The Eurasian Economic Union

– Risks and Opportunities of an Emerging Bipolar Europe –

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A. Introduction

The current armed conflict in eastern Ukraine attained sad notoriety, as it showed that war in Europe could no longer be considered a phenomenon belonging to the past, effectively eradicating years of international cooperation in different areas. The dispute between the West and Russia over the fate of Ukraine reminded many of the days of the so-called "Cold War", during which the two superpowers of that time – the United States of America (USA) and the Union of Soviet Socialist Republics (USSR) – irreconcilably faced off against each other, each maintaining a geographical area of political influence on a global scale. Far from discussing security aspects, the present article intends to analyse the said conflict from a geopolitical perspective in the context of the competition between two regional integration systems – the European Union (EU) and the Eurasian Economic Union (EAEU) –, which have clashed as a result of their continued territorial expansion. For this purpose, legal, economic and political aspects will be taken into account. The main objective of the present article is to shed light on the functioning of the latter integration system, with a view to assisting the EU in developing strategies for bilateral cooperation, ultimately preventing further confrontation.

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B. The Conflict in Ukraine as a Symptom of a Clash between two Integration Systems

Whilst the general public tends to see the armed conflict primarily as a confrontation between Ukraine and Russia over territorial and ethnic boundaries, little is known about the true reasons of the dispute. In order to understand these reasons, the conflict must be contemplated within the greater context of the economic and political restructuring of Eastern Europe and the Caucasus over the past years, whose main protagonist has been the EU. After the collapse of the USSR and the communist regimes in Eastern Europe, the EU has stepped in and filled the political vacuum, setting a new agenda aimed at helping the individual States in their transformation into market economies, thus enabling their subsequent incorporation into the European single market. While this is certainly the case for those Eastern European States which joined the EU as full members from the year 2004 onwards, it is also to a certain degree true for those States in the Balkans and the Caucasus which have established privileged trade ties with the EU.[1] However, with the emergence of the EAEU in Eurasia, a new actor has entered the international scene, openly challenging the new order established by the EU with the so-called Eastern Partnership (EaP). A proper analysis of the events leading to this clash – which has dramatically escalated including economic sanctions and military measures – requires that the perspective of both integration systems be taken into account. For that purpose, the following shall explain, firstly, the content of the EU's geopolitical strategy with regard to Eastern Europe and the Caucasus and, secondly, how it has been perceived by Russia.

I. The EU's View of a Unipolar Europe Reflected in the Eastern Partnership

It follows from Article 8 of the Treaty on the European Union (TEU), that the EU

> "shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterized by close and peaceful relations based on cooperation."

This provision further states that for this purpose, the EU

> "may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation."

Although this provision was not applicable before the entry into force of the Treaty of Lisbon on 1 December 2009, it best articulates the EU's new foreign policy as

1 The involvement of the EU in the Balkans and the Caucasus is certainly not limited to trade and economic integration, as it also includes various activities aimed *inter alia* at promoting political stability and the rule of law in these regions, often in cooperation with other entities such as the Organization for Security and Co-operation in Europe (OSCE), the Council of Europe and the United Nations (UN). The present article deals merely with areas falling within the EU's Neighbourhood Policy.

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regards its neighbouring geographical environment. The "enlargement fatigue" experienced in the past decade, along with the pressing question as to what should be the ultimate boundaries of the EU as a regional integration system, made it necessary to develop a strategy in relation to those States, to which the EU could not offer an accession perspective. A differentiated approach was eventually adopted within the European Neighbourhood Policy (ENP), the general strategy which encompasses the EU's foreign relations with Eastern Europe, the Caucasus, the Middle East and Northern Africa. The EaP, the strategy developed specifically for Eastern Europe and the Caucasus, was born in 2008 on the basis of a Polish-Swedish proposal as a joint initiative involving the EU, its Member States and six eastern European partners: Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine.[2]

The EaP is based on a commitment to the principles of international law and fundamental values – democracy, the rule of law, human rights and fundamental freedoms – and implies support for a market economy, sustainable development and good governance. More concretely, according to the joint declaration signed in Prague in May 2009 which gave birth to EaP, it aims at "creating the necessary conditions to accelerate political association and further economic integration between the EU and the interested partner countries. It seeks to support political and socio-economic reforms of the partner countries, facilitating approximation towards the EU. This is meant to serve the shared commitment to stability, security and prosperity of the EU, the partner countries and indeed the entire European continent."[3] In other words, the EaP constitutes a foreign policy strategy aimed at fostering economic development in Eastern Europe with a view to guaranteeing stability and peaceful cooperation in the EU's immediate neighbourhood.

From a legal perspective, the EaP is implemented by bilateral association agreements concluded between the EU and individual partner States whose objective is the establishment of Deep and Comprehensive Free Trade Areas (DCFTA), ultimately offering opportunities for trade and investment. In technical terms, the creation of these association agreements implies a regulatory approximation leading to convergence with EU laws and standards, with this measure expected to facilitate the opening of national markets.[4] The consequence of this approximation is that Eastern partners are required to adopt the EU's acquis by incorporating it into their respective national

2 *Wojna/Gniazdowski*, Eastern Partnership: The opening report, The Polish Institute of International Affairs, April 2009, p. 9.

3 Council of the European Union, Joint Declaration of the Eastern Partnership Summit, Prague, 7/5/2009, 8435/09 (presse 78).

4 Council of the European Union, Joint Declaration of the Eastern Partnership Summit, Warsaw, 29-30/9/2011, 14983/11 (presse 341), p. 3; *Petrov/Kalinichenko*, On similarities and differences of the European Union and Eurasian Economic Union legal orders: Is there the "Eurasian Economic Union" acquis?, Legal Issues of Economic Integration 43 (2016), p. 297.

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legal orders, at least in specific sectors covered by the subject matter of the agreements.[5] The EU has repeatedly stressed the importance of legislative and regulatory approximation for the achievement of the objectives set by the EaP and has therefore offered support to national institutions wishing to make themselves familiar with the EU's legal framework. In the long term, this process shall lead to a gradual economic integration of the Eastern partners in the EU internal market and the creation of a common economic area. It is worth noting in this context that the cooperation envisaged by the EaP goes beyond matters pertaining to trade, extending even to the area of justice and home affairs, migration and asylum, the fight against corruption and border control. Furthermore, cooperation in the field of energy is envisaged with a view to strengthen energy security. A long-term stable and secure energy supply and transit shall be achieved, also through better regulation, energy efficiency and greater use of renewable sources. The EaP proposes the inclusion of provisions on energy interdependence in association or other bilateral agreements between the EU and the partner States. A strong incentive for partner States to cooperate with the EU is the prospect of visa liberalisation, which is seen as an instrument for facilitating trade and investment, expected to be achieved gradually once the conditions for safe mobility are met.[6]

Thus, it is possible to conclude from the foregoing that the association agreements proposed to EU partner States in the framework of the EaP aimed at establishing so-called DCFTAs are no longer based solely on the tariff reduction logic, because they cover a broader range of issues, such as removal of non-tariff barriers, liberalisation of the services sector, elimination of the States' protectionist measures, favourable conditions for foreign direct investment, etc. By offering free trade agreements, the EU requires from its partner States economic modernisation with high EU standards in areas such as sanitary and phytosanitary standards, technical regulations, public procurement, competition policy and State-aid.

The EaP appears to be based on the concept of a "unipolar Europe", entailing an incorporation of the eastern partners into the orbit of the EU as the focal point, with access to its internal market as the key instrument used for achieving this goal. It might be more than a sheer coincidence that the launch of the EaP took place shortly after

5 See for example the EU-Ukraine association agreement, which in its Article 124(1) stipulates that "the Parties recognise the importance of the approximation of Ukraine's existing legislation to that of the EU. Ukraine shall ensure that its existing laws and future legislation will be gradually made compatible with the EU acquis." Moreover, Article 56(1) states that "Ukraine shall take the necessary measures in order to gradually achieve conformity with EU technical regulations and EU standardization, metrology, accreditation, conformity assessment procedures and the market surveillance, and undertakes to follow the principles and practices laid down in relevant EU Decisions and Regulations." Article 56(5) prescribes that "Ukraine shall refrain from amending its horizontal and sectoral legislation […], except in order to align such legislation progressively with the corresponding EU acquis, and to maintain such alignment." For more detailed information about standard approximation, see *De Micco*, When choosing means losing – The Eastern partners, the EU and the Eurasian Economic Union, Study, March 2015, p. 33.

6 *Pertusot*, La politique européennes de voisinage: un phénix bureaucratique?, Notes de l'Institut français des relations internationales, November 2016, p. 12.

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Russia's invasion of Georgia in 2008. However, there is no indication in favour of the assumption that the EU leaders intended to alienate or exclude Russia from any partnership with the EU. On the contrary, Russia was offered the opportunity to become part of the EaP along with the other Eastern European countries. This offer was, however, rejected by Russia which did not consider this kind of partnership to be in line with its perception of itself as a regional power, entitled to a privileged, or at least to some kind of, relationship with the EU as equals.[7] In order to understand the disagreement between the EU and Russia as regards the shape and future of their relations, it is necessary to take into account Russia's view on the events taking place in its immediate neighbourhood at that time.

II. Russia's Reservations to the EU's Eastern Partnership as a Result of its View of a Bipolar Europe

The enlargement of the North Atlantic Treaty Organization (NATO) so as to include former Member States of the USSR and the Warsaw Treaty Organization (also known as the Warsaw Pact) was met with Russia's clear discontent. Concessions made by NATO such as the assurance to refrain from setting up new military bases in those Eastern European countries were aimed at addressing Russia's security concerns based on an alleged perception of being "cornered" by foreign military forces.[8] Interestingly, the situation was significantly different in the context of the EU's eastern enlargement despite the considerable political, social and economic impact the accession to this integration system has had on these countries' societies and the fact that, for the first time ever, Russia and the EU as a political entity shared common borders.

The current legal basis for EU-Russia relations is the Partnership and Cooperation Agreement (PCA) of 1994.[9] Since then, the concept of a "Strategic Partnership" was invoked and several attempts were made to deepen bilateral cooperation. In May 2003, when the perspective of Russia's participation in the ENP was vanishing, agreement was made on the deepening of cooperation through the establishment of four "Common Spaces".[10] At the Khanty-Mansiysk summit in 2008, the leaders of the EU and Russia decided to work on a "New Basic Agreement" to replace the PCA of 1994.[11] A further step was made in 2010, with the launch of the "Partnership for Moderniza-

7 *De Bardeleben*, Revising the EU's European Neighbourhood Policy: The Eastern Partnership and Russia, in: Kanet (ed.), Russian Foreign Policy in the 21st century, 2011, p. 246.

8 *Itzkowitz Shifrinson*, Deal or no deal? The end of the cold war and the U.S. offer to limit NATO expansion, International Security 40 (2016), pp. 7-44.

9 Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, OJ L 327 of 28/11/1997, p. 3.

10 European Commission, EU/Russia: The four "common spaces", press release memo/04/268 of 23/11/2004. The four areas of cooperation are economy & the environment; freedom, security & justice; external security; research & education, including cultural aspects.

11 Council of the European Union, Joint statement of the EU-Russia summit of on the launch of negotiations for a new EU-Russia agreement, Khanty-Mansiysk, 27/6/2008, 11214/08 (presse 192).

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tion" covering several areas: from the more economic and technical to the judicial fields and the strengthening of the rule of law.[12] Despite all these efforts, no meaningful results were achieved in bilateral talks. On the contrary, many dialogues were frozen when Russia became increasingly assertive in its foreign policy towards neighbour countries. In the meantime, the EU had started negotiating association agreements aimed at establishing DCFTAs with EaP countries, including Ukraine. As will be explained in what follows, this fact would change the course of EU-Russia relations dramatically, to the point of initiating a veritable geopolitical competition on dominance over Eastern Europe and the Caucasus. In fact, the rapprochement between the EU and Ukraine, regarded by Russia as part of its traditional sphere of influence due to the manifold historical and cultural ties between both nations,[13] must be seen as a turning point in Russia's stance towards the EU, which was initially characterised by cautious interest rather than by distrust.[14]

In response to the EaP initiative, Russia – along with other post-Soviet States – launched a series of projects with the objective of regional economic integration in the Eurasian space, with the creation of a Eurasian Customs Union (ECU) in 2010 and the eventual establishment of the EAEU in 2015. An assessment of Russia's leading role in these integration processes and its vision of future relations with the EU reveals that Russia regards the EAEU primarily as an instrument of foreign policy which helps it bolster its own bargaining position vis-à-vis the EU. Its perception of the future geopolitical order appears to be one of a "bipolar Europe" with genuine spheres of influence reserved to the EU and the EAEU respectively, with the latter under Russian leadership. Tensions between both integration systems increased when it became obvious that this vision contradicted the model envisaged by the EU, articulated by the EaP. Russia concretely feared that a rapprochement between the EU and the Eastern European countries would take be to the detriment of Russia's relations with these countries.[15] In particular, the legislative and regulatory approximation foreseen in the EaP, including the adoption of the EU's technical standards, was seen by Russia as having the potential to create obstacles to trade if these technical standards happened to be incompatible with the ones applied by Russia.[16] This, together with the elimination of most customs tariffs in trade with the EU, prescribed by the association agreements, was considered to pose a risk to Russia's competitiveness. Another aspect

12 European Commission, EU and Russia launch new partnership for modernization, press release IP/10/649 of 1/6/2010.

13 The Kievan Rus as a federation of Slavic tribes under the reign of the Varangian Rurik dynasty (882-1240 AD) is regarded by the modern peoples of Belarus, Ukraine and Russia as their cultural ancestor. Furthermore, Ukraine occupies a central place in Russia's political psyche. The debate on whether Ukraine is a separate country or simply "*kraina*" ("borderlands") of Greater Russia is so intense that it can sour friendships and family relations in Russia.

14 See *Atilgan et al.*, The Eurasian Union – An integration project under the microscope, KAS International Reports 2/2014, p. 15.

15 *Zagorski*, Eastern Partnership from the Russian perspective, Internationale Politik und Gesellschaft 3/2011, p. 41.

16 See *Vilpišauskas et al.*, Eurasian Union: a challenge for the European Union and Eastern Partnership countries, Eastern Europe Studies Centre, Vilnius, 19/12/2012, p. 11.

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deemed critical was the EaP's agenda in the area of energy cooperation, which from Russia's perspective undermined the existing agreements between Russia and Ukraine and Moldova, respectively. In general, any agreement by which Ukraine would give up sovereignty in areas relevant to trade in favour of integration with another integration system such as the EU was deemed as likely to undermine Russia's plan of including Ukraine into a Eurasian integration perspective.

