picking up cases, doing so at their own discretion.

suggested by scholars for such statistics is a feeling of jealousy, and of course a fear of losing the exclusive right of the national high courts to have the final word in the interpretation of national rules.¹² K. Alter called it a policy 'don't ask the European Court of Justice (ECJ) and the ECJ can't tell'.¹³ By far the majority of the requests for preliminary rulings have been sent to the CJEU by the lower courts of the Member States. Significantly, it was also the lower courts that triggered the seminal judgments of the ECJ in cases such as *Van Gend en Loos*¹⁴ and *Costa v. Enel*.¹⁵

- (c) Another crucial difference between the preliminary rulings of the Court of the Eurasian Community and the preliminary rulings of the CJEU is their binding force. In case of preliminary rulings delivered by the CJEU, such rulings shall be binding not only on the courts which raised the questions before the Court of Justice, but in effect on all courts of the EU, thus ensuring the uniform interpretation of EU law. In contrast, it is really disappointing to read in the Statute that the preliminary rulings of the Court of the Eurasian Community will not be binding, not even on the domestic court which raised the questions before the Court of the Community (paragraph 3 Article 26 of the Statute of the Court).

All the above mentioned differences in the preliminary rulings procedures of CJEU and of the Court of the Eurasian Communities give sufficient grounds to anticipate that the mechanism of the preliminary rulings of the Eurasian Court will be weak, and will not be able to play the same role as in the case of the CJEU. It is unlikely that the highest courts of the Member States of the Community will be enthusiastic to use this mechanism. More probably, they will find ways to ignore it. In the end, judges of the highest national courts in all countries behave very much alike. Furthermore, the non-binding character of the preliminary rulings will dramatically diminish their practical value for the national judiciaries.

Taking into account the evident weakness of the preliminary rulings procedure of the Court of Eurasian Community, the jurisdiction of the Court to hear private complaints cases deserves special attention. In accordance with Article 2 of the Private Litigants Treaty, the Court is entitled to adjudicate applications of undertakings challenging the compatibility of the acts of the Eurasian Economic Commission or the Commission's actions (or failure to act) with the founding

¹² Attractive explanations of such phenomena had been suggested by J.H.H. Weiler in his well-known article *Transformation of Europe*, 100:200302484 Yale L.J. (1991).

¹³ K. Alter, *supra* n. 2, at 98–99.

¹⁴ Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

¹⁵ Case 6/64 *Costa v. ENEL* [1964] ECR 586.

treaties of the Community. Any undertaking may initiate the proceedings before the Court of the Eurasian Community claiming that an act of the Commission (or action or failure to act) is incompatible with the primary law of the Community and infringed the rights of the undertaking in question. Such a summary, and a somewhat awkward description of the jurisdiction of the Court imply several qualifications.

First, private litigants may initiate the proceedings before the Court questioning only the acts of the Commission (the acts of other institutions of the Community including the acts of the Interstate Council, the main legislative body of the Community, are fully excluded from this procedure).

Second, the proceedings may be initiated only by undertakings claiming that the act or the action (the failure to act) of the Commission infringed 'the rights and lawful interests of undertakings conferred upon them by the Treaties of the Community' (paragraph 2 Article 2 of the Private Litigants Treaty). It means that in order to establish its own jurisdiction, the Court must (i) verify that the applicant is indeed an undertaking in the sense of the Treaty and (ii) find out what rights and interests of the applicant were infringed by the Commission.

Third, the application shall be held by the Court as admissible upon the payment by the undertaking of a special court filing fee in the amount of RUR 30,000 (roughly around USD 1,000). And, last but not least, the private appeal shall be admissible only after the Eurasian Economic Commission has had occasion to reconsider the subject matter of the case. The Private Litigants Treaty contains a rather vague provision in this respect (which will certainly require further clarification from the Court's side in the process of establishment of its own jurisdiction in each case): 'If within 2 months the Commission fails to take measures concerning the application of the undertaking, the latter will be entitled to submit its claim to the Court.' Assuming that direct appeals of the private litigants will represent the major part of the caseload of the Court, at least in the nearest future, the present author would like to make some comments as to this particular jurisdiction of the Court of the Community.

4 A CLOSER LOOK AT DIRECT APPEALS TO THE EURASIAN COURT

To begin with, there can be little doubt that very soon the Court will face the need to interpret more broadly the term 'undertakings' used in the Private Litigants Treaty. Now the Treaty defines this term as 'any legal entities duly registered in any Member State of the Community or in the third countries, or individuals duly registered as private entrepreneurs in any Member State of the Community or in the third countries' (Article 1 of the Treaty). These provisions of the Treaty strikingly resemble the corresponding articles of the Treaty establishing

the European Coal and Steel Community (which in its initial version also restricted the list of applicants exclusively to undertakings and their associations). And only in 1957, with the signing of the European Economic Community Treaty, was this provision replaced by a much broader notion 'any natural or legal person'.

Having in mind the rather broad range of issues already transferred by the Member States of the Customs Union to the level of the Eurasian Community, it is obvious that the acts of the Commission now directly affect not only undertakings but other private persons as well. This definition will probably be amended in the new Treaty on the Eurasian Union which is in the process of being drafted now.

