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The Court of the Eurasian Economic Union: Some Initial Jurisprudence[2]

This article offers an overview of the first years of case law of the Court of the Eurasian Economic Union, which started its work on 1 January 2015. Both procedural and substantive issues are covered, ranging from the pre-litigation procedure and the presentation of new pleas in law during court proceedings to the mutual recognition of customs authorities' decisions in the Union and the deferral of the decision to impose anti-dumping measures beyond the maximum duration of an anti-dumping investigation.

Key words: EAEU, WTO, dispute settlement.

JEL: F13

I. Introduction

A number of regional integration organizations have at one point established a supranational court modelled, to a greater or lesser degree, on the Court of Justice of the European Union ('CJEU'). The Eurasian Economic Union ('EAEU' or 'Union'), the most advanced organization of economic integration in the post-Soviet space, is no exception. One of its organs is the Court of the Eurasian Economic Union (the 'Court' or 'Court of the Union'), which began its work on 1 January 2015 with the entry into force of the Treaty on the Eurasian Economic Union of 29 May 2014 ('TEAEU')[3].

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2 The article was submitted in September 2018.

3 The Treaty on the Eurasian Economic Union, Astana, 29 May 2014, in force 1 January 2015. The Treaty was initially signed by Belarus, Kazakhstan and Russia. Armenia and Kyrgyzstan acceded to the Treaty on 2 January 2015 and on 12 August 2015, respectively. Publication.pravo.gov.ru (2018). Oficial'nyj internet-portal pravovoj informacii. URL: <http://publication.pravo.gov.ru/Document/View/0001201501160013.

Although very young, the Court has been relatively active — in nearly four years of operation, it has decided, as of 27 October 2018, six disputes on their merits[1], found applications inadmissible or terminated proceedings on the applicant's request in eleven cases[2], and issued nine advisory opinions.[3]

This article aims to introduce the reader to some of the jurisprudential aspects of Eurasian integration by providing a concise — but by no means exhaustive — overview of the case law the Court has developed to date. After describing in the next section the structure and powers of the Court, the article examines seven sa-

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1 In two cases, General Freight v. Commission, Sevlad v. Commission, the claimant challenged tariff classification by the Commission. Since economic entities may not bring actions against Member States to the Court of the EAEU, the claimants in Tarasik v. Commission and Oil Marine Group v. Commission challenged the Commission's alleged failure to perform monitoring and control of a Member State's compliance with its international obligations.. In one dispute, ArcelorMittal Kryvyi Rih v. Commission, a third-country claimant challenged a Commission decision imposing anti-dumping duties on the claimant's products. As of July 2018, the Court has decided only one inter-state dispute, in which the applicant alleged illegality of the acts of the respondent's customs authorities and courts (Russia v. Belarus). Courteurasian.org. (2018). Court of the Eurasian Economic Union. URL: <http://courteurasian.org/ [Accessed 2018].

2 Gamma v. Commission, Unitrade v. Commission, KAPRI v. Commission, Remdiesel v. Commission, Chamber of Entrepreneurs Atameken (request for advisory opinion), Rusta-Broker v. Commission, Bryanskselmash v. Commission, NLMK v. Commission, VIZ-Steel v. Commission, TMR Import v. Commission, Yarshintorg v. Commission.

3 On request from Commission employees (concerning a Commission Board regulation on employee attestation), Kazakhstan (concerning the application of in-quota tariffs to goods released from customs after expiration of the import license), Belarus (concerning whether a Member State may impose stricter admissibility criteria for vertical agreements — in casu, a lower cap on the market share of each party to a vertical agreement — than those provided for under the TEAEU), Commission (concerning termination of employment of Commission employees), Commission (concerning the application of Article 29 of the TEAEU, which sets out exceptions from the functioning of the single market of goods), Kyrgyzstan (concerning the application of a uniform fee for transportation of cargo in transit via third countries), Deputy Director of the Commission's Department of Technical Regulation and Accreditation (concerning termination of employment of Commission officials due to the limitation on the number of officials of the same nationality), Belarus (concerning whether decisions of the Commission of the Customs Union form part of Union law), Kazakhstan (concerning whether individuals are required to declare foreign currency above USD 10,000 to the customs authority of the EAEU Member State of their destination when travelling from another EAEU Member State by air transport via a third country without leaving the transfer area of the layover airport).

lient procedural and substantive legal issues on which the Court has pronounced in its decisions, orders[1], and advisory opinions.

In order to make it easier for the reader to understand the Court's line of reasoning, an overview of the Court's case law on each specific issue is preceded by English-language excerpts of the legal provisions relied on by the Court in its *ratio decidendi*. Since a single generally accepted translation of the legal instruments making up Union law does not exist, the authors had to make their own terminological choices — a task all the more challenging that the meaning of the Russian terms themselves is not always free from ambiguity (see, in this regard, the terminological discussion in section). Thus, although the English terms the authors eventually opted for do reflect their best judgment, it is not to be assumed that they represent the official or the generally accepted translation of the Russian-language legal texts.

II. General information about the Court

The Court of the Eurasian Economic Union is a standing organ of the Union with the seat in Minsk, Belarus.[2] It is composed of ten judges[3] who are tasked with ensuring uniform application of Union law by the Member States and organs of the Union.[4] Union law is comprised of the TEAEU, international agreements within the Union, international agreements of the Union with a third party, decisions

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1 Decisions ('решения') are Court judgments on the merits of a case, while orders ('постановления') are Court rulings on procedural issues (e.g., admissibility of an application to the Court).

2 The other organs of the Union are the Supreme Eurasian Economic Council, the Eurasian Intergovernmental Council, and the Eurasian Economic Commission.

Publication.pravo.gov.ru. (2018). Oficial'nyj internet-portal pravovoj informacii. URL: <http://publication.pravo.gov.ru/Document/View/0001201501160013?index=9&rangeSize=1 [Accessed 2018].

3 Two judges from each Member State of the Union with a term in office of nine years (paragraphs 7 and 8 of the Statute of the Court). No provision for partial rotation of judges is made, i.e. the terms of all judges end simultaneously. Neshataeva, T., Myslivskiĭ, P. and D'iachenko, E. (2015). Evraziiskaia integratsiia: rol' suda [Eurasian Integration: The Role of the Court] Moscow: Statut, pp.107-129.

4 Statute of the Court of the Eurasian Economic Union. (2018). [ebook] Paragraph 2, p.1. URL: <http://courteurasian.org/en/ [Accessed 2018].

and orders of the organs of the Union (except those of the Court).[1] In deciding disputes, the Court applies the generally recognized principles and norms of international law; the TEAEU, international agreements within the Union, and other international agreements to which the states that are parties to the dispute are participants; decisions and orders of the organs of the Union; international custom as evidence of a general practice accepted as law.[2] Note that the Statute expressly directs the Court to apply international agreements in which the parties to the dispute participate, irrespective of whether the other Member States of the Union are also its participants.[3]

From time to time, the Court buttresses its rationale by the legal stances taken by other international tribunals, including the Court of Justice of the European Union, the European Court of Human Rights, and the International Court of Justice.[4] The Panel in *Tarasik v. Commission* stated that 'the legal views and case law of other courts may be taken into consideration as persuasive precedent'.[5] Citations to the case law of other international judicial fora are even more frequent in separate opinions — some judges have quite extensively availed of the opportunity to record their dissent, provided for by the Rules of Procedure of the Court.[6]

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1 Publication.pravo.gov.ru. (2018). Oficial'nyj internet-portal pravovoj informacii. URL: <http://publication.pravo.gov.ru/Document/View/0001201501160013?index=7&rangeSize=1 [Accessed 2018]. In its Advisory Opinion of 10 July 2018, the Court concluded that decisions of the Commission of the Customs Union, the predecessor of the EAEU, are, to the extent they do not contravene the TEAEU, also part of Union law.

2 Statute of the Court of the Eurasian Economic Union. (2018). Paragraph 50, p.7. URL: <http://courteurasian.org/en/ [Accessed 2018]. This is the order in which the sources of law are enumerated in the Statute.

3 See Section below.

4 See, for example, General Freight v. Commission, Decision of the Panel of 04 April 2016, p. 16; General Freight v. Commission, Decision of the Appeals Chamber of 21 June 2016, pp. 15–16, 19.

5 Tarasik v. Commission, Decision of the Panel of 28 December 2015, p. 15.

6 Rules of Procedure of the Court. (2018). [ebook]. Article 79(1), p.32. URL: <http://courteurasian.org/en/ [Accessed 2018]. See, for example, Remdiesel v. Commission, Order of the Panel of 8 April 2016, Dissenting Opinion of Judge Neshataeva, pp. 4–6; ArcelorMittal Kryvyi Rih v. Commission, Decision of the Panel of 27 April 2017, Dissenting Opinion of Judge Chaika, pp. 3–6; Russia v. Belarus, Decision of the Grand Panel of 21 February 2017, Dissenting Opinion of Judge Kolos, pp. 10, 16; Russia v. Belarus, Decision of the Grand Panel of 21 February 2017, Dissenting Opinion of Judge Neshataeva, pp. 5–6.

Only Member States of the Union and 'economic entities' ('хозяйствующие субъекты') (juridical persons and physical persons registered as sole traders in a Member State of the Union or in a third state) have standing to bring disputes before the Court. Notably, the Commission may not initiate proceedings and may only appear before the Court as a respondent or a third party ('party with an interest in a dispute')[1].

A Member State may apply to the Court for a finding that (1) an international agreement within the Union or certain provisions thereof are contrary to the TEAEU; (2) another Member State has infringed the TEAEU, international agreements within the Union, and/or decisions of an organ of the Union or certain provisions of the TEAEU, such agreements and/or decisions; (3) a Commission decision or its certain provisions are contrary to the TEAEU, international agreements within the Union, and/or decisions of an organ of the Union. When hearing an application from a Member State, the Court sits in a Grand Panel composed of all the judges of the Court. There is no further recourse against decisions of the Grand Panel, which are therefore final[2].

Pursuant to paragraph 39(2) of the Statute of the Court[3], an economic entity may seek a finding that: (1) a Commission decision or certain provisions thereof; or (2) a Commission act or failure to act is contrary to the TEAEU or international agreements within the Union *if such decision, provisions thereof, action or failure to act by the Commission directly affect the rights and legitimate interests of the economic entity in the area of entrepreneurial or other economic activity*. In *ArcelorMittal Kryvyi Rih v. Commission*, the Court found that the Commission decision imposing anti-dumping duties on products of the claimant and other Ukrainian producers was, in its entirety, in conformance with Union law[4]. Judge Chaika opined in his dissent that the Court had overstepped its jurisdiction by ruling in respect of the entire Commission decision, including producers which had not lodged an application with the Court: 'It follows from [Paragraph 39(2) of the Statute of the Court] that in contesting a Commission decision, an economic entity may not act on behalf of third parties or public at large'[5].

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1 Statute of the Court of the Eurasian Economic Union. (2018). Paragraph 60, p.8. URL: <http://courteurasian.org/en/ [Accessed 2018].