The launch of the EAEU is considered by observers as Russia challenging the approach taken by the EU which, as already explained, sees the EU and its internal market as the focal point for economic and political integration in an extended geographical area encompassing the entire European continent and the Mediterranean. The uncertainty has been exacerbated by Russia's ambiguous stance towards the EU which has repeatedly switched from cooperative to hostile. On the one hand, the idea expressed by the Russian President *Vladimir Putin* to create a "common humanitarian and economic space" from Lisbon to Vladivostok, with the EU and EAEU as the negotiating partners,[17] can be cited as an example of Russia's alleged willingness to cooperate with the EU on friendly terms. On the other hand, it should not be left unmentioned that the EAEU does not appear to shy away from openly competing with the EU, even at the risk of threatening the latter's own existence. In fact, the EAEU's integration plans – as conceived by its key strategists – appear to include the possibility of inviting disgruntled EU Member States and candidate States to join the EAEU.[18]

III. Subsequent Creation of the Eurasian Economic Union

With the creation of the EAEU, a new integration system emerged in a vast geographical area denominated by its founding fathers as "Eurasia", with no clear boundaries, thus theoretically encompassing the entire landmass of Europe and Asia. The EAEU, officially operative since 1 January 2015, is the result of the latest wave of integration in the post-Soviet area. It is commonly assumed that the idea of a "Eurasian Union" had originally been formulated by the Kazakh President *Nursultan Nazarbayev* in 1994,[19] albeit without an appropriate follow-up. Fifteen years later, Russian foreign policy priorities refocused on the regional level. Furthermore, the economic crisis of 2008 had heavily hit Russia and its neighbouring countries, increasing the need for cooperation to achieve economic growth. In addition, the EU's EaP launched in 2009 and China's growing presence in Central Asia in political and economic mat-

17 See *Adomeit*, Putin's 'Eurasian Union': Russia's integration project and policies on post-Soviet space, Center for International and European Studies, Neighbourhood Policy Paper, Issue 4, July 2012, p. 2.

18 See the *Glazyev*, advisor to the Russian President and member of the Russian Academy of Sciences, Who stands to win?, speech of 27/12/2013, http://eng.globalaffairs.ru/print/number/Who-Stands-to-Win-16288 (5/5/2017), in which he suggests that the EAEU should invite Greece, Cyprus and Turkey to apply for membership in this integration system.

19 See Eurasian Economic Commission, Eurasian Economic Integration: facts and figures, 2015 – first 6 months, p. 6.

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ters were seen in Moscow as threats to its influence in the post-Soviet space. The launch of the EAEU was therefore seen as an adequate means to counter these developments.[20]

C. Overview of the Integration Efforts in the Post-Soviet Space

As will be shown in the following, even though the creation of the EAEU must be regarded as a reaction to the EaP, the integration process did not come out of nowhere. Instead, it could look back at various integration efforts made since the collapse of the USSR, crowned with more or less success. For a better understanding of the general integration context in the post-Soviet space, in which the EAEU was born, a brief account of these previous efforts will be presented.

I. Commonwealth of Independent States

The creation of the Commonwealth of Independent States (CIS) in 1991 constitutes the first commitment to regional economic and political integration in the post-Soviet space. Its purpose, essentially, consisted of managing the orderly separation of the former Soviet republics and the continuation of political and economic dialogue in a new format. The founding document of the CIS, signed on 21 December 1991 in Almaty by all former Soviet republics, excluding the Baltic States and Georgia, offered an ambitious, integrationist agenda. The CIS was supposed to achieve a coordination of both foreign and defence policy, and to develop "a common economic space, a common European and Eurasian market and a customs policy".[21] The common economic space was meant to be formed "on the basis of the market economy principle, envisaging the free movement of goods, services, capital and labour".[22] Within this framework, the Member States established a network of overlapping bilateral and multilateral agreements, albeit with numerous and no permanent institutional structures.[23] In the first years of the CIS' existence, the Member States showed little interest in further integration, mainly due to the prioritisation of the transformation into market economies and the establishment of international relations with the rest of the world, first and foremost with the USA and the EU. In addition, the breakup of the USSR as a political entity had just occurred, and the Member States were rather keen on asserting their newly gained sovereignty. Another factor was the unbalanced economic interdependence between Russia and the other post-Soviet States, which did not encourage Russia to embark on further integration. In fact, the CIS was not par-

20 *Cornell*, The European Union: Eastern Partnership vs. Eurasian Union, in: Putin's Grand Strategy: The Eurasian Union and Its Discontents, September 2014, p. 180; *Delcour et al.*, The implications of Eurasian integration for EU's relations with the countries of the post-Soviet space, Studia Diplomatica No. 48, 2015, p. 12.

21 See Article 4 of the Charter establishing the CIS, adopted on 22 January 1993 in Minsk.

22 See Article 19 CIS Charter.

23 *Dragneva/Wolczuk*, Ukraine between the EU and Russia – The integration challenge, 2015, pp. 14-19.

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ticularly favourable to Russia, since it obliged it to open its domestic market to imports coming from less competitive CIS States and to provide them with raw materials and energy at discount prices. Over time, political support for the CIS dwindled, due to the diverging economic orientations of its Member States. Once the post-Soviet States had recovered from the initial shock of the breakup of the USSR, the CIS essentially lost its purpose.

From a legal perspective it is worth pointing out that the CIS was never meant to become a successor of the USSR. On the contrary, its founding documents declared that the "USSR as a subject of international law and a geopolitical reality no longer existed"[24] and stated that the CIS was open for membership not only to all ex-USSR republics, but to other States "sharing the purposes and principles of the founding agreement".[25] Furthermore, according to the Declaration of Almaty of 21 December 1991, the CIS is defined in negative specifications as "neither a State nor a supranational structure", in which cooperation shall be "carried out in accordance with the principle of equality through coordinating institutions formed on a parity basis".[26] The CIS Charter adopted on 22 January 1993 – but not ratified by all Member States – defined the CIS also in negative terms as "not a State" and "not holding supranational powers", while emphasising that "the Member States are independent and equal subjects of international law".[27] In its structure, the CIS can be described as a multitude of legal regimes, including a confederation-like nucleus constituted by some States striving for closer forms of cooperation, and a looser structure of legal links with other participating States based on various types of membership, reservations to constituent instruments and selective participation in the acts passed by the CIS. By opting for both a multi-speed and an "à la carte" approach, allowing them to choose the level and pace of integration into the existing CIS structures, the Member States hoped to reconcile conflicting national interests as well as to prevent a domination by Russia.[28] It should be noted in this context that the diversified integration approach taken by the CIS went beyond the legal possibilities foreseen in other, more ambitious, integration systems such as the EU.[29] After all, rather than to promote deep integration, eventually leading to a political union – a project given up with the dissolution of the USSR –, the objective of the CIS was to prevent an outright economic disinte-

24 Paragraph 13 of the Declaration of Almaty of 21/12/1991.
25 Article 7 CIS Charter.
26 Paragraph 10 Declaration of Almaty.
27 Article 1 CIS Charter.
28 *Danilenko*, The Economic Court of the Commonwealth of Independent States, New York University Journal of International Law and Politics, 1999, pp. 893, 918.
29 These possibilities include *inter alia* negotiated exemptions to specific EU legal acts as well as opt-outs in certain areas of integration for individual Member States on the one hand and, on the other hand, the mechanisms of "enhanced cooperation" and "permanent structured cooperation", which allow groups of Member States to embark jointly on deeper integration upon fulfilment of legal conditions laid down in the EU Treaties.

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gration in the post-Soviet space as a result of the newly obtained national sovereignty.[30]

One of the CIS's main disadvantages was precisely its fragmented legal system, composed of numerous agreements, as well as its unclear and imprecise norms.[31] As a result, the multilateral regime did not foster effective domestic implementation. Furthermore, there was no effective binding mechanism to ensure compliance with the obligation undertaken by the Member States. Even though a permanent judicial body – the Economic Court of the CIS – was established which was empowered to rule over State disputes, its rulings only had the status of recommendations.[32] The role of this judicial body therefore proved to be nominal. Consequently, despite the rhetoric, the CIS multilateral framework ultimately relied on high-level diplomacy and traditional power mechanisms. Investing in the design of an institutional framework, capable of enabling integration within the CIS was clearly not at the core of Russia's economic cooperation strategy. The CIS is commonly regarded as a multilateral platform which did not live up to its promises.[33] Nevertheless, the integration processes which would follow learned from the CIS experience, as many of its shortcomings were clearly remedied.

II. Eurasian Economic Community

In the early 2000s, with Vladimir Putin's ascension to power, Russia's focus of interest shifted again towards Eurasia, as documented in the "Foreign Policy Concept" which explicitly mentioned the cooperation with the Member States of the CIS as the key strategic priority.[34] A result of this strategy change was the creation of two new regional organisations, namely the Eurasian Economic Community (EAEC) and the Collective Security Treaty Organization (CSTO), which gave Eurasian integration a better-defined institutional structure. Inspired by the European integration experience, the EAEC became an elaborate and complex organisation, with an Interstate Council (of heads of State), an Integration Committee and Secretariat (as the main

30 On 25/3/2005, at a CIS Summit in Yerevan, Russian President *Putin* said that "expecting from the CIS outstanding achievements in the spheres of economic, political and military cooperation, naturally led to nothing, since there were no prerequisites for that. The CIS was formed to help conduct the process of USSR disintegration in a more civilized way." Russian Foreign Minister *Lavrov* has used the expression "civilized divorce" to describe the form of integration within the CIS, see *Kembayev*, Legal aspects of the regional integration processes in the post-Soviet area, 2009, p. 94.

31 *Dragneva/Wolczuk*, (fn. 23), pp. 17-19.

32 Article 32 CIS Charter.

33 *Sisu Vicari*, The Eurasian Economic Union – Approaching the economic integration in the post-Soviet space by EU-emulated elements, Revue Interventions Économiques 55 (2016), p. 4; *Van der Togt/Montesano/Kozak*, From competition to compatibility – Striking a Eurasian balance in EU-Russia relations, Clingendael Report, Netherlands Institute of International Relations, 2015, p. 13.

34 The foreign policy concept of the Russian Federation approved by the President of the Russian Federation *Vladimir Putin*, 28/6/2000, www.bits.de/EURA/russia052800.pdf (5/5/2017).

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executive body), an Inter-Parliamentary Assembly and a Court of Justice. The new organisation was given the task of creating a Customs Union (CU) and a Single Economic Space (SEE), this time with clear deadlines, in accordance with a specific schedule.[35]

The multiphase integration process comprising three steps started with the establishment of the CU between Russia, Belarus and Kazakhstan in July 2010.[36] The three Member States negotiated a common external tariff, customs norms and the setup of regulatory bodies. The Customs Code adopted in November 2009 replaced the domestic legislation of the Member States by becoming the applicable law in CU matters. It has been described as a piece of modern customs legislation simplifying customs requirements and implementing the provisions of key international conventions in the field.[37] The concrete implementation of the CU started in the following year, when intra-CU border controls over a wide range of goods were lifted and subsequently introduced towards non-CU countries. The second step was the establishment of the SES in January 2012. Besides the elimination of internal tariffs for goods, market freedoms were guaranteed for services, capital and labour; the latter to be implemented in the medium term. Furthermore, Member States committed to coordination in key areas such as macroeconomic policies, competition, transport and energy.

Within the institutional framework, the Eurasian Economic Commission (EEC), established in February 2012 as a permanent regulatory body with its headquarters in Moscow, played a central role. Its main tasks were to ensure the proper development of the integration process, as well as to submit proposals for its continuation. In addition, the EEC was to ensure the external representation of the entire bloc in trade negotiations. A considerable novelty was its power to adopt decisions binding on the Member States. In all those areas where competence was delegated to the supranational level, the EEC had the authority to legislate,[38] even if the decision-making process foresaw an involvement of the Member States. Moreover, an independent judicial body was established in the same year in Minsk, with its rulings being binding on the Member States. The Court's role consisted of ensuring compliance with the agreements concluded within the EAEC, to interpret the treaties as well as to settle disputes. It is worth mentioning that private individuals were allowed to challenge EEC acts before the Court, even though the implementation of the rulings remained at the discretion of the national sovereign.[39]

35 *Galiakberov/Abdullin*, Theory and practice of regional integration based on the EurAsEC model (Russian point of view), Journal of Eurasian Studies 5 (2014), pp. 118-120.

36 *Kirkham*, The formation of the Eurasian Economic Union: How successful is the Russian regional hegemony?, Journal of Eurasian Studies 7 (2016), p. 117.

37 *Dragneva/Wolczuk*, Eurasian Economic Integration: Law, Policy and Politics, 2013, p. 45.

38 *Woffgang/Brovka/Belozerov*, The Eurasian Customs Union in transition, World Customs Journal 7 (2013), p. 96.

39 *Davydenko/Kalimanov*, Court of Eurasian Economic Community renders its first judgment, 19/11/2012, www.cisarbitration.com/2012/11/19/court-of-eurasian-economic-community-renders-its-first-judgment/ (5/5/2017).

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D. The EAEU as the Most Advanced Stage of Integration in the Eurasian Space

As third step in the integration schedule, on 29 May 2014, the leaders of Russia, Belarus and Kazakhstan gathered in Astana to sign the Treaty on the Eurasian Economic Union (TEAEU), which entered into force on 1 January 2015.[40] By then, Armenia had joined the agreement, followed only a few months later by Kyrgyzstan. The creation of the EAEU implied, legally speaking, the simultaneous dissolution of the EAEC.[41] Due to its ambitious objectives and the progress made to this date, this integration system must be seen as the most advanced one in the Eurasian space. The following account will elaborate on political, legal and economic aspects in relation to the integration process.

I. The Rationale(s) behind the Creation of the EAEU

The objectives pursued by the Member States with the creation of the EAEU are economic in nature. This can be deduced from the name of the EAEU itself, which had been a matter of debate among the governments prior to the establishment of the organisation,[42] as well as in the frequent reference hereto in various provisions. More specifically, Article 1(2) TEAEU provides that an international organisation of "regional economic integration", bestowed with international legal personality shall be established. According to Article 1(1) TEAEU, this international organisation shall ensure free movement of goods, services, capital and labour within its borders, as well as coordinated, agreed or common policy in the economic sectors determined under this Treaty and other international treaties concluded within the framework of the organisation. Integration shall, as specified in Article 4 TEAEU, be achieved by creating a common market for goods, services, capital and labour and by ensuring comprehensive modernisation, cooperation and competitiveness of national economies within the global economy. The ultimate socio-economic goal behind these measures is to create proper conditions for sustainable economic development of the Member States in order to improve the living standards of their population. Pursuant to Article 5(2) and (3) TEAEU, the Member States shall implement coordinated or agreed policy in spheres of the economy covered by the scope of the TEAEU and other treaties concluded within this framework.

As mentioned above, the TEAEU defines the integration objective as "economic", implicitly excluding any aspiration towards the establishment of a political union be-

40 Treaty on the Eurasian Economic Union, www.un.org/en/ga/sixth/70/docs/treaty_on_eeu.pdf (5/5/2017).

41 The Agreement on the dissolution of the EAEC was signed at a meeting of the EAEC Intergovernmental Council in Minsk on 10/10/2014, entering into force on 1/1/2015.

42 *Popescu*, Eurasian Union: the real, the imaginary and the likely, Chaillot Paper No. 132, September 2014, p. 21.

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tween the Member States.[43] This view is further confirmed by Article 3 TEAEU, which lists the basic principles of functioning of the integration systems, *inter alia* the "respect for specific features of the political structures of the Member States" as well as their "sovereign equality". As for each individual Member State, the motivation to participate in the Eurasian integration process differs depending on economic and political interests. Belarus has so far taken part in all Russian-led attempts to Eurasian integration, including the Union State between both countries, initiated in 1996 and strengthened in the following years. With its economy being heavily dependent on Russia, Belarus has made its participation conditional upon Russian loans and preferential treatment, e.g. energy supply at discount prices. It sees in the establishment of a common oil market a guarantor for stability of supply.[44] Another reason was the need to overcome the economic crisis in 2011. Not yet a member of the World Trade Organization (WTO), and politically isolated from Europe, Minsk needed financial support from Moscow for its own survival. As far as Kazakhstan is concerned, President *Nazarbayev's* support for Eurasian integration, 20 years after his first proposal, allowed him to be remembered as one of the "founding fathers" of the integration process. Kazakhstan's interest mainly consists of ensuring access to the vast Russian market and having a counterbalance to China's growing influence in the country. Both President *Nazarbayev* and the Belarusian President *Aleksandr Lukashenko* have repeatedly stressed the purely "economic" nature of the project and have been eager to defend publicly their respective country's sovereignty against Russia's endeavours to transform the integration process into more of a political union.[45] By the same logic, plans to introduce a single currency, thus giving rise to a monetary union, have been rejected by the other Member States as an infringement of their sovereignty.[46] These aspirations are connected with Russia's geopolitical strategy, believed to aim at gaining political influence in the post-Soviet space, against the growing presence of the EU and China. Whether the integration lives up to the objectives set, will be discussed in the further course of this article.

