

# The Eurasian Economic Union: Balancing Sovereignty and Integration

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# The Eurasian Economic Union: Balancing Sovereignty and Integration

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## Introduction

On 1 January 2015, a new international organisation was launched in the post-Soviet space, the Eurasian Economic Union (EAEU). Building on the previous integration efforts of Russia, Belarus and Kazakhstan, the formation of an economic union signalled the advancement of the integration agenda and was described as ‘epoch-making’ by its political ‘godfathers’.<sup>1</sup> This ‘deepening’ of integration was to be accompanied by improved institutions, including the drafting of a comprehensive Treaty to raise the effectiveness of integration.

That such an ‘improvement’ would (and even should) strengthen the supranational nature of the project was a reasonable assumption. Firstly, in comparative regional integration terms, moves towards ‘deep’ integration have been associated with ‘high’ institutionalisation and legalization of cooperative efforts, including the corresponding handover of sovereignty to common bodies.<sup>2</sup> The introduction of EU-style juridicised forms of dispute resolution, in particular, has been found to correlate with the proposed depth of integration.<sup>3</sup> Secondly, the institutional design of previous post-Soviet integration regimes already charted a progressive and deliberate course towards the adoption of EU-style supranational features.<sup>4</sup> The emulation of such institutional templates was motivated by the fact that, despite its deficiencies, the EU was seen as the only successfully functioning model for deep integration, one built upon ‘objective principles’ transferable across borders.<sup>5</sup> Thirdly, criticisms of the early Eurasian regime pointed consistently to the need for a more coherent and expanded

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<sup>1</sup> ‘Putin: Peredacha polnomochii v EAES ne oznachaet utratu suvereniteta’, *RIA Novosti*, 29 May 2014, <http://ria.ru/economy/20140529/1009842639.html>

<sup>2</sup> Whilst this is a complex and much debated issue, many have argued that depth of integration and legality are positively correlated. For an overview, see K. Raustiala (2005) ‘Form and Substance in international Agreements’, 99 *The American Journal of International Law* 581-614. Despite the fact that the terms ‘institutionalisation’ and ‘legalisation’ can have somewhat different connotations in international law and international relation discourses, here they are used synonymously. They are understood as concepts to describe a continuum of possible institutional design, with the ‘high’ end of the spectrum associated with EU-style supranational transfer of sovereignty to a common organisation, e.g. K. Abbott et al. (2000) ‘The Concept of Legalization’, 54:3 *International Organisation* 401-419.

<sup>3</sup> J. McCall Smith (2000) ‘The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts’, 54:1 *International Organization* 137-180.

<sup>4</sup> R. Dragneva and K. Wolczuk (2015) ‘EU Emulation in the Design of Eurasian Integration’, in D. Lane and V. Samokhvalov, eds. *The Eurasian Project and Europe: Regional Discontinuities and Geopolitics* (Routledge).

<sup>5</sup> T. Valovaya (2012) ‘Eurasian Economic Integration: Origins, Patterns, and Outlooks’, *EDB Eurasian Integration Yearbook* 42-61; V. Gustov (2008) Na puti k sozdaniiu tamozhennogo soiuzza Evraziiskogo Ekonomicheskogo Soobshestva’, *Evraziiskaia Integratsiia: Ekonomika, Pravo, Politika*, No. 3, 19-23.

common regulation. Importantly, many of the predictions about the potential benefits of Eurasian integration were premised on issues, such as the removal of non-tariff barriers as key obstacles to internal trade.<sup>6</sup> Such extensive regulatory harmonisation agenda, however, is conditional on effective regulatory institutions and robust guarantees for domestic implementation, something found to be problematic in the Eurasian context. Finally, the narrative about the importance of transfer of sovereignty in the context of the EAEU was emphasised by the project political leaders in their dealings on the international stage. Vis-à-vis the European Union, for example, it was underlined that sovereignty was transferred to the institutions of the EAEU in a supranational fashion with the implication that trade relations should be regulated not at bilateral but at inter-bloc level.<sup>7</sup> The same position was followed in the context of Kazakhstan's WTO accession, where its undertakings are to be implemented by domestic but also EAEU bodies.<sup>8</sup>

What the Treaty on the EAEU adopted on 29 May 2014 delivered in terms of institutional design,<sup>9</sup> however, suggests that the deepening of economic integration was not accompanied by a clear consolidation of the level of pre-existing institutionalisation or its expansion. As early commentators pointed out, the Treaty was weak 'from an international, legal and constitutional point of view'.<sup>10</sup> In particular, despite the welcome codification of the legal basis of integration, the Treaty on the EAEU reversed the trend towards high institutionalisation, strengthening the protection of state sovereignty in line with traditional, intergovernmental patterns of inter-state relations. Indeed, in the context of awakened sovereignty sensitivities, political leaders, such as the Kazakh President, were keen to underline that the new Treaty 'entirely excludes any kind of limitation or violation of Kazakh sovereignty. We have provided mechanisms excluding limitations or violation of our sovereignty at all levels.'<sup>11</sup>

This development presents an empirical and analytical puzzle in terms of the resulting balance between integration objectives and the institutional framework for their achievement. Certainly, this balance is sufficiently precarious and opaque, allowing for different interpretations to be communicated to different political audiences. The implications are extremely important in terms of the need to clarify the domestic, and particularly constitutional, implications of membership in the EAEU. Scrutinising the balance between

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<sup>6</sup> E.g. D. Tarr (2016) 'The Eurasian Economic Union of Russia, Belarus, Kazakhstan, Armenia and the Kyrgyz Republic: Can it Succeed where its Predecessors Failed?', 54:1 *East European Economics* 1-22.

<sup>7</sup> See, for example, the statement of Russia's Deputy- Prime Minister Shuvalov following the signing of the Treaty, 'Obshchee ekonomicheskoe prostranstvo s Evropoi teper' vozmozhno lish' v formate ES-EAES - Shuvalov', *Vedomosti*, 30 May 2014, <http://www.vedomosti.ru/politics/print/2014/05/30/27183511>. Similarly, 'Evraziiskii soiuz predlagaet ES nachat' dialog o sozdanii oshchego ekonomicheskogo prostranstva', *TASS*, 26 October 2015, <http://tass.ru/ekonomika/2380019>.

<sup>8</sup> WTO, 'Overview of Kazakhstan's Commitments', [https://www.wto.org/english/news\\_e/news15\\_e/kazakhannex\\_e.pdf](https://www.wto.org/english/news_e/news15_e/kazakhannex_e.pdf). Kazakhstan became formally a member of the WTO on 30 November 2015.

<sup>9</sup> The Treaty on the Eurasian Economic Union was signed by Russia, Belarus, and Kazakhstan on 29 May 2014 and entered into force on 1 January 2015.

<sup>10</sup> P. Kalinichenko (2015) 'The Eurasian 'Bewitchery' of the Astana Treaty', *The Intersection Project*, 8 August 2015, <http://intersectionproject.eu/article/russia-euroep/eurasian-bewitchery-astana-treaty>.

<sup>11</sup> 'Dogovor o sozdanii EAES zakonodatel'no iskliuchaet narushenie suvereniteta – Miniust RK', *Tenge*, 26 May 2014, <http://tenge.me/?p=9546>.

the form and substance of integration is also vital in assessing the viability of the EAEU regime and its institutional determinants. Yet, while the policy interest in the EAEU has been massive, the academic analysis of its legal aspects is in its infancy.<sup>12</sup>

In addressing this puzzle and filling an important gap in the literature, this chapter examines the degree to which the formal setup of the EAEU entails a limitation or transfer of its member states' sovereignty to the common integration framework. Drawing on international organizations' analysis, the chapter starts by identifying a set of formal criteria to capture the key limits imposed by sovereignty on the transfer of state power to such organisations. The discussion then proceeds to provide an overview of the circumstances around the adoption of the EAEU Treaty, situating it against the background of previous integration efforts and key aspects of the wider regional context affecting member states' preferences in relation to integration-sovereignty trade-offs. Given the fluid and complex narratives accompanying the launch of the EAEU, the analysis also draws on the drafting history of the Treaty.<sup>13</sup> Even though Armenia's membership was also actively negotiated during the spring of 2014, the EAEU Treaty was very much the product of Russia, Belarus and Kazakhstan, with Armenia's place defined as a country 'acceding' to this Treaty.<sup>14</sup> This was the same with the Kyrgyz Republic, which followed suit in joining the EAEU.<sup>15</sup> That is why here only the negotiating position of the three founding countries will be considered. Applying the formal criteria identified, the next four sections seek to discuss the extent to which the design of the EAEU calls for the members' sovereignty transfer and how the imposed limits to such transfer compare with the provisions of previous regimes. In conclusion, the chapter offers some explanations for the observed trajectory and discusses its potential implications.