2 See the resource above. Paragraphs 39, 70, 71, 74, 105–107.

3 Read in conjunction with paragraphs 108 and 109 of the Statute of the Court.

4 ArcelorMittal Kryvyi Rih v. Commission, Decision of the Panel of 27 April 2017, p. 26.

5 ArcelorMittal Kryvyi Rih v. Commission, Decision of the Panel of 27 April 2017, Dissenting Opinion of Judge Chaika, pp. 7, 9.

Applications brought by an economic entity are adjudicated by a Panel, which comprises one judge from each Member State of the Union. Decisions[1] handed down by a Panel may be appealed — only on points of law — to *an* Appeals Chamber, which is not a standing body but consists — in what is a rather peculiar arrangement for international tribunals — of those judges of the Court who did not take part in the first instance proceedings[2]. To date, an Appeals Chamber has only once reversed a Panel's (interim) finding, which in any event did not affect the outcome of the case[3].

Economic entities have made attempts to get around the prohibition for them to challenge acts of the Member States by suing, instead, the Commission for an alleged failure to carry out 'monitoring and control' of the respective Member State's compliance with Union law[4] and to take measures addressing identified violations. Such a claim was indeed made as soon as the very first dispute submitted to the Court, *Gamma v. Commission*. The applicant, a coal producer based in Kazakhstan, sought to have repealed Kazakhstan's export tax on coal as applied to intra-Union trade and, to that end, asked the Court to find that the Commission failed in its duty to perform monitoring and control of Kazakhstan's compliance with Union law. The Court refused to hear the dispute as, in its view, the application failed to specify how the applicant's rights or legitimate interests were infringed by the Commission[5].

In *Tarasik v. Commission*, the first dispute heard by the Court on its merits, the claimant challenged the Commission's refusal to perform monitoring and control (i.e., failure to act) in response to conduct of Kazakhstani customs authorities which the applicant alleged was in contravention of Union law[6]. Judge Chai-

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1 But not orders by which a Panel admits or refuses to admit an application.

2 Paragraphs 70, 71, 76, 77, 79, 80, 110 of the Statute of the Court. Articles 69(2) and 70(1) of the Rules of Procedure of the Court. Note that there is no remand procedure provided for. An Appeals Chamber may affirm a Panel's decision or reverse it in full or in part and hand down a new decision.

3 In General Freight v. Commission, the Appeals Chamber disagreed with the Panel that the non-binding classification opinions of the Harmonized System Committee form part of Union law (see General Freight v. Commission, Decision of the Appeals Chamber of 21 June 2016, p. 19).

4 Paragraph 43(4) of the Regulation on the Eurasian Economic Commission.

5 Gamma v. Commission, Order of the Panel of 10 March 2015, pp. 1–3.

6 For an overview of the facts of the dispute, see Section below.

ka took the view that in interpreting the Commission's obligation to carry out monitoring and control, the Court should appreciate the fact that '[a]n economic entity has no means to defend its private interest [infringed by a Member State's failure to comply with Union law] other than by requesting the Commission to perform monitoring and control'.[1] The majority of the Court, both in the first and appellate instances, disagreed. The Appeals Chamber ruled that monitoring is not a mechanism for supranational supervision and is not necessarily triggered by an application lodged by an economic entity with the Commission.[2] Monitoring is 'primarily' aimed at evaluating, on an ongoing basis, the Member States' compliance with international agreements and decisions of the Union organs with a view to developing suggestions for improvement of Union law.[3] The Appeals Chamber affirmed the conclusion of the Panel that the results of monitoring are intended 'in the first place' for the Member States, hence the performance of the monitoring function by the Commission did not directly affect the rights and legitimate interests of the applicant.[4]

The Panel in *Oil Marine Group v. Commission*, however, while formally sticking with the same interpretation of the Commission's duty to perform 'monitoring and control' as had been set out in *Tarasik*, found in favour of the claimant who sought the same form of order as Mr Tarasik. The Panel reckoned that 'an economic entity has a legitimate interest in the Member States' due compliance with international treaties that form part of Union law and, consequently, in [the Commission's proper performance of the monitoring and control function]'.[5] While a request of an economic entity for the Commission to perform monitoring and control in respect of a Member State's law does not, in and of itself, serve as a legal basis for the commencement of the latter, it — provided always that such request is properly substantiated — nonetheless constitutes a source of information for such monitoring.[6] The Panel found that the Commission, which in the case at

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1 Tarasik v. Commission, Decision of the Appeals Chamber of 03 March 2016, Dissenting Opinion of Judge Chaika, p. 14.

2 The Appeals Chamber stated that 'the obligation to perform monitoring and control […] upon an application by an economic entity is not directly incumbent upon the Commission […]' (see Tarasik v. Commission, Decision of the Appeals Chamber of 3 March 2016, p. 18).

3 Tarasik v. Commission, Decision of the Appeals Chamber of 3 March 2016, pp. 18–19.

4 Ibid, p. 18; Tarasik v. Commission, Decision of the Panel of 28 December 2015,p. 17.

5 Oil Marine Group v. Commission, Decision of the Panel of 11 October 2018, p. 10.

6 Oil Marine Group v. Commission, Decision of the Panel of 11 October 2018, p. 12. The Appeals Chamber in Tarasik v. Commission ruled that 'where an application for

hand confined itself to verifying the content of the Russian Federation's law but failed to establish how it was applied in practice, conducted monitoring and control in a way that was 'incomplete and superficial'[1] and thus violated the rights of Oil Marine Group.[2]

Finally, in *Rusta-Broker v. Commission*, the applicant, a customs representative, felt aggrieved by Russia's application of solidary liability[3] to customs representatives and sought, *inter alia*, a finding that the Commission had failed to carry out monitoring and control of Russia's compliance with Union law. The Panel refused to hear the case as liability of customs representatives was at the time of the events regulated at the national level.[4]

Unlike the CJEU — or even the Court of the Eurasian Economic Community,[5] the predecessor of the EAEU — the Court of the Union has no jurisdiction to give pre-

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monitoring and control is lodged with the Commission by an economic entity, the condition sine qua non for the Commission to perform acts in law is the presentation of sufficient and positive evidence of an infringement of the rights and legitimate interests of the economic entity in the entrepreneurial or other economic activity conferred on it by the [TEAEU] and/or international agreements within the Union' (see Tarasik v. Commission, Decision of the Appeals Chamber of 3 March 2016, p. 19). The Panel apparently deemed that the application of Oil Marine Group to the Commission contained such 'sufficient and positive evidence'.

1 Oil Marine Group v. Commission, Decision of the Panel of 11 October 2018, pp. 13–14.

2 The company's complaint arose from inconsistent application among the EAEU Member States of criteria for the exemption from import duties of watercraft included in international ship registries. More particularly, Oil Marine Group was aggrieved by the failure of the customs and judicial authorities of the Russian Federation to grant the exemption.

3 Referred to in common law systems as joint and several liability.

4 Rusta-Broker v. Commission, Order of the Panel of 12 December 2016, pp. 1–4. In response to a complaint filed with the Commission, the Commission informed the applicant that the draft 2017 Customs Code of the EAEU provides, in Article 405(4), that the customs representative and the declarant are held solidarily liable for customs duties and taxes (see ibid, p. 5).

5 Article 3 of the Agreement on the Initiation of Legal Action at the Court of the Eurasian Economic Community by Economic Entities in Disputes within the Customs Union and on the Specifics of the Related Judicial Procedure of 9 December 2010 conferred on the highest courts of the Member States of the Customs Union a right (and where there is no further recourse against the decision of the judicial organ in the case, imposed an obligation)

liminary rulings on requests by national courts of the Member States.[1] The powers of the Court in respect of remedies it may grant are also quite limited and, generally, do not extend beyond a declaratory relief, i.e. a finding of inconsistency of a respondent's legal instrument, act, or failure to act with Union law. The Statute of the Court mandates that the Court dismiss all requests to award damages and, in general, all requests for pecuniary orders.[2] The lodging of an application with the Court does not normally result in the suspension of the international agreement or Commission decision being challenged.[3] A Commission decision found to be in violation of Union law remains in force until the Commission implements the judgment of the Court,[4] unless the Court suspends the Commission decision 'on a reasoned motion' of a party to the dispute.[5] As for international agreements or acts (failure to act) by the Member States found to be in violation of Union law, the Statute does not prescribe any concrete time periods for bringing them into compliance with Union law.

In addition to contentious, the Court is bestowed with advisory jurisdiction. On request by a Member State or organ of the Union, the Court elucidates the meaning of the provisions of the TEAEU, international agreements within the Union, international agreements with a third party (if the agreement with a third party so provides), and decisions of the organs of the Union. Officers and employees of the organs of the Union may request the Court to provide an interpretation of

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to request the Court of the Eurasian Economic Community to give a preliminary ruling on matters concerning the application of international agreements concluded within the Customs Union and the application of acts of the Commission of the Customs Union affecting the rights and legitimate interests of economic entities, if such matters are material to the resolution of the merits of the case. Court of the Eurasian Economic Union. (2018). Dogovor ob obrashhenii v sud EvrAzJes. URL: <http://courteurasian.org/page-21691 [Accessed 2018].

1 In the only preliminary ruling it had time to make, the Court of the Eurasian Economic Community concluded that the ruling was 'binding, final, [took] effect when pronounced, and applie[d] directly in the Member States of the Customs Union' (see Preliminary Ruling of the Court of the Eurasian Economic Community of 10 July 2013, para. 5 of the operative part).

2 Statute of the Court of the Eurasian Economic Union. (2018). [ebook]. Paragraph 61, p.8. URL: <http://courteurasian.org/en/ [Accessed 2018].

3 Ibid, paragraph 54, p.7.

4 Ibid, paragraph 111, p. 13. The Commission must implement the decision within a reasonable period of time, which must in any case not exceed 60 days from the entry in force of the Court decision, unless the Court prescribes another timeframe (see ibid).

5 Ibid, paragraph 112, p. 13.

provisions relating to employment relations.[1] However, an exercise of advisory jurisdiction by the Court is without prejudice to the authority of the Member States to adopt joint interpretations of international agreements.[2]

Finally, one more restriction on the Court's powers is enshrined in Article 42 of the Statute, which explicitly prohibits the Court from conferring on the organs of the Union any competence additional to that expressly provided under the TEAEU and/or international agreements within the Union. In disputes heard to date, the Court has resorted to this provision to justify its findings that the Commission was not required (did not have the competence) to do what claimants had expected it to do.[3]

Against this background of the Court's powers, the next sections provide an overview of the most important case law of the Court to date. The authors begin with procedural issues, such as the completion of pre-litigation procedures and the introduction of new pleas in law not presented in the application to the Court, to then proceed to substantive matters.