II. Partial Emulation of the Supranational EU Model of Integration

The plan to establish a customs union and a common market within a fraction of the time needed by the EU shows unmistakably the degree of ambition with which regional economic integration is pursued by the Member States of the EAEU. An analysis of objectives, mechanisms of integration and institutional framework reveals

43 According to the theory of regional economic integration, a political union is understood to be the final stage after the creation of a free trade zone, a customs union, a common market, a monetary and an economic union between the participating States.

44 *Furman/Liebman*, Europeanization and the Eurasian Economic Union, in: Dutkiewicz/Sakwa (eds.), Eurasian Integration – The view from within, 2015, p. 188.

45 *Garcés de los Fayos*, The signature of the Eurasian Union Treaty: A difficult birth, an uncertain future, In-depth analysis, August 2014, p. 6; *Popescu*, (fn. 42), p. 21.

46 International Crisis Group, The Eurasian Economic Union: Power, politics and trade, Europe and Central Asia Report No. 240, 20/7/2016, p. 13.

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that the integration process embarked on by the EAEU is largely inspired by the experience of the EU despite the different political, economic and social backgrounds.

As regards the objectives pursued, it has already been mentioned that the EAEU has undergone several steps of evolution, passing from a network of free-trade agreements concluded within the CIS, the subsequent creation of a customs union – an objective achieved in 2010 – to the gradual establishment of a common market. By doing so, the EAEU has followed the example set by the EU over almost 60 years of continued regional economic integration. Another important feature adopted by the EAEU is the choice of a similar institutional framework, characterised by bodies acting within their respective areas of competence in fulfilment of specific tasks, which essentially emulates the legislative, the executive and judicial branch of government within a State ("institutional balance").[47] This is complemented by Article 5(1) TEAEU, codifying the "principle of conferral", well-known in EU law,[48] which lays down the obligation for the integration system, as an autonomous legal entity, to act merely within the scope and limits determined by the treaties conferring competence. In addition, the EAEU has opted for a format of integration similar to the one introduced by the EU in so far as it presents certain supranational elements.[49] This is, in particular, the case for the decisions adopted by the EEC and the procedures before the Court of Justice (EAEU-CJ), which shall be explained in further detail below.

Nonetheless, in order to properly understand integration within the EAEU, it appears necessary to look beyond the apparent similarities. A critical view is required in order to avoid any misunderstandings implying the unlimited adoption of the EU model in Eurasia. A closer examination of the integration systems allows for the conclusion that certain elements characteristic of the EU model were toned down or completely eliminated. For example, contrary to the model set by the EU,[50] the EAEU does not openly pursue integration potentially leading to a political union. Furthermore, no clear reference to democracy, rule of law or human rights is made in the founding treaties of the EAEU, which suggests a possible indifferent stance by the Member States towards these values. Only the second recital in the TEAEU's preamble is vaguely reminiscent of the protection of fundamental rights by referring to "the need for unconditional respect for the rule of constitutional rights and freedoms of man and national", however, without specifying these rights and freedoms and how they could possibly be safeguarded in areas falling within the competence of the Eurasian bodies. It should not be left unmentioned that this new legal system does not yet have a catalogue – neither codified nor developed by the case-law of the EAEU-

47 *Petrov/Kalinichenko*, (fn. 4), p. 302.
48 See Articles 4(1), 5(1) and (2) TEU.
49 *Sisu Vicari*, (fn. 33), p. 8.
50 Regarding the EU's gradual evolution into an entity showing an institutional structure similar to the ones existing in federal States around the globe, *Kühn*, The principle of mutual recognition of judicial decisions in EU law in the light of the 'Full Faith and Credit' clause of the U.S. Constitution, Boletín Mexicano de Derecho Comparado No. 47, 2014, pp. 449-484.

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CJ[51] – of fundamental rights.[52] This circumstance certainly must suit certain Member States, in which the principles mentioned above have not attained an optimal level of development. In fact, most governments in the EAEU Member States must be characterised as autocratic,[53] with a patent emphasis on the constitutional role of every State's president, thus confirming the assessment.

Moreover, the founding treaties do not provide an answer to the question as to whether any "Eurasian identity" in the form of a cultural link exists, which would encourage integration between the participating States. The only apparent common cultural-historical trait appears to be the influence of Russian culture as well as the shared Soviet heritage.[54] Certainly, the fact of belonging to the same political entity for decades has forged some clear cultural and economic ties. However, apart from these characteristics, nothing indicates that the EAEU would constitute a "closed club" restricted to post-Soviet republics or that it could not possibly incorporate States in other geographical areas. This aspect will be examined in the context of the EAEU's increased activity in the area of international relations.

III. Institutional Framework

One of the most significant moments in the evolution of the EAEU has been the creation of an institutional framework able to push the integration agenda. A milestone was the establishment of the CU in 2010, by which the grouping composed of Russia, Belarus and Kazakhstan was transformed into a fully-fledged international organisation, followed by the creation of the EEC and the Court of Justice in 2012. Although the EAEC was dissolved with the creation of the EAEU, the latter essentially inherited its institutional framework, though not without making a number of adjustments. The following account reflects the current state of development of the EAEU.

1. Eurasian Supreme Council

The highest EAEU institution is the Supreme Council, which consists of the heads of States (Article 10 TEAEU). It considers the issues of principle regarding the functioning of the EAEU, determines the strategy, directions and perspectives of integration development and makes decisions to implement EAEU objectives. One of the

51 However, the EAEU-CJ has referred to the "right of judicial protection" in its judgment of 21/6/2016 in cases CE-1-2/2/2-16-KC and CE-1-2-2/2-16-АП (ZAO "General Freight").

52 See *Ispolinov*, First judgments of the Court of Eurasian Economic Community: Reviewing private rights in the new regional agreements, Legal issues of economic integration 40 (2013), p. 244.

53 *Papava*, Georgia's choice: The European Union or the Eurasian Economic Union, Georgian Foundation for Strategic and International Studies, 2016, p. 10.

54 See *Robers/Moshes*, The Eurasian Economic Union: a case of reproductive integration?, Post-Soviet Affairs, December 2015, p. 10; *Mukhamediyev*, Eurasian Economic Union: present and future perspectives, Economic Change and Restructuring Empirical and Policy Research on the Transitional and Emerging Economies, 2016, p. 3.

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main competences of the Supreme Council is to control all budgetary issues. Overall, based on its function, the Supreme Council is comparable to the European Council in the EU, even though the former has more powers. The next institution in the hierarchy is the Intergovernmental Council, which previously was only a formation of the Supreme Council consisting of the heads of the Member States' governments. Essentially, it can be considered to be the same, even though it is established as a separate body. It has within its competence the realisation and control of the compliance with the founding treaty, international treaties within the EAEU framework, and the decisions of the Supreme Council.

2. Eurasian Economic Commission

a) Composition and Competences

The EEC is the permanent governing body of the EAEU, which consists of two distinct parts: the Commission Council and Commission Board (Article 18(1) TEAEU). The Commission Council performs the overall regulation of the integration processes of the EAEU and the overall management of the EEC's activities. The Council consists of one representative from each Member State, acting as deputy heads of government. Therefore, this position is political. The Commission Board is the executive body of the EEC. The Board consists of three representatives per Member State. The Supreme Council approves the composition of the Board and the duties of its members. The Board is the only body in the whole Union that has an exhaustive list of competences. One of the important competences of the Board is the monitoring and control of compliance with the international agreements concluded within the EAEU framework.

b) Limited Supranational Nature

As already mentioned, a critical view of the institutional framework is necessary in order to look beyond the apparent structural similarities between the EAEU and the EU. Their structures are not entirely comparable and it is difficult to identify the equivalent institutions and their respective functions. One of the most obvious differences is the structure and composition of the EEC. The official EAEU website describes the EEC as a "permanent supranational regulatory body" of the EAEU.[55] Assuming the accuracy of this assertion, the EEC (together with its predecessor, the Commission of the CU) would be the first institution in the post-Soviet space to be officially considered supranational. While there is certainly no official definition of "supranationality" in public international law, it is generally assumed that it presupposes the presence of a number of characteristics in international organisations such as (1) the ability of the decision-making body to adopt legal acts having direct effect

55 See the website of the EEC, describing composition and functions of this EAEU institution, www.eurasiancommission.org/en/Pages/about.aspx (5/5/2017).

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in the national legal orders of the Member States, which implies that no implementation is needed; (2) these legal acts having supremacy of the conflicting national law; (3) the adoption of these acts based on a majority decision of the representatives of the Member States instead of consensus, as is common for intergovernmental organisations; (4) ability to enforce decisions; (5) legal personality of the international organisation, distinguishable from that of its Member States; and (6) financial autonomy. Once these elements are given, it may be assumed that the international organisation constitutes an autonomous entity, capable of adopting legal acts in accordance with its own decision-making procedure. The sum of these acts will constitute a legal order *sui generis*, thus abandoning the typical classification of public international law.

In light of the above explanations, the official classification of the EEC as supranational must be nuanced, as it only partly fulfils these requirements.[56] Rather than an institution, the EEC appears to be an organisation within another organisation, since it encompasses two important bodies with differences in terms of composition, competence and decision-making procedure. The Council is clearly an intergovernmental body, which adopts decisions solely by consensus and is composed of members of the national governments. The Board, in contrast, is composed of staff members obliged to act independently from their governments (Articles 34(1) and 56(2) EEC Regulation) and its decisions are adopted by qualified majority (though by consensus in certain cases (Article 18(2) and (3) TEAEU). Consequently, only the Board, and not the whole Commission, could possibly be compared to the European Commission with its supranational format, which consists of independent members. Conversely, the Commission Council could be compared to the Council of the EU, in the sense that it represents the interests of the national governments. There is an important difference though, which consists of the fact that voting in the Council of the EU has been modified in the course of the various treaty amendments so as to allow decision-making based on a qualified majority in many areas, thus introducing an important supranational element into this intergovernmental EU institution. This is not the case of the EEC Council, where all decisions are taken by unanimity. This aspect is of particular relevance, as it has the effect of seriously diminishing the supranational character of the Board. In fact, the EAEU incorporates a principle in the decision-making procedure, according to which upper-level bodies may, by consensus, invalidate decisions taken by a lower-level body (Articles 12 and 16 TEAEU). In case of disagreement, any decision adopted by the Board could potentially be challenged at a higher level of the institutional hierarchy, up to the highest level of the Supreme Council. Given that, firstly, all of the following levels are intergovernmental as regards composition and unanimity in the decision-making, and, secondly, Member States may challenge the decisions in question, it is guaranteed that Member States remain in control of the decision-making process, by means of what is essentially a veto power. Furthermore, as regards the decision-making powers of the EEC Council, even

56 Criteria (1), (2) and (5) appear to be fulfilled in the EEC's case, whereas criteria (3) and (4) are not or in any case not unrestrictedly, as explained in further detail in the analysis. Criterion (6) is not fulfilled, as the EAEU as such does not have a system of own resources but rather depends on financial contributions from the Member States.

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under the premise that the representatives of the Member States put their national allegiances aside in an aim to pursue the path of integration for the common good of economic integration in the Eurasian region, the reality is that all important decisions are passed up the chain of command, first to the EEC Council in the form of national government deputy prime ministers, and then, if no agreement is reached, to the Supreme Council. Against that backdrop, although the supranational element of the EAEU could be extended in the future, the current reality is one of hierarchy. Furthermore, the fact that this hierarchy essentially replicates the hierarchical order in the Member States makes the EAEU appear more similar to an intergovernmental rather than a supranational organisation. All these aspects make it impossible for the EEC or any of its constituent parts to become autonomous actors within the integration process.

c) Absence of Effective Democratic Checks and Balances

Even though it is possible, to a certain degree, to identify similarities between EAEU and EU institutions, it is evident that decision-making within the EAEU differs considerably from that in the EU. EU decision-making is based on a legislative process involving several institutions, with the European Commission on the one hand, which has executive functions and virtually exclusive competence for making legislative proposals, and the Council and the European Parliament as co-legislators on the other hand. The involvement of the European Parliament provides the necessary democratic legitimacy for the adoption of EU legal acts, although it should not go unmentioned in this context that the Council of the EU, composed of democratically elected national governments and accountable to their respective parliaments, also possesses the necessary democratic legitimacy. In contrast, every institution in the EAEU adopts its own acts separately, and democratic legitimacy is limited to the representatives of the national governments present in the Council.

The absence of effective democratic checks and balances and the concentration of decision-making power located in the Supreme Council means that the heads of State can decide to take integration in different directions, thus helping the integration system to adapt to any new situation. This includes the possibility of multi-speed integration, in accordance with Member States' needs. On the other hand, the EAEU model, based on presidential control has clear disadvantages: not only is the fate of the entire integration process dependent on the interpersonal relationship between national leaders and their own ability to keep power within their States, but there is little room for other actors in the integration process to play their role. This is particularly true for the EEC but also for individuals and economic operators, who are meant to benefit from regional economic integration. As a remedy to the lack of democratic accountability in the decision-making, the EEC has endeavoured to involve the business community through various Consulting Committees under the auspices of the EEC Board. They are increasingly used by the EEC to involve both the business community and State entities in the discussion of important issues, giving them the opportunity to express their concerns and make proposals, summarised in

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the form of a Forum Resolution at the end. Moreover, the Advisory Council on the EEC held its first session in Moscow on 20 March 2013. The EEC has also worked on developing regulatory impact analysis ("RIA") procedures, aimed at assessing the effect of supranational legislation on the business community. Despite these efforts, it is questionable that they can substitute proper public involvement, so as to provide the necessary democratic legitimacy. In fact, the RIA procedures appear to only assess the impact on business, but not any social effects. In addition, they are not built into the standard decision-making procedure, but require the EEC to carry out an assessment on its own initiative.

Against this background, the EAEU is very much characterised by a top-down process lacking any societal base. Despite this significant shortcoming, the possibility of creating a Eurasian Parliament is not promising at all.[57] Individual calls for embarking on such a project have faced resistance, explained by its high political sensitivity. The opinion within the EAEU institutions appears to be that the existence of a directly elected Eurasian Parliament might reveal the asymmetry within the EAEU, meaning a clear majority of seats for Russia, which might possibly antagonise nationalist forces in Kazakhstan and other much smaller Member States. The clear wish of Belarus and Kazakhstan to avoid any politicisation of the integration process, reflected in the insistence on the attribute "economic", will most likely block any progress towards further democratic participation of the population to decision-making.