Furthermore, in sharp contrast with Article 263 TFEU giving the CJEU the right to review the legality of the acts of EU institutions and describing grounds of such review (like lack of competence, infringement of essential procedural requirement, infringement of the Treaties or of any rule of law relating to the application or misuse of powers), the Court of the Eurasian Community can review the acts of the Eurasian Economic Commission only on the grounds of compatibility with the provisions of the founding treaties. The difference between the competence to review the legality (as in case of CJEU) and to review the compatibility (the Court of Eurasian Community) produces judgments from the two courts with dramatically different legal effects as will be shown below.

To recall, applicants can challenge acts of the Commission if such acts allegedly infringed the rights and lawful interests of the applicants conferred by the founding treaties of the Community. Similar to the original founding treaties of the European Communities, no written bill of fundamental rights has been included in the treaties of the Eurasian Community. This means that the Court, in establishing its jurisdiction, in each case will have to be rather creative in determining exactly which rights of the applicant were infringed. Indeed, as will be shown below, the Court in its first judgment revealed its eagerness in finding certain rights of the undertakings while interpreting the treaties. But when doing so the Court faced a tremendous challenge with far-reaching consequences. The Court can either proceed with unsystematic and incoherent interpretation of the fundamental rights issues under the founding treaties or the Court may try to follow the way already chosen by the Court of Justice of the European Union. It is well known that since 1969¹⁶ the CJEU, in the absence of the bill of rights in the founding treaties, created its own remarkable fundamental rights jurisprudence, proclaiming fundamental rights as a part of the general principles of the Community law enshrined in the Treaties and thus creating its own unwritten

¹⁶ Case 29/69 *Stauder v. City of Ulm*, [1969] ECR 419.

catalogue of fundamental rights.¹⁷ The CJEU did so for several reasons, including the need to protect and further strengthen its doctrine of supremacy and direct effect of the Union law.¹⁸

The present author submits that from the first judgments of the Court of the Eurasian Community it is already clear that this Court is under pressure now to make its own choice, and that this choice could affect significantly the very success of the Eurasian Community. In case the Court decides to elaborate its own concept of fundamental rights, it must be prepared to find answers to certain crucial issues at a time when some of them remain still unresolved on the national level of the Eurasian Community's Member States. For example, are companies entitled to rely on 'human' or fundamental rights (an affirmative answer of the Court will be in line with jurisprudence of the European Convention on Human Rights (ECHR) and the CJEU recognizing some fundamental rights of business entities like the right to property, the right to fair trial, the right not to incriminate oneself, etc.¹⁹)? Of course, it will also be very interesting to see a response of the Court if private applicants invoke the rights conferred by the national constitutions of the Member States of the Eurasian Community.

Paradoxically, the necessity for litigants to identify their rights being infringed by acts of the Commission could not only be an obstacle for well-based claims (due to the current uncertainty of the status of their rights under the founding Treaties of the Eurasian Community), but at the same time this necessity could fail to play an effective filtering role in case of ill-founded claims. In fact, any binding decision of the Commission being directly applicable could be treated as affecting

¹⁷ See e.g., A. Rosas, *The European Court of Justice and Fundamental Rights: Yet Another Case of Judicial Activism?* in *European Integration through Interaction of Legal Regimes* 33–64 (C. Baudenbacher & H. Bull ed., Center European L., U. Oslo 2007).

¹⁸ J. Coppel & A. O'Neill, *The European Court of Justice: Taking Rights Seriously*, 29 C.M.L. Rev. 669 (1992); J.H.H. Weiler & N. Lockhart, 'Taking Rights Seriously' Seriously: *European Court of Justice and its Fundamental Rights Jurisprudence*, Part I 32 C.M.L.Rev. 70 (1995).

¹⁹ In his extensive analysis of ECtHR jurisprudence concerning rights of the companies, M. Emerland noted that 'the Court has never doubted that the Convention's system of private litigation is open for corporate persons' Emerland M., *The Human Rights of Companies: Exploring the Structure of ECHR Protection* 4 (Oxford U. Press 2006). A vivid example of ECtHR's application of the Convention's rights to business entities is the well-known *Yukos* case where the Court found violations of the right to fair trial and the right to property (ECtHR, Case of *OAO Neftyanaya Kompaniya YUKOS v. Russia*, Judgment, 20 Sep. 2011).

The CJEU also has extensive case law concerning fundamental rights of the companies. Regarding the right of protection against self-incrimination see ECJ Judgment of 15 Oct. 2002 in Joined Cases C-238/00 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P. *Limburgse Vinyl Maatschappij (LVM) and Others v. Commission*. See also the recent CJEU judgment in DEB case where the Court held that the right to legal aid under Art. 47 of the EU Charter of Fundamental Rights are granted to legal entities as well. Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH* available at: <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30dba6c4e19c0c0941b4a361f96114ba43e5.e34KaxiLc3qMb40Rch0SaxuKa3f0?text=&docid=83452&pageIndex=0&doclang=EN&mode=doc&dir=&occ=first&part=1&cid=6011>.

in one or another way the rights of undertakings (including measures of general application). For instance, a recent Decision of the Commission to introduce a unified 10% import tariff for desktop personal computers with a value not exceeding USD 3000 directly affects all importers and sellers of such equipment and in principle could be questioned by private litigants before the Court.²⁰ Accordingly, the vague and confusing description of the standing rules provided by the Private Litigants Treaty very soon will require clarification from the Court or from the Member States (by way of amending the Treaty). The Court will not have too many options in this case. It could interpret this provision broadly, encouraging the growth of its caseload,²¹ although this might provoke a negative reaction from the Member States (conceivably even forcing them to amend the Treaty). Then again, the Court might also follow the CJEU and invent a sort of its own version of the *Plaumann*-formula,²² restricting in some way the access of private litigants to the Court.