III. Completion of pre-litigation procedures

As is the case with EU and WTO law, Union law requires that the applicant, before bringing a dispute before the Court, seek to settle the dispute out of court by following an established pre-litigation procedure. This requirement equally applies to economic entities and the Member States. In pursuance of Article 33 of its Rules of Procedure, the Court has rejected or shelved those applications from economic entities that fail to provide evidence that the pre-litigation procedure

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1 Note that the Court does not have jurisdiction in employment disputes involving employees or officers of the organs of the Union. In fact, it appears that such disputes do not fall under the jurisdiction of any international or national courts Ispolinov, A. (2016) 'Statut suda EAES kak otrazhenie opaseniy i somneniy gosugarstv-chlenov Evraziiskogo soyuza' [The Statute of the Court as a Reflection of the Concerns and Doubts of the Member States of the Eurasian Union] 4 Pravo, The Journal of the Higher School of Economics, p.160.

2 Statute of the Court of the Eurasian Economic Union. (2018). [ebook]. Paragraphs 46-48, p.6. URL: <http://courteurasian.org/en/ [Accessed 2018].

3 See, for example, Tarasik v. Commission, Decision of the Appeals Chamber of 03 March 2016, p. 28 (to support a finding that the Commission has no powers to perform monitoring and control in respect of agreements which are not part of Union law); Bryanskselmash v. Commission, Order of the Panel of 17 April 2017, p. 5 (to support a finding that the Commission has no regulatory powers in respect of specific industrial subsidies within the Union before the entry into force of a special agreement on the matter).

has been completed.[1] In *Russia v. Belarus*, the first and only interstate dispute to date, a question arose whether a failure by the Russian Federation to include all of its legal claims in the scope of consultations amounts to a failure to observe the pre-litigation procedure established by Union law.

Legal provisions applied in the dispute(s)

- Article 112 of the TEAEU
  - Settlement of Disputes
  - Any disputes relating to the interpretation and/or application of provisions of this Treaty shall be settled through consultations and negotiations.
  - Unless otherwise provided for by the Statute of the Court of the Eurasian Economic Union (Annex 2 to this Treaty), if no agreement is reached within 3 months from the date a formal written request for consultations and negotiations was sent by one party to the dispute to the other party to the dispute, the dispute may be referred by either party to the Court of the Union unless the parties agree to use other procedures to resolve the dispute.
- Paragraph 43 of the Statute of the Court
  - No dispute shall be admitted for hearing by the Court unless the applicant has sought to settle the matter with the respective Member State or the Commission out of court through consultation, negotiation or other means provided for by the Treaty and international treaties within the Union, except as expressly provided for by the Treaty.
- Article 33 of the Rules of Procedure of the Court
  - Admission of an application. Refusal to admit an application. Shelving of an application.
  - […]
  - 2. The Court shall issue an order refusing to admit an application if:
  - […]
  - b) the pre-litigation procedure for the settlement of the dispute has not been observed;
  - […]
- Article 23 of the Rules of Procedure of the Court
  - Adversarial process
  - […]
  - 2. The parties have the right to know of each other's arguments before the commencement of the proceedings.
  - […]
- Paragraph 43 of the Regulation on the Eurasian Economic Commission[2] ('Commission Regulation')

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1 See, for example, KAPRI v. Commission, Order of the Panel of 1 April 2015, p. 4; Tarasik v. Commission, Order of the Panel of 16 September 2015, p. 3.

2 Annex 1 to the TEAEU.

- 43. The College of the Commission shall:
- […]
- 8) assist the Member States in the settlement of disputes within the Union before the disputes are submitted to the Court of the Union;
- […]

- Article 20 of the Agreement of 21 May 2010 on Mutual Administrative Assistance Among Customs Authorities of the Member States of the Customs Union[1] ('Agreement of 21 May 2010')
  - *Settlement of disputes*
  - […]
  - 3. The Commission of the Customs Union shall assist the parties in settling disputes before they are submitted to the Court of the Eurasian Economic Community.
- Article 2 of the Customs Code Treaty of 27 November 2009[2] ('Customs Code Treaty')
  - […]
  - The Commission of the Customs Union shall assist the Parties in settling disputes within the Customs Union before such disputes are submitted to the Court of the Eurasian Economic Community.
  - […].

Case law of the Court

In *Russia v. Belarus*, the claimant presented pleas under certain provisions of: (1) the Customs Code of the Customs Union, which is annexed to the Customs Code Treaty of 27 November 2009; (2) the Agreement of 21 May 2010 on Mutual Administrative Assistance Among Customs Authorities of the Member States of the Customs Union;[3] (3) the TEAEU. However, no pleas under the TEAEU had been a subject of consultations between the parties held before the matter was submitted to the Court.

The order by which the Court admitted the application states the following in respect of the observance by the claimant of the pre-litigation procedure:

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1 Tsouz.ru. (2010). Agreement on Mutual Administrative Assistance Among Customs Authorities of the Member States of the Customs Union. URL: <http://www.tsouz.ru/MGS/mgs21-05-10/Pages/Sogl_vzaimn_adm_pom.aspx [Accessed 2018].

2 Szrf.ru. (2009). Customs Code Treaty. URL: <http://www.szrf.ru/doc.phtml?nb=edition00&issid=2010050000&docid=221 [Accessed 2018].

3 These two agreements remained in force as among the Member States of the EAEU and formed part of the Union law as of the date of the relevant events and as of the date of the dispute.

By way of extrajudicial settlement of this dispute, the Russian Federation sent, on 1 June 2015, a note to the Republic of Belarus with a proposal to settle the matter out of court. Twelve rounds of bilateral consultations were held since August 2015, which failed to resolve the dispute. The negotiations resulted in a table of disagreements between the parties regarding the provisions of the Customs Code of the Customs Union and of the Agreement of 21 May 2010 as they apply to the transportation of domestic appliances from the territory of the Kaliningrad oblast of the Russian Federation to the rest of the customs territory of the Customs Union via the territory of a state which is not a member of the Customs Union.

Therefore, in the view of the Court, as of the date of the lodging of the application by the Russian Federation with the Court, the pre-litigation procedure in respect of this matter had been complied with.[1]

The final judgment, which found, *inter alia*, that the respondent had 'complied not in full' with the provisions of the TEAEU invoked by the Russian Federation, does not deal with the issue of observance of the pre-litigation procedure.

In their dissenting opinions, Judge Fedortsov and Judge Kolos argue that the Court should have declined to examine the applicant's claims under the TEAEU for the following reasons: (1) Article 112 TEAEU provides that a dispute regarding the interpretation and/or application of provisions of the TEAEU may be referred to the Court only after consultations or negotiations have failed to resolve the dispute; consultations held in this case did not touch upon either the TEAEU in general or its specific provisions;[2] (2) pursuant to paragraph 43 of the Statute of the Court and Article 33 of the Rules of Procedure, the Court must reject an application if the applicant has not sought to settle the matter with the respective Member State out of court through consultations, negotiations or by other means;[3] (3) before submitting the dispute to the Court, the applicant *must* have referred it to the Commission which, pursuant to Article 2 of the Customs Code Treaty, Article 20(3) of the Agreement of 21 May 2010, paragraph 43(8) of the Commission Regulation, assists the Member States in resolving disputes within the Union before resort is had to the Court; the requirement to involve an independent third party (*in casu*, the Commission) in the resolution of international disputes accords with international practice,

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1 Russia v. Belarus, Order of the Grand Panel of 12 September 2016, p. 5.

2 Russia v. Belarus, Decision of the Grand Panel of 21 February 2017, Dissenting Opinion of Judge Fedortsov, p. 2; Russia v. Belarus, Decision of the Grand Panel of 21 February 2017, Dissenting Opinion of Judge Kolos, p. 9.

3 Ibid

including that of regional organizations of economic integration, and is, for instance, enshrined in Article 259 of the Treaty on the Functioning of the European Union[1] ('TFEU').[2]

Judge Neshataeva (as did apparently the Court) took a different view:

Paragraph 43 of the Statute of the Court and Article 23(2) of the Rules of Procedure of the Court do not require that the claims addressed as part of the pre-litigation procedure and those made in the application to the Court coincide. This accords with the case law of international courts (e.g., *Nicaragua v. United States of America*, ICJ Reports 1984, p. 428, para. 83).

In this respect, the respondent mixes up the judicial and pre-litigation procedures, the latter not being of adjudicative nature. Accordingly, Article 23(2) of the Rules of Procedure of the Court does not apply to the pre-litigation phase. The purpose of bilateral consultations is to try and settle a dispute which arose out of specific facts examined by the parties. Consultations cannot have as their objective the legal assessment and evaluation of the facts, which is what an applicant seeks from the Court. Uniform application of the law is an objective of the Court (paragraph 2 of the Statute of the Court).

Hence, discontinuance of proceedings on a motion of a respondent or judge would amount to a denial of justice, for the parties would lose the right to put forward their case by presenting their arguments and evidence, while the Court would be unable in a just, unbiased, and independent manner to determine the scope of rights and obligations of the parties.[3]

IV. Introduction of new pleas not presented in the application to the Court

EU law makes a distinction between pleas in law, i.e. legal propositions which provide the basis for the forms of order sought, and arguments relied upon by the party presenting the pleas. The applicant may not introduce new pleas in the course of proceedings save for those pleas that are based on matters of law or of

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1 Consolidated Version of the Treaty on the Functioning of the European Union, 2008 O.J. C 115/47, at 47.

2 Russia v. Belarus, Decision of the Grand Panel of 21 February 2017, Dissenting Opinion of Judge Kolos, pp. 10–11.

3 Russia v. Belarus, Decision of the Grand Panel of 21 February 2017, Dissenting Opinion of Judge Neshataeva, pp. 12–13.

fact which come to light in the course of the procedure.[1] In contrast, parties may adduce new arguments within the scope of the pleas included in their application to the court. This distinction prevents an unanticipated expansion of a dispute beyond the subject-matter stated in the application and thus serves to protect the respondent's rights of defence.

In a similar vein, WTO law differentiates between claims, understood as an allegation 'that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement' and arguments 'adduced by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision'.[2] The procedural rule for the presentation of claims in WTO disputes is the same as that for the presentation of pleas in EU law: '[A]ny claim that is not asserted in the request for the establishment of a panel may not be submitted at any time after submission and acceptance of that request'.[3] The same restriction does not apply to arguments, which may be elaborated in the course on the proceedings. On the other hand, '[b]oth "claims" and "arguments" are distinct from the "evidence" which the complainant or respondent presents to support its assertions of fact and arguments'.[4]

Union law does not make a distinction of this kind between the legal basis for an application (pleas in law) and the arguments relied on. The submissions made by a party in support of the forms of order sought are indiscriminately referred to as 'arguments' ('доводы'). It is tempting to view 'arguments' as this term is used in EAEU law as a party's assertions or contentions linking evidence to the forms of order sought, but the decision of the Appeals Chamber in *General Freight v. Commission* suggests that evidence, too, may be an element of 'arguments'. At the same time, the Court — or at least some of the judges — appear willing to discriminate

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1 Article 84, Rules of Procedure of the General Court, OJ L 105, 23 April 2015, p. 1; Article 127(1), Rules of Procedure of the Court of Justice, OJ L 265, 29 September 2012, p. 1.

2 WTO Appellate Body Report, Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products (Korea — Dairy), WT/DS98/AB/R, adopted 12 January 2000, para 139.