3. Court of Justice of the EAEU

a) Composition

The EAEU-CJ is a permanent judicial body based in Minsk,[58]whose functioning and composition is regulated by Article 19 TEAEU and the Statute of the EAEU-CJ, incorporated as Annex 2 to this Treaty. The EAEU-CJ is tasked with ensuring application of the TEAEU by the Member States and the bodies of the integration system, of the international treaties concluded within its framework or between the EAEU and third parties as well as of the decisions adopted by the EAEU bodies. The EAEU-CJ consists of two judges from every Member State, appointed for a period of nine years. All judges shall be of high moral character, highly qualified in the field of international and domestic law, and shall usually meet the requirements applicable to judges of the highest judicial authorities of the Member States (Article 9 of the Statute).

57 As presidential adviser *Sergey Glazyev* recently explained, "[w]e are building the EAEU as functionally limited. Unlike the EU, we do not plan to create a common parliament", speech "Imperative of Eurasian integration", http://realnoevremya.com/articles/711 (5/5/2017). A significant change of mind must have taken place in the meantime, given that the EAEC as predecessor had an Interparliamentary Assembly consisting of deputies delegated by the parliaments of the Member States. However, the lack of balance in the number of deputies in favour of Russia was considerable (more than twice or five times higher than the other Member States).

58 Website of the EAEU-CJ, http://courteurasian.org/en/ (5/5/2017).

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The Supreme Council confirms nominations from the Member States and can also dismiss them (Articles 10 and 11 of the Statute). However, the Member States (as well as the EAEU-CJ and the judges themselves) can also initiate the dismissal of a judge (Article 13 of the Statute). Most of the current judges have a track record in the former court of the EAEC (EAEC-CJ), which started functioning in January 2012. With the entry into force of the TEAEU on 1 January 2015, the EAEC-CJ has ceased to exist, paving the way for the new EAEU-CJ.

b) Competences

The competences of the EAEU-CJ are listed in chapter 4 of its Statute.[59] Essentially, the EAEU-CJ can act on actions filed by Member States but also by economic entities registered either within or outside the EAEU. The aim of this judicial body is to secure a uniform application of the legal provisions of which the legal system of the EAEU is composed.

The economic entities may submit the following disputes to the EAEU-CJ:

- on the compatibility of the decisions made by the EEC and its particular provisions which directly affect the rights and legitimate interests of the economic entity in the area of entrepreneurial or other economic activity if such decision or particular provisions lead to the breach of rights and legitimate interests of the economic entity;
- on appeal of actions or inactions of the EEC which directly affect the rights and legitimate interests of the economic entity in the area of entrepreneurial or other economic activity, if such action or inaction lead to the breach of rights and legitimate interests of the economic entity under the TEAEU.

The EAEU-CJ shall consider cases either in the (regular) Chamber, against whose judgments it is possible to file an appeal before the Appeals Chamber, or the Grand Chamber.[60] However, the EAEU-CJ does not have the power to hear disputes related to compensation of losses or other claims of material character. It should be further mentioned that the EAEU-CJ does not accept claims if the economic entity did not initiate the three month preliminary dispute settlement procedure before the EEC.[61]
In performing its duties, the EAEU-CJ is guided by the following sources of law:

- the universally recognised principles and norms of international law;
- the TEAEU;

59 For a more detailed account of the competences of the EAEU-CJ, see the author's study of comparative supranational procedural law, *Kühn*, The Draft Protocol on the Creation of the Court of Justice of Mercosur: A New Milestone in Judicialisation of Regional Integration Law, European Law Reporter 3/2016, p. 104.
60 Articles 70 and 79 of the Statute.
61 Articles 43 and 44 of the Statute.

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- international agreements concluded within the framework of the EAEU;[62]
- decisions and orders of the EAEU bodies.

The EAEU-CJ charges a fee for the resolution of a dispute submitted by the economic entity or by a Member State. The fee is paid in advance and equals the value of 37.000 Russian rubles for the year 2015.[63]

According to the Statute on the EAEU-CJ, the Court shall review the dispute within a 90 days period.[64] After the EAEU-CJ has issued a decision, the EEC has to enforce it no later than 60 calendar days unless otherwise indicated in the decision. If the EEC does not enforce the decision, the economic entity has the right to refer to the EAEU-CJ with a petition on adopting measures for its enforcement. Then the EAEU-CJ shall submit the petition to the Supreme Eurasian Union Council within a period of 15 calendar days in order to decide on the matter. The acts of the EAEU-CJ have to be published in the official bulletin of the EAEU-CJ as well as on its official web site.[65]

c) Critical Remarks

Although the EAEU-CJ is intended to be the judicial body of this integration system, entrusted with the task of settling disputes concerning the interpretation of the provisions, which are part of its legal system, with the aim of ensuring their uniform interpretation, there are a few legal aspects worth pointing out, as they appear liable to undermine this role.

First of all, it is important to mention that the competences of this judicial body have been curbed with the transition of the integration process to its latest stage.[66] While the EAEC-CJ was still competent to deal with requests for preliminary rulings from national courts concerning the interpretation of EAEC law,[67] this type of procedure has now been abolished. Even though this procedure had been used only once, its importance for the enforcement and development of integration law cannot be overstated, as the history of other integration systems with similar types of procedure shows.[68] The same applies to the infringement procedure, by which, under the previous legal regime, the EEC could sue Member States for non-compliance with inte-

62 These are international agreements concluded either between the Member States, aimed at fostering integration within the EAEU, or between the EAEU (and its Member States) with a third party. This is explained in the section of this article dedicated to the set of rules which constitute the Eurasian legal system.

63 Decision of the Supreme Eurasian Economic Council No. 85 of 10/10/2014 concerning the identification of the amount, currency and procedures for the payment, use and refund of the duty paid by business entities applying to the EAEU-CJ.

64 Article 37(1) Rules of Procedure in conjunction with Article 96 of the Statute.

65 Article 21(1) Rules of Procedure.

66 *Van der Togt/Montesano/Kozak*, (fn. 33), p. 24.

67 Article 13(2) Statute of the EAEC-CJ. See *Blockmans/Kostanyan/Vorobiov*, Towards a Eurasian Economic Union: The challenge of integration and unity", CEPS Special Report No 75, December 2012, p. 17.

68 For a comparative study of the procedural law applied by supranational courts in Europe and Latin America, see *Kühn*, (fn. 59), p. 104.

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gration law.[69] With the abolishment of this other type of procedure, the EAEU-CJ has lost the competence to establish a breach by means of a legally binding judgment upon request by a supranational body pursuing the common interest. Instead, Member States are now required to directly sue the Member State acting in breach of Eurasian law before the EAEU-CJ. However, due to the fact that Member States are generally reluctant to file actions against each other out of fear of retaliation, the loss of the infringement procedure with the participation of a supranational "guardian of the treaties" might eventually encourage recourse to diplomatic negotiations and, only as a last option, to the dispute settlement mechanism.[70] Diplomatic negotiations might, however, ultimately prove detrimental to legal certainty and to the rule of law in general. By contrast, judicial decisions in infringement proceedings provide guidance to all legal subjects on how norms must be interpreted, enriching the new legal order with a body of case-law. The recent application by Russia against Belarus in connection with an alleged breach by the latter of the legal provisions regulating the free movement of goods within the CU[71] gives reason for optimism that this risk might not materialise.

Furthermore, it is noteworthy that there is no provision establishing the EAEU-CJ's exclusive jurisdiction and jurisprudence,[72] implicitly suggesting that there might be other mechanisms aimed at interpreting the rules within the EAEU's legal system. This conclusion is supported by Article 47 of the Statute, which stipulates that "providing clarifications by the EAEU-CJ's shall mean providing an advisory opinion and shall not deprive the Member States of the right for joint interpretation of international treaties". This sentence must be construed as meaning that the interpretation of the rules given by the EAEU-CJ on request of the Member States or institutions is merely consultative and that Member States may decide by common accord on how to interpret these rules. Another point of evidence of the lack of exclusive jurisdiction can be found in Article 112 TEAEU, according to which "any disputes relating to the interpretation and/or application of provisions of this Treaty shall be settled through consultations and negotiations." The rules concerning the settlement of disputes prioritise diplomatic solutions over judicial decisions, allowing a referral of the dispute to the EAEU-CJ only "if the parties do not agree on the use of other resolution procedures". This aspect giving Member States the ultimate power of interpretation must be seen as a weak point of the EAEU's legal system, as it undermines the authority of EAEU-CJ's rulings.

The EAEU-CJ is deprived of the power to impose penalties on Member States for breach of integration law, ultimately making law enforcement less efficient. Instead,

69 Article 13(4) Statute of the EAEC-CJ.

70 *Yeliseyeu*, EAEU Court: Limited jurisdiction, harsh on applicants, marginally popular, Eurasian Review, Belarusian Institute of Strategic Studies, July 2015, p. 2.

71 This is the first interstate infringement case in the EAEU-CJ's history. See press release, http://courteurasian.org/doc-16453 (5/5/2017).

72 *Karliuk*, The Eurasian Economic Union: An EU-like legal order in the post-soviet space?, National Research University Higher School of Economics, Basic Research Program, WP BRP 53/LAW/2015, p. 18.

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recourse is made to a "diplomatic" mechanism laid down in Article 114 of the Statute, which stipulates that, "if a judgment is not implemented, the issue can be referred to the Supreme Council, in request of measures required for the judgment's execution". The disadvantage of this mechanism is that decisions are taken unanimously at Supreme Council level, meaning that all Member States participate in the voting, including the defendant, as there are no provisions to prevent them from doing so. As a result, a Member State reluctant to comply with a judgment delivered by the EAEU-CJ could theoretically block any decisions addressed to it, thus paving the way to open-ended negotiations. This, in turn, implies an additional element of legal uncertainty.

Another critical aspect is related to the Member State's ability to initiate the termination of a judge's duties upon fulfilment of certain conditions (Article 13 of the Statute). The conditions are listed in Article 12 of the Statute and include, apart from those known in other European jurisdictions,[73] some grounds for dismissal linked to non-specified instances of "grave misconduct",[74] ultimately lacking sufficient clarity. This provision might encroach upon judicial independence and, therefore, undermine the EAEU-CJ's supranational nature. Potentially detrimental to judicial independence is also the fact that the EAEU-CJ allows for dissenting opinions,[75] which makes the dissenters' identity public, ultimately making judges vulnerable to pressure. Dissenting opinions may also expose inconsistencies in case-law or disagreements between the judges, harming the authority of the EAEU-CJ as a judicial body. Despite these issues, Article 53 of the Statute elevates the independence of judges to one of the basic principles of judicial proceedings at the EAEU-CJ.

As already mentioned, the evolution of the founding treaties providing the legal basis for the Eurasian integration process is characterised by a clear intention of the drafters to limit the powers of the judicial body. Apart from the aspects referred to above, two specific provisions must be cited, which clearly reflect this intention. Firstly, Article 42 of the Statute stipulates that the EAEU-CJ does not have the power to create competences for EAEU institutions in addition to those explicitly provided for in the treaties. Behind this reiteration of the "principle of conferral", already laid down in Article 5(1) TEAEU, is the aim of limiting the EAEU-CJ's ability to develop the so-called "implied powers" of the international organisation, which might eventually lead to a more autonomous evolution of the integration process. By setting limits for the legislative and administrative powers of the integration systems' bodies regardless of the objectives pursued, the supranational character of the EAEU is diminished. Secondly, Article 102 of the Statute provides that "no decision of the Court

73 Articles 2-6 of the Statute of the Court of Justice of the European Union (CJEU); Articles 2-6 of the Statute of the EFTA Court; Rule 7 of the Rules of the European Court of Human Rights (ECtHR).

74 See Article 12 of the Statute, point 5 ("participation in activities incompatible with the office of a judge") and point 8 ("serious misconduct incompatible with the high status of a judge"). These provisions resemble more those of non-European international jurisdictions, such as Article 11 of the Statute of the Andean Community Court and Article 24 of the Regulation of the Court of Justice of the Central American Integration System (SICA).

75 Article 79 of the Rules of Procedure.

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may alter and/or override the effective rules of the Union law and the legislation of the Member States, nor may it create new ones". This provision is problematic, as it seems to reduce the EAEU-CJ's rulings to merely non-binding opinions on the interpretation of integration law. While it remains to be seen how this provision will be applied in practice, it can be said for sure that a potential inability of the EAEU-CJ to alter or declare void acts of secondary law adopted by the EEC would constitute an issue undermining any attempt to put in place an institutional balance between the administrative and the judicial branches. Moreover, in so far as the EAEU-CJ appears to be precluded by this provision from declaring that integration law takes precedence over national law, it can be presumed that the drafters must have avoided acknowledging the supranational nature of this new legal system. Given the fact that neither of these two provisions existed under the previous legal regime, it is reasonable to presume that the judicial activism shown by the EAEC-CJ in its early years of existence[76] might have alarmed the Member States and ultimately persuaded them to take a more cautious approach at the time of drafting the EAEU's founding treaties. Cited as one important example of such judicial activism is the ruling delivered on 8 April 2013, in which the EAEC-CJ declared a EEC decision void with *erga omnes* effect despite the lack of any legal basis in the EAEC legal order conferring that competence.[77] Another example is the judgment delivered on 10 July 2013, by which the EAEC-CJ decided to rule on a case although the request for a preliminary judgment had been withdrawn by the referring national court at an early stage of the procedure, probably in an attempt to seize the opportunity to assert its authority.[78]

In view of these issues, it is uncertain how the EAEU-CJ could ever succeed in ensuring the uniform interpretation and application of Eurasian law. A number of features have been incorporated into the founding treaties, which prevent it from unfolding its full potential as a judicial body able to contribute to the development of the Eurasian legal system.

IV. The Eurasian Legal System

1. Main Characteristics

The Eurasian legal system – involving countries which were not such a long time ago part of the Russian Empire and the USSR and therefore share similar legal traditions – essentially constitutes a fusion of the Roman continental and the Soviet socialist legal systems. Following their typical positivist approach, this recently created legal system avoids, for the most part, any reference to abstract principles and values, relying instead on concepts explicitly codified within the TEAEU as the core of this

76 See *Karliuk*, The limits of judiciary within the Eurasian integration process, National Research University Higher School of Economics, Basic Research Program, WP BRP 69/LAW/2016, p. 7; *Dragneva*, The Eurasian Economic Union: Balancing sovereignty and integration", Institute of European Law, Birmingham Law School, WP 10/2016, p. 18.

77 Judgment of the Grand Chamber of the EAEC-CJ of 8/4/2013.

78 Judgment of the Grand Chamber of the EAEC-CJ of 10/7/2013.

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integration system's legal framework and the other sources of law previously referred to. As indicated above, not only are certain provisions detrimental to the evolution of the Eurasian legal system, the TEAEU and the case-law of the EAEU-CJ also remain silent as regards the issue of supranationality, omitting any direct references to direct effect and supremacy of Eurasian law within the legal systems of the Member States.[79]

A noteworthy aspect is the definition of the EAEU as an "international organization of regional economic integration" (Article 1(2) TEAEU), which already circumscribes the objectives of the integration process, namely the establishment of a customs union and an internal market. This, as well as Kazakhstan's insistence on including the term "economic" in the organisation's official name,[80] makes clear that the integration process is not meant to encroach upon areas of political security, internal and foreign affairs. A "functionalist" integration approach as in the EU, whereby the achievement of economic integration goals serves to attain certain forms of integration in political areas[81] can therefore be discarded, regardless of the recent efforts of the EAEU to enhance its international presence even beyond the post-Soviet space. Certainly, the pursuit of mere economic integration does not preclude the evolution of the Eurasian legal system to one including elements of supranationality. An example thereof is Article 13 of Annex I to the TEAEU containing the regulation of the EEC, which provides *inter alia* that "Decisions of the Commission shall form part of Eurasian law and shall be directly applicable on the territories of the Member States". However, this is the only provision within the Eurasian legal framework that evokes the notion

79 The recent advisory opinion of 4/4/2017 in case No. СЕ-2-1/1-17-БК, by which the EAEU-CJ established for the first time that the "general rules of competition [laid down in Articles 74, 75, 76 of the TEAEU] have direct effect and shall be directly applicable by Member States as rules enshrined in an international treaty" can therefore be regarded as a landmark judicial decision setting a turning point in the legal history of the EAEU. This opinion is shared by *Kalinichenko*, A Principle of Direct Effect: The Eurasian Economic Union's Court pushes for more Integration, VerfBlog of 16/5/2017. It may be assumed that the EAEU-CJ was inspired by the case-law of the CJEU on the interpretation of the EU competition rules laid down in Articles 101 and 102 TFEU (see, for example, CJEU, joined cases C-295/04 to C-298/04, *Manfredi*, EU:C:2006:461, para. 39; CJEU, case C-550/07 P, *Akzo Nobel*, EU:C:2010:512; CJEU, case C-536/11, *Donau Chemie*, EU:C:2013:366, para. 21). Notwithstanding this important development, it still remains to be seen how the national constitutional courts will implement these principles of Eurasian law into their respective legal systems.