Moreover, the requirement that the Commission must have occasion to reconsider the subject matter of the case as a precondition for the admissibility of a private appeal could also raise a lot of questions. The very text of p. 1 Article 4 of the Treaty is very confusing: 'In case of failure of the Commission to take measures concerning the issue raised by the undertaking, the latter could submit a claim to the Court.' But what will happen if the Commission sends a response to the applicant or even takes some actions to remedy the situation but neither the response nor the measures taken are sufficient for the undertaking concerned? Does it mean that in this case the claimant should refer the case again to the Commission before sending the claim to the Court? Or even worse—could that mean that the claimant lost its right to raise the claim on this subject matter before the Court after getting a response from the Commission? As it will be shown below it seems that the Court in its first judgments tried to provide some answers to these questions.

²⁰ In accordance with the Protocol on the accession of the Russian Federation to the WTO, Russia is entitled to keep import tariff for personal computers on the level up to 10% but in 2015 it shall be totally abolished. The issue of the hierarchy and relation between WTO commitments and obligations under the Customs Union will be addressed below in a more detailed manner.

²¹ For the Court of the ECSC in the first years of its activity. See M. Rasmussen, *The Origins of a Legal Revolution – The Early History of the European Court of Justice*, 14 J. European Integration History 77–98 (2008).

²² In the *Plaumann* case the ECJ formulated its own restrictive interpretation of 'direct and individual concern' requirement provided by the Treaty in case of claims of the private parties. Case 25/62 *Plaumann v. Commission* [1963] ECR 95.

5 A COMMENTARY ON THE FIRST JUDGMENTS OF THE EURASIAN COURT

It is worth noting that the Court, in its first judgments issued in late 2012, revealed a certain understanding of the complexity and urgency of the problems mentioned above. The Court seems ready to take certain steps to compensate some of the shortcomings in the procedure envisaged by the Treaty for direct appeals by private litigants. Moreover, the judgments highlight some additional uncertainties and gaps in the private appeals procedure which initially were not obvious.

(i) The *Yuzniy Kuzbass* case

The first case was initiated by the Russian mining company Yuzniy Kuzbass contesting the validity of paragraph 1 of the Decision of the Commission No. 335 dated 17 August 2010.²³ The paragraph concerned was formulated in the following way:

1. To take into consideration information provided by the Russian authorities regarding the abolishment as of August 18 of the acts of the Federal Customs Service of the Russian Federation concerning customs clearance and customs control on the inner borders of the members states (of the Customs Union – AI) with due regard to decision of the Russian Federation to continue to keep in place for statistical purposes the customs clearance procedures for the goods of 27th Group (fuel resources, oil and products of oil rectifications).

The applicant questioned the validity of this paragraph claiming that it was incompatible with the provisions of the Treaty of October 2007 establishing the Single Customs Territory and the Customs Union stipulating in a precise and unconditional manner a total abolishment of all customs clearance procedures in internal trade between the Member States of the Customs Union. The Interstate Council, the highest institution of the Eurasian Community, established a deadline for this purpose – 1 July 2011. The claimant also pointed out that the existence of the customs clearance procedures in Russia on 1 July 2011, even in case of a relatively narrow list of goods, nevertheless means additional costs for it. In the opinion of the claimant such costs are equal to a hidden obstacle in the cross-border trade inside the Customs Union. Moreover, when the claimant decided to refrain from such customs clearance procedures while making deliveries of the coal from Russia to Kazakhstan, Russian customs authorities almost immediately launched an investigation resulting in fines of 20 million Rubles (around EUR 0.5 million) in total for the failure to declare coal imported from

²³ The Decision of the Commission No. 335 'On certain problematic issues connected with the functioning of the single customs territory and on the practice of implementation of the Customs union'. 17 Aug. 2010. available in Russian at: http://www.tsouz.ru/KTS/KTS18/Pages/R_335.aspx.

Russia to Kazakhstan. It is quite surprising that the Russian customs authorities invoked the very same paragraph 1 of the Decision No. 335 as a legal basis for the imposition of the fines. The mining company applied to the regional commercial court contesting the decision to impose the fines, and to the Court of the Eurasian Community asking the Court to declare paragraph 1 of the Decision No. 335 incompatible with the founding Treaties. The Russian court decided to stay the proceedings until the decision of the Court of the Community would be delivered (having no right to raise the issue of application of the Community law before the Court of the Community by itself, as explained above).

The Court in its judgment supported the position of the applicant, coming to some important conclusions.

First, the Court established its own jurisdiction in this case dismissing the objection of the Commission, which referred to the absence of any proof of proper fulfilment by the claimant of the requirement to make a prior notification of the Commission as prescribed by the Treaty. The Court held that 'there is a lack of legal certainty concerning this issue' mainly due to the fact the Commission failed to elaborate any procedure for proper handling of such prior notifications. In such circumstances the Court took the view that 'the applicant did not have access to an effective non-judicial tool of dispute settlement, which resulted in the infringement of its rights of access to justice'. Such a conclusion could be considered as a bold step and an undisputable success for the young Court, which on this precise issue acted in line with other international courts while securing the right of final say concerning its own jurisdiction for itself.