### **Conceptualising the limits on sovereignty**

International organisations are frequently classified as 'intergovernmental' or 'supranational'.<sup>16</sup> The conceptualisation of these labels in the literature has not entailed a universally accepted, bright-line definition. While the EU tends to exemplify the most 'supranational', highly institutionalised end of the spectrum, it is recognised that all organisations entail some erosion of absolute state sovereignty, with member states voluntarily granting powers for the purposes of achieving the organisation's objectives. This

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<sup>12</sup> See, for example, E. Bail'dinov (2014) 'Dogovor o Evraziiskom ekonomicheskom soiuze: shag vpered, dva shaga nazad', *Evrasiiskii iuridicheskii zhurnal* Nr. 10(77), 25-33; M. Karliuk (2015) 'The Eurasian Economic Union: an EU-like Legal Order in the Post-Soviet Space?' *HSE Working Paper* BPR/LAW/2015; Zh. Kembayev (2016) 'Sravnitel'no-pravovoi analiz funktsionirovaniia Suda Evraziiskogo Ekonomicheskogo Soiuzu' 2:18 *Mezhdunarodnoe pravosudie* 30-45.

<sup>13</sup> Two drafts of the Treaty are used in particular. The first one was posted by the Kazakh side on 10 September 2013, <http://kazenergy.com/ru/2012-09-05-04-11-04/2011-05-13-18-20-44/10777-2013-09-10-07-03-15.html>. The second draft, dated 30 January 2014 and containing the comments, proposals and reservations of the three member state, was posted also by the Kazakh side, [//palata.kz/ru/news/3129](http://palata.kz/ru/news/3129), followed by a publication on the web-site of the Russian Ministry of Economic Development on 12 February 2014, [http://economy.gov.ru/minec/about/structure/depSNG/doc20140212\\_1](http://economy.gov.ru/minec/about/structure/depSNG/doc20140212_1). Information is also drawn from conversations with senior officials of the Eurasian Economic Commission and interviews reported in the press.

<sup>14</sup> Armenia signed an accession treaty on 10 October 2014, which entered into force on 2 January 2015.

<sup>15</sup> The Kyrgyz Republic signed an accession treaty on 23 December 2014, coming into force on 12 August 2015.

<sup>16</sup> E.g. J.H.H. Weiler (1982) *Supranational Law and the Supranational System*, PhD Thesis, EUI, Florence, <http://cadmus.eui.eu/handle/1814/4822>; H. Schermers and N. Blokker (2001) *International Institutional Law*, 3rd ed. (Martinus Nijhoff Publishers, The Hague/London, Boston).

erosion tends to be revealed in a range of ‘mixed’ characteristics with many organisations proving to represent hybrid types. Nonetheless, these categories remain helpful for the analysis of the EAEU, particularly when the focus of analysis is placed on the dynamic mix of different limits (material as well as temporal) imposed by sovereignty on the transfer of state power from the state to the international organisation, delineated in the latter’s constitutive treaties.<sup>17</sup>

First, such limits are reflected in the type of competences granted to an organization. As observed by Martin Martinez, unlike supranational organizations, intergovernmental organizations have concurrent instead of exclusive competences, which tend to be exclusively listed in constitutive treaties and limited to a restricted set of substantive areas.<sup>18</sup>

Second, the degree of independence of the organisation’s internal bodies is highly indicative of the limits on sovereignty. Intergovernmental organisations may have common bodies, but they are not independent of the member states, particularly of their executive branches.<sup>19</sup> Notably, governments cannot be bound against their will and any binding decisions require unanimity. In supranational organisations, common bodies exhibit high independence from member states – in terms of their composition, but more importantly, in terms of their decision-making powers. Critically, independent bodies can adopt decisions by majority vote, thereby binding some member states against their will.

Third, sovereignty can also be limited by the development of a body of common law within an organisation. Establishing the autonomous nature of such an order in international organisations can be complex.<sup>20</sup> The EU’s model has underscored the ability of the organization to enact binding decisions directly applicable to member states and its citizens.<sup>21</sup> Thus, the acts adopted by the common bodies of a supranational organization, unlike international law proper, require no ratification or the application of another domestic procedure for its entry into the domestic legal order or its supremacy over contradictory domestic norms. In this sense, the state is bound a priori, regardless of the particular decision at stake and without the possibility to control its entry into the domestic legal order.

Fourth, often the most visible limit on sovereignty relates to the availability of disciplinary and enforcement mechanisms, allowing a member state to be compelled to comply with the decision of the common bodies, even if it opposes it. Supranational organizations like the EU vest extensive disciplinary powers with its permanent regulator, the European Commission, as well as binding dispute resolution powers with its Court. In intergovernmental organisations states’ compliance is encouraged primarily through diplomatic means and peer-pressure.

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<sup>17</sup> M. Martin Martinez (1996) *National Sovereignty and International Organizations* (Kluwer Law International, The Hague/Boston/London).

<sup>18</sup> *Ibid*, at 72.

<sup>19</sup> Schermers and Blokker, *op.cit.* note 16.

<sup>20</sup> M. Sørensen (1983) ‘Autonomous Legal Orders: Some Considerations Relating to a Systems Analysis of International Organisations in the World Legal Order’, 32 *Int’l & Comp. L.Q.* 559–576.

<sup>21</sup> Weiler, *op.cit.* note 16.

The above list is not necessarily exhaustive, but captures the most salient limits on the transfer of sovereignty. Importantly, as Martin Martinez points out, the imposed limits are rarely static, but tend to change over time.<sup>22</sup> Such a dynamic perspective is particularly suited to the analysis of the EAEU, and Eurasian integration frameworks more generally, characterised by path dependence, recurrent sovereignty sensitivities as well as frequent changes in design.<sup>23</sup> While the Eurasian Economic Union has been in existence for a very short time and the observations on its institutional practices are still limited, it builds on several preceding initiatives. For this reason, it is important to situate it in its historical and regional context.

### **Institutional and historical background of the EAEU**

The EAEU is a new international organisation in the post-Soviet world, launched following the adoption of its founding Treaty. Yet, its genesis and institutional design cannot be understood without tracing its roots within previous integration efforts in the region. In fact, the EAEU inherited an already developed regime and is best conceptualised in terms of its ‘constitutionalisation’ and modification. Thus, the drafting of the new Treaty was an opportunity to organise and improve the pre-existing framework. At the same time, the new round of bargaining allowed member states to revisit the terms of integration in line with their evolving priorities and the changing geopolitical context.

The EAEU was set up on the basis of the Customs Union (CU) and Single Economic Space (SES) between Russia, Belarus and Kazakhstan. After a quick inception, including the drafting of a package of constitutive agreements, the CU was launched in June 2010. It was envisaged as a treaty regime within an existing organisation, the Eurasian Economic Community (EurAsEC).<sup>24</sup> This formula allowed a core of ‘willing partners’ to move fast towards more advanced forms of integration by upgrading and supplementing the EurAsEC regime. Importantly, as will be illustrated in the subsequent discussion, this commitment had a certain novelty to it in providing for an improved institutional framework to enable effective integration. In doing so, the supranational templates of the EU, viewed as the most successful example of ‘deep’ integration, provided inspiration for institutional design and signalled some in-roads into limiting sovereignty to achieve the objectives set.<sup>25</sup>

At the same time, given the incremental and selective nature of the design process, the resulting Customs Union regime exhibited important gaps.<sup>26</sup> The addition of a large number of new agreements led to a cumbersome and complex web of regulation, characterised by complex cross-references and inconsistencies. These faults were exacerbated by the fast speed of the developing integration agenda, allowing little time for careful drafting or attention to

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<sup>22</sup> Martin Matinez, op.cit. note 17.

<sup>23</sup> R. Dragneva (2013) ‘The Legal and Institutional Dimensions of the Eurasian Customs Union’, in Dragneva, R. and Wolczuk, K. (2013) *Eurasian Economic Integration: Law, Policy and Politics* (Edward Elgar, Cheltenham).

<sup>24</sup> The Eurasian Economic Community was set up in October 2000 and united Russia, Belarus, Kazakhstan, Kyrgyzstan and Tajikistan. Its set up drew on a previous set of agreements and integration bodies between those countries, Dragneva, op. cit. note 23.