80 International Crisis Group, (fn. 46), p. 4.

81 The functionalist approach as originally conceived by *Jean Monnet*, precursor of European integration, foresees the identification of common economic interests by the States participating in the integration process, followed by cooperation in the relevant areas. Cooperation for the purpose of achieving the economic objectives is expected to have a "spill-over effect" into other related areas, hereby increasing the interdependence between the States. Governance of the economically integrated geographical space requires the development of an advanced form of cooperation at political level, ultimately leading to a political union. The underlying objective of guaranteeing peace among the States is therefore attained by political means serving immediate economic interests, see *Ilievski*, The concept of political integration: The perspectives of neofunctionalist theory, Journal of Liberty and International Affairs 1 (2015), p. 42.

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of supranationality. This is remarkable considering that the provisions regulating the functioning of the EAEU-CJ's predecessor established the principle of supremacy,[82] which is no longer the case under the current legal regime. Again, it must be presumed that the drafters of the TEAEU shied away from conferring too much power on the newly created international organisation.

In the absence of any express reference to supremacy in the founding treaties, this matter is relegated to the level of the Member States, which are called upon to ensure enforcement of Eurasian law within their respective legal orders. Accordingly, national courts have the power to specify the consequences derived from a possible incompatibility of national law with Eurasian law. Theoretically, national constitutional courts could opt to recognise the supranational nature of Eurasian law and, by so doing, contribute to its development. Given the origins of Eurasian law in public international law, constitutional courts should, in principle, have the authority to clarify its rank within the national legal systems it has been incorporated into. However, the constitutional traditions in the Member States – eager to safeguard national sovereignty – leave little room for optimism. In fact, none of the national constitutions envisage any possibility for the supremacy of Eurasian law.[83] In addition, even if the constitutional courts of the Member States were willing to recognise to some extent the primacy of Eurasian law over conflicting national legislation,[84] it is rather unlikely that this might affect the rank of national constitutional law. Instead, it is more probable that the national constitutional courts might assert the primacy of the latter, also in integration matters. It must therefore be assumed that the constitutional courts of the Member States might refuse the recognition of supremacy, direct applicability and direct effect of Eurasian law within their respective legal systems, should these principles be seen as threatening national sovereignty.

It is worth recalling in this context that the Russian Constitutional Court has repeatedly refused to recognise the supremacy of international agreements in its recent case-law. An example is the case of *Avangard-Agro-Orel*[85] concerning the direct applicability of a decision of the EEC and a judgment of the EAEC-CJ, in which the Russian Constitutional Court – exercising its alleged competence to verify the con-

82 See Article 6 of the Statute of the EAEC-CJ, which stated the following: "Every member state of the EAEC is bound by the decision of the EAEC-CJ in a case in which the said state is a concerned party. The decision of the EAEC-CJ is implemented by relevant organs of the concerned parties in accordance with national legislation within the period defined by respective governments as three months from the date of the decision." Supremacy of EAEC legal acts over national legislation was also recognised in the case-law of the EAEC-CJ, cases 2-4/2-2014 and 1-7/5-2013, *Jackpot*, and the Russian Constitutional Court, case 1050-O, *Team Niinivirta AY v. Vyborg Customs*.

83 *Karliuk*, (fn. 72), p. 12.

84 The TEAEU constitutes an inherent part of the national legal systems, just as any international agreement and other sources of Eurasian primary law. The constitutional courts of the Member States could therefore define the relation between (1) "originary" national legislation and (2) national legislation adopted in implementation of Eurasian law by introducing a "rule of primacy".

85 Russian Constitutional Court, case 417-O, judgment of 3/3/2015, http://doc.ksrf.ru/decision/KSRFDecision190708.pdf (5/5/2017).

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formity of Eurasian acts with the Russian Constitution – found both the decision and the judgment to be "in breach of the established standard of protection of human rights and constitutional foundations in the Russian Federation". Another example is a recent ruling regarding the legal effect of decisions of the European Court of Human Rights (ECtHR) within the Russian legal order.[86] More specifically, the Russian Constitutional Court ruled that the participation of the Russian Federation in any international treaty did not mean giving up national sovereignty. According to the Court, neither the European Convention on Human Rights (ECHR), nor the legal positions of the ECtHR based thereon, could alter the supremacy of the Constitution. For that reason, the Court ruled that their practical implementation within the Russian legal system was only possible through recognition of the supremacy of the Constitution's legal force.[87] These examples show that, in extreme cases, the Russian Constitutional Court might not shy away from setting aside international obligations in order to safeguard national sovereignty.

Furthermore, it should not be left unmentioned that the current political situation is not favourable to a further conferral of sovereign powers to the EAEU, leading to increased supranationality. In view of the recent political crisis between Ukraine and Russia involving the annexation of Crimea and the armed conflict in Eastern Ukraine, the other Member States appear to have become particularly wary of the consequences of a possible loss of sovereignty through integration. Furthermore, Belarus and Russia appear to show little consideration of the legal framework regulating the EAEU's common trade policy. While Russia has adopted sanctions against the EU, obviating the EEC's exclusive competence in the area of trade policy,[88] Belarus has learned to bypass the regime of sanctions for its own benefit.[89] These measures, which undermine the role of the EEC as well as the EAEU's objectives, certainly do not encourage taking additional steps towards deeper integration, as they provide evidence for the shortcomings of the entire integration system.

86 Russian Constitutional Court, case 21-P, judgment of 14/7/2015, http://doc.ksrf.ru/decision/KSRFDecision201896.pdf (5/5/2017).

87 See, for an analysis of this judgment, the Venice Commission, Final opinion on the amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation, adopted by its 107th Plenary Session, Venice, 10-11/6/2016. The Venice Commission has arrived at the conclusion that this judicial practice is incompatible with the obligations of the Russian Federation under international law, as a State is bound under Article 26 of the Vienna Convention on the Law on Treaties (the Vienna Convention) to respect ratified international agreements and pursuant to Article 27 of the Vienna Convention it cannot invoke the provisions of its internal law as justification for its failure to perform a treaty, including the ECHR. The execution of international obligations stemming from a treaty in force for a certain State is incumbent upon the State as a whole, i.e. all State bodies, including the Constitutional Court; thus, it is the duty of all State bodies to find appropriate solutions for reconciling those provisions of the treaty with the Constitution (for instance through interpretation or even the modification of the Constitution).

88 *Mukhamediyev*, (fn. 54), p. 9.

89 See *Astapenia*, Belarus and the Declining Eurasian Economic Union, Belarus Digest of 3/12/2015, http://belarusdigest.com/story/belarus-and-declining-eurasian-economic-union-23846 (5/5/2017).

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Lastly, it should be noted that there is no territorial definition of the Member States in the founding treaties, which means they entirely refrain from specifying the geographical scope of application of Eurasian law. This point has proved significant in view of the border disputes that persist with third States, such as Ukraine (over the Russian annexation of Crimea) and Azerbaijan (over the Armenian occupation of Nagorny-Karabach).[90] This neutral approach has helped to defuse potential conflicts among the Member States due to their different allegiances, which might have undermined the integration process.

2. The Set of Rules which constitute the Eurasian Legal System

Article 6(1) TEAEU lists the sources of the Eurasian legal system, briefly mentioned above, which can, in principle, be classified as primary and secondary law, in accordance with the categories developed in the field of regional economic integration law. The TEAEU as such must be regarded as primary law. An intermediate status in terms of hierarchy, similar to the one established within the EU legal system,[91] is granted by dint of Article 6(2) and (3) TEAEU to those international treaties concluded within the integration system or with a third party. These provisions clarify that the international treaties in question shall not contradict the basic objectives, principles and rules of the functioning of the EAEU, thus reinforcing the autonomy of the Eurasian legal system. Furthermore, primacy of primary law is ensured by the provision whereby in case of conflict between international treaties within the EAEU and the founding treaty, the latter shall prevail. Secondary law includes those acts adopted by the various bodies making up the EAEU's institutional framework. The Eurasian legal system is characterised by a strict normative hierarchy, which becomes visible when studying the decision-making procedures, as seen previously.

The strict hierarchy of norms within the Eurasian legal system, giving decisions of the Supreme Eurasian Council and the Intergovernmental Council overriding effect over decisions adopted by the EEC (Article 6(4) TEAEU), does not alter the fact that the latter is this integration's system executive and permanent regulating body (Article 1 Annex I to the TEAEU). The EEC exercises its powers in the following areas: customs tariff and non-tariff regulation; customs regulations; technical regulations; sanitary, veterinary-sanitary and phytosanitary quarantine measures; transfer and distribution of import customs duties; establishment of trade regimes for third parties; statistics of foreign and mutual trade; macroeconomic policy; competition policy; industrial and agricultural subsidies; energy policy; natural monopolies; state and/or municipal procurement; mutual trade in services and investments; transport and transportation; monetary policy; intellectual property; labour migration; financial markets

90 *Garcés de los Fayos*, (fn. 45), p. 9.

91 International agreements concluded by the EU constitute an integral part of the EU legal system, ranking between primary and secondary EU law. This conclusion follows from, on the one hand, the requirement of compatibility with the EU Treaties (Article 218(11) TFEU) and, on the other hand, the fact that these agreements are binding upon the institutions of the EU and on its Member States (Article 216(2) TFEU).

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(banking, insurance, the currency market, the securities market). On matters which fall under its competences, the EEC can sign international treaties, though only if the Supreme Council vests it with the necessary competences.[92]

The Board enjoys a wide range of legislative and executive powers, such as the adoption of "decisions", "dispositions" and "recommendations"; the implementation of the legal acts issued by the Supreme Council and by the Intergovernmental Council as well as of the decisions adopted by the Council of the EEC; the implementation of the international treaties forming EAEU law and of the decisions of the EEC; the representation of the EEC's interests before courts, including the EAEU-CJ and more. The Board also has legislative powers, though limited in scope, as it is empowered to develop its own proposals and to compile proposals of the Member States in the various areas of integration.

3. Integration Policies

As in other integration systems with a supranational format,[93] the EAEU distinguishes between various integration policies, characterised by a different degree of cooperation, namely "agreed" and "coordinated". The "coordinated" policies are defined as policies "implying the cooperation between the Member States on the basis of common approaches approved within Bodies of the EAEU and required to achieve the objectives of the EAEU"; the "agreed" policies are "policies implemented by the Member States in various areas suggesting the harmonisation of legal regulations, including on the basis of decisions of the Bodies of the EAEU, to the extent required to achieve the objectives of the EAEU" (Article 2 TEAEU). The agreed policies are conducted within the sphere of application of sanitary, veterinary-sanitary and phytosanitary quarantine measures (Article 56(2) Annex I); consumer protection (Article 31(1) Annex I), macroeconomic area (Article 62(1) Annex I); monetary area (Article 64(1) Annex I); regulation of financial markets (Article 70(1) Annex I); antitrust area – but only in relation with actions of economic entities of third countries affecting the competition in commodity markets of the Member States (Article 74(4) Annex I) and agricultural area (Article 94(1) Annex I). The coordinated policies cover the following areas: taxation (Article 71(1) Annex I); energy (Article 79(1) Annex I); transport (Article 86(1) Annex I), intellectual property (Article 89 Annex I), industrial cooperation (Article 92 Annex I), the rules for granting subsidies for industrial goods (Article 93(1) Annex I) and labour migration (Article 96(1) Annex I). The introduction of the "agreed" and "coordinated" policies – whose wording is evocative of intergov-

92 *Kirkham*, (fn. 36), p. 117.

93 The EU distinguishes between exclusive, shared and supporting competences (Article 2 TFEU) in areas covered by the scope *ratione materiae* of the EU Treaties. The acts adopted by EU bodies in the exercise of these competences (Article 288 TFEU) may have binding effect, such as to create uniform legislation, to harmonise national legislation entirely or partially, or be merely non-binding, which is the case of recommendations or acts of "soft law". The CAN also acts in areas of its competence, having the choice to regulate a specific aspect exhaustively or only partially by means of acts having binding effect.

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ernmental forms of international cooperation –, coupled with the top-down decision-making system, can be regarded as an indication that the Member States have shied away from conferring powers to genuinely supranational and independent bodies.

V. Economics and Trade

1. Establishment of a Common Market

From an economic perspective, the establishment of the EAEU constitutes a step forward towards a new stage of integration, but it is not necessarily a breakthrough. The TEAEU provides for more freedom of movement of goods, services, capital and workers (Article 1(1) TEAEU) in a common market of 182.7 million consumers,[94] and lays down more detailed and extensive regulations for the sectors that have already been integrated. In 2016, a common regulation for the market in pharmaceuticals and medical devices will come into force. In some cases, the sovereignty of a Member State will be preserved in areas that have not hitherto been regulated because of their economic sensitivity. Regulations for the most contentious domains have been postponed: this concerns the creation of a common market for oil and gas (postponed until 2025), for electricity (postponed until 2019) and for services (postponed until 2025). A common transport market (for motor vehicles and rail) is to be created in several steps.[95] The fact that those sectors have once again been exempted from integration under transitory provisions demonstrates that the interests of the Member States are still divergent, with some of them reluctant to accept further integration in branches of the economy considered to be of strategic significance, especially those strategically important to Russia. The fact that no agreement has been reached in those domains is also due to the fast pace of the negotiations, which has been imposed by Russia and criticised by the other Member States.

Integration is most advanced in the area of free movement of persons, in particular as regards access to labour markets. Mutual recognition of professional qualifications has been enhanced. Income tax will be paid in the country of residence from the first day of employment. Furthermore, all EAEU nationals are guaranteed equal access to basic medical care. The EAEU is currently working on adopting legislation, which shall enable the mutual recognition of professional experience and on the acquisition of pension rights by workers employed in a Member State other than the State of origin. Despite such progress, the estimated economic benefits from integration are expected to be limited due to the differences in the Member States' economic potential, and the fact that the creation of the common market in oil and gas and the common market in electricity, both of which are of key importance for the partners, has been postponed. Trade exchange between the EAEU's founding States accounted for only 12 % of their total trade in 2012 and 2013 (11 % in the first half of 2014). Moreover,

94 In comparison, the EU single market accounts for 500 million consumers.

95 Eurasian Economic Commission, Eurasian Economic Integration: Facts and figures, 2016 – first 6 months, p. 71.

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due to the differences in economic potential, the nature of trade exchange, and finally Russia's central geographical position in the EAEU, integration is expected to strengthen the network of bilateral economic relations between the Member States and Russia. The creation of the EAEU is expected to consolidate the existing system of economic dependencies, and open only narrow opportunities for integration in new areas.