Still, this author would submit that the conclusion of the Court could have been even more persuasive if the Court had analysed the meaning and objectives of the requirement of prior reconsideration by the Commission as prescribed by the Treaty. The Court could have emphasized that this procedure is by no means a sort of Berlin wall blocking access to the Court, but constitutes merely a tool to filter out ill-founded applications while at the same time giving the Commission the opportunity to remedy the situation itself before the case is handled by the Court. In this specific case drawing certain parallels with the rule of exhaustion of domestic remedies, developed by the ECtHR, could also be helpful. In its well-known jurisprudence the ECtHR formulated the criteria of effectiveness and availability of the domestic remedies, thus leaving for the ECtHR to judge in each specific case whether the applicant should have used it or not.²⁴ Borrowing

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²⁴ See *inter alia* ECtHR, *Akdivar v. Turkey*, Judgment, 16 Sep. 1996, where the Court held that:

66. Under Article 26 (Art. 26) normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see, *inter alia*, the *Vernillo v. France*

arguments from the case law of another international court would strengthen the reasoning of the Court of the Community, rendering its rulings more persuasive and authoritative.²⁵ With such additional clarifications the Court would show the Commission that the Court is highly interested in the accelerated creation of an effective pre-judicial remedy for private applicants. At the same time, the Court would reserve for itself the right to evaluate the effectiveness of such a tool and probably, in certain extraordinary circumstances, to declare a private appeal admissible even without such prior reconsideration and without waiting for an expiry of the two months period established by the Treaty.

Adjudicating the merits of the case, the Court held that paragraph 1 of the Decision No. 335 was not compatible with the founding treaties due to the following reasons:

First, the Court dismissed the objection of the Commission arguing that the paragraph in question had no legal force, being just a fixation of information provided by Russia and taken into account by the Commission. The Court held that ‘the decisions of the Commission having a binding character should not in principle contain any vague and ambiguous provisions as well as provisions of declaratory or informative nature’. The Court came to the conclusion that paragraph 1 indeed had such binding force.

Second, considering the issue of the infringement of the rights of the applicant, the Court underlined that the application of paragraph 1 of the Decision No. 335 by the Russian customs authorities resulted in imposition of the fines on the applicant and consequently infringed the rights of the latter provided by the Treaties. It is interesting to note that the Court avoided clarifying what kind of rights had been infringed in this case, simply talking about some abstract rights.

In addition the Court held that, taking into account that paragraph 1 covers only exports from Russia to the other countries of the Customs Union and that it resulted in the necessity for the applicant to prepare a double set of documentation in each delivery of the goods in question from Russia, the paragraph shall be

Judgment of 20 Feb. 1991, Series A No. 198, pp. 11–12, para. 27, and the *Johnston and Others v. Ireland* Judgment of 18 Dec. 1986, Series A No. 112, p. 22, para. 45).

67. However, there is, as indicated above, no obligation to have recourse to remedies, which are inadequate or ineffective. In addition, according to the “generally recognised rules of international law” there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal (see the *Van Oostenvijk v. Belgium* Judgment of 6 Nov. 1980, Series A no. 40, pp. 18–19, paras 36–40). The rule is also inapplicable where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the state authorities has been shown to exist, and is of such a nature as to make proceedings futile or ineffective.

²⁵ A. Rosas, a judge of the CJEU, called such borrowings ‘horizontal judicial dialogue’. A. Rosas, *Methods of Interpretation – Judicial Dialogue*, in *The Role of International Courts* (C. Baudenbacher & E. Busek eds., German L. Publishers 2008).

considered as 'disproportionate burden' for the Russian undertakings. According to the Court it constitutes 'arbitrary discrimination and presents a disguised restriction on trade', prohibited by Article 3 of the Treaty establishing the Single Customs Territory and Customs Union.²⁶

Further developments of the case revealed obvious weakness and even some gaps in the legal architecture set out by the Private Litigants Treaty, especially in connection with the execution of the judgment and the enforcement procedure. According to the Treaty, in case of successful challenge of an act of the Commission before the Court the effect of the judgment shall be just a suspension of such act as of the entry of the judgment into force and till the relevant amendment will be made by the Commission in order to bring it in compliance with the judgment (the Commission has sixty days for that). The judgment in the *Yuzniy Kuzbass* case became effective on 29 November 2012 when the Appeal Chamber of the Court dismissed the appeal of the Commission and upheld the judgment of the Chamber of the Court. On 22 January 2013 the Commission made the necessary amendments to Decision No. 335, bringing it in compliance with the judgment. On 16 January 2013 the Russian commercial court hearing the claim of *Yuzhniy Kuzbass*, ruled invalid and revoked entirely all the decisions of the Russian customs authorities imposing fines on the claimant. The domestic court referred to the judgment of the Court of the Community, while pointing out that the decisions of the customs authorities to impose the fines were based exclusively on paragraph 1 of the Decision No. 335.²⁷

However, the judgment of the Court of the Community was completely ignored by another Russian commercial court (sitting in the Ryazan region), which held on 20 December 2012 another Russia company liable for violation of the same paragraph 1 of the Decision No. 335.²⁸ The Ryazan court did so in spite of the fact that the application of paragraph 1 had to be suspended from 29 November 2012 onwards. The outcome of the case heard by the Ryazan court makes the situation even more complicated (if not surrealistic). Instead of declaring invalid the decision of customs authorities imposing the fines, the Ryazan

²⁶ Article 3 of the Treaty says that 'from the moment of the establishment of the Customs Union the Parties shall not use in the trade between them customs duties, quantitative restrictions on imports and any measures having equivalent effect. Nothing in the present article shall preclude the Parties to introduce in the trade between them special protective, antidumping and countervailing measures as well as measures prohibiting or restricting import or export if measures are justified on the grounds of public morality; the protection of health and life of humans, animals or plants; the protection of environment and cultural treasures provided however such prohibitions and restrictions shall not constitute a means of arbitrary discrimination or a disguised restriction on trade'.