<sup>25</sup> Valovaya, op.cit. note 5.

<sup>26</sup> Dragneva, op. cit. note 23.

domestic implementation. In 2012, the CU was transformed into a SES by adding another set of agreements and implementing a partial institutional reform, including the creation of a new permanent regulator with enhanced powers, the Eurasian Economic Commission. At the same time, the transition to a Eurasian Union was already contemplated in December 2010 with the process accelerating fast, as will be discussed below.<sup>27</sup>

The design of the Customs Union and SES exhibited one other very important shortcoming: its legal status. Being a treaty regime, the CU did not have a separate legal personality. Thus, for example, following Russia's accession to the WTO in August 2012, the Eurasian institutions were in charge of implementing important undertakings, in particular, Russia's tariff reduction schedule. Yet, those institutions had no representative powers before the WTO. Similarly, it was clear that 'actorness' on the global stage, including the international legal personality behind it, was particularly prized by the Kremlin. President Putin made no secret of his ambitions about Eurasian integration as a constitutive part of a new multipolar world and an equal partner of the EU.<sup>28</sup> This was also important in terms of the planned widening of the Eurasian project. In particular, serious overtures to solicit the membership of Ukraine were made as of the spring of 2011; these were followed by talks with Kyrgyzstan, the partner of the Customs Union trio in the EurAsEC, with whom formal accession talks were started in October 2011.

The terms and outlines of the proposed Eurasian Union were initially set out in a draft Decision of the Commission of the CU of May 2011. This document exposed some of the clear differences in the country's views on further integration: Kazakhstan preferred a purely economic integration framework, yet one falling short of a currency union, whereas Russia viewed the project as a pathway to a fully-fledged union, including cooperation in defence, border management and foreign policy. As Cooper points out, Kazakhstan had major reservations to calling the new entity a 'union', preferring the name 'single economic space' instead.<sup>29</sup> The following months were key in putting the project in motion and agreeing on some of its fundamentals. Much is owed to the drive of Vladimir Putin and the priority given to the Eurasian project in the context of his bid for a third presidency. The broad consensus reached was reflected in the Declaration on the Eurasian Economic Integration adopted by the countries' Heads of State on 18 November 2011, which launched the SES but also announced the intention to create a Eurasian Economic Union. The document provided little detail, yet it was telling of the compromises that had already taken place by defining the project in primarily economic terms, while retaining the name 'union'. Critically, it was decided that such a union will be based on the codification of the legal basis of the Customs Union and SES to be completed by 1 January 2015. To this deadline, another was added soon: that a

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<sup>27</sup> J. Cooper (2013) 'The Development of Eurasian Economic Integration', in Dragneva, R. and Wolczuk, K. (2013) *Eurasian Economic Integration: Law, Policy and Politics* (Edward Elgar, Cheltenham). The idea of the Union is traditionally attributed to Nursultan Nazarbayev, the President of Kazakhstan, presented in a speech at the Moscow State University on 29 March 1994. The focus here, however, is on the practical incarnation of the initiative within the Eurasian integration project.

<sup>28</sup> V. Putin, 'Novyi integratsionnyi proekt dlia Evrazii – budushchee, kotoroe rozhdaetsia segodnia', *Izvestia*, 4 October 2011. Notably, the value of international legal personality of integration platforms was also exhibited at the founding of the EurAsEC back in 2000, Dragneva and Wolczuk, op.cit. note 4.

<sup>29</sup> Cooper, op.cit. note 27, at 29.

draft treaty on the EAEU be prepared by 1 May 2014.<sup>30</sup> This ambitious time-scale was clearly driven by the Russian side, with President Putin initially referring even to a launch in 2013.<sup>31</sup>

Following this decision, the preparation for the planned codification and new Treaty progressed at a fast pace. The draft, leaked by the Kazakh side in September 2013,<sup>32</sup> revealed that a highly ‘unionist’ concept was initially developed, as the following analysis will demonstrate, including a parliamentary body, the Eurasian Inter-parliamentary Assembly. These proposals met a strong opposition, particularly in Kazakhstan. The Kazakh position reflected its underlying preferences for a purely economic agenda expressed previously, but also its concerns over the running of the integration process. Significantly, the Council of Heads of State of 24 October 2013 became a platform for unprecedentedly open criticism of Russia’s dominance over the project, as will be discussed later.

The result was a significantly trimmed down revised draft, made public in the beginning of February 2014. The draft retracted many of the previous features, including the planned parliamentary assembly, and reflected the reassurances sought to maintain the purely economic nature of the organisation as well as guarantee the equality of member states.<sup>33</sup> Nonetheless, a range of difficult issues remained, as revealed in the intense negotiations over the spring 2014 in the rush to meet the agreed deadline of 1 May 2014.

Critically, this process was overtaken by the political developments in Ukraine, resulting in a popular revolt, the collapse of President Yanukovich’s regime and the formation of a new government at the end of February 2014. Although Belarus and Kazakhstan allied behind Russia in its reaction to the Ukrainian events, some differences emerged. Importantly, as the expedited on President Nazarbayev’s insistence summit of the heads of state on 5 March revealed, Kremlin’s partners Lukashenko and Nazarbayev were concerned about Russia’s lack of consultation and the military build-up in the Crimean region.<sup>34</sup> The following annexation of Crimea, formally supported or at least not publicly challenged, and the ethnic zeal it unleashed in Russia, however, clearly unsettled countries like Kazakhstan with large Russian minorities and reawakened sovereignty concerns.<sup>35</sup>

These developments, it can be argued, affected the negotiating context. Speaking soon after the annexation, the Kazakh President was keen to emphasise that ‘[As] far as our independence is concerned, it is a constant. Kazakhstan will not surrender to anybody even an iota of its independence. But some economic prerogatives we will transfer voluntarily to

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<sup>30</sup> Decision Nr 21 of the Supreme Eurasian Economic Council, 19 December 2012.

<sup>31</sup> N. Buckley, ‘Putin sets sight on Eurasian economic union’, *Financial Times*, 16 April 2011.

<sup>32</sup> <http://kazenergy.com/ru/2012-09-05-04-11-04/2011-05-13-18-20-44/10777-2013-09-10-07-03-15.html>

<sup>33</sup> <http://palata.kz/ru/news/3129>.

<sup>34</sup> A. Klasikovskii, ‘Putin vsypal Kievu, a zatylok cheshut I v Minske’, *Naviny*, 5 March 2015, [http://naviny.by/rubrics/politic/2014/03/05/ic\\_articles\\_112\\_184790](http://naviny.by/rubrics/politic/2014/03/05/ic_articles_112_184790); N. Hayrumyan, ‘Integration talks amid Ukraine crisis: Leaders of Customs Union member states meeting in Moscow’, *ArmeniaNow.com*, [https://www.armenianow.com/commentary/analysis/52454/armenia\\_customs\\_union\\_russia\\_membership\\_kazakhstan\\_belarus\\_lukashenko\\_nazarbayev](https://www.armenianow.com/commentary/analysis/52454/armenia_customs_union_russia_membership_kazakhstan_belarus_lukashenko_nazarbayev)

<sup>35</sup> ‘Russia-Ukraine Crisis Alarms Central Asian Strongmen’, *EurasiaNet.org*, 4 March 2014, <http://www.eurasianet.org/node/68104>. D. Solovyov, ‘As Kiev looks West, Putin turns east to build Eurasian dream’, *Reuters*, 27 March 2014, <http://uk.reuters.com/article/uk-ukraine-crisis-centralasia-idUKBREA2Q0BW20140327>.



supranational organs'.<sup>36</sup> Importantly, the Kazakh side became more determined to ensure that such transfer remains 'voluntary' and conditional on member states' consensus, insisting on explicit guarantees to assert sovereignty and appease domestic sensitivities.

Recognising Belarus's high dependence on Russia, President Lukashenka was more prepared to accept limitations of sovereignty.<sup>37</sup> As he famously put it, 'sovereignty is not an icon one needs to pray before'.<sup>38</sup> He was determined, however, to get a better price for its sacrifice, slowing down the Treaty completion marathon in order to achieve it. The negotiations focused on seeking to secure a free trade with no exemptions, including tariffs on energy, culminating in an ultimatum issued in late April that Belarus might not sign with the satisfactory resolution of the issue. The strategy delivered only partial results, i.e. a time-table for removal of exemptions rather than immediate free trade terms, yet the financial package attached to them was sufficient to secure Lukashenka's support for the final run-up now planned for the end of May.<sup>39</sup> While it was these tensions that captured the headlines, behind the stage the push for greater intergovernmentalism in the final version of the treaty continued, as will be illustrated in the discussion below.