3 Ibid. This is because 'the panel request serves two essential purposes. First, it defines the scope of [and hence the panel's jurisdiction over] the dispute. Second, it serves the due process objective of notifying the respondent and third parties of the nature of the complainant's case[footnote omitted]' (See WTO Appellate Body Report, European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft (EC — Large Civil Aircraft), WT/DS316/AB/R, adopted 1 June 2011, paras 639, 786).

4 Appellate Body Report, Korea — Dairy, above note 58, para 139.

between different categories of arguments and deny admissibility of new arguments of certain categories at later stages of a dispute.

Select legal provisions applied in the dispute(s)

- Article 23 of the Rules of Procedure of the Court
  - *Adversarial process*
  - […]
  - 2. The parties have the right to know of each other's arguments before the start of the Court proceedings.
  - 3. The parties bear the risk of consequences that follow if they take, or fail to take, procedural actions.
- Article 29 of the Rules of Procedure of the Court
  - *Parties to a dispute*
  - […]
  - 2. Parties, their agents have the right to:
  - […]
  - b) […] make statements, give explanations in writing and verbally as well as in electronic form, adduce arguments on all issues arising in the course of the proceedings.
  - […]
  - 3. Parties, their agents shall:
  - […]
  - d) exercise their rights in good faith and not abuse them;
  - […]
- Article 9 of the Rules of Procedure of the Court
  - Application by an economic entity requesting resolution of a dispute
  - An application by an economic entity shall state:
  - […]
  - d) […], the facts and arguments relied on by the economic entity in seeking a form of order as provided for in paragraph 2 herein.
  - […]
  - In its application, an economic entity shall seek the following forms of order in accordance with paragraph 39(2) of the Statute of the Court: a finding that a decision by the Commission or its certain provisions are contrary to the Treaty and/or international agreements within the Union, and/or a finding that a challenged act (failure to act) by the Commission is contrary to the Treaty and/or international agreements within the Union.
- Article 39 of the Rules of Procedure of the Court
  - As part of preparing a case for hearing, the Judge-Rapporteur may:
  - […]
  - c) offer the parties to rectify their claims and defence, and indicate a period to provide the necessary additional documents, materials;
  - […]
- Article 69 of the Rules of Procedure of the Court
  - Scope of review by an Appeals Chamber
  - The Court shall examine an appeal based on the materials on the case record,

within the scope of the arguments presented in the appeal and in the response, which may be complemented by the parties in the course of the proceedings.
  - The Court may admit additional evidence if the party has shown that it was not possible to present the evidence to the Panel for reasons beyond its control and the Court finds these reasons to be compelling.
- Article 48 of the Rules of Procedure of the Court
  - *Statements and motions of the parties*
  - Statements and motions to the Court, including on the merits of claims and defence, shall be made in writing, may be presented verbally during a Court hearing […].

Case law of the Court

In the *Russia v. Belarus* dispute discussed above,[1] most of the claimant's legal claims under the TEAEU were not presented in the application to the Court, were introduced for the first time at the first oral hearing and elaborated at the second oral hearing.[2] The Court made findings on all these claims, including those not included in the application initiating proceedings. In that regard, Judge Kolos noted in his dissenting opinion that adding new pleas in law ('требования') after the commencement of proceedings contradicts the due process requirements under Article 23(2) and the good faith and non-abuse of rights requirements under Article 29(3)(d) of the Rules of Procedure of the Court, which should have given rise to estoppel against the applicant with respect to its claims under the TEAEU.[3]

By contrast, in *General Freight v. Commission*, a new 'argument', which could arguably be characterized as an alternative plea in law, raised by the claimant at an oral hearing was not even mentioned in the first-instance Panel decision —

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1 See Section .

2 Russia v. Belarus, Decision of the Grand Panel of 21 February 2017, Dissenting Opinion of Judge Fedortsov, p. 3. At the first oral hearing, the applicant claimed infringement of the TEAEU by the customs authorities of Belarus. At the second oral hearing, it additionally alleged infringement of the TEAEU by the judicial authorities of Belarus (see ibid).

3 Russia v. Belarus, Decision of the Grand Panel of 21 February 2017 of 21 February 2017, Dissenting Opinion of Judge Kolos, pp. 9–10. Procedural estoppel was also mentioned, as 'a generally recognized principle and norm of international law which follows from the principle of bona fides', in the dissenting opinion in another dispute, Remdiesel v. Commission. In that case, Judge Neshataeva argued that the Commission, having failed to plead lack of jurisdiction within the timeframe prescribed for lodging a defence, should have been estopped from presenting this plea at a later stage in the proceedings (Remdiesel v. Commission, Order of the Panel of 8 April 2016, Dissenting Opinion of Judge Neshataeva, pp. 3–4). In this regard, both judges refer, inter alia, to Ciulla v. Italy, Judgment, 22 February 1989, Series A, No. 148, paras 28–29.

it is only the Appeals Chamber that engaged with it, because the new plea was also presented in the appeal.[1] The claimant imported into the Union air-cooled water chillers, which he contended should be classified under heading 8415 of the Commodity Nomenclature of the Eurasian Economic Union. The customs authority, however, classified the chillers under subheading 8418 in accordance with the Commission classification decision No. 117 of 18 July 2014. The claimant therefore lodged an application with the Court, requesting it to find that the said decision was not in compliance with the EAEU Commodity Nomenclature.[2] During the oral hearings, the claimant additionally invoked the International Convention on the Harmonized Commodity Description and Coding System ('HS Convention'),[3] to which all EAEU Member States are parties,[4] and the classification decision taken by the Harmonized System Committee at its 34th session ('HS Committee Decision), according to which the chillers may be classified not only under subheading 8418.69 (import tariff rate 10%), as provided for in the Commission decision, but also under subheading 8418.61 (import tariff rate 9.4%), 'as the case may be'.[5] The claimant's alternative 'argument' therefore was that the Commission decision was contrary to the TEAEU and the international agreements within the Union because it was inconsistent with the HS Committee decision.

The Appeals Chamber stated that the claimant had not sought to rectify its claims before the Panel by following the procedure provided for in the Rules of Procedure and, pursuant to Article 23(3) of the Rules, had to face the consequences of its failure to take the required procedural action. This — in a line of reasoning which is difficult fully to grasp — led the Appeals Chamber to conclude that the HS Committee classification decision must be treated as evidence adduced in support of the claimant's original plea (that in accordance with the HS Conven-

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1 General Freight v. Commission, Decision of the Appeals Chamber of 21 June 2016, pp. 21, 22.

2 General Freight v. Commission, Decision of the Panel of 04 April 2016, pp. 2–4.

3 International Convention on the Harmonized Commodity Description and Coding System, Brussels, 14 June 1983, as amended by the Protocol of Amendment of 24 June 1986. Wcoomd.org. (2017). World Customs Organization. URL: <http://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs-nomenclature-2017-edition/hs-nomenclature-2017-edition.aspx [Accessed 2018].

4 General Freight v. Commission, Decision of the Panel of 4 April 2016, pp. 1–3, 9–11. On the status of the HS Convention in Union law, see Section below.

5 General Freight v. Commission, Decision of the Appeals Chamber of 21 June 2016, pp. 3–4, 11–12, 21.

tion, the chillers in question should be classified under heading 8415). Since the HS Committee decision was irrelevant to that original plea (recall that the HS Committee decision provides for classification of the chillers under subheading 8418.61 or 8418.69, but not under heading 8415), the Appeals Chamber concluded that the Panel was correct in declining to admit the evidence and that it must also be rejected on appeal.[1]

In his separate opinion, Judge Chaika disagreed, noting that neither the Statute of the Court nor the Rules of Procedure contain any prohibition for a claimant to present new arguments on appeal — a conclusion, in his view, supported by Article 69(1) of the Rules of Procedure.[2] The latter puts restrictions only on new evidence, but evidence (information about facts obtained by following the procedure established by law) is not to be confused with arguments (a party's assessment of the facts of a case). Therefore, the Appeals Chamber should have examined the claimant's new argument on its merits rather than dismissing it on a formal ground.[3] Moreover, in the view of Judge Chaika, Article 39 of the Rules of Procedure concerns the actions of the Judge-Rapporteur and does not restrict the actions of the parties to the dispute. It follows from Articles 29(2)(b) and 48 of the Rules of Procedure that oral and written proceedings co-exist in the Court, which means that a Panel must examine all claims, pleas, and defences irrespective of the form in which they are presented.[4]

V. Judicial review of non-binding instruments

The Court held in *Sevlad v. Commission* (Panel) and in *General Freight v. Commission* (Appeals Chamber) that Commission classification *decisions* are not judicially reviewable for consistency with classification opinions (decisions) prepared by the Harmonized System Committee as the latter, in accordance with Articles 7(1)(b) and 8(2) of the HS Convention, constitute recommendations and are thus not

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1 General Freight v. Commission, Decision of the Appeals Chamber of 21 June 2016, pp. 22–23.

2 General Freight v. Commission, Decision of the Appeals Chamber of 21 June 2016, Separate Opinion of Judge Chaika, p. 4.

3 Ibid, pp. 4–7. Judge Chaika clarifies that, in response to the new plea, the Appeals Chamber should have repeated its finding that the HS Committee classification decisions do not have a binding force, thus a failure to follow the opinions contained in them does not imply an inconsistency with the HS Convention (ibid, p. 7).

4 Ibid, pp. 7–8.

legally binding on the parties to the HS Convention.[1] In *Remdiesel v. Commission*, a reverse issue arose — whether a Commission *recommendation*, a non-binding legal act, is reviewable by the Court of the EAEU.

Select legal provisions applied in the dispute(s)

- Article 5 of the Agreement on the Eurasian Economic Commission of 18 November 2011[2]

1. The Commission shall, within its powers, adopt decisions, which shall be binding on the Parties, and recommendations, which shall be non-binding.
   – […]

- Paragraph 13 of the Commission Regulation
  - The Commission shall, within its powers, adopt decisions, which are normative legal acts binding on the Member States; orders, which are internal administrative acts; and non-binding recommendations.
  - Decisions of the Commission shall form part of Union law and shall be directly applicable in the Member States.
- Article 6 of the TEAEU

1. The Law of the Union shall consist of:
   – this Treaty;
   – international treaties within the Union;
   – international treaties of the Union with a third party;
   – decisions and orders of the Supreme Eurasian Economic Council,
   – the Eurasian Intergovernmental Council, and the Eurasian Economic Commission adopted within the powers provided for by this Treaty and international treaties within the Union.
   – Decisions of the Supreme Eurasian Economic Council and Eurasian Intergovernmental Council shall be implemented by the Member States as provided for in their national legislation.