²⁷ Case A27-13542-2012, Judgment available in Russian at: http://kad.arbitr.ru/PdfDocument/8e419bfd-1afa-4761-a235-2be93d9787e0/A27-13542-2012_20130116_Resheniya%20i%20postanovleniya.pdf.

²⁸ Case No 54-8509/2012, Judgment available in Russian at: <http://kad.arbitr.ru/Card/cdf3f2e0-fa1a-4474-ac9d-2a3a695aa89d>.

commercial court decided to drop all charges against the company 'taking into account the negligible importance of the case and active repentance of the company'. This judgment illustrates that the Yuzhniy Kuzbass judgment of the Court so far has been unnoticed (if not even neglected) by the Russian judiciary.

Moreover, all Russian domestic acts obliging Russian companies to perform customs clearance procedures in case of the export of the goods of Group 27 to the Member States of the Customs Union 'for statistical purposes' are still in force. Consequently, the Russian authorities continue to breach the obligations under the founding Eurasian Community treaties. These developments confirm the general weaknesses of the current enforcement procedures in the Eurasian Community. The Court in its judgment avoided any references to the Russian domestic acts in question, notwithstanding the fact that these acts obviously constitute an infringement of the obligations under the founding Treaties. Probably the Court did so presuming that it is not its task to remind the Member States more generally about their obligations, but that this falls within the purview of the Commission.²⁹

From the above, it is evident that the provision of the Treaty stating that in case of a successful challenge of an act of the Commission before the Court, the application of the contested decision shall be just suspended, is very problematic. A simple suspension does not automatically mean nullity of the contested decision. Strictly speaking, a suspensive power means that the Court does not have the power to hold the Commission decision null and void.³⁰ But does a judgment have any legal effects beyond suspension of the contested act? Should the Commission not make its best efforts to eliminate the legal consequences of the act declared by the Court incompatible with the Treaties? To eliminate such uncertainties, the present author submits that it would be more effective and reasonable to provide the Court with an explicit right to annul the decision of the Commission and to permit the Court to determine any retroactive effect of the judgment or to qualify the extent of the nullity of the act in question. It is worth noting that in February 2013 the Court received a request from the protagonist

²⁹ Article 20 of the Treaty on the Eurasian Economic Commission gives the Commission similar rights as in case of the infringement procedure under Art. 258 of TFEU. The Eurasian Commission may initiate an investigation if it considers that a Member State has failed to fulfil its obligations under the founding treaties. If the Member State in question failed to remedy the violations of the Treaty provisions, the Commission is entitled to bring the case before the Court of the Community. As in the case of the European Communities before the Maastricht Treaty, the judgment of the Court is just declaratory without any right of the Court to impose lump sums and penalties on the state concerned.

³⁰ It is highly interesting to note that Tatiana Neshataeva, the Judge of the Court of the European Community, in her recent publication gave rather broad interpretation of this provision of the Treaty saying that the Court has enough competence to annul the decision of the Commission and stipulate the retroactivity of the Court judgment. T. Neshataeva (2012) *Evrasiysky Sud: nazad v budishee, Zakon*, No. 9 pp. 152–162.

Yuzhniy Kuzbass to clarify the difference between the notions of ‘incompatibility’ (a definition used by the Private Litigants Treaty) and ‘nullity’ (a well-known concept in the Russian law).³¹ In its judgment of 8 April 2013 the Grand Chamber of the Court held that in case of a successful challenge of the act of the Commission, such act shall be void *ab initio* if the Court does not decide otherwise.³² It remains to be seen how and to what extent such broad interpretation of the provisions of the Private Litigants Treaty made by the Court will be accepted by the Member States.

In addition, the founding treaties of the Eurasian Community remain silent regarding any right to damages if the private applicant suffered losses as a result of the contested act of the Commission. Thus, the Private Litigants Treaty does not give the Court jurisdiction to hear actions for damages of any kind instituted by the private applicants (p. 4 Article 11 of the Treaty). In particular, the founding treaties do not contain any provisions similar to Article 340 TFEU, which stipulates the non-contractual liability of the Union for the damage caused by its institutions. It would be most regrettable, this author submits, if the drafters of the Eurasian Community treaties intended to leave private applicants without any right to damages in these cases.

Presumably, this issue shall be resolved by the national courts. But who could be liable for, say, damage suffered by Yuzhniy Kuzbass? Russian customs authorities who erroneously interpreted and applied the Decision of the Commission? Or the Commission which could be seen to have blessed in its Decision No. 335 the infringement by the Russian side of its obligations under the founding treaties? The treaties remain silent on these issues as well. Meanwhile, any discussions regarding redress in the Yuzhniy Kuzbass case will likely remain theoretical.