### Competences

Regional organisations in the post-Soviet space have tended to have wide and far-reaching, yet not necessarily clearly specified objectives. The CIS sought to promote cooperation in an open-ended range of areas: from the economy to various aspects of culture and social life. Yet, the tasks of the organisation were always limited to promoting cooperation with member states in the lead. The latter's participation in any of these platforms was always selective, frequently subject to extensive reservations, and revocable.<sup>40</sup> The EurAsEC was similarly designed with an ambitious agenda in mind, starting with a customs union, yet in terms of decision-making practices, it never moved beyond being a framework for discussion and broad cooperation.<sup>41</sup>

The Customs Union launched in 2010 represented a break in this pattern in so far as it had clearly defined objectives with competences in the area of customs regulation vested with the common bodies of integration, particularly its permanent regulator. The resulting regime was one of partial attribution of powers, with some issues vested with CU authorities, but others requiring the action of national bodies. For example, a main criticism of the Code of the

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<sup>36</sup> 'N. Nazarbaev: Kazakhstan ne otdast ni iotu nezavisimosti komu by to ni bylo', *Zakon.Kz*, 25 March 2014, <http://www.zakon.kz/4611637-n.nazarbaev-kazakhstan-ne-otdast-ni.html>.

<sup>37</sup> M. Frear (2013) 'Belarus: Player and Pawn in the Integration Game', in Dragneva, R. and Wolczuk, K. (2013) *Eurasian Economic Integration: Law, Policy and Politics* (ward Elgar, Cheltenham).

<sup>38</sup> 'Suverenitet ne ikona', *Gazeta.Ru*, 24 October 2013, <http://www.gazeta.ru/business/2013/10/24/5722545.shtml>.

<sup>39</sup> 'Moskva nal'et Belarusi polstakana v dolg', *Naviny*, 9 May 2014, [http://naviny.by/rubrics/economic/2014/05/09/ic\\_articles\\_113\\_185443](http://naviny.by/rubrics/economic/2014/05/09/ic_articles_113_185443).

<sup>40</sup> R. Dragneva (2004) 'Is 'Soft' Beautiful?: Another View on Law, Institutions and Integration in the Commonwealth of Independent States', 29:3 *RCEEL* 279-324.

<sup>41</sup> M. Golovnin (2008) 'Opportunities and Obstacles to EurAsEc Integration', EDB Eurasian Integration Yearbook 2008, 38-53, [http://www.eabr.org/general/upload/docs/a\\_n1\\_2008\\_12.pdf](http://www.eabr.org/general/upload/docs/a_n1_2008_12.pdf). Arguably, the most important contribution to integration was made by the Court of the EurAsEC, as will be discussed further below.

Customs Union was the large number of references to domestic law.<sup>42</sup> Ultimately, the division of competences between CU and domestic institutions was problematic. In fact, one of the strongest grievances of the EU at the time was about this, including the instrumental use of the competence issue by Russia: often trade restrictions were initiated by domestic bodies, yet for their lifting, the trade partner was referred to the customs union institutions.<sup>43</sup>

Being a treaty regime made it possible to easily add new objectives to the project. The most notable expansion of the scope of cooperation was the addition of the SES in 2012. While the goal of the SES was generally defined as the creation of a common market, in practice there was a package of 17 agreements dealing with different areas of cooperation (or aspects thereof in some cases), such as macroeconomic policy, competition, natural monopolies, movement of capital, public procurement, labour migration and statistics. The level of transfer of powers to the CU and SES bodies was very different across these areas. President Nazarbayev referred to the transfer of 175 national competences to the newly launched Eurasian Economic Commission.<sup>44</sup> Yet, few of these competences were exclusive, particularly in view of the decision-making mechanism established, as will be discussed in the next section.

The concept of the EAEU as a new, fully-fledged international organisation gave the opportunity to reconsider the objectives and scope of Eurasian integration. As discussed earlier, the compromise reached was for drafting a treaty on integration in purely economic matters. The scope of economic integration was to be delineated by the previously concluded agreements, which were to be codified. At the same time, there was much talk on the possible expansion of this scope, particularly in relation to a common currency. Yet, the association of a monetary union with a political union was too strong for Russia's partners.<sup>45</sup> Indeed, none of the drafts purported to define exhaustively the integration agenda, allowing for new areas of cooperation to be added by subsequent agreements. Similarly, it was clear that the leadership of Russia and Belarus remained amiable to integration spilling into areas of political and defence cooperation. This explains Kazakhstan's insistence on including in the final draft the specific designation of the EAEU as an international organisation for 'regional economic integration'.<sup>46</sup>

To secure the achievement of its objectives, the September 2013 draft Treaty attempted to provide a clear division between Union and national competences. The proposal referred to exclusive Union competences in relation to the customs union, customs administration, external trade policy, competition, technical standards, sanitary and phyto-sanitary measures.

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<sup>42</sup> See, for example, V. Visloguzov, 'Kodeks razdora', *Kommersant*, 21 June 2010.

<sup>43</sup> Interviews with DG Trade officials (April 2014) and EU's Trade Delegation in Moscow (November 2013 and March 2014).

<sup>44</sup> V. Osipov, 'Evoliursiia evraziiskoi integratsii', *Kazakhstanskaia Pravda*, 1 January 2012, <http://www.kazpravda.kz/archives/view/141430>.

<sup>45</sup> While even a name for such a currency was floated, *altyn*, it was decided not to proceed in this direction at that point. Nevertheless, Russia clearly continues its effort to convert the EAEU into a monetary union, despite its partners' reluctance. See, for example, A. Kim, 'Common Currency for the Eurasian Economic Union: Testing the Ground?', *Eurasia Daily Monitor*, 27 March 2015, [http://www.jamestown.org/programs/edm/single/?tx\\_ttnews%5Btt\\_news%5D=43712&cHash=965d3d424fe9325ed36b197d121ccf66#.VzgQ\\_krLIU](http://www.jamestown.org/programs/edm/single/?tx_ttnews%5Btt_news%5D=43712&cHash=965d3d424fe9325ed36b197d121ccf66#.VzgQ_krLIU).

<sup>46</sup> Article 1 (2) of the EAEU Treaty.

In relation to the areas falling within the SES agenda, the proposal was for a joint competence of the Union and the member states. Purely domestic competences in these matters were defined as residual: when envisaged in an international agreement or not regulated by Union legislation at all.<sup>47</sup>

Despite the systematic clarity on this issue, this draft must have resembled too much the various versions for a Union Treaty to replace the USSR developed during 1991. Unsurprisingly, this was one of the areas of notable difference between the various drafts. The January version listed the areas of Union competence, leaving out the term ‘exclusive’ altogether. It also abandoned the term ‘joint’ competence. The result was a distinction between ‘coordinated (*skoordinirovannuiu*), harmonised (*soglasovannuiu*), and ‘when needed’, unified (*edinuiu*) policy in the areas determined by the treaty and other international agreements’.<sup>48</sup>

The final Treaty, however, opted for a much opaque approach to this matter. Article 5 (1) stated that ‘[T]he Union is endowed with competences within the limits established by this treaty and other international agreements concluded within the Union.’ Thus, it refrained from spelling out clearly the areas of attributed competence, leaving those to be identified by what is a complex analysis of the Treaty, its voluminous appendices, and any other agreements that may be added subsequently. As one of the first analysts of the Treaty points out, ‘this task is made more difficult by the possibility for member states to introduce reservations or limitations in a range of areas’.<sup>49</sup> As a consequence, the author concludes, the competence of the Union is ‘down to zero’ which will seriously impede the effective functioning of the Union.

Article 5 (2) of the Treaty retains the reference to coordinated and harmonised policy, as defined in this Treaty and other agreements. Responding to the criticisms,<sup>50</sup> the Treaty provided legal definitions for the two terms: ‘coordinated’ is defined as policy based on common approaches approved by the bodies of the Union, and ‘harmonised’ – as based on harmonised legal regulation, including by acts of the bodies, to the extent necessary for achieving the objectives of the union.<sup>51</sup> On the basis of these definitions, however, it is extremely difficult to establish clearly the differences between the two types of policies. This is not just because of the unfortunate, hasty drafting. Confusingly, many policies were referred to as ‘coordinated (harmonised)’.<sup>52</sup> It is also clear that the designation of cooperation in certain areas as ‘unified’ or ‘coordinated’ was of particular sensitivity in the drafting

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<sup>47</sup> Article 5 of the September 2013 draft.