In the cases of Belarus and Armenia, the EAEU is likely to preserve the existing system whereby Russia has been subsidising their economies, mainly through the supply of cheaper energy resources[96] – a benefit that has become less attractive in view of the present economic situation (low oil prices and changes to the taxation of the oil sector in Russia) – and through loans granted by Russia and the Russian-dominated Eurasian Development Bank. Russia's decision to offer preferential terms of co-operation to Belarus, Armenia and Kyrgyzstan (at the level of bilateral economic relations with Russia) was the price that the Kremlin agreed to pay for involving those countries in the integration process.[97] However, with Russia's economy being severely hit by the sanctions adopted by the EU as a result of the military aggression against Ukraine and the oil price shock,[98] Russia's ability to maintain subsidies for a longer period of time or offer subsidies to other Member States has been hampered.

Russia also remains an important but unavoidable partner for Kazakhstan, as the modernisation of its economy depends on continued access to Russian transit corridors and the huge Russian market of 145 million people. On the other hand, both Belarus and Kazakhstan fear that too much integration might pave the way for Russian capital to dominate their respective economies. This is particularly true for Belarus, which has proven reluctant to the privatisation of the heavily state-owned economy out of fear of losing control over key financial flows.[99] In Kazakhstan, there is also a persistent fear that bigger Russian companies might swallow up domestic competition, and this is an issue that is delaying the harmonisation of certain policies. What can be said with certainty is that participation in the EAEU exposes Kazakhstan to growing competition from stronger Russian companies in its domestic market. As the manufacturing base in the EAEU Member States is underdeveloped and obsolete, the creation of a common market will in fact facilitate the access of goods from Russia (whose industry is the most developed among them) to the markets of the other Member States, and not the other way around. Belarus is an exception here, because nearly 50 % of its exports go onto the Russian market.

Despite the cautious and gradual opening of national markets to cross-border trade due to persistent distrust of free competition with Russia that might follow from an

96 *De Micco*, (fn. 5), p. 52.

97 *Peyrouse*, Die Mitgliedschaft Kirgistans in der Eurasischen Wirtschaftsunion: Eine Vernunftehe?, Zentralasien-Analysen No. 88, 27/4/2015, p. 2.

98 The consequences have been a slowdown of GDP growth, an acceleration of inflation and an increase in capital outflow. Hence, economic growth in Russia is hardly possible in medium-term and is totally dependent on external factors, see *Mukhamediyev*, (fn. 54), p. 13.

99 *Keršanskas*, Privatisation in Belarus: Far from Western standards, BelarusInfo Letter, Eastern Europe Studies Centre, Issue 10 (40), 2013, p. 1.

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elimination of obstacles to trade, the advantages of participating in the Eurasian integration process clearly prevail. For all Member States, the integration process offers the chance to obtain subsidies and trade concessions, in particular in the energy sector, from Russia.[100] For some, which face political isolation (like Belarus) or have small economies (like other post-Soviet Central Asian republics), the EAEU might perhaps even be the only way to connect to international trade. Consequently, the EAEA ultimately functions as a platform for insertion in the global economy, an aspect which shall be discussed in further detail below. For the Central Asian republics, membership in the EAEU represents in any case a choice for a strategic partnership with Russia, in order to balance China's increased activity in the region.

2. Development of Intra-Regional Trade

When it comes to real figures, it is difficult to assess the EAEU's success. The initial creation of the customs union coincided with a boost in intra-regional trade, up by 32.1 % in 2011 to some $62 billion, and by a further 7.5 % in 2012. Since then, however, the trend has been strongly downwards, falling by 5.5 % in 2013, 11 % in 2014 and 25.8 % in 2015. By 2015 trade among EAEU Member States was down to $45 billion. In January-April 2016, trade was down 18.4 %, year-on-year. Foreign trade outside the EAEU has also been in decline for the bloc since 2012, shrinking by 34 % in 2015.

The difficulty in assessing the EAEU's direct impact on trade is a result of the fact that its introduction coincided with an economic slowdown in Russia and Kazakhstan and sharp currency devaluations. Above all, the decline in oil and commodity prices skewed figures sharply downwards (mineral resources were two-thirds of EAEU exports and one-third of trade within the EAEU in 2015). As a result, foreign trade for EAEU Member States has declined with all major partners, both within and outside the EAEU. The situation has been exacerbated by the fact that the economic problems experienced undermined confidence in the integration system, ultimately leading some Member States to re-introduce trade barriers between them in order to protect their domestic markets. As a conclusion, at least in terms of intra-regional trade, the EAEU has not yet delivered the promised benefits.

3. Establishment of a Customs Union

With the establishment of a customs union and the conferral of competence in the field of external trade policy, customs, external tariffs and non-tariff barriers to the supranational EEC, an important shift of sovereign power has taken place in favour of the EAEU. The effect expected by the Member States from this conferral of competences is an increase in bargaining power, which might prove useful for the conclusion of trade agreements with third States. However, doubts still persist regarding the proper functioning of the customs union, as the common external tariff does not seem

100 *De Jong*, Why countries are not rushing to join Putin's union, euobserver of 27/5/2016, https://euobserver.com/opinion/133574 (5/5/2017); *Papava*, (fn. 53), p. 10.

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to apply yet to all goods. The customs union must therefore be considered incomplete, a fact which is crucial when it comes to assessing compliance with WTO law, as shall be discussed later. Furthermore, the development of a common trade policy at supranational level, exercised by the EEC, would logically imply the loss by national authorities of the respective competence in trade matters. And yet, the unilateral adoption of sanctions by Russia against EU agricultural products, in place since 2014, without obtaining the EEC's authorisation, has shown that the customs union's architecture appears to lack consistency in its current state of development.[101] The same applies for Russia's embargo on Ukrainian food imports in response to the entry into force of that country's DCFTA with the EU, the imposed obstacles on Ukrainian goods transiting to Kazakhstan and Kyrgyzstan and for the unilateral sanctions imposed against Turkey, introduced in December 2015 in response to the shooting down of a Russian plane on the Turkish-Syrian border. In all aforementioned cases the other EAEU Member States have refrained from supporting Russia's position, instead maintaining cordial relations with the EU, Ukraine and Turkey.[102] This deficiency in the management of the customs union risks undermining the integration system's external appearance and credibility towards potential trade partners. The absence of a constant and reliable contact partner is believed to be one of the reasons why the EU has so far been reluctant to recognise and establish formal contact with the EAEU.[103]

VI. The EAEU within the Global Framework for Multilateral Trade

1. The WTO Legal Framework

The establishment of the EAEU's customs union inevitably raises the question of its compatibility with WTO law, and more specifically with paragraph 8 of Article XXIV GATT, which allows a number of States to create a common customs territory with the aim to facilitate trade between them upon fulfilment of certain conditions. This question is of much practical relevance, as to date Kyrgyzstan (since 20 December 1998), Russia (since 22 August 2012) and Kazakhstan (since 30 November 2015) are all WTO members, with the consequence that the EAEU will have to fulfil the aforecited conditions laid down in the multilateral trade rules once all Member States have joined the WTO. These conditions are that States concluding economic integration agreements must eliminate duties and other restrictive trade measures for substantially all trade. In addition, States are required to apply the same duties and other trade rules

101 *Van der Togt/Montesano/Kozak*, (fn. 33), p. 26.

102 *Chiarello*, Paper tiger or game-changer? Challenges and opportunities of EU engagement with the Eurasian Economic Union, College of Europe, Master Thesis 2014-2015, p. 22.

103 See Council of the EU, Progress Report on the implementation of the EU Central Asia Strategy, SWD(2015) 2 final of 13/1/2015: "As a precondition for closer integration with the EU, the EAEU must be fully based on WTO principles and rules, and should help remove barriers to deeper economic cooperation. It must also fully respect the sovereign and autonomous decisions of States to decide on their participation, and should not create obstacles to trade between the EU and the EAEU members."

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vis-à-vis third countries. Other requirements of paragraph 5(a) of Article XXIV of GATT establish that when forming a customs union, duties for third countries shall not on the whole be higher or more restrictive than prior to the formation of such a union. The Memorandum of Understanding on the Interpretation of Article XXIV of GATT explains that the evaluation of the requirements of paragraph 5(a) of Article XXIV shall be based on the changes in weighted average tariff rates and customs duties collected. Paragraph 6 of Article XXIV states that if one of the members of the customs union increases the rate of duty above the frozen level, compensatory adjustments must be arranged for the remaining members of the WTO according to the procedure provided for in Article XXVIII of GATT. Finally, one of the last provisions of Article XXIV of GATT is that the transitional period for the formation of a customs union or the conclusion of free trade area agreements cannot exceed ten years.

2. Legal and Economic Challenges

The EAEU faces legal and economic challenges at a multilateral trade level. The WTO legal framework is of particular importance for the EAEU, as its rules are binding upon all States forming part of this integration system and take priority over agreements within the CU by virtue of Eurasian law regardless of any formal membership in the multilateral trade system.[104] First of all, the EAEU replaced its Member States' individual tariff regimes with a single external tariff. In most cases this was based on pre-existing Russian trade tariffs,[105] which were relatively high and therefore raised levies on imports for the more open economies of Kyrgyzstan, Kazakhstan and Armenia, although there have been transitional arrangements for tariffs on many goods. However, for countries such as Kyrgyzstan, which had low tariffs on its consumer-goods trade with China, the result has been higher prices on Chinese imports and difficulties for wholesale and re-export trade. Apart from these economic consequences resulting from a higher external tariff, it should be noted that Member States willing to join the WTO will have to reconcile their commitments under the WTO agreements and the TEAEU in order to avoid claims for compensation from third States, as an increase of duties for external imports would be inconsistent with the conditions for the creation of regional trade agreements under the WTO rules referred to above.[106] For that reason, Kazakhstan currently has, following its accession to the WTO in November 2015, two sets of tariffs in effect, one for goods destined for other EAEU Member States and another for those destined exclusively for its home market. Kazakhstan's WTO membership has also slowed the progress on a unified EAEU Customs Code. Initially announced for 2015, it will now come into force in 2017 at the earliest. Armenia, in return, is expected to be relieved from the risk of compensatory payments from third States, as the EAEU common external tariff is expected

104 *Woffgang/Brovka/Belozerov*, (fn. 38), p. 99; *Dragneva/Wolczuk*, Russia, the Eurasian Customs Union and the EU: Cooperation, stagnation or rivalry?, Chatam House Briefing Paper, August 2012, p. 8.

105 *Popescu*, (fn. 42), p. 12; *Kirkham*, (fn. 36), p. 119.

106 *Popescu*, (fn. 42), p. 23.

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to be decreased to a level lower than its commitment under the WTO legal framework.[107]

It should be noted in this context that Belarus' accession negotiations do not appear to have progressed despite support from the EU.[108] Another issue concerns the fact that even though the EAEU is meant to have formed a customs union, Russia has continuously disregarded the EEC's exclusive competence in the area of trade policy in order to impose counter-sanctions against the EU, without even consulting the other Member States.[109] Furthermore, Belarus has taken advantage of this conflict by importing goods produced in the EU and re-exporting them to Russia. These flagrant violations of customs union rules raise serious doubts as regards the viability of the integration system as a whole. They might also undermine the EAEU's efforts to achieve recognition as a customs union under WTO law.

Whilst an assessment of compatibility with the GATT provisions referred to above has not, to the present day, been carried out by the WTO, the author submits that the legal conditions laid down therein are not yet met. Firstly, despite a legal obligation under Eurasian law to comply with the WTO legal framework – in order to allow Russia to abide by its commitments in the multilateral trade system –, not all EAEU Member States have joined the WTO. Secondly, even if this had occurred, it is questionable whether duties and other restrictive trade measures would have truly been eliminated for "substantially all trade", irrespective of the formal existence of a EAEU Customs Code. The continued disputes related to interregional trade between EAEU Member States, the existence of a separate set of tariffs in Kazakhstan for Eurasian trade, as well as the inconsistencies as regards trade policy with third countries reveal grave weaknesses in the management of the customs union. A formal assessment will certainly have to be carried out once Belarus joins the WTO and a notification to the Contracting Parties pursuant to paragraph 7(a) of Article XXIV GATT is submitted.[110]

Regardless of these pending issues at a multilateral trade level, the EAEU has recently embarked on a dynamic plan to attract potential trade partners, seeking deeper trade relations with them. The most prominent example is the conclusion of a free

107 *Zhanaltay*, World Trade Organization's Regulation Harmonization with Other Organization: Eurasian Economic Union, 5/3/2016, http://eurasian-research.org/en/research/comments/economy/world-trade-organization's-regulation-harmonization-other-organization (5/5/2017).

108 *Dabrowski*, Belarus at a crossroads, Bruegel Policy Contribution 2016/02, January 2016, p. 8.

109 International Crisis Group, (fn. 46), p. 12.

110 In accordance with points 7 and 8 of the Understanding on the Interpretation of Article XXIV GATT, all notifications made under paragraph 7(a) of Article XXIV shall be examined by a working party in the light of the relevant provisions of GATT and of paragraph 1 of this Understanding. The working party shall submit a report to the Council for Trade in Goods on its findings in this regard. The Council for Trade in Goods may make such recommendations to Members as it deems appropriate. In regard to interim agreements, the working party may in its report make appropriate recommendations on the proposed time-frame and on measures required to complete the formation of the customs union or free-trade area. It may if necessary provide for further review of the agreement.

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trade agreement between the EAEU and Vietnam in 2015, which entered into force in October 2016.[111] This is one of various recent measures undertaken by the Russian-led EAEU with a view to provide the integration process with international recognition and legitimacy.

E. The EAEU's External Action

I. The Geopolitical Dimension

A principal rationale of the EAEU's emergence is the competition between Russia and the EU in the post-Soviet space. With the launching of the EaP and the simultaneous accession of ten Central and Eastern European States the same year, the EU gained a new Eastern border with the post-Soviet space. Ukraine's "Orange Revolution" and the subsequent rapprochement of this country to the EU became a source of concern for Russia, which had hoped to keep Ukraine within its sphere of influence. The EAEU must therefore be seen – at least from a purely European perspective – as Russia's attempt to counter the EU's influence in its own geopolitical "backyard". Far from merely destabilising Ukraine by military means with the aim to undermine this country's Western integration, Russia has sought to challenge the EU's "transformative power" that emanates from the EaP legal framework described above by creating a sophisticated integration system in the region that emulates the EU's basic features. The EAEU and its legal system might therefore represent, as some authors have suggested, a serious attack against the EU's "normative hegemony".[112] Armenia's more or less forced accession to the EAEU in return for security guarantees[113] as well as Georgia's choice in favour of integration with the EU as a result of its tense relations with Russia following their military confrontation in 2008[114] have become paradigmatic for the clash between these two rivalling integration systems. Both countries have faced serious pressure from Russia, ultimately taking totally opposing decisions, in accordance with their respective geopolitical interests.

Considered globally, the EAEU is meant to become a building block within a "multipolar world", according to the Russian viewpoint. As Putin has argued, the EAEU "is a chance for the entire post-Soviet space to become an independent centre

111 Free Trade Agreement between the Eurasian Economic Union and Vietnam, www.eurasiancommission.org/ru/act/trade/dotp/sogl_torg/Documents/EAEU-VN_FTA.pdf (5/5/2017).