(ii) The *ONP* Case

In its second judgment delivered in 2012, in the case *ONP v. Commission*,³³ the Court of the Eurasian Community got a chance to express its views regarding the compatibility of the acts of the Commission with the pre-existing obligations of the Member States, i.e., obligations they assumed under international treaties concluded before the establishment of the Customs Union. In this case the Russian company ONP challenged before the Court the Decision No. 891, where the Commission for the purpose of customs clearance procedures classified

³¹ The Court of Eurasian Community, notification of 28 Feb. 2013, available in Russian at: <http://sudevrizes.org/main.aspx?guid=20541>.

³² The Court of the Eurasian Community, Grand Chamber Judgment of 8 Apr. 2013, available in Russian at: <http://www.tsouz.ru/Docs/sud/Documents/tolkovanie.pdf>.

³³ The Court of the Eurasian Community case *ONP v. Eurasian Commission* available in Russian at: <http://www.rg.ru/pril/74/41/95/1.pdf>. In its decision of 21 Feb. 2013 The Appeal Chamber dismissed the appeal of the Commission and upheld the Judgment of the Chamber of the Court.

demilitarized tow-cars (with fully dismantled weaponry and armory) as motor vehicles for the transportation of people and goods. The applicant insisted that the tow-cars in questions should instead be classified as tractors, taking into account their main functional purpose, namely haulage and pushing.

Analyzing Decision No. 891, the Court took into account that the standards and principles of classifications of the goods had been laid down by the international Convention on the Harmonized Commodity Description and Coding System drafted under the auspice of the World Customs Organization.³⁴ The Court also underlined that three Member States of the Customs Union became parties to this Convention before the creation of the Customs Union. At the same time, the Court found that the Customs Code of the Customs Union as well as the Agreement on unified rules of the customs clearance in the Customs Union are based on the harmonized system of the description and codification of the goods. The Court considered these facts as sufficient reason to state that the Convention became a part of the legal orders of the Member States (but not the legal order of the Community – AI) and with due regard to the principles of international law, such as *pacta sunt servanda* and good faith, the provisions of the Convention should be binding upon the Customs Union and fully applicable.

Applying the provisions of the Convention to the Decision of the Commission challenged by the applicant, the Court held that the Commission, contrary to the provisions of the Convention, used other criteria for the customs classification of the goods in question than the criteria of functional assignment used by the Convention.³⁵ In addition, the Court found that the Commission had infringed essential procedural requirements, including the principle of legal certainty, by issuing a decision with really vague and badly formulated provisions.

Establishing its own jurisdiction in this case, the Court disagreed with the argument of the private litigant that the infringement of its rights happened in the form of the bankruptcy resulting from the higher amount of customs duties it had to pay to the Russian customs authorities following the reclassification of its vehicles. Instead, the Court formulated its own vision on the rights of the applicant that had been infringed by the act of the Commission. The Court identified the right to make an independent choice of the customs classification code while performing customs clearance of the goods (in the present case it was done by the Commission), as well as the right to do business on economically

³⁴ Convention on the Harmonized Commodity Description and Coding System Convention on the Harmonized System of 14 Jul. 1983. Full text is available at: http://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs_convention.aspx.

³⁵ See Note 2 to Ch. 87 of the HS Nomenclature 2012 Edition, available at: http://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs_nomenclature_2012/hs_nomenclature_table_2012.aspx.

advantageous conditions, which had been infringed by the arbitrary classification of the vehicles.

Finally, on the merits, the Court came to the conclusion that the Decision of the Commission No. 819 was not compatible with the treaties establishing the framework of the Community (primary law).

4 The ONP case is also remarkable as being the very first case where the Court made a reference to the jurisprudence of other international courts, referring in the Appeal Chamber decision³⁶ to the ECtHR judgment in the case *Credit and Industrial Bank v. Czech Republic*.³⁷ The Court did so dismissing the objection of the Commission which argued that the claimant lost its right to raise the claim on this subject matter before the Court while in bankruptcy. The Court's intention was definitely to strengthen the persuasiveness and authoritativeness of its conclusions. Of course a direct citation from the referred ECtHR judgment would have looked better,³⁸ but the mere fact of the first reference to the case law of another international court should be welcomed.

It is also really striking to see that, in reaching its conclusions, the Court included the above mentioned Convention in the primary law of the Community. That the Member States of the Customs Union became parties to this Convention before the creation of the Union was no obstacle for the Court. Instead, the Court found decisive that all issues covered by this Convention had been transferred by the Member States to the level of the Customs Union. In other words, the Court found the Convention a binding instrument not only for the Member States but for the Customs Union and its institutions as well. The Court's line of argument could be compared with the approach taken by the CJEU in the well-known case *International Fruit Company*³⁹ where the Court held that:

7. Before the incompatibility of the Community measure with a provision of international law can affect the validity of that measure, the Community must first of all be bound by that provision...

18. It therefore appears that in so far as under the EEC Treaty the Community has assumed the powers previously exercised by the Member States in the areas governed by the Geneva agreement, the provisions of that agreement have the effect of binding the Community.

³⁶ The Court of the Eurasian Community case *ONP v. Eurasian Commission*, Decision of the Appeal Chamber, 21 Feb. 2013, p. 4, available in Russian at: <http://www.rg.ru/pril/74/42/10/2.pdf>.

³⁷ ECtHR *Credit and Industrial Bank v. Czech Republic*, Judgment, Reports, 2003_XI.

³⁸ In para. 49 of the referred judgment ECtHR, it stated that 'when the application was lodged with the Commission... .., the applicant bank, although under compulsory administration, had not ceased to exist as a legal person. It was at that time represented by its compulsory administrator, who, had replaced the statutory body... .. and who had legal capacity to defend the rights of the applicant bank, and, consequently, to apply to the Convention institutions if he considered it appropriate'.