<sup>48</sup> Article 5 of the September 2013 draft.

<sup>49</sup> Bail’dinov, op. cit. note 12.

<sup>50</sup> For example, see President Nazarbayev’s comments at the December 2013 summit, ‘Sochinitel’nyi Soiuz’, *Gazeta.Ru*, 24 December 2013, <http://www.gazeta.ru/business/2013/12/24/5818017.shtml>.

<sup>51</sup> Article 2 of the Treaty.

<sup>52</sup> E.g. Article 86 (Transport), Article 94 (Agricultural policy)

process, ultimately resulting in the near elimination of the term ‘unified’ and the higher number of ‘harmonised’ policies.<sup>53</sup>

### **Delegation to common decision-making bodies**

In the past two decades, delegation to common bodies came to be seen as an important precondition for successful integration in the post-Soviet space. This has been particularly so with regard to the expectations of an effective permanent regulator. On balance, while the design of the principal plenary, decision-making bodies of integration has been characterised by strong intergovernmental features, the design of the permanent regulator in successive post-Soviet integration projects demonstrated some inroads into limiting member states sovereignty. Yet, such limitations have never been without reservations.<sup>54</sup> The EAEU reproduces this pattern, while also seeking to address some of the asymmetry concerns arisen in the previous years.

As with its predecessors, the principal decision-making fora of the EAEU are its Councils. The Supreme Council (*Vysshiĭ sovet*) consists of the member states’ heads of state and is defined as the highest body of the Union.<sup>55</sup> The organisation also has a junior council, the Intergovernmental Council (*Mezhpravitel’stevennyi sovet*), consisting of the heads of government.<sup>56</sup> Similar to the plenary bodies of other international organisations, these Councils meet periodically: at least once or twice a year, respectively. Critically, no departure from unanimity takes place in the decision-making process. Decisions are adopted by consensus, with no sacrifice of state sovereignty.<sup>57</sup> Importantly also, no other body can constrain the decisions of the Supreme Council. As pointed out earlier, the plans to set up a Parliamentary Assembly within the EAEU never materialised in the face of Kazakhstan’s strong opposition.<sup>58</sup> The Supreme Council can turn to the Court of the EAEU with a query, yet the Court’s consultative opinions have only the status of recommendations.<sup>59</sup>

The permanently functioning body of the EAEU, the Eurasian Economic Commission, largely inherited the design of its predecessor. As already noted, in 2012 a new Eurasian Economic Commission replaced the first Commission of the CU.<sup>60</sup> The 2012 Commission was modelled on the EU Commission, developed organisational structure consisting of two tiers, a Council and a Collegium, and clearly associated with the deepening of the integration agenda accompanying the simultaneous launch of the SES. It is noteworthy that it was hailed

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<sup>53</sup> ‘Unified’ policies are only mentioned in Article 1. ‘Obedit’ sia – ne znachit dogovorit’ sia’, *Kommersant*, 12 February 2014, <http://www.kommersant.ru/doc/2405918>; ‘Chto ne ustraivaet Kazakhstan v dogovore o Evraziiskom soiuze?’, *Radio Azattyq*, 25 March 2014, <http://rus.azattyq.org/a/evrazijsky-soiuz/25308597.html>.

<sup>54</sup> Dragneva, op.cit. note 23.

<sup>55</sup> Article 10 of the EAEU Treaty.

<sup>56</sup> Article 14 of the EAEU Treaty.

<sup>57</sup> Article 13 (2) and Article 17 (2) of the EAEU Treaty.

<sup>58</sup> The September 2013 draft referred to a Eurasian Inter-Parliamentary Assembly modelled on the Parliamentary Assembly of the Eurasian Economic Community.

<sup>59</sup> Section 98 of Annex 2, Statute of the Court of the EAEU.

<sup>60</sup> Cooper, op.cit. note 27. Treaty on the Eurasian Economic Commission, 18 November 2011.

as the first ‘supranational, neutral from the member states body, to which newer and newer competences will be transferred’.<sup>61</sup>

The EAEU Treaty defines the upper tier of the Commission, the Council, as the body providing ‘the general regulation of integration processes as well as the general leadership of the activities of the Commission’.<sup>62</sup> Indeed, the Council is in charge of the most important decisions within the competence of the Commission. As with the higher Councils, the EEC Council consists of member states’ representatives, this time at the level of deputy heads of government.<sup>63</sup> Similarly, this Council adopts its decisions by consensus.<sup>64</sup> If no consensus is achieved, the decision is referred to the higher councils.

The lower tier of the Commission is the only body that can be deemed to exhibit supranational features. Its members (also called Ministers) must be citizens of the EAEU’s member states and are nominated by those member states. Indeed, member states must be equally represented within the Collegium.<sup>65</sup> Yet the principles of their appointment and portfolio allocation provide for some independence from the member states as this act should be approved by the highest common body of the EAEU, the Supreme Council. The Collegium was envisaged as a developed professional bureaucracy, where the Collegium members should have professional qualification and experience suitable to their portfolio.<sup>66</sup> Importantly, the Treaty requires that in exercising their powers Ministers should remain independent of the member states which nominated them and cannot seek or receive instructions from them.<sup>67</sup> Their independence should be underpinned by the fact that they cannot be recalled by their member states before the expiry of their 4-year term, except in specified circumstances and pursuant to a decision of the Supreme Council.<sup>68</sup>

Yet, contrary to the stated intentions, the experience of the 2012 Commission showed that the formal regime is not sufficient to guarantee the independent, professional functioning of the Collegium. Indeed, this has been an area provoking some of the most vocal criticisms of the Commission. The Kazakh President Nazarbayev spoke of the ‘politisation’ of this body, protesting particularly against Russia’s influence over ‘its’ Ministers and Commission’s civil servants.<sup>69</sup>

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<sup>61</sup> See President Medvedev’s statement, ‘Vstrecha prezidentov Rossii, Republiki Belarus’ I Kazakhstana, 18 November 2011, <http://kremlin.ru/events/president/news/13581>.

<sup>62</sup> Section 22 of the Regulation (*Polozhenie*) on the Eurasian Economic Commission, Annex 1 to the TEEU (‘The EEC Regulation’).

<sup>63</sup> Section 23 of EEC Regulation.

<sup>64</sup> Article 18 (2) of the EAEU Treaty.

<sup>65</sup> According to the latest developments, the Collegium consists of 10 members, that is two from each member states, Decision 23 of the Supreme Council, 16 October 2015.

<sup>66</sup> Section 32 of the EEC Regulation.

<sup>67</sup> Section 34 of the EEC Regulation.

<sup>68</sup> Section 41 of the EEC Regulation.

<sup>69</sup> President Nazarbayev referred to the participation of Russia’s Ministers in meetings of the Russian government allowing them to receive guidance on specific issues. He also protested about the minimal time given to evaluate lengthy drafts prior to their tabling for approval. ‘Kazakhstan nameren vstupit’ v VTO do sozdaniia Evraziiskogo ekonomicheskogo soiuz – Glava gosudarstva’, *Kazinform*, 24 October 2013, <http://inform.kz/rus/article/2599908>.

The concern for Russia's ability to dominate the Commission and its departments, seated in Moscow, led to the insistence for additional requirements to prevent undue influence. Consequently, the appointment of department heads and their deputies must be done on competitive basis, yet also follow the principle of equal member state representation.<sup>70</sup> In an effort to provide stronger guarantees for independence, an explicit rule was included that the civil servants of a Department cannot be members of one and the same member state. The appointment of the departments' staff should also be on competitive basis, yet it can reflect the member states' financial contribution to the Commission, thus potentially allowing for a larger Russian representation. As with the Ministers, civil servants and other staff must be independent from the EAEU member states.<sup>71</sup> Indeed, as an additional precaution, the explicit obligation of member states to abstain from seeking to influence the way civil servants might fulfil their duties, was inserted.