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1 Sevlad v. Commission, Decision of the Panel of 7 April 2016, p. 20; *General Freight v. Commission*, Decision of Appeals Chamber of 21 June 2016, pp. 17–19. The Court, however, clarified that '[t]hough of only recommendatory character, [HS Committee] classification opinions must be taken into account to ensure uniform interpretation and application of the Harmonized Commodity Description and Coding System of the World Customs Organization' (*Sevlad v. Commission*, Decision of Appeals Chamber of 2 June 2016, p. 23). These opinions 'may *be of significant assistance in determining the scope of the HS and EAEU Commodity Nomenclature headings' (General Freight v. Commission, Decision of Appeals Chamber of 21 June 2016, p. 19).*

2 Szrf.ru. (2011). Agreement on the Eurasian Economic Commission of 18 November. URL: <http://www.szrf.ru/doc.phtml?nb=edition00&issid=2012011000&docid=93. [Accessed 2018]. The agreement was in force at the time of the events, but lapsed with the coming into force of the TEAEU. A provision substantially similar to this one is currently laid down in paragraph 13 of the Commission Regulation.

– […]
- Paragraph 39 of the Statute of the Court
  – 39. The Court shall resolve disputes arising in connection with the implementation of the Treaty, international treaties within the Union and/or decisions of the Bodies of the Union:
  – […]
  – 2) at the request of an economic entity:
  – concerning compliance of a Commission decision or of certain provisions thereof […] with the Treaty and/or international agreements within the Union […];
  – […]
- Article 56 of the Rules of Procedure of the Court

1. The Court shall dismiss the case if it establishes that:
   – a) the dispute falls outside of the jurisdiction of the Court;
   – […]

Case law of the Court

The claimant in *Remdiesel v. Commission* is an importer of marine engines, which the claimant classified under subheading 8408.10 of the EAEU Commodity Nomenclature (described in the Harmonized System Nomenclature as 'Marine propulsion engines'), the applied import tariff rate is 0%. Following an inspection in 2014, the customs authority reclassified the engines under subheading 8408.90 ('Other engines'), the applied tariff rate is 9%.[1] It must be noted that the Russian-language description of subheading 8408.10 which was used, at the time of the events, in the EAEU Commodity Nomenclature ('двигатели для силовых судовых установок') is broader than the English-language description used in the Harmonized System Nomenclature ('Marine propulsion engines') and may indeed be interpreted to include non-propulsion as well as propulsion engines.[2] Thus, in the claimant's opinion, the customs authority's decision was based on the explanatory notes to subheadings 8408.10.11 to 8408.10.99, implemented by a Commission College Recommendation No. 4 of 12 March 2013, which stated that these subheadings do not cover engines used for purposes other than propulsion.[3]

The Commission contended that, pursuant to Article 5(1) of the Agreement on the Eurasian Economic Commission of 18 November 2011 and paragraph 39(2) of the Statute of the Court, Commission recommendations, being non-binding on

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1 Remdiesel v. Commission, Order of the Panel of 8 April 2016, pp. 2–3.

2 The discrepancy has been eliminated in the EAEU Commodity Nomenclature currently in effect.

3 Remdiesel v. Commission, Order of the Panel of 8 April 2016, pp. 2–3.

the Member States of the Union, are not judicially reviewable. The Commission therefore moved the Court to dismiss the case for lack of jurisdiction pursuant to Article 56(1) of the Rules of Procedure.[1] The claimant argued that the Commission Recommendation in dispute is a regulatory act that must be reviewable for consistency with the Union law and is inconsistent with the Agreement on the Eurasian Economic Commission of 18 November 2011, the TEAEU, the Decision of the EAEU Board No. 54 of 16 July 2012, by which the EAEU Commodity Nomenclature was adopted.[2]

The Panel concluded that 'Commission recommendations (including Commission College Recommendation No. 4) are not normative legal acts, do not form part of Union law pursuant to Article 6 of the TEAEU[3] and are not challengeable in the Court as they fall outside of its jurisdiction'. The Panel therefore dismissed the case (terminated the proceedings).[4] The Appeals Chamber refused to hear the claimant's appeal as the Statute of the Court does not provide for appeals against Panel orders on procedural issues, but only against Panel decisions on the merits.[5]

A dissent by Judge Neshataeva explains, *inter alia*, why, in her opinion, the Court did have jurisdiction over this dispute. Firstly, responding to executive organs' issuance of non-binding interpretations inconsistent with superior law, the case law and the legal doctrine of EAEU Member States have recognized the judicial reviewability of 'interpretative acts'. This uniform national jurisprudence has resulted in the adoption of laws or Supreme Court resolutions which enshrine the right to a judicial review of interpretative acts. Secondly, the same approach is followed by integration organizations. In particular, the CJEU has ruled that '[a] n action for annulment must […] be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effect' (*Commission v. Council*, 22/70, ECR 263, para 42). Thirdly, the Court should have adopted a systemic and teleological approach to interpretation of the term 'Commission decision' as a normative legal act enacted by an organ of the Union, which may or may not have binding legal force. Moreover, the Commission recommendation in dispute is *de facto* binding as it is routinely applied by customs authorities in making classification decisions and affects the rights and

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1 Ibid, pp. 5–7.

2 Ibid, p. 7. The Order of the Panel does not mention any specific legal provisions of these treaties and legal acts challenged by the applicant.

3 See Section above.

4 Remdiesel v. Commission, Order of the Panel of 8 April 2016, p. 8.

5 Remdiesel v. Commission, Order of the Appeals Chamber of 11 May 2016, pp. 3–4.

legitimate interests of public at large.[1] The Court's finding of no jurisdiction based on an arbitrary designation of a Commission's normative legal act as a 'recommendation' may thus essentially result in a denial of justice.[2]

As for the substance of the dispute, Judge Neshataeva took the view that 'even if the challenged explanatory notes [adopted by the Commission recommendation at issue] are consistent with the acts of superior legal force, the Commission's practices with respect to the explanatory notes must be compliant with the fundamental principles of legal certainty and respect for legitimate expectations of economic entities'. This means that 'legal regulation must be certain and predictable, [and] economic entities have the right to know in advance and anticipate the legal implications which the adoption of a legal act may have, so as to be able to protect their legitimate expectations'.[3]

VI. Conditions for the application of treaties 'external' to union law

It was mentioned in section II that the Statute unambiguously mandates that the Court apply 'international agreements to which the states that are parties to the dispute are participants'. There are a few categories of such agreements.

Firstly, an external agreement which was not concluded within the Union may nonetheless be incorporated into Union law by reference (this, for example, is the case for the rights and obligations under the WTO agreements of the Member States of the Union that have acceded to the WTO[4]). Secondly, an external agreement which is not expressly incorporated by reference into Union law may nevertheless be so fundamental to the operation of the Union that the Court treats it essentially as an international agreement within the Union (e.g., the HS Convention, to which all the Member States of the Union are parties). Finally,

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1 Remdiesel v. Commission, Order of the Panel of 8 April 2016, Dissenting Opinion of Judge Neshataeva, pp. 4–8.

2 Ibid, pp. 14–15.

3 Ibid, pp. 13–14.

4 Such rights and obligations form part of the legal system of the Union to the extent they relate to: (1) the legal matters that the Parties have authorized the organs of the Customs Union to regulate within the framework of the Customs Union; or (2) the legal matters regulated by the international agreements which constitute the legal framework of the Customs Union (Article 1 of the Agreement of 19 May 2011 on the Functioning of the Customs Union within the Framework of the Multilateral Trading System, see note 88 below).

in a dispute brought by an economic entity against the Commission, the Court refused to give effect to a less salient external agreement to which only a few Member States of the Union, including the one whose conduct gave rise to the judicial proceedings, were a party.

Select legal provisions applied in the dispute(s)

- Article 2 of the TEAEU
  - *Definitions*
  - […]
  - 'international agreements within the Union' means international agreements concluded among the Member States on matters related to the functioning and development of the Union;
  - […]
- Paragraph 50 of the Statute of the Court
  - In deciding disputes, the Court shall apply:

1) the generally recognized principles and norms of international law;
2) the TEAEU, international agreements within the Union, and other international agreements to which the states that are parties to the dispute are participants;
3) decisions and orders of the organs of the Union;
4) international custom as evidence of a general practice accepted as law.

- Article 45 of the Rules of Procedure of the Court
  - *Judicial review in disputes brought by an economic entity against a Commission decision or certain provisions thereof and/or against an act (failure to act) by the Commission*

1. In carrying out a review in disputes brought by an economic entity against a Commission decision or certain provisions thereof and/or against an act (failure to act) by the Commission the Court in session shall review:
   - […]
   - c) the challenged decision or certain provisions thereof and/or the challenged act (failure to act) by the Commission for compliance with the TEAEU and/or international agreements within the Union.
   - […]

- Article 25 of the TEAEU
  - *The Principles of the Functioning of the Customs Union*
  - […]

2. For the purposes of this Treaty, the terms below shall have the following meaning:
   - […]
   - 'Unified Commodity Nomenclature of the Foreign Economic Activity of the Eurasian Economic Union' (EAEU CN) means the foreign economic activity commodity nomenclature based on the Harmonized Commodity Description and Coding System of the World Customs Organization and the Unified Foreign Economic Activity Commodity Nomenclature of the Commonwealth of Independent States;
   - […]

- Article 51 of the 2009 Customs Code of the Customs Union[1]

1. The commodity nomenclature of foreign economic activity shall be based on the Harmonized Commodity Description and Coding System of the World Customs Organization and the Unified Foreign Economic Activity Commodity Nomenclature of the Commonwealth of Independent States.
   – […]

- Article 1 of the Agreement of 19 May 2011 on the Functioning of the Customs Union within the Framework of the Multilateral Trading System ('Agreement of 19 May 2011')[2]

1. From the date of accession of any of the Parties to the WTO, the provisions of the WTO Agreement as set out in the Protocol of Accession of such Party to the WTO, including the commitments undertaken by such Party as part of the terms of its accession to the WTO, which relate to the legal matters that the Parties have authorized the organs of the Customs Union to regulate within the framework of the Customs Union as well as those which relate to the legal matters regulated by the international agreements which constitute the legal framework of the Customs Union, shall become part of the legal system of the Customs Union. […]

- Paragraph 43 of the Commission Regulation
  – The College of the Commission shall carry out the following functions and powers:
  – […]
  – 4. monitors and controls compliance with international agreements which form part of Union law and with decisions of the Commission, and notifies to the Member States the need to comply.
  – […]

Case law of the Court

In *General Freight v. Commission* and *Sevlad v. Commission*, the claimants requested the Court to determine whether a Commission classification decision was consistent with the HS Convention. The Panel in *General Freight v. Commission* found that the HS Convention governs the customs tariff relations within the Union and

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1 Mddoc.mid.ru. (2017). Customs Code of the Eurasian Economic Union. URL: <http://mddoc.mid.ru/api/ia/download/?uuid=b48c5fca-9b44-40d4-ad92-40a5987f8f82 [Accessed 2018]. The 2017 Customs Code of the Eurasian Economic Union has been signed and will, upon its ratification by the Member States and entry into force, replace the currently effective Customs Code of the Customs Union.