³⁹ Joined Cases 21-24/72, *International Fruit Company NV and others v. Produktschap voor Groenten en Fruit* [1972] ECR 1219.

Such striking similarities lead us to the question of an approach to be taken by the Court of the Eurasian Community towards WTO rules and their place in the legal order of the Community. The Court will have a chance to clarify this issue soon as it is already registering a claim of a Ukrainian company challenging the decision of the EEC Commission to impose a 20% ad valorem antidumping duty in case of import of certain steel products from Ukraine.⁴⁰ In the claim the applicant questioned the compatibility of the Decision with the treaties establishing the legal framework of the Community and with the WTO rules as well.

It remains to be seen whether the Court will be bold enough to streamline the highly complicated and controversial issue of the relation between the EEC legal order and WTO rules especially bearing in mind that Belarus and Kazakhstan are not members of WTO yet.⁴¹

6 CONCLUSION

Based on this analysis of the Eurasian Community Court's jurisdiction, and the Court's first judgments, the present author would draw the following conclusions:

⁴⁰ The Court of Eurasian Community, Press release, 16 Apr. 2013 (67) 2013, available in Russian at: <http://sudevrizes.org/main.aspx?guid=6541>.

⁴¹ The basic features of the current status quo could be described very briefly in following points:

1. In accordance with Art. 15.4 of the Constitution of the Russian Federation, international treaties of the Russian Federation (including all WTO commitments) form an integral part of the legal system of the Russian Federation. Once a treaty entered into force it shall be binding and enforceable throughout the entire territory of the Russian Federation. In the event of a conflict, provisions of an international treaty prevail over domestic Federal laws adopted prior to or after entry into force of the treaty (see p. 151 of the Report of the Working Party on the accession of the Russian Federation to the WTO, WT/ACC/RUS/70 WT/Min (11)/2).
2. The Member States of the Customs Union concluded a special treaty called Treaty on the Functioning of the Customs Union in The Framework of the Multilateral Trading System of 19 May 2011. The Treaty stipulates that from the date of accession of any Customs Union Member State to the WTO, the provisions of the WTO Agreement became an integral part of the legal framework of the Customs Union in relations to the matters transferred to the Customs Union.
3. The WTO rules (including individual commitments taken by each Member State of the Customs Union in course of its accession) shall prevail over any conflicting provision of any treaty concluded in the framework of the Customs Union and shall not be affected by any decision of the institutions of the Union or by decision of the Court of EEC (see p. 185 of the Working Party Report).
4. It's very important to note that such an unlimited and unqualified monist approach presumes that provisions of the Treaty of 19 May 2011 (and hence indirectly WTO provisions) could be applied by the national courts and the EEC Court as well (p. 186 of the Report of Working Party).

All points mentioned above lead us to the conclusion that the easiest and most time saving way to challenge a measure taken by Russia or by the Customs Union could be a recourse to the proceedings before the EEC Court (if the Court supports the monist approach of the drafters of the Treaty of 19 May 2011). Such proceedings initiated by any foreign undertaking claiming that an act of the EEC Commission infringed its rights could be more effective than any governmental use of the Dispute Settlement Body procedures under WTO rules.

- (1) Successful Eurasian integration will never become a reality without a strong Court, especially taking into account the already announced plans to transform the Eurasian Community into the Eurasian Union, a full-fledged political and economic union, with corresponding transfer of new competences and powers to the level of the Union.⁴²
- (2) The jurisdiction of the Court requires a serious re-think. The current version of the preliminary ruling procedure has to be amended so as to become an effective tool of consistent interpretation and application of Eurasian Community law. Furthermore, as demonstrated by the first judgment of the Court, the procedure for direct private appeals to the Court also needs to be improved (notably the rules on standing and, more importantly, on the effect of the judgments of the Court as well as their enforcement).
- (3) While the vague provisions of the Treaty describing the jurisdiction of the Court to hear private appeals could be considered too restrictive in terms of *locus standi*, at the same time they seem quite liberal to the extent they allow private litigants to challenge *all* acts of the Commission – even acts of general application. At least in theory this could provide the Court with a basis to launch a sort of a constitutional review of the Community measures, allowing it to draw up its own catalogue of fundamental rights. But the likelihood of the Court starting this journey in the near future remains relatively small. It is still a very young international court, having an as yet unstable institutional background (taking into account the on-going process of replacing all treaties by one Treaty on the Eurasian Union).
- (4) Human rights will play a vital role in the future of the Eurasian Community or Union in general, and of the Court in particular. The early acknowledgment of the importance of this factor by all stakeholders of the Eurasian Community (including the drafters of the Treaty on the Eurasian Union) is critical for the depth and effectiveness of the integration process. Sooner or later the absence of a catalogue of human rights on the level of the Eurasian Community, as well as evident gaps in judicial control of the compatibility of the acts of the Community with human rights, will attract a keen interest from the ECtHR. This Court will be ready to perform its own judicial scrutiny of the acts and actions of the Eurasian Community. The fact that, from the three current members of the Customs Union, only Russia is a

⁴² V. Putin, 'Novy integratsionny proekt dlya Eurazii: budushee, kotoroe rozhdaetsya segodnya' ('New integration project for Eurasia: future which is emerging today'), available in Russian in *Izvestiya*, 3 Oct. 2011.