Critically, the supranational nature of the Collegium has been best exemplified in its power to decide certain issues by qualified majority, where every country (and a country's Minister) carries one vote.<sup>72</sup> Thus, there is the formal possibility for a decision to be taken against the will of a member state, thereby directly restricting its sovereignty. This change introduced with the 2012 Commission and retained in the Treaty, was a departure from the previous design of post-Soviet permanent regulators, characterised by weighted voting as the basis for distribution of votes, thereby favouring Russia as the strongest state and essentially guaranteeing it formal dominance over the regulator's decision-making.<sup>73</sup> The implications of qualified majority voting, however, remain highly limited.

Firstly, qualified majority voting in the Collegium is reserved to routine, non-controversial issues. Issues of potential sensitivity are vested with the Council which, as mentioned, decides by consensus. Indeed, the Regulation on the Eurasian Economic Commission lists 130 issues, such as the preparation of draft decisions of the higher Councils, approval of changes to import tariffs of sensitive goods, and the adoption of technical standards.<sup>74</sup>

Secondly, and most importantly, any member state can request that a decision of the Collegium it disagrees with, is repealed or amended.<sup>75</sup> This request is initially dealt with by the EEC Council, but if no consensus is achieved there, it can be taken to the Intergovernmental Council or the Supreme Council.

Thus, the possibility for qualified majority voting has important domestic constitutional implications. However, its significance is easily negated and no country can be bound against its will by a decision of the Commission. This is not just with regard to matters deemed as 'sensitive' by the Supreme Council in advance, hence included in the list of issues reserved

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<sup>70</sup> Article 9 (2) of the EAEU Treaty. These civil servants are appointed by the Chairperson of the Collegium for a period of 4 years subject to requirements for professional qualification and experience. Tellingly, the importance of this provision is underscored by envisaging it in the Treaty itself rather than in the Annex 1 dealing with the composition and functioning of the Commission.

<sup>71</sup> Section 56 of the EEC Regulation.

<sup>72</sup> Section 21 of the EEC Regulation; Article 18 (2) of the EAEU Treaty.

<sup>73</sup> Dragneva *op.cit.* note 23.

<sup>74</sup> Appendix 1 to EEC Regulation.

<sup>75</sup> Section 30 of the EEC Regulation

for the Council of the Commission. It applies also on an *ad hoc* basis even with regard to operational, potentially non-controversial issues. In this sense, delegation to the Collegium is revocable. Its decisions will stand only when they are accepted *ex post* by all member states. If they are not, the contested issue can be escalated to the highest level of decision-making and resolved within the complex context of political bargaining. Unsurprisingly, the Collegium's role has been described as a 'filter' and a body proposing drafts for the higher bodies, rather than exercising its own decision-making or executive powers.<sup>76</sup>

This outcome ensures that the legal constraints which are placed on sovereignty as a result of delegation are weak and that the importance of the Collegium as a regulatory body, including the efforts to provide formal guarantees for its independence, is diminished. It is noteworthy that the description of the 2012 Commission as a 'supranational body' has been abandoned in the new set-up. Thus, ultimately, the EAEU's mode of decision-making remains strongly intergovernmental as well as centred on the highest level of state authority.

### **Common legal order**

The experience of the Commonwealth of Independent States (CIS) led to the emergence of a 'law of the CIS'.<sup>77</sup> Such a law, however, was decidedly a sub-group of international law. Furthermore, there was little 'common' about it given the variable number of signatories and uneven ratification of international agreements.<sup>78</sup> The decisions of the CIS principal decision-making bodies, its Councils, when they were of normative nature, also had the status of international agreements and were, thus, subject to ratification or other procedure for transformation into domestic law. While subsequent integration frameworks toyed with the idea of 'direct applicability', ultimately this was purely a declarative notion, an epitome of the symbolic emulation of EU-templates.<sup>79</sup> The 'international law' position was retained within the EurAsEC, whereby decisions were deemed to be implemented 'through the adoption of the necessary domestic normative acts in accordance of national legislation'.<sup>80</sup>

The design of the Customs Union represented a break in the pattern to the extent that it sought to provide an 'organised' international law regime. The founding agreement of the CU delineated its 'treaty basis' to be included in a designated 'list' adopted by the Council of Head of State.<sup>81</sup> The requirement for a 'block' adoption of agreements, whereby they enter into force simultaneously in all member states, ensured a new level of commonality. Given

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<sup>76</sup> Bail'dinov, op.cit. note 12.

<sup>77</sup> V. Kirilenko and Iu. Mishal'chenko (2001) 'Pravo Sodrushestva Nezavisimyykh Gosudarstv v sisteme mezhdunarodnogo prava'.

<sup>78</sup> Dragneva op.cit. note 40.

<sup>79</sup> Dragneva and Wolczuk op.cit. note 4. The Treaty on the Customs Union and the Single Economic Space of 26 February 1999 provided for an 'EU-style decisions', binding in their entirety and subject to direct implementation by the member states. The Agreement on the Legal Guarantees for the Formation of the Customs Union and the Single Economic Space of 26 October 1999, however, defined 'direct implementation' as requiring transformation into domestic law.

<sup>80</sup> Article 14 of the Treaty on the EurAsEC. This view was also upheld in Consultative Ruling Nr 01-1/3-05 of the Economic Court of the CIS (sitting as a Court of the EurAsEC) of 10 March 2006, which stated that none of the member states' constitutions provided for an act of international body to be a source of law within these countries without an act of domestic transformation.

<sup>81</sup> Protocol on the Procedure for Entry into Force of the International Agreements Directed to Forming the Treaty Basis of the Customs Union of 6 October 2007.

the incremental fit of the CU within the EurAsEC, however, no special provision was made to determine the status of the decisions of the Council. In so far as the rules pertaining to the EurAsEC framework continued to apply, formally they still had the status of international law. Confusingly, however, despite the important normative contents of some of them, Council decisions were not explicitly defined as belonging to the treaty basis of the CU.<sup>82</sup>

The status of the decisions of the permanent regulator, the Commission of the CU, however, represented a clear departure from the past regime, thus introducing a certain duality in the integration regime. The Commission's decisions were to formally enter into force within a month of their official publication and, as of that date, become binding on the member states.<sup>83</sup> A Decision of the Council of Heads of State defined further that such decisions are subject to direct application in the member states of the CU.<sup>84</sup> Importantly, it provided that their legal force within the domestic systems of the member states will be equivalent to that of acts issued by the state organs competent to regulate the issues transferred to the Commission. This approach was retained in the design of the 2012 Eurasian Economic Commission. Furthermore, the decisions of this Commission were explicitly defined as being part of the treaty basis of the CU.<sup>85</sup>

As noted previously, from its very inception, the drafting of the EAEU Treaty was linked to the effort to codify the legal basis for integration.<sup>86</sup> In the short period of existence of the CU and SES, the international agreements underpinning them had proliferated. The attempt to order this treaty basis by delineating them in a Council-approved 'list' was implemented in a problematic way.<sup>87</sup> Importantly, this solution did not help eliminate the build-up of gaps and inconsistencies in the common regime. Ultimately, this was a fragmented regulatory regime and its complexity was found to be a key obstacle to realising its potential benefits.<sup>88</sup>

The EAEU Treaty delivered on the promise in the sense that it codified (and reworked to various degrees) a large number of agreements. This has not necessarily stopped the further proliferation of agreements, but has rationalised the legal basis hitherto. Introducing a welcome clarity, the Treaty provided that its provisions will prevail over any contradictory provisions of such additional agreements, thus asserting its primacy.<sup>89</sup> The EAEU Treaty also referred to a distinct 'law of the Union', consisting of the Treaty, international agreements concluded within the Union, international agreements with third parties and the acts of the Supreme Council, the Intergovernmental Council and the Eurasian Economic Commission, adopted within the scope of their competences.<sup>90</sup> Significantly, the Treaty also defined the legal hierarchy of the acts of the different bodies, whereby the decisions of the Supreme Council prevail over any contradictory decisions of the Intergovernmental Council and the

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<sup>82</sup> Dragneva, *op.cit.* note 23.

<sup>83</sup> Article Articles 7 and 8 of the Treaty on the Commission of the Customs Union of 6 October 2007.

<sup>84</sup> Decision Nr 15 of the Council of Heads of State of 27 November 2009.

<sup>85</sup> Article 5 of the Treaty on the Eurasian Economic Commission.

<sup>86</sup> See for example, Decision Nr 21 of the Supreme Eurasian Council of 19 December 2012.

<sup>87</sup> Among other things, the last formally approved list was adopted in November 2009 and, despite the legal importance of the list, not updated thereafter, Dragneva, *op.cit.* note 26.

<sup>88</sup> Interviews with senior officials of the Eurasian Economic Commission, November 2013.