2 Mddoc.mid.ru. (2011). Agreement on the Functioning of the Customs Union within the Framework of the Multilateral Trading System. URL: <http://mddoc.mid.ru/api/ia/download/?uuid=42c5a7ed-02fd-44cc-beed-a463ec239867 [Accessed 2018].

thus constitutes applicable law in the dispute 'alongside' Union law.[1] This is so because: (1) Article 51 of the Customs Code of the Customs Union, which forms part of Union law, expressly refers to the Harmonized Commodity Description and Coding System of the World Customs Organization as the basis for the commodity nomenclature of the Union;[2] (2) all the Member States of the Union have ratified the HS Convention and have thus undertook, under Article 3.1 of the HS Convention, to maintain their customs tariff and statistical nomenclatures in conformity with the Harmonized System; (3) Article 45 of the TEAEU transfers to the Commission the competence to maintain the EAEU commodity nomenclature and common customs tariff.[3] The Appeals Chamber affirmed, specifying that the judicial review of a Commission decision for compliance with the HS Convention is carried out 'in pursuance of the requirement of Article 45(1)(c) of the Rules of Procedure',[4] which mandates that the Court review said decisions for compliance with (1) the TEAEU and/or (2) international agreements within the Union. The Appeals Chamber thus appears to have equated, for the purposes of Article 45(1)(c), the HS Convention to an international agreement within the Union.

On the way to its conclusion as to the status of the HS Convention in Union law, the Appeals Chamber in *General Freight v. Commission* devised a two-tier test to determine whether an international agreement which is not an international agreement within the Union nor an international agreement of the Union with a third party nonetheless binds the Union. Under this test, an external agreement binds the Union if: 1) all the Member States of the EAEU are participants to the agreement; 2) the subject matter of the agreement relates to the EAEU's common policy.[5] The Appeals Chamber stated that this test reflects the established practice

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1 General Freight v. Commission, Decision of the Panel of 4 April 2016, p. 11. Remarkably for a court rooted in the continental legal tradition, the Panel notes that the same conclusion reached by its predecessor, the Court of the Eurasian Economic Community ('EEC'), has the force of stare decisis because pursuant to Article 3.3 of the Agreement on the Termination of the Eurasian Economic Community, after the termination of the EEC, the decisions of the Court of the EEC remain in force. In its Advisory Opinion of 10 July 2018, the Court also explicitly referred to stare decisis as the principle it follows in interpreting the norms of international law.

2 In this respect, the Appeals Chamber made an additional reference to Article 25 of the TEAEU: General Freight v. Commission, Decision of the Appeals Chamber of 21 June 2016, p. 15.

3 General Freight v. Commission, Decision of the Panel of 4 April 2016, pp. 10–11.

4 General Freight v. Commission, Decision of the Appeals Chamber of 21 June 2016, pp. 13–17.

5 Ibid, p. 15.

of integration organizations and provided references to a few CJEU cases, including *International Fruit Company and Others*, *Intertanko and Others*, etc.[1]

Judge Chaika dissented with regard to the second criterion, arguing it should be wider in scope and include both common and concerted policy areas, i.e. all areas in which powers have been transferred to the supranational level.[2] He referred, in particular, to an earlier Panel decision in *Sevlad v. Commission*, in which the Panel, without making a distinction between Commission powers pertaining to the common as opposed to concerted policy areas, had found that the right of the Commission to 'take into account' the rights and obligations of the Member States of the Union under the HS Convention derived from the powers transferred to the Commission by the Member States.[3]

In *ArcelorMittal Kryvyi Rih v. Commission*, the claimant invoked certain provisions of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994[4] ('Anti-Dumping Agreement'). The Panel found that, pursuant to Article 99(4) of the TEAEU and Annex 31 thereto, the Agreement of 19 May 2011 on the Functioning of the Customs Union within the Framework of the Multilateral Trading System applies in the Union. In accordance with Article 1 of the Agreement of 19 May 2011, the WTO Agreement and the relevant commitments of the Member States under their Protocols of Accession to the WTO, to the extent such commitments relate to the powers transferred by the Members States of the Union to the organs of the Union, form part of Union law. The Panel concluded that the judicial review of the Commission decision at issue, which imposed anti-dumping duties on bars and rods originating in Ukraine, must also 'take into account' the provisions of the

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1 General Freight v. Commission, Decision of the Appeals Chamber of 21 June 2016, pp. 15–16.

2 General Freight v. Commission, Decision of the Appeals Chamber of 21 June 2016, Dissenting Opinion of Judge Chaika, pp. 8–10. For a description of the different levels of policy integration, see Section below.

3 General Freight v. Commission, Decision of the Appeals Chamber of 21 June 2016, Dissenting Opinion of Judge Chaika, p. 10. The claimant in Sevlad v. Commission argued that the Commission had unacceptably broadly interpreted the relevant HS Committee classification opinion. As discussed above (see Section), the Court ruled that HS Committee opinions are not binding legal acts and Commission decisions therefore cannot be reviewed for consistency with them.

4 GATT Secretariat. (2002). The Results of the Uruguay Round of Multilateral Trade Negotiations, the Legal Texts. URL: <https://www.wto.org/english/docs_e/legal_e/19-adp_01_e.htm [Accessed 2018].

GATT 1994 and the Anti-Dumping Agreement.[1] At one point, the Panel also said it was taking into account the WTO case law and buttressed its rationale on one of the legal issues with (its own reading of) a statement made by a WTO Panel in a dispute settlement report.[2]

In *Tarasik v. Commission*, a question arose whether the Court could (and should) apply the 1958 Geneva Agreement concerning the Adoption of Uniform Technical Prescriptions for Wheeled Vehicles, Equipment and Parts[3] ('Geneva Agreement'). Only three out of five current Member States of the Union have acceded to the agreement (and were its participants at the time of the dispute) — Belarus, Kazakhstan and the Russian Federation. While Article 50 of the Statute directs the Court to apply 'international agreements to which the states that are parties to the dispute are participants', Kazakhstan, whose actions essentially gave rise the claimant's grievances, was not a party to the dispute as economic entities cannot bring actions against the Member States of the Union, but only against decisions and acts (failure to act) of the Commission.

Konstantin Tarasik is a sole trader who imported Nissan Titan vehicles from the US to Kazakhstan. In his customs declaration, he classified the vehicles under heading 8704 as motor vehicles for the transport of goods. Such vehicles are not subject to the excise tax in Kazakhstan. The customs authorities of Kazakhstan did not contend that the classification made by the importer in the declaration was erroneous. However, for taxation purposes, the customs authorities reclassified the vehicles as, essentially, light motor vehicles for the transport of persons (an excisable good under the Tax Code of Kazakhstan) and assessed excise tax. Having exhausted domestic remedies, Tarasik filed a complaint with the Commission. After the Commission responded that it lacked the powers to review for lawfulness actions and decisions of national customs authorities, Tarasik challenged the Commission's failure to act before the Court.[4] He alleged, among other things, that the Commis-

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1 ArcelorMittal Kryvyi Rih v. Commission, Decision of the Panel of 27 April 2017, pp. 5–6.

2 Ibid, p. 16. The reference was to the WTO Panel Report in Russia — Anti-dumping Duties on Light Commercial Vehicles from Germany and Italy, WT/DS479/R, adopted 27 January 2017 and the issue concerned the period for injury analysis in an anti-dumping investigation.

3 Agreement concerning the Adoption of Uniform Technical Prescriptions for Wheeled Vehicles, Equipment and Parts which can be fitted and/or be used on Wheeled Vehicles and the Conditions for Reciprocal Recognition of Approvals Granted on the Basis of these Prescriptions, done at Geneva, 20 March 1958, UNTS 335, p. 211.

4 The facts of the dispute are best summarized in a concise manner in Tarasik v. Commission, Decision of the Appeals Chamber of 03 March 2016, Dissenting Opinion of Judge Neshataeva, pp. 1–3.

sion had failed in its duty to carry out the monitoring and control of compliance by Kazakhstan with international agreements, as prescribed by subparagraph 43(4) of the Commission Regulation, i.e. had failed to look to it that Kazakhstan complied with its obligations under, *inter alia*, the Geneva Agreement.[1]

The Panel, which disallowed the application, did not engage with the claim under the Geneva Agreement at any length (if at all). In his dissenting opinion, Judge Chaika noted, in particular, that the requirements contained in the EAEU Technical Regulation 'On the Safety of Wheeled Transport Vehicles' are harmonized with the United Nations Economic Commission for Europe ('UNECE') Vehicle Regulations which are adopted under the Geneva Agreement — a fact which makes the Geneva Agreement, in relation to the Member States of the Union, 'a universal international agreement in the area of technical regulation in the Union, whose provisions are binding [on the Member States]'.[2] Article 3 of the Geneva Agreement lays down a provision for the mutual recognition of type approvals between the contracting parties of the agreement. In this dispute, the type of chassis used on the imported vehicles was indicated in the documentation issued by the US manufacturer (the US also being a contracting party to the Geneva Agreement). However, the customs authorities of Kazakhstan, contrary to Article 3 of the Geneva Agreement, disregarded this documentation and used another type of chassis (light vehicle chassis instead of heavy vehicle chassis) for classification purposes. This, according to Judge Chaika, should have led the Panel to conclude that the Republic of Kazakhstan was in violation of the Geneva Agreement.[3]

On appeal, the claimant essentially repeated the arguments set out by Judge Chaika in his dissent. The Appeals Chamber responded that the Geneva Agreement does not form part of Union law, is not binding on all the Member States of the Union, and applies only among its participants. The Commission therefore has no power to monitor and control Kazakhstan's compliance with the Geneva Agreement.[4] The fact that the Technical Regulation 'On the Safety of Wheeled Transport Vehicles' is harmonized with the relevant UNECE Regulations which are adopted under the Geneva Agreement does not mean that the provisions of the Geneva

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1 Tarasik v. Commission, Decision of the Panel of 28 December 2015, p. 6.

2 Tarasik v. Commission, Decision of the Panel of 28 December 2015, Dissenting Opinion of Judge Chaika, p. 5.

3 Recall, however, the Kazakhstan was not, and could not be, the respondent in the dispute. The application alleged that the Commission had failed to monitor and control Kazakhstan's compliance with, inter alia, the Geneva Agreement. Thus Kazakhstan's (non-) compliance with the Geneva Agreement was in any case an interim issue.

4 Tarasik v. Commission, Decision of the Appeals Chamber of 03 March 2016, p. 24.

Agreement apply unconditionally and/or take precedent in the sphere of technical regulation in the Union, or are included in Union law.[1] 'Compliance with the Geneva Agreement by the Republic of Kazakhstan forms part of the exclusive competence of the Republic of Kazakhstan as a subject of international law'.[2]

VII. Mutual recognition of customs authorities' decisions in the customs union

In *Russia v. Belarus*, a question arose as to the extent to which Union law restricts the actions of national customs authorities or, in other words, as to the relationship between Union law and national laws of the Member States in the areas covered by Union law. The Court made some important pronouncements, in particular with regard to direct application of the relevant provisions of Union law and the unconditional nature of the obligation of mutual recognition of customs authorities' decisions in the Union.