112 *Sisu Vicari*, (fn. 33), p. 8.

113 *Weitz*, The Customs Union and Eurasian Union: a primer, Putin's Grand Strategy: The Eurasian Union and its Discontents, Central Asia-Caucasus Institute & Silk Road Studies Program 2014, p. 36.

114 The association agreement between the EU and Georgia was formally signed on 27/6/2014. It was provisionally applied since September 2014 and entered into force on 1/7/2016, see *Papava*, (fn. 53), p. 9.

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for global development, rather than remaining on the outskirts of Europe and Asia".[115] Some Russian officials express this in almost existential terms, suggesting that Russia might be facing a choice: either become a powerful ideological and civilisational centre in its own right or integrate with one of the existing power centres and lose its identity. In this line of thinking, the EAEU is a mechanism for Russian influence in a "sphere of special interests" in the former Soviet republics, where Russia opposes Western political and security influence, particularly achieved through the kind of "colour revolutions" experienced in Georgia, Kyrgyzstan and Ukraine. Russian officials continue to see the West as a destabilising actor in Eurasia, seeking to undermine friendly regimes.[116] This pleads in favour of a more politically integrated EAEU, capable of resisting such influence. This geopolitical ideology has been influenced by Russian nationalist *Alexander Dugin*, appreciated in certain circles of government and received with distrust by the West.[117]

Russia's aspiration to use the EAEU as a geopolitical instrument to increase its influence in the world has become obvious in the EEC's new international agenda, which encompasses the signature of memoranda of understanding with several countries around the world. The memorandum of understanding signed by the EAEU and Peru on 6 October 2015, which presents patterns common to all other memoranda[118] and shall consequently be used as an example, sets out various areas of cooperation and the means to pursue such cooperation, including the creation of a Joint Working Group between the EEC and the Peruvian government, entrusted with its implementation. Both parties agree to hold meetings as necessary, but at least once a year, in addition to maintaining regular contacts. The memorandum of understanding nonetheless makes clear that it is not an international agreement, does not create rights and obligations under international law and does not entail any financial obligation of either party. It is obvious that these provisions do not go beyond the establishment of diplomatic contacts aimed at exploring areas of cooperation. Interestingly, prior to the signature of the memorandum, Peru had requested observer status at the EAEU, an unprecedented event in the history of the organisation.[119]

115 See statement of President *Vladimir Putin*, Eurasian integration to allow its members not to be on periphery of Europe and Asia, Voice of Russia of 19/9/2013, https://sputniknews.com/voiceofrussia/news/2013_09_19/Eurasian-integration-to-allow-its-members-not-to-be-on-periphery-of-Europe-and-Asia-Putin-7856/ (5/5/2017).

116 *Delcour/Wolczuk*, Spoiler or facilitator of democratization? Russia's role in Georgia and Ukraine, Democratization 22 (2015), p. 467.

117 See *Clover*, The unlikely origins of Russia's Manifest Destiny, Foreign Policy of 27/7/2016, http://foreignpolicy.com/2016/07/27/geopolitics-russia-mackinder-eurasia-heartland-dugin-ukraine-eurasianism-manifest-destiny-putin/ (5/5/2017).

118 Similar memoranda of understanding have been signed with Mongolia (17/6/2015), Chile (19/6/2015) and Singapore (18/5/2016).

119 On 7/11/2014, *Viktor Khristenko*, former Chairman of the Board of the EEC, had a meeting in Moscow with a delegation from Peru headed by the country's former President *Ollanta Humala*. At the meeting, it was decided to start preparing a Memorandum of Cooperation between the EEC and the Peruvian Government to establish a dialogue on the issues the parties are interested in. During the meeting, the intent of Peru to receive a status of a EAEU observer was also discussed, see www.eurasiancommission.org/en/nae/news/Pages/07-11-2014-3.aspx (5/5/2017).

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However, there are reasons to believe that the EAEU might be considering deepening ties with third States even outside the post-Soviet space: the conclusion of the free trade agreement with Vietnam and the reported invitation to Syria to join the EAEU. In addition, the EAEU is said to have begun trade agreement talks with some 40 States,[120] including Egypt, Israel and India, and reached a temporary trade deal with Iran in December 2015. A remarkable evolution has been the recent announcement by the Russian Government of an initiative to create a "Great Eurasian Partnership" with China, India, Pakistan, Iran, the Former Yugoslav Republic of Macedonia, other CIS States, as well as other interested States and integration systems,[121] although details about the legal terms of this multi-level partnership have not yet been disclosed. There are however indications that the agreements to be concluded with third States might foresee some type of association similar to the EU's current ENP and EaP.[122] These developments are in line with the Member States' objective to connect to global trade by using the influence of a single market of important dimensions,[123] emulating the EU's trade strategy.

An aspect theoretically posing challenges to Russia's vision of Eurasian integration subject to its own geopolitical influence is China's ambitious Silk Road Economic Belt (SREB) initiative: the transport, infrastructure and trade initiative launched by President *Xi Jinping* in 2013 aimed at facilitating trade between China and Europe.[124] The SREB still lacks a clear programme but is backed by at least $40 billion of promised investments in infrastructure for trade routes from western China through Central Asia and Russia to the Middle East and Europe. It is still questionable how these two projects will coexist or be combined. In May 2015, President *Putin* highlighted the possibility of a harmonious alignment with the Chinese initiative. In December 2015, after talks in Beijing, Prime Minister *Dmitry Medvedev* announced the initial agreement to "search for points of common interest". Working groups are putting a roadmap together, but it is hard to imagine substantive joint initiatives at this stage. It is more likely that the EAEU and China's SREB will work largely in parallel, with China focusing on bilateral investments and infrastructure and the EAEU on cooperation among its Member States. Central Asian Member States will probably have to

120 See statement of the Russian Prime Minister *Dimitri Medvedev* of 17/10/2015, Eurasian Economic Union holds free trade zone talks with about 40 States, http://tass.com/economy/906882 (5/5/2017).

121 See Putin proposes formation of a 'great Eurasian partnership', news of 17/6/2016, http://rbth.com/news/2016/06/17/putin-proposes-formation-of-a-great-eurasian-partnership_603985 (5/5/2017); Speech of presidential adviser *Sergey Glazyev*, Imperative of Eurasian integration, http://realnoevremya.com/articles/711 (5/5/2017); Presidential address to the Russian Federal Assembly of 1/12/2016, http://en.kremlin.ru/events/president/news/53379 (5/5/2017).

122 See *Knobel/Pereboyev*, Eurasian Partnership: Potential instruments for external relations of the Eurasian Economic Union, EDB Eurasian Integration Yearbook, 2013, p. 43.

123 See the speech of President *Nazarbayev* of 31/5/2016 on the occasion of the Supreme Eurasian Economic Council meeting in expanded format, http://en.special.kremlin.ru/catalog/keywords/82/events/52049 (5/5/2017).

124 *De Jong*, (fn. 100).

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assess compatibility of their respective commitments with Russia under the TEAEU and those derived from future agreements with China.[125]

II. Relations with the EU

1. Obstacles to a Rapprochement between both Integration Systems

The EEC's new agenda on international affairs aimed at establishing ties of cooperation and facilitating trade with third States has not been fruitful as regards relations with the EU. *Viktor Khristenko*, then head of the EEC, formally requested negotiations with the European Commission in October 2015. European Commission President *Jean-Claude Juncker* responded with a letter to President *Putin* in November 2015 that offered the possibility of cooperation with the EAEU under certain conditions.[126] Juncker's initiative was sharply criticised by several Eastern European Member States, in particular Poland and Lithuania. Ever since, the EU has avoided entering into official talks with the EAEU, which is ironic considering its traditional keen interest in promoting regional integration worldwide[127] and its preference for interregional bloc-to-bloc negotiations, as is the case for the relations with the Latin American integration systems Mercosur and the Andean Community (CAN).[128]

In order to understand the reluctance on the EU's part to establish formal relations and negotiate any kind of cooperation agreement with the EAEU, it must be borne in mind that while *Khristenko's* proposal might well have been in line with the spirit of President *Putin's* idea postulated back in November 2010 about "creating a harmonious economic community stretching from Lisbon to Vladivostok", which would have envisaged some kind of legal connection between the two integration systems (a phenomenon referred to occasionally as "integration of integration"), circumstances have radically changed since the outbreak of hostilities over Ukraine. There are currently several important obstacles to closer links between the EU and the EAEU:

- the dispute over Crimea's status and the armed conflict in eastern Ukraine;[129]
- Russia's opposition to decisions by Ukraine, Moldova and Georgia to pursue political association and economic integration with the EU;

125 *Cheng-Hin Lim*, China and the Eurasian Economic Union: Prospects for the Silk Road Economic Belt, Eurasia Review of 14/5/2015, http://ippreview.com/index.php/Home/Blog/single/id/18.html (5/5/2017).

126 See Letter on cooperation between EU, Eurasian Economic Union sent by EC chief to Putin, news of 19/11/2015, http://tass.com/economy/837900 (5/5/2017).

127 *Laruelle*, The European Union in a reconnecting Eurasia – Foreign economic and security interest, Report of the Center for Strategic and International Studies, 2016, p. 10.

128 See *Kühn*, Die Andengemeinschaft – Juristische Aspekte der internationalen Beziehungen zwischen der Europäischen Union und lateinamerikanischen Integrationssystemen im Zeitalter des Neuen Regionalismus, 2003.

129 *Ivachenko*, Debunking myths about the Eurasian Economic Union, news of 19/8/2016, www.russia-direct.org/opinion/debunking-myths-about-eurasian-economic-union (5/5/2017).

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- the desire of non-Russian EAEU Member States to maintain or enhance bilateral relations with the EU, rather than negotiate through the EAEU;[130]
- the difficulty of harmonising EAEU and EU rules relevant to international trade (technical standards and customs rules);[131]
- some Russian analysts see the proposed EU-USA Transatlantic Trade and Investment Partnership ("TTIP") as making any pan-European (EU-EAEU) deal much more difficult.[132]

These obstacles, and especially the political disagreement over Ukraine, led many EU Member States to oppose any form of EU-EAEU dialogue. In an effort to resolve the conflict in Ukraine, some EU Member States (Germany and France) involved in diplomatic negotiations with Russia were even willing to go so far as to agree to recognise the EAEU, as envisioned by President *Putin*.[133] However, Russia's failure to implement the Minsk Peace Agreements and the respective recourse to trade sanctions that ensued have made this goal impossible to achieve to date. Given the lack of progress in the peace process, it is highly unlikely that this situation will change in the short term.

2. The Association Agreement concluded by the EU and Ukraine

Meanwhile, the EU and Ukraine have signed an association agreement establishing a DCFTA on 27 June 2014. The agreement was simultaneously ratified by the *Verkhovna Rada* (the Ukrainian parliament) and the European Parliament on 16 September 2014. In an attempt to ease Russia's concerns – Russia was worried about the risk that EU goods might enter its market free of tariffs through Ukraine, with a possible damage for the domestic economy – the EU and Ukraine agreed to postpone the provisional application of the trade-related part of the agreement until 31 December 2015.[134] From a legal perspective, the association agreement qualifies as a so-called "mixed agreement", with most areas covered falling within the competence of the EU, with the consequence that a provisional application thereof is possible as far as the aforementioned areas are concerned. The approval of the EU Member States as regards those areas falling within their competence is still pending, after the process suffered a major setback with the negative outcome of a (non-binding) referendum on the agreement conducted in the Netherlands on 6 April 2016.

130 *Weitz*, (fn. 113), p. 35.
131 *Zagorski*, (fn. 15), pp. 42-44.
132 *Vinokurov*, Mega deal between the European Union and the Eurasian Economic Union, Russia in Global Politics, November-December 2014.
133 See Merkel says free trade zone with Russia possible, news of 18/4/2015, www.rt.com/business/250909-merkel-russia-trade-zone/ (5/5/2017).
134 This is the case even though the concerns raised by Russia were not convincing. Firstly, the association agreement was due to be implemented over a period of ten years, giving Russia enough time to adapt to possible changes in the trade flows. Secondly, the alleged incompatibility of technical standards could have been solved thanks to Russia's positive experience with the EU on standardization, see *Dragneva/Wolczuk*, (fn. 23), p. 115.

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At this moment, the Dutch Government and the EU are discussing possible amendments to the association agreement liable to dispel the concerns of the Dutch electorate. Possible solutions to the impasse might include amendments ranging from merely political declarations stating that the agreement shall not lead to Ukraine's accession to the EU to the incorporation of legally binding provisions ruling out any commitment by the Netherlands to support Ukraine in military matters.[135] Since approval by each of the 28 EU Member States as well as a unanimous EU Council Decision are required before the association agreement can be officially concluded, the matter is considered urgent in EU circles. The latest seriously discussed option, which has recently obtained the approval of the European Council's Legal Counsel,[136] envisages the adoption of a "Decision of the Heads of States or Government meeting within the European Council" on the association agreement, specifically discarding the conferral on Ukraine of the status of a candidate country as well as any collective security guarantees. In addition, it emphasises the unrestricted right of EU Member States to limit migration of Ukrainian jobseekers and at the same time clarifies the absence of any obligation to provide further financial support to Ukraine. The advantage of this solution, which has a few precedents in EU legal practice,[137] lies in the fact that, as an intergovernmental agreement of public international law forming part of the EU *acquis*, it provides useful clarifications that are binding on the EU Member States on how to apply the provisions of the association agreement. Certainly, in order to become an interpretative instrument binding on Ukraine by virtue of Article 31(2)(b) of the Vienna Convention on the Law of Treaties, this Decision would have to be accepted by Ukraine. The said Decision was already adopted within the framework of the European Council of 15 December 2016.[138]

It should not be forgotten in this context that the conclusion of the association agreement in question almost failed, as former Ukrainian President *Viktor Yanukovych*, under immense pressure by the Kremlin and facing possible economic disadvantages for his country resulting from a deterioration of trade relations with Russia,

135 *Van der Loo*, The Dutch Referendum on the EU-Ukraine Association Agreement – Legal options for navigating a tricky and awkward situation, CEPS Commentary of 8/4/2016.

136 See European Council, Draft Decision of the Heads of State or Government, meeting within the European Council, on the association agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part – Form, legal nature, effects and conformity with the association agreement, Opinion of the Legal Counsel of 12/12/2016 (EUCO 37/16, JUR 602).

137 See, for instance, decisions of the Heads of State or Government, meeting within the European Council, taken in December 1992 and in June 2009 to address certain problems raised by the Government of a Member State following a referendum in that State or decisions taken by common agreement of the representatives of the Member States, including at the level of Heads of State or Government, in December 1992, October 1993 and December 2003 on the location of the seats of a number of EU institutions and bodies, in the context of Article 341 TFEU. See, more recently, the Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union, OJ CI 69 of 23/2/2016, p. 1.

138 European Council Conclusions on Ukraine of 15/12/2016, www.consilium.europa.eu/en/press/press-releases/2016/12/15-euco-conclusions-ukraine (5/5/2017).

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repeatedly delayed the signature of the agreement.[139] *Yanukovych* was eventually removed from power through the so-called "Euromaidan" revolution and replaced by a new pro-European government. In recognition of the difficulties Ukraine had to overcome, the former President of the European Council *Herman Van Rompuy* paid homage to the victims of the said revolution at the signing ceremony with the following words: "In Kiev and elsewhere, people gave their lives for this closer link to the EU. We will not forget this."[140] Against this background, whatever solution the EU might come up with for the impasse caused by the Dutch referendum, due account must be taken of the will of the Ukrainian nation to embark on an integration process with the EU.