<sup>89</sup> Article 6 (3) of the EAEU Treaty.

<sup>90</sup> Article 6 (4) of the EAEU Treaty.



Commission, and the decisions of the Intergovernmental Council prevail over contradictory decisions of the Commission.

Nonetheless, the status of the decisions of the bodies of integration did not change. The legal nature of the acts of the Supreme and Intergovernmental Councils remains firmly grounded in international law. This outcome was the result of a compromise during the negotiations, where another attempt to provide for directly binding acts of the Councils failed in favour of a strict intergovernmental solution. Article 7 (2) of the September draft envisaged a general provision to the effect that ‘the legal acts of the Union are subject to a binding application, have direct effect on the territory of the member states and have priority over the domestic legislation of the member states.’ Article 13 (1) of the January 2014 draft, however, sought a more nuanced approach and included a Russian proposal to distinguish between EU-style decrees (*dekrety*) defined as explicitly binding on member states, and directives (*direktivy*) defined as providing common objectives to be achieved through the adoption of domestic laws, which were also met with opposition. The result was the fall-back to the pre-existing solution, with the Treaty stating that their decisions are implemented by the member states in the manner provided by national legislation.<sup>91</sup> Thus, ultimately, the domestic effect of the decisions of the Councils remains determined by the status granted to international law in domestic constitutions and laws of treaties.

Similarly, the Treaty maintains the approach to the Commission’s decisions developed previously. These decisions are defined as explicitly ‘binding’ on the member states and subject to direct application (*neposredstvennoe primeneniye*) within the territories of the member states.<sup>92</sup> While the Regulation on the Commission is fairly detailed on the organisational aspects of this body, there is nothing on the nature of this direct applicability in the context of domestic law. One might assume that, at least in law, the inherited agreement on the domestic force of the Commission’s decisions previously reached might stand. Yet, this whole area remains unclear and unresolved.

Thus, the direct applicability of the Commission’s decisions would suggest a sustained move towards supranationality with important implications for domestic constitutional arrangements. Yet, as with qualified majority voting in the Collegium, the potential effect of this provision on the restriction of member states’ sovereignty should not be exaggerated. As discussed, any decisions opposed by a member state can be ‘uploaded’ to the higher bodies, thereby placed back within the framework of international law. In this sense, the introduction of the concept of a ‘law of the Union’ has an organising and symbolic role, but little effect on its legal nature. What remains critically important, then, is the domestic treatment of this law. It is noteworthy, that during the drafting of the Treaty this was another area of high sensitivity and at least Kazakhstan was highly committed to minimising the references to ‘bindingness’ and ensuring that the law of the Union cannot have a direct effect, therefore the admission of

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<sup>91</sup> Article 6 (1) of the EAEU Treaty. The Treaty defines a decision (*resheniye*) as an act of normative nature, distinguishing it from resolutions (*razporiazheniia*) as acts of organisational and administrative nature, Article 2 of the EAEU Treaty.

<sup>92</sup> Section 13 of the Regulation on the EEC.

the acts of the bodies of integration should firmly remain subject to its own constitutional order.<sup>93</sup>

### **Enforceability**

Post-Soviet integration has been characterised by weak disciplinary and enforcement mechanisms. Despite the fact that a permanent dispute resolution body was created, the Economic Court of the CIS, its design was problematic. Importantly, its rulings were not defined as binding; instead, it was provided that ‘the state with respect to which a decision was adopted, ensures its implementation.’<sup>94</sup> Thus, implementation was a matter of the state’s discretion. In the event of non-compliance, the only option for the aggrieved state has been turning to the Council of Heads of State, as the highest body of integration.<sup>95</sup> Given the consensus based mode of decision-making, however, this has meant that decisions can be blocked by the unwilling party.

In effect, very few state disputes were brought before the Court during its existence, restricting its primary importance to issuing advisory opinions.<sup>96</sup> Ultimately, the rulings of the Court in these disputes were predominantly not complied with, resulting in further rounds of diplomatic negotiations. The Court itself has over the years become increasingly marginalised and paralysed.<sup>97</sup> Ultimately, state disputes have been the province of high-level diplomacy within the framework of the Council of Heads of State or outside the multilateral framework altogether. In the absence of voluntary compliance, traditional bilateral inter-state relations, including the use of economic coercion, have prevailed.

The setting up of the Eurasian Economic Community, despite its greater ambition, did not depart from the CIS formula. The EurAsEC Treaty provided for the creation of a dedicated Court, yet in practice such a Court was not set up. Instead, the exercise of its competence was placed with the Economic Court of the CIS on the basis of a confusing and poorly stitched up regime.<sup>98</sup> Its rulings were similarly deemed to only recommend measures for implementation, supported by the voluntary undertaking that every member state obliges itself to implement the decision of the Court issued in a case it is a party to.<sup>99</sup>

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<sup>93</sup> See, for example, Kazakhstan’s proposal in the January 2014 draft stating that ‘an act of the Union cannot repeal or change the national legislation of the member states’, Article 6 (3), which was not retained in the final version as a general provision, but clearly explains the compromise reached. The strength of Kazakhstan’s sensitivity is evident in that it even objected to the Russian proposal that ‘international treaties representing the law of the Union, which have entered into force, become binding on the Union and its member states’, Article 6 (2).

<sup>94</sup> Article 4 of the Statute of the Economic Court of the CIS, 6 July 1992.

<sup>95</sup> Article 18 of the CIS Charter provides that the Council can ‘recommend to the parties an appropriate procedure or method of settling’ the dispute.

<sup>96</sup> R. Dragneva (2017) ‘The Legitimacy of International Trade Tribunals: The Case of Post-Soviet Regional Courts’, in Ruiz Fabri, H., Howse, R. and Ulfstein, G. eds., *International Trade Tribunals* (CUP, Cambridge, forthcoming).

<sup>97</sup> Currently, only Russia and Belarus appoint regular judges to the Economic Court of the CIS. While the Court has continued issuing certain acts, their legitimacy and legality is highly questionable.

<sup>98</sup> Dragneva, op.cit. note 97.

<sup>99</sup> Article 6 (1) of the Statute of the Court of the EurAsEC, approved by Decision Nr 122 of the Interstate Council of EurAsEC, 27 April 2003.

The launch of the CU and SES represented a change in this trend in so far as it was accompanied by the effort to strengthen the disciplinary and enforcement institutions of integration. Notably, after more than a decade, the Court of the EurAsEC was finally set up as a dedicated court in 2012. Its revised Statute removed the formula ‘recommended for implementation’, explicitly stating that the Court’s decisions are binding (*obiazatel’nye dlia ispolneniia*) on the parties to a dispute.<sup>100</sup> This language betrayed a clear attempt to signal a higher degree of supranationality of the regime. Yet, the legal meaning of bindingness within the domestic legal orders of the member states remained their own constitutional matter. In cases of non-compliance, the only remedy at the level of the common regime was turning to the Interstate Council. Thus, high-level political bargaining remained the ultimate resort in seeking compliance with the Court’s ruling.

Of further significance were the important enforcement powers granted to the Commission. Exhibiting some similarity with its EU counterpart, the 2012 Eurasian Economic Commission was given the power to issue notifications informing a member state of the need for mandatory compliance. According to Article 20 of the Treaty on the Eurasian Economic Community, if a state failed to comply, the Commission was given the right to lodge a complaint with the Court of the EurAsEC.

Thus, at least on a symbolic level, the regime of the CU and SES suggested a willingness to provide for a developed dispute resolution system centred on the Court of the EurAsEC with some emulation of the design of the Court of Justice of the EU.<sup>101</sup> While, ultimately a member state could not be forced to comply against its will, the institutional framework seemed to suggest a common commitment to create an effective and legitimate dispute resolution body. Certainly, the practice of the Court revealed its efforts to establish itself as an authoritative and respected institution, but also to engage in judicial activism emulating its EU counter-part.<sup>102</sup>

The Treaty of the EAEU opted for the setting up of a Court of the EAEU as a completely new body, introducing some changes in the previous regime. Yet, many of these changes weakened this body, raising concerns about its independence and the overall effectiveness of its role.<sup>103</sup> The decisions of the Court were not deemed to be part of the ‘law of the Union’. In addition, a special (and somewhat convoluted) provision was inserted to the effect that ‘the decision of the Court does not change and/or invalidate any norms of the law of the Union in force and the legislation of the member states, nor create new ones.’<sup>104</sup> According to commentators, this was in direct reaction to the judicial activism shown by the Court of

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<sup>100</sup> Article 20, Statute of the Court of the EurAsEC, approved by Decision Nr 502 of the Interstate Council of EurAsEC, 5 July 2010.