Select legal provisions applied in the dispute(s)

- Article 123 of the Customs Code of the Customs Union
  - *Mutual administrative assistance*

1. For the purposes of this chapter, mutual administrative assistance means actions of the customs authority of one Member State of the Customs Union on behalf of or in collaboration with the customs authority of another Member State of the Customs Union for the proper application of the customs law of the Customs Union and for the prevention, repression, investigation of customs offences in the Customs Union.
2. Mutual administrative assistance includes:
   - the exchange of information among customs authorities of the Member States of the Customs Union;
   - the mutual recognition of decisions adopted by customs authorities;
   - the carrying-out of certain customs controls provided for under this Code by the customs authority of a Member State of the Customs Union on behalf of the customs authority of another Member State of the Customs Union.
   - Mutual administrative assistance may also include other kinds of interaction among the customs authorities in accordance with international agreements of the Member States of the Customs Union.

- Article 125 of the Customs Code of the Customs Union
  - *Mutual recognition of decisions adopted by customs authorities*
  - Decisions of customs authorities adopted as part of completing customs

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1 *Tarasik v. Commission, Decision of the Appeals Chamber of 03 March 2016*, p. 27.

2 *Ibid, p. 28.*

formalities in respect of goods in the process of importation into or exportation from the customs territory of the Customs Union, goods under customs control, goods in customs transit through the customs territory of the Customs Union, goods in bonded storage, goods undergoing customs control procedures shall be mutually recognized by the customs authorities of the Member States of the Customs Union and shall have equal legal force in the customs territory of the Customs Union in the cases defined by the customs legislation of the Customs Union.

- Article 11 of the Agreement of 21 May 2010 on Mutual Administrative Assistance Among Customs Authorities of the Member States of the Customs Union ('Agreement of 21 May 2010')
  - *Grounds for submitting a request to carry out certain customs controls*

1. The grounds for submitting a request to carry out certain customs controls shall be:

1) The need to confirm the existence of goods under customs control;
2) […]
3) The existence of information which evidences a possible violation of the customs legislation of the Customs Union and/or of a Member State of the Customs Union, whose customs authority is submitting the request.

2. A request may also be submitted on grounds other than those enumerated in paragraph 1 herein.

- Article 17 of the Agreement of the Agreement of 21 May 2010
  - *Decisions of customs authorities subject to mutual recognition*
  - The following decisions of customs authorities shall be mutually recognized and shall have equal legal force in the customs territory of the Customs Union:

1. Adopted in compliance with the customs law of the Customs Union in the course of completing customs formalities on goods entering or leaving the customs territory of the Customs Union, goods under customs control, goods in customs transit through the customs territory of the Customs Union, goods in bonded storage;
2. Adopted in compliance with the customs law of the Customs Union in the course of carrying out customs controls.

- Article 3 of the TEAEU
  - The Union shall carry out its activities within the competence conferred on it by the Member States in accordance with this Treaty, on the basis of the following principles:
  - […]
  - promotion of mutually beneficial cooperation and equality of rights while taking into account the national interests of the Parties;
  - […]
- Article 25 of the TEAEU
  - *Principles of the Functioning of the Customs Union*

1. The following principles apply within the Customs Union of the Member States:
   - […]

5) free movement of goods between the territories of the Member States with no customs declaration or state controls (transport, sanitary, veterinary sanitary, quarantine phytosanitary controls), except as otherwise provided under this Treaty.
– […]

- Annex 5 to the Agreement on Accession of the Republic of Armenia to the TEAEU of 10 October 2014[1]
– […]

5. When in customs transit from the customs territory of the Union to the customs territory of the Union via territories of foreign states, Eurasian Economic Union goods retain the status of Eurasian Economic Union goods.
– […]

Case law of the Court

Throughout 2014 and in 2015, customs authorities of Belarus detained properly documented shipments of household appliances in customs transit from Kaliningrad oblast,[2] where the appliances were assembled from imported components, to the rest of Russia via Lithuania and Belarus. Although the appliances had been found by Russia's competent authority, the Chamber of Commerce and Industry, to meet the sufficient processing criteria and had thus been duly declared as Union goods, the customs authorities of Belarus refused to recognize them as such (i.e., refused to give effect to the decision to release the goods adopted by the Russian customs authority) and opened administrative proceedings which resulted in a finding of an administrative offence (failure to declare non-Union goods) and forfeiture of the goods to Belarus.

After interstate consultations failed to resolve the matter, Russia brought the dispute before the Court, alleging a violation by Belarus (specifically, by its customs authorities and courts) of the obligation to recognize the decisions of customs authorities of another Member State of the Union, enshrined in Article 125 of the Customs Code of the Customs Union, as well as a violation of related provisions (Articles 11 and 17) of the Agreement of 21 May 2010 on Mutual Administrative Assistance Among Customs Authorities of the Member States of the Customs Union and of Article 3 of the TEAEU.[3]

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1 Consultant.ru. (2014). Agreement on the Accession of the Republic of Armenia to the Treaty on the Eurasian Economic Union. URL: <http://www.consultant.ru/document/cons_doc_LAW_169854/ [Accessed 2018].

2 Russian exclave on the Baltic Sea.

3 Russia v. Belarus, Order of the Grand Panel of 12 September 2016 p. 10; Decision of the Grand Panel of 21 February 2017, Separate Opinion of Judge Chaika, pp. 2–4.

Belarus argued that the actions of its customs authorities were taken in compliance with the provisions of Union law governing customs controls and in pursuance of the national laws of Belarus governing administrative penalties for infringements of customs rules.[1] In the view of Belarus, the Court had no jurisdiction *ratione materiae* over the dispute to the extent it arose out of the actions of the national authorities of Belarus based on the municipal law of Belarus. The Grand Panel confined itself to finding, in the order admitting the application, that the Court has jurisdiction in disputes over compliance by a Member State with provisions of Union law, and since the TEAEU and the Agreement of 21 May 2010 form part of Union law, the Court had jurisdiction over this dispute.[2] The Grand Panel, however, stopped short of a declaration of the general supremacy of Union law over the national laws of the Member States.[3]

On the merits of the case, the Grand Panel ruled that:

1. Mutual recognition of decisions adopted by customs authorities does not imply the sending of inquiries, requests, information, or the performance of any other acts which would serve as pre-conditions for such recognition. Accordingly, 'in the cases established in the customs law of the Customs Union, decisions adopted by customs authorities must be mutually recognized *a priori*, without any reservations or conditions. Until proven otherwise, such decisions are presumed to be in full conformance with the requirements applying to them and, consequently, with the customs law of the Customs Union.[4]
2. Article 11 of the Agreement of 21 May 2010 lists the sufficient grounds on which customs authorities of a Member State must submit a request to the customs authorities of another Member State to perform certain actions on behalf of the former. Article 11 constitutes *jus singulare* in relation to the general provisions governing customs controls (in particular, those on risk management) and thus takes precedence over the latter.[5]

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1 Russia v. Belarus, Decision of the Grand Panel of 21 February 2017, p. 2; Russia v. Belarus, Decision of the Grand Panel of 21 February 2017, Dissenting Opinion of Judge Kolos, pp. 3–5.

2 Russia v. Belarus, Order of the Grand Panel of 12 September 2016, pp. 3–5.

3 In that respect, Judge Chaika stated in his separate opinion that the Court should have followed the approach of the CJEU in Costa v ENEL and Amministrazione delle finanze dello Stato v Simmenthal (See Russia v. Belarus, Decision of the Grand Panel of 21 February 2017, Separate Opinion of Judge Chaika, pp. 5–6).

4 Russia v. Belarus, Decision of the Grand Panel of 21 February 2017, pp. 6–7.

5 Ibid, p. 9–10.

3. Actions of a Member State in relation to customs controls, which go beyond what is required by the customs law of the Customs Union and represent an expansive interpretation of the rights of the Member States, contradict the principles of the functioning of the Customs Union, in particular those laid down in Article 25(1)(5) of the TEAEU.[1]
4. It is 'appropriate' for the customs authorities of a Member State which carry out customs controls on Customs Union goods in customs transit from one Member State to another Member State of the Union to 'refrain' from unilaterally deciding on the accuracy, admissibility, sufficiency of the documents issued by the competent authorities of the state of departure as the Agreement of 21 May 2010 requires the observance of the established international procedures for mutual administrative assistance among the customs authorities.[2]
5. The Agreement of 21 May 2010, in particular its Article 17 (which defines what decisions of customs authorities must be mutually recognized in the Union), elaborates on the provisions of Article 125 of the Customs Code of the Customs Union on the mutual recognition of customs authorities' decisions. The provisions of Article 17 are imperative,[3] do not contain exceptions or references, and therefore must apply directly. If properly applied, Article 125 of the Customs Code, Articles 11 and 12 of the Agreement of 21 May 2010 do not leave room for raising the issue of (non-)recognition of a good as a Union good when such good is in customs transit from one Member State to another Member State of the Union.[4]
6. In addition, an issue similar to this one is dealt with in the Agreement on the Accession of Armenia[5] to the EAEU. Annex 5(5) of the Agreement provides that Union goods in customs transit from a Member State of the Union to another Member State of the Union via a third party retain the status of Union goods.[6]

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1 Russia v. Belarus, Decision of the Grand Panel of 21 February 2017, p. 10.

2 Ibid, p. 11.

3 In other words, mandatory, i.e. do not allow for derogations.

4 Russia v. Belarus, Decision of the Grand Panel of 21 February 2017, pp. 11–12.

5 Armenia is, essentially, an exclave of the EAEU as it has no common borders with the other Member States of the EAEU.

6 Russia v. Belarus, Decision of the Grand Panel of 21 February 2017, pp. 15.

VIII. Competition policy: Whether a Member State may impose stricter admissibility criteria for vertical agreements than those provided for under the TEAEU

As part of Union-wide competition rules, the TEAEU prohibits certain vertical agreements, but also provides for exceptions from the prohibition. In particular, a vertical agreement is permitted if the market share of each party to the vertical agreement in the relevant product market does not exceed 20 percent. Belarus requested an advisory opinion from the Court on whether the Member States may establish a lower market share threshold for the exception.

Select legal provisions applied in the dispute(s)

- Article 76 of the TEAEU
  - *Common rules of competition*
  - […]

4. Vertical agreements between economic entities (market operators) are prohibited, except for vertical agreements which are deemed admissible in accordance with the admissibility criteria established by Annex 10 to this Treaty, if:

1) such agreements lead or may lead to the fixing of the resale price of a product, except where the seller fixes the maximum resale price for the buyer;
2) such agreements provide for the obligation of the buyer not to sell the products of an economic entity which is in competition with the seller. This prohibition does not apply to agreements providing for the buyer to arrange the sale of products under the trademark or another branding device of the seller or producer.

- […]

- Annex 19 to the TEAEU
  - II. Admissibility of agreements; derogations
  - […]

6. Vertical agreements are admissible if:

1) such agreements are franchise agreements;
2) the share of each economic entity (market operator) which is a party to such agreement in the product market of the product which constitutes the subject matter of the vertical agreement does not exceed 20 percent.

- […]

- Article 74 of the TEAEU
  - *General provisions*
  - […]

3. The Member States have the right to establish in their laws additional prohibitions as well as additional requirements and restrictions in respect of the prohibitions provided for in Articles 75 and 76 of this Treaty.