In line with the requirements laid down by the association agreements concluded within the framework of the EaP, Ukraine is obliged to a gradual and dynamic approximation of its national legislation to EU norms and standards, subject to a mechanism to monitor the application and implementation of the agreement, its objectives and commitments. The duration of the EU-Ukraine association agreement is unlimited. At the same time, the parties will undertake a comprehensive review of the achievement of objectives under the agreement within five years. Ukraine has entered the EU's orbit of influence at the same time as it faces uncertainty as regards its territorial integrity. In retrospect, it appears ironic that Russia's attempts to force Ukraine into joining the EAEU have only served to alienate this country and encourage it to see its future in a partnership with the EU.

Although the current standoff over Ukraine makes any rapprochement between both integration systems impossible at this stage, this does not necessarily mean that international relations cannot make any progress, more concretely at a bilateral level and in technical areas.[141]

3. Bilateral Relations between the EU and EAEU Member States

Bilateral cooperation between the EAEU Member States and the EU is unchanged. This fact is due to various reasons: For the EU, the strengthening of these relations has the advantage of making it possible to reiterate the EU's commitment to harmonious cooperation with the individual nations, without having to assume the possible legal and political consequences of providing the EAEU – an integration system dis-

139 *Dragneva/Wolczuk*, (fn. 23), pp. 84-90.

140 *Van Rompuy*, Statement at the signing ceremony of the Association Agreements with Georgia, Moldova and Ukraine, EUCO 137/14 of 27/6/2014.

141 Under the current circumstances, the European Commission only has a mandate to maintain contacts at a technical level with the EAEU and only hesitantly analyses the possibility of more far-reaching interactions in the future, see *Delcour et al.*, (fn. 20), p. 14.

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playing at times an antagonistic attitude –[142] with diplomatic legitimacy. Indeed, some observers fear that legitimising the EAEU as an autonomous political actor might be construed by Russia as a confirmation of its alleged rightful dominance in the post-Soviet space, with adverse effects for the EaP and the EU's future engagement in the region.[143] For the EAEU Member States, keeping bilateral relations intact has the benefit of maintaining close ties with the EU as a trade partner, in addition to asserting their own sovereignty towards Moscow. Examples of fruitful cooperation are the EU's support to Belarus in joining the WTO and to Kazakhstan in fostering the rule of law. Moreover, the EU has continued to forge deeper economic relations: negotiations with Armenia on a new overarching framework for the deepening of their bilateral relations began in 2015, after a re-assessment of their mutual interests; an Enhanced Partnership and a Cooperation Agreement was signed with Kazakhstan in December 2015;[144] and Kyrgyzstan was granted GSP+ status[145] in February 2016, allowing exports to the EU to benefit from tariff exemptions.[146] As the Ukraine crisis and the ensuing sanctions have shown, the EAEU Member States neither endorse Russia's geopolitical plans nor do they wish hostilities with the EU.

From a long term perspective, upholding bilateral cooperation in a variety of fields might prove to be the ideal strategic approach for the EU as long as it remains unclear what the future holds for the EAEU. In the event that the EAEU should fail to live up to its promises and cease to exist one day, the EU could still rely on continued bilateral relations. A cautious approach appears also justified from a legal perspective, as it is questionable what the EU's interest in establishing direct trade relations with the EAEU could be, where both its compatibility as a customs union with WTO law and its ability to establish a common trade policy remain problematic. In other terms,

142 Russia's diplomatic interventions in Georgia, Armenia and Ukraine aimed at undermining the efforts of these countries to achieve an association with the EU within the EaP are considered by observers as hostile acts against the EU. At the same time, Russia has repeatedly expressed interest in future cooperation between the EU and the EAEU. This contradictory behaviour has made the development of a consistent EU foreign policy towards the EAEU extremely difficult.

143 *Eberhard*, Dialogue with the Eurasian Union on Ukraine – an opportunity or a trap?, OSW Commentary No. 154, December 2014, p. 3.

144 European External Action Service, EU and Kazakhstan sign Enhanced Partnership and Cooperation Agreement, press release of 21/12/2015 (unique ID: 151221_02).

145 The General System of Preferences (GSP) is an autonomous trade instrument of the EU designed to support emerging economies in their effort to boost exports, ultimately to the benefit of each party's economy. Third countries having GSP status benefit from a partial or total tariff exemption when exporting to the EU. The exemption is usually granted to certain products considered particularly important for the third country's economy. The award of this status is attached to political conditionality, such as the fight against drugs, the respect of international conventions on human rights, labour rights, environment protection, good governance, etc., with the consequence that the EU may unilaterally withdraw the trade advantages if the conditions are not met. The GSP is authorised under WTO rules, which means that the EU is not obliged to grant most favoured nation treatment to other WTO Contracting Parties not qualifying for GSP status. For details, see *Kühn*, (fn. 128).

146 See Kyrgyz Republic and the EU, https://eeas.europa.eu/headquarters/headquarters-homepage/1397/kyrgyz-republic-and-eu_en (5/5/2017).

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a number of important legal obstacles must still be overcome on the EAEU side before the establishment of a contractual relationship between trade-blocs can be regarded as feasible. Recognition for political reasons would be merely symbolic. On the other hand, should the EAEU stand the test of time and be conferred more competences, with the consequence of becoming the EU's sole partner in trade matters, there is still the chance that Member States might exert a positive influence on this new relationship between integration systems through the EAEU's decision-making bodies. This will depend on how Russia's influence is calibrated within the integration system.

Bilateral cooperation in technical matters might be an area worth exploring in the meantime. As previously mentioned, the current clash between the EU and the EAEU appears to be rooted in the belief of an alleged normative incompatibility between the legal orders of these two integration systems. The possible realisation by political leaders that this understanding of exclusivity of membership in an integration process is based on a misconception might help defuse tensions. Consequently, a possible approach to follow would be to scrutinise means of achieving compatibility of rules and technical standards (the EU CEN-CENELAC with the Soviet GOST)[147] with the aim of enabling Ukraine and other States taking part in the EaP to define their legal relations with the EAEU freely and without fear of retaliation from any side. Viable solutions could be found through effective customs cooperation, controls on rules of origins and arrangements on regulatory convergence and/or the principle of mutual recognition.

The current negotiations between the EU and Armenia for a cooperation agreement have the potential to serve as a test case for the EAEU Member States' ability to pursue a multi-vector integration strategy. It is worth bearing in mind that Armenia had already successfully negotiated an association agreement establishing a DCFTA with the EU and was very close to concluding it. However, under pressure from Russia, which had made security guarantees conditional upon membership in the EAEU, Armenia decided to abandon its original plan and ultimately joined the latter integration system.[148] Despite this abrupt change of mind, in March 2015, Armenia and EU resumed talks on a framework for a possible new bilateral agreement to replace the

147 Whilst tariffs used to constitute the main barriers to trade in the past, nowadays technical requirements imposed by States are the main obstacles. In order to ensure free movement of goods within an integrated economic area, technical standards must be adopted, which take safety and quality concerns into account. Their recognition implies that authorities may not ban or restrict the commercialisation of the goods in question for reasons already addressed by the standardization entities. The EU relies on the standards developed and agreed by three officially recognised European Standardization Organizations: the European Committee for Standardization (CEN), the European Committee for Electrotechnical Standardization (CENELEC) and the European Telecommunications Standards Institute (ETSI). EAEU Member States rely on a different set of technical standards, maintained by the Eurasian Council for Standardization, Metrology and Certification (EASC), a regional standardization organisation operating under the auspices of the Commonwealth of Independent States (CIS). This set of standards is commonly referred to as GOST, which is an acronym for *gosudarstvennyy standart* (Russian: *государственный стандарт*), which means "state standard".

148 See *Atilgan et al.*, (fn. 14), p. 41; International Crisis Group, (fn. 46), p. 4.

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Partnership and Cooperation Agreement (PCA). The first stage of the talks consisted of a "scoping exercise" aimed at identifying the policy areas, in which cooperation would still be possible despite Armenia's membership in the EAEU. The text of the previously negotiated draft association agreement served as a basis of discussion. It can be expected that the chapters on political dialogue, common foreign and security policy as well as justice, freedom and security, including a significant number of sectoral chapters will remain for the most part unaltered. The real challenge is likely to be the part concerning the DCFTA or, more concretely, the chapters on customs, services, sanitary and phytosanitary measures (SPS) and intellectual property rights, essential for granting access to the EU's internal market.[149] An agreement on these difficult areas would send a positive signal for the EU's future negotiations with EAEU Member States.

Indeed, in the best possible scenario, some States would be enabled to obtain simultaneous membership in the EaP and the EAEU or any sort of association with the latter integration system. By so doing, relations between the EU and Russia could improve, ultimately paving the way for a possible recognition of the EAEU by the EU as a trustworthy partner in areas falling within its competence. In the long term, both integration systems might envisage the creation of a single economic space stretching from Lisbon to Vladivostok.[150] The recently concluded "Comprehensive Economic and Trade Agreement" (CETA) between the EU and Canada shows that inter-regional regulatory cooperation is feasible. A successful outcome of the current negotiations between the EU and Mercosur might also send out a positive signal.

For the time being, this vision is admittedly a very optimistic one, as contact in technical matters has only taken place on a few occasions, being limited to support provided by experts on a non-official basis.

F. Risks and Chances of a Bipolar Europe

In recent years, Europe has seen the emergence of two integration systems, keen on expanding their respective areas of influence. The instrument used is that of assimilation, achieved by legislative and regulatory approximation. The presumed normative incompatibility between both legal orders has led to a race, in which one side has not shied away from using military force. The risks derived therefrom have become palpable for an important number of people living in the eastern parts of the continent. The conflict in eastern Ukraine has the potential to flare up at any time, increasing the risk of a new Cold War. Moreover, eastern European States appear to be constrained in the conduct of their international relations, feeling compelled to join one or the other integration system in the interest of their own survival. For the sake of lasting

149 *Delcour et al.*, (fn. 20), p. 19.

150 See, in this context, the author's work on regional convergence between the Andean Community and Mercosur, *Kühn*, Reflexiones sobre una posible convergencia regional con la participación de la Comunidad Andina y del Mercosur. Lecciones de la experiencia integracionista europea, Revista General de Derecho Europeo No. 36, May 2015.

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peace, dialogue between both integration systems must take place in order to identify areas of conflict and seek viable solutions.

The rise of the EAEU has questioned the approach taken so far by the EU's EaP, consisting of inviting countries in the periphery to adopt the EU's *acquis* with a view to enable them to access the EU's internal market. This unilateral approach, based on the concept of a unipolar Europe composed of "concentric circles", characterised by different levels of normative approximation to the EU's legal order (EEA, EU-Switzerland bilateral agreements, EU-Turkey customs union, associations with third States in Europe offering a perspective of accession, EaP, Union for the Mediterranean), must be reviewed, as it has become obvious that partner countries cannot be expected to align their domestic legislation solely to the EU's requirements without taking into account other contractual relations these countries have entered into, including membership in a different integration system. Instead, the EU should embark on a comprehensive dialogue with the EAEU with a view to render their legal orders mutually compatible. This would be the consequence of the realisation of the existence of a bipolar Europe in the 21st century.

While a unipolar Europe does not appear to be a realistic option anymore, a bipolar Europe would offer multiple chances for cooperation in the interest of peace and stability. Furthermore, as the most advanced integration system in the world, the EU could contribute to the development of the EAEU, also with the aim of helping it embrace Western values, such as democracy, the respect for human rights and the rule of law. If this approach proves successful, the EAEU might gradually assimilate to the EU's model, thus increasing the mutual compatibility of their legal orders. A possible rapprochement in the spirit of the EU's traditional strategy aimed at encouraging regional economic integration would facilitate the transmission of values and integration experience and, as a result, increase the EU's importance for the States in the post-Soviet space. A bipolar Europe – with the EU and an allied EAEU as building blocks – could also have the effect of strengthening Europe's role in the world. In an era, in which China appears to intend to play a more assertive role, cooperation between both integration systems in Eurasia based on common values and objectives might prove crucial. This view is perfectly in line with the general goals pursued by the EU and the EAEU, as described above. In the end, both integration systems can only benefit from a rapprochement. Political sensitivities aside, such a rapprochement would merely constitute a technical challenge. In any case, the European Commission does not appear to rule out this option once the political conditions are met.[151]

Nonetheless, the EU would be well-advised to maintain multi-level relations, including with the EAEU Member States with a view to facilitate the dialogue and to demonstrate its commitment to harmonious cooperation with the individual nations, thus avoiding a too strong Russian influence in the post-Soviet space. Furthermore, it should be borne in mind that the EAEU still shows several structural deficiencies at

151 Statement of the EU Commissioner for trade, *Cecilia Malmström*, at the CEPS Corporate Breakfast on 20/10/2016 in Brussels, in reply to the author's question as to whether an agreement in trade matters between the EU and EAEU would be possible in the near future.

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its current stage of evolution (e.g. coherence in foreign trade relations, compatibility of the customs union with WTO law), including its heavy dependence on the political agenda of predominantly autocratic governments in the EAEU Member States.[152] As changes in the regimes – which will certainly take place in the future – are likely to pose problems to the functioning of the EAEU, the EU should keep ties with the various levels of government and society in the Member States, in order to guarantee the continuity of bilateral cooperation.

G. Conclusions

The present article was intended to offer an insight into the geopolitical background of the conflict in Ukraine, focusing on the clash between the EU and the emerging EAEU over spheres of influence. The article has explained the EU's "Eastern Partnership" strategy as part of its wider "Neighbourhood Policy", aimed at integrating States in the eastern and southern periphery into its internal market on the basis of a process foreseeing political dialogue, cooperation in various areas and normative approximation in the field of trade rules and technical standards.

An overview of the main characteristics of the legal order of the EAEU has also been offered, highlighting some differences to the EU, whose model it seemingly intends to emulate. The differences identified concern the values and principles of integration, the integration method, the institutional framework and decision-making procedure. The overview has focused on a number of deficiencies in the institutional setup, likely to undermine the attainment of the objectives pursued. The account has been broadened so as to encompass some issues of an economic and political nature, which the EAEU must overcome. The author's objective has been to shed light on the integration efforts in an area of the world, which has largely been ignored by Western scholars.

While it is still too early to assess the success of this new integration system, there are a few indications that the EAEU may not currently be delivering the envisaged economic prosperity. Instead, it appears that the Eurasian integration process might be a predominantly political project pursued by Russia, partly for ideological reasons, supported by the other Member States, eager to benefit from its clout in order to connect better to the global economy and balance out China's growing influence. What can be said for sure is that the post-Soviet space has already for years been a fertile ground for diverse integration initiatives, comparable to a certain extent to Latin America. However, for the first time in history, a sufficiently stable and coherent integration process has emerged, based on the EU's integration experience and demanding of international recognition. This represents an important turning point in the history of Eurasia, in particular, since the order established by the EU is being challenged. Against this backdrop, the present article elaborates on the possible strat-

152 *Dragneva/Wolczuk*, Eurasian Economic Integration: Institutions, promises and faultlines, The Geopolitics of Eurasian Economic Integration, LSE Special Report June 2014, p. 13.

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egy to be pursued by the EU in terms of dialogue and the establishment of contractual relations with the EAEU and its Member States.

The author's ultimate objective is, however, to stimulate interest in this fascinating new integration system among the readers and thus prepare them for possible developments in the future, in connection with the EAEU's more visible presence in the international arena.

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