<sup>101</sup> A. Ispolinov (2013) ‘Pervye resheniia Suda Evrazes: teoreticheskie I prakticheskie voprosy iurisdiktsii’, *Rossiiskoe pravosudie* Nr 6 (86), 89-101.

<sup>102</sup> This activism was revealed primarily in relation to appeals by commercial actors against the decisions of the permanent regulator, the Eurasian Economic Commission, *ibid*.

<sup>103</sup> Bail’dinov, *op.cit.* note 12; Karliuk, *op.cit.* note 12.

<sup>104</sup> Section 102 of the Statute of the Court, Annex 2 of the EAEU Treaty.

EvrAsEC, particularly in its *Iuzhnii Kuzbass* case where it provided a wide interpretation of its competences, suggesting the ability to create Union law.<sup>105</sup>

Critically, also the disciplinary and enforcement powers of the Commission were reduced. While the September 2013 draft reproduced Article 20, placing it at the very beginning of the treaty, this provision did not survive in the final version. Thus, currently compliance with agreements or decisions remains voluntary, with remedies that can be pursued only through the traditional route of inter-state relations. The EAEU Treaty is similarly careful to give a wide berth to member states in case consultations and negotiations between them fail. Article 112 provides that a country can resort to the Court of the EAEU ‘unless an agreement on the use of another mechanism is reached’.

Thus, there has been an effort to minimise the juridicisation of the overall regime, leaving member states in full control of the implementation of their undertakings. While the scope of integration remains substantial, there is little to ensure that member states will comply with its various complex requirements. Ultimately, if the commitment of the leadership of the respective country wanes or it fails to deliver on the implementation of the necessary domestic measures, the only remedy is the political pressure that might be exerted by its peers.

## **Conclusion**

The Eurasian Economic Union came into being following a stream of preceding integration initiatives. The political narrative around its inception and launch sought to present it as the next logical step in the integration process. This advancement of the integration agenda also suggested a parallel strengthening of the common regulatory regime, with respective implications for the limitation of member states’ sovereignty. Yet, in essence the EAEU is less of a supranational framework than its predecessors, offering weak formal constraints to state sovereignty and reasserting intergovernmental modes of operation. As this chapter demonstrated, this was exhibited in the reduction of the Treaty limits on members’ sovereign powers (e.g. the removal of enforcement powers of the Commission), the opaque nature of transferred competences (e.g. in relation to many of the common policies), or the lack of effective guarantees for upholding the existing limits (e.g. in relation to the acts of the Commission or the status of the Court’s decisions).

Explaining this development and its meaning in comparative regional integration terms deserves an extensive treatment, which will be undertaken elsewhere. Yet, it is clear from the drafting history of the Treaty that the observed shift is closely related to the eruption of the Ukraine crisis. Sovereignty sensitivities have mattered in previous post-Soviet integration rounds with important implications for the weakness and poor effectiveness of design.<sup>106</sup> In the Customs Union format, however, many of these sensitivities were placated or sufficiently

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<sup>105</sup> Karliuk, op.cit. note 12; Kembayev, op.cit. note 12.

<sup>106</sup> Dragneva, op.cit. note 40.

offset by the expected benefits of integration.<sup>107</sup> Although none of the envisaged limitations of sovereignty were absolute, many of the design features of that regime as well as the language of integration suggested the transfer of powers to the common framework with important domestic constitutional implications, even when these required further attention and elaboration. Following Russia's annexation of the Crimea, however, security and sovereignty concerns were reignited, feeding old sensitivities and prompting new attempts to balance the costs and opportunities of integration.<sup>108</sup>

The resulting institutional set-up places a huge emphasis on the presence of effective domestic constitutional mechanisms to ensure the supremacy of the common regime. Even more importantly, progress in integration and the implementation of undertakings are critically dependent not on common rules constraining behaviour, but on commitment at the highest level of political decision-making. Any limitation of sovereignty is voluntary applying not just at the founding of the organisation and endowing it with certain powers and rules, but also at every step thereafter: every measure is conditional on the member state's consent and can be revoked.

Whether an ambitious integration agenda, including large-scale regulatory harmonization, can be delivered in this way, remains to be seen. The odds are complicated by the fact that the compromise reached with the Treaty of the EEU is not necessarily stable. As President Lukashenko pointed out, the Treaty does not offer a satisfactory answer to Belarus's demands.<sup>109</sup> While all member states proceeded to ratify the Treaty in a rather uneventful manner, ensuring its entry into force on 1 January 2015 as planned, the fragile nature of their commitment was laid bare. Amidst continued spats with Russia's leadership on Kazakh statehood, President Nazarbayev asserted the revocability of the commitment made: 'If the rules which were previously established in the treaty are not fulfilled, then Kazakhstan has the complete right to end its membership in the Eurasian Economic Union. Astana will never be in an organization which represents a threat to the independence of Kazakhstan.'<sup>110</sup> Reading such statements, it is not surprising that 'sovereignty' is used in relative terms. While the traditional notion has become a rarity in the modern interdependent world, post-Westphalian sovereignty has exhibited a range of normative, rhetorical and theoretical shades of meaning.<sup>111</sup> Yet, it is clear that in the Eurasian context the securitisation of sovereignty and emphasis on 'independence' have become prominent with judgement on economic issues following suit.

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<sup>107</sup> R. Dragneva and K. Wolczuk, 'Commitment, Asymmetry and Flexibility: Making Sense of Eurasian Economic Integration', in Dragneva, R. and Wolczuk, K. (2013) *Eurasian Economic Integration: Law, Policy and Politics* (Edward Elgar, Cheltenham).

<sup>108</sup> M. Laruelle (2015) 'Kazakhstan's Posture in the Eurasian Union: In Search of Serene Sovereignty', *Russian Analytical Digest* No. 165, 17 March 2015, Centre for Security Studies, <http://www.css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/pdfs/RAD-165-7-10.pdf>.

<sup>109</sup> 'Lukashenko ne ustrayvaet dogovor o sozdanii EAES', *Korrespondent.net*, 29 May 2014, <http://korrespondent.net/world/3370805-lukashenko-ne-ustrayvaet-dohovor-o-sozdanyy-eaes>.

<sup>110</sup> 'Nazarbaev zaiavil o vozmozhnom vykhode Kazakhstana iz Evraziiskogo soiuz'a', *Newsru.com*, 31 August 2014, <http://newsru.com/world/31aug2014/nazarbaev.html>.

<sup>111</sup> See, for example, J. E. Thomson (1995) 'State Sovereignty in International Relations: Bridging the Gap Between Theory and Empirical Research', 39 *International Studies Quarterly* 213-233.

At the same time, the commitment of member states even with regard to core and hitherto relatively uncontroversial common competences, such as the Customs Union, has been undermined by the nature of Russia's response to Ukraine's progress with its Association Agreement with the EU. In the absence of a consensus by Belarus and Kazakhstan to support the removal of the CU preferential trade regime with Ukraine, Russia elected to proceed unilaterally. While such a unilateral course was formally approved by the partners,<sup>112</sup> this step only underscored the principle of revocability of joint undertakings when a country disagrees with a certain course of action and the ultimately intergovernmental nature of the overall regime. Subsequent developments related to the similarly unilateral imposition of economic sanctions to Ukraine and the EU and the resulting 'trade wars' within the EEU, including the reintroduction of customs borders, confirm the weakness of the formal arrangements made and the relative and symbolic nature of Eurasian integration. It is unsurprising that Russia's partners, to the extent allowed by their economic interdependence, have been keen to diversify trade and pursue a more openly multi-vector course. It is also unsurprising that Kazakhstan's accession to the WTO has also led to the introduction of a special regime on commodities with import tariffs lower than those of the CU, including customs controls within the Union and further fragmentation of the common customs regime.<sup>113</sup> Thus, despite the continued lip-service to an ambitious Eurasian integration agenda with the potential to deliver benefits to a market of 180 million people, hegemonic behaviour and limited attention to the quality of institutions have so far posed serious concerns about its long-term future.

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<sup>112</sup> See Decision Nr 48 of the Supreme Eurasian Economic Council, 24 October 2013.

<sup>113</sup> See Decision Nr 22 of the Supreme Eurasian Economic Council, 16 October 2015.