party to the ECHR should not create the illusion that the acts of the Eurasian Community are out of bounds for the ECtHR. On the contrary, this fact may actually encourage the ECtHR to take a closer look at the Customs Union. The first complaints from Russian applicants might already be enough for the ECtHR to investigate whether the judicial protection of the individual's rights by the Eurasian Community complies with the standards of the ECHR. This author would not be surprised if the ECHR would handle such complaints with priority, as there are good reasons to consider that such applications raise 'questions capable of having an impact on the effectiveness of the Convention system'.⁴³ The ECtHR will not permit a situation where the biggest country of the Council of Europe is significantly affected by the binding and directly applicable acts of the Eurasian Community which are not covered by the supervisory system of the ECHR. In its well-known jurisprudence the ECtHR several times stated that the Convention does not exclude the transfer of competence from the state to international organization, provided that Convention rights continued to be secured by the state in question.⁴⁴ In the case of the Eurasian Community, this means that Russia continues to be responsible under the Convention even after signing the founding treaties of the Community or when implementing or applying the acts of institutions of the Community.

It is simply unrealistic to believe that the Eurasian Community, given its current arrangements, will enjoy the same well-known *Bosphorus* presumption of compliance which the ECtHR applies to the European Union.⁴⁵ All the deficiencies of the system of judicial protection in the Eurasian Community mentioned above, such as the restrictive standing rules, the weaknesses of the enforcement mechanism, and the absence of the right to damages in case an individual's right is breached by an act of the Community, will be important factors for the ECtHR when formulating its attitude towards the Eurasian Community.

- (5) In the meantime, a real challenge for the Eurasian Community legal order could come from constitutional courts of the Member States. They could play human rights cards in the same way as the constitutional courts of Germany and Italy did when the European Communities questioned the exclusive right of the CJEU to interpret

⁴³ See ECHR priority Policy available at: http://www.echr.coe.int/NR/rdonlyres/DB6EDF5E-6661-4EF6-992E-F8C4ACC62F31/0/Priority_policyPublic_communication_EN.pdf.

⁴⁴ ECtHR, *Matthews v. United Kingdom* (No. 24833/94).

⁴⁵ ECtHR, *Bosphorus Airways v. Ireland* (No. 45036/98), 30 Jun. 2005.

EU law.⁴⁶ This author predicts with confidence that if the process of Eurasian integration grows apace, we will soon see critical remarks in the direction of the Eurasian legal order (and the Court of the Community) from the side of national constitutional courts. For instance, the Russian Constitutional Court (and its Chairman) is known to be sceptical towards the international judiciary. This is exemplified by a recent judgment of the Russian Constitutional Court No. 8-P.⁴⁷ Discussing one of the treaties concluded by the Member States of the Customs Union which directly affected the applicant, the Constitutional Court extensively used human rights mantras, positioning itself as an ultimate guardian of the core values of the national constitution. The Court did not cross the line by directly reviewing the constitutionality of the agreement in question on the grounds of national human rights, but the message hidden between the lines was pretty clear – the Court is watchful. This judgment can be seen as a sort of warning shot in the direction of the Eurasian Community.⁴⁸

How the jurisprudence of the Court of the Eurasian Community will develop remains to be seen. Hopefully the Court will be bold enough to have its own voice and become one of the effective institutions of contemporary international justice. Already its first judgments provide Russia, the Customs Union, and the international community with enough thoughts for reflection.

⁴⁶ The German Constitutional Court in its famous *Solange-I* decision held that in absence of the catalogue of fundamental rights on the level of the European Communities, it will continue to have competence to review the acts of the European Communities with regard to conformity of such acts with fundamental principles of the German Constitution. BVerfGE, 37, 271 see also the decision of the *Italian Constitutional Court in Frontini v. Ministero delle Finanze*, Judgment of 27 Dec. 1973, Guir. Const. 2401.

⁴⁷ Constitutional Court of the Russian Federation, Judgment No. 8-P, 27 Mar. 2012, available in Russian at: <http://www.rg.ru/2012/04/13/sud-dok.html>.

⁴⁸ This judgment was rendered in connection with the complaint of a Russian citizen who passed on 10 Jul. 2010 through the Chinese–Russian border declaring some goods bought for private use and paying customs duties in an amount of about USD 50. However, the Russian customs authorities re-calculated the applicable customs duties and ordered him to pay USD 1500 more. The re-calculation had been made on the basis of the Agreement of the Member States of the Customs Union concerning the customs clearance procedure of goods imported for private use. Such Agreement was temporary (till its entry into force) in use as of 1 Jul. 2010. All domestic courts dismissed the claims of the applicant. Finally, the applicant made a desperate attempt to apply to the Constitutional Court challenging the constitutionality of the provision of the Russian law on the international treaties permitting temporary use of the treaties, which could affect human rights. The Constitutional Court demanded only to amend the Law on international treaties by inclusion of a special provision concerning compulsory publication of the treaties, which are temporary in use.

Author Query Form

No	Query	Page	
1	Please provide expansion for CJEU?	226	
1.1	Please provide us the shortened running head for this article. As the title is too long to occupy the space.	227	
2	Please confirm the word ‘seriously’ needs to be retained twice in the footnote.	233	
3	Please check if ‘horisontal’ needs to be retained as is or it needs to be changed to ‘horizontal’	236	
4	Please check if EctHR should be changed to ECtHR.	242	