Case law of the Court

The Court started by saying that it had to determine, as a preliminary matter, whether the regulation of competition is within the competence of the Union or the Member States. Depending on the degree of cohesion, a policy pursued by the

Member States in a specific economic sector may be either 'coordinated', 'concerted',[1] or 'common'.[2] The Court devised a two-tier test for the identification of areas of common policy: (1) the existence of uniform legal regulation; 2) delegation of competence by the Member States to the EAEU.[3] Both concerted and coordinated policies are pursued with a view to achieving the objectives set out in the TEAEU. The difference is that the former requires harmonization of national laws of the Member States to the extent necessary to achieve the objectives, while the latter — only the establishment of common approaches.[4]

The Court concluded that the degree of cohesion of the Member States' activities in the area of competition will vary depending on: (1) the nature of the market (national or transboundary); and (2) the nationality of the economic entity concerned (a Member State market or a third country market).[5]

Competition in a transboundary market, i.e. a market whose geographical boundaries encompass the territories of two or more Member States,[6] is a matter of common Union policy. In particular, Annex 19 to the TEAEU establishes common competition rules in transboundary markets and confers on the Commission the power to supervise compliance with the rules.[7]

The TEAEU expressly provides that the activities of economic entities of third countries, if such activities may have a negative effect on competition in the product markets of the Member States, are subject to the Member States' concerted policy.[8]

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1 In many translations of the TEAEU this policy is referred to as 'agreed policy'.

2 Article 1(1) of the TEAEU.

3 Advisory Opinion of the Grand Panel of 4 April 2017, p. 4.

4 Article 2 of the TEAEU; Advisory Opinion of the Grand Panel of 4 April 2017, p. 4.

5 Advisory Opinion of the Grand Panel of 4 April 2017, p. 6.

6 The detailed criteria to determine a market as 'transboundary' are established in the Decision of the Supreme Eurasian Economic Council of 19 December 2012 No 29 'On approval of the criteria for classifying a market as transboundary'.

7 Advisory Opinion of the Grand Panel of 4 April 2017, p. 5.

8 Article 74(4) of the TEAEU as cited in Advisory Opinion of the Grand Panel of 4 April 2017, pp. 5-6.

As for competition on the national markets of the Member States, Articles 75-76 of the TEAEU only establish common principles and rules, which may be elaborated in the national laws of the Member States. In particular, Article 74(3) of the TEAEU specifically allows the Member States to establish in their national laws other prohibitions and additional requirements and restrictions in respect of the prohibitions enshrined in the TEAEU. This brought the Court to conclude that the protection of competition in the national markets is a matter of coordinated Union policy.[1] Therefore, the Member States have, as a matter of principle, a degree of discretion in regulating competition in their national markets.

Turning to the main issue of the dispute, the Court concluded that Union law makes a distinction between 'admissibility criteria' and 'prohibitions'. After reviewing the dictionary definitions of some of the terms used in the relevant provisions, the Court ruled that Article 74(3) of the TEAEU allows the Member States to introduce additional *prohibitions* or requirements and restrictions in respect of the *prohibitions* enshrined in the TEAEU, but not add to or modify the existing *admissibility criteria*.[2]

IX. Whether the deferral of a decision to impose anti-dumping measures extends the duration of an anti-dumping investigation or is otherwise prejudicial to the interests of foreign producers or importers

Anti-dumping, safeguard, and countervailing measures on products originating from third countries and imported into the Union are applied on a Union-wide basis through Commission decisions.[3] Investigations are conducted by the Commission's Department for Internal Market Defence.[4] Union law does not expressly prescribe any time limits for the adoption by the Commission of a decision to impose an anti-dumping duty after the *de facto* conclusion of an anti-dumping investigation. In *ArcelorMittal Kryvyi Rih v. Commission*, one of the central issues was whether a delay in the adoption of a Commission decision imposing anti-dumping duties beyond the 18-month period provides a basis for a finding of inconsistency of the decision with Union law.

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1 Advisory Opinion of the Grand Panel of 4 April 2017, p. 5.

2 Advisory Opinion of the Grand Panel of 4 April 2017, p. 8–9.

3 Article 48(2) of the TEAEU.

4 Article 48(4) of the TEAEU. Decision of the Board of the Commission of 7 March 2012 No 1 'On some issues of the application of safeguard, anti-dumping, and countervailing measures in the single customs territory of the Customs Union'.

Select legal provisions applied in the dispute(s)

- Article 45 of the Rules of Procedure of the Court
  - *Judicial review in disputes brought by an economic entity against a Commission decision or certain provisions thereof and/or against an act (failure to act) by the Commission*
  - […]

2. […]
   - A review of a Commission decision relating to the application of a safeguard, anti-dumping, or countervailing measure […] shall be limited to a review of:
   - Observance by the Commission of the essential procedural requirements, the correct application of the legal norms which precede the adoption of the decision in dispute;
   - […]

- Article 78 of the Rules of Procedure of the Court
  - *General requirements for a decision of the Court*
  - […]

8. If in the absence of violations identified by the Court in pursuance of Article 45 of these Rules of Procedure, the safeguard, anti-dumping, or countervailing investigation […] could not have resulted in a different decision of the Commission […], the decision of the Commission may be found to be in compliance with the Treaty and/or international agreements within the Union.

- Article 5 of the Anti-Dumping Agreement
  - *Initiation and subsequent investigation*
  - […]

5.10 Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.

- Article 30 of the Agreement of 25 January 2008 on the Application of Safeguard, Anti-Dumping, and Countervailing Measures in Respect of Third Countries ('Agreement of 25 January 2008').[1]
  - *Commencement and conduct of investigation*
  - […]

13. The duration of an investigation shall not exceed:
    - […]

2) 12 months from the date of commencement of an investigation based on

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1 Mddoc.mid.ru. (2008). Agreement on the Application of Safeguard, Anti-Dumping, and Countervailing Measures in Respect of Third Countries. URL: <http://mddoc.mid.ru/api/ia/download/?uuid=db810659-3e83-4555-9920-34ce565306e6, http://mddoc.mid.ru/api/ia/download/?uuid=ff901a03-4a0d-4505-88f4-bfa63570d2d4. *This agreement was in force throughout most of the duration of the investigation in dispute, but expired on 1 January 2015 with the entry into force of the TEAEU (Annex 33(I)(6) to the TEAEU) and was replaced by Annex 8 to the TEAEU.*

an application seeking the imposition of an antidumping or countervailing measure. This duration may be extended by the [investigating] authority, but by no more than 6 months.

15. The date of conclusion of an investigation shall be the date on which the Commission of the Customs Union considers the investigation report and a draft of the decision of the Commission of the Customs Union [imposing, extending, revising, or terminating the measure].

- Protocol on the Application of Safeguard, Anti-Dumping, and Countervailing Measures in Respect of Third Countries (Annex 8 to the TEAEU)

107. An anti-dumping measure shall be imposed by a decision of the Commission in an amount and for a term which are necessary to remove injury to the domestic industry of the Member States caused by dumped imports.

217. The duration of an investigation shall not exceed:

– […]

2) 12 months from the date of commencement of an investigation based on an application seeking the imposition of an antidumping or countervailing measure. This duration may be extended by the investigating authority, but by no more than 6 months.

219. The date of conclusion of an investigation shall be the date on which the Commission considers the investigation report and a draft of the Commission [decision imposing, extending, revising, or terminating the measure].

Case law of the Court

On 20 November 2013, the Commission commenced an anti-dumping investigation concerning imports of bars and rods originating in Ukraine. The investigation was concluded on 19 May 2015, but the decision to impose anti-dumping duties was adopted only on 29 March 2016, i.e. over 10 months after the *de facto* conclusion of the investigation and more than two years after its commencement.[1] Based on these facts, in *ArcelorMittal Kryvyi Rih v. Commission*, the claimant, who was among the producers covered by the Commission decision, alleged a violation of the time limits set for the duration of an anti-dumping investigation or, alternatively, an abuse of right by the Commission — in the claimant's view, the adoption of the decision beyond the time limit set by the law for the conduct of an investigation had resulted in the infringement of the rights of foreign producers and importers.[2]

The Court found no fault in the deferred adoption of the decision by the Commission. The 'formal' duration of the investigation did not exceed the limits set

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1 ArcelorMittal Kryvyu Rih v. Commission, Decision of the Panel of 27 April 2017, p. 2.

2 Ibid, pp. 7–8.

by Article 30(13)(2) of the Agreement of 25 January 2008, paragraph 207(2) of Annex 8 to the TEAEU, and Article 5.10 of the Anti-Dumping Agreement. To the Court, the legally relevant fact is the date on which the investigation is deemed concluded as per Article 30(15) of the Agreement of 25 January 2008 and paragraph 219 of Annex 8 to the TEAEU. Deferred adoption of the decision to impose anti-dumping duties does not extend the formal duration of an investigation and thus does not result in a violation of the applicable legal provisions.[1] As for the abuse of right argument, the Court stated that the claimant had not produced evidence of any damage the claimant had sustained as a result of the deferral by the Commission of the decision to impose the anti-dumping measures.[2]

Judge Chaika disagreed that the Commission may adopt a decision imposing an anti-dumping measure after the 18 months, which he qualifies as the preclusive period, have lapsed.[3] He noted that in accordance with the established Commission practice, an investigation is deemed concluded by the adoption of a decision imposing an anti-dumping measure rather than by the consideration of a report of the investigating authority. Expiration of the preclusive period must therefore terminate an investigation and bar the Commission from adopting a decision to impose or not to impose an anti-dumping measure.[4]

To Judge Chaika, a violation of the preclusive period may result in a distortion of the dumping margin and an incorrect assessment of the anti-dumping duty, i.e. may affect the substance of the Commission decision. For this reason, the requirement to conclude an investigation within the preclusive period constitutes an essential procedural requirement. In these circumstances, Article 78(8) of the Rules of Procedure of the Court should not apply and the claimant should not be required to demonstrate that, absent the violation, the outcome of the investigation would have been different. Since the deficiencies of an act adopted with an essential procedural violation may be remedied only through nullification of the act, the Court should have found that the Commission decision is contrary to Union law.[5]

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1 ArcelorMittal Kryvyu Rih v. Commission, Decision of the Panel of 27 April 2017, pp. 17–18.

2 Ibid, p. 19.

3 ArcelorMittal Kryvyi Rih v. Commission, Decision of the Panel of 27 April 2017, Dissenting Opinion of Judge Chaika, p. 2.

4 Ibid, p. 4.

5 Ibid, pp. 5–7.

X. Conclusion

Although still very young, the Court has developed some important jurisprudence on both procedural and substantive matters of Union law. Apparently seeing itself part of the wider system of public international law and dispute settlement, the Court readily borrows from the case law of the courts of other integration organizations, in particular of the CJEU, of the International Court of Justice, and of the Dispute Settlement Body of the WTO. In a move strikingly uncharacteristic of other international fora, it asserts, in no uncertain terms, the doctrine of *stare decisis,* though, when referring to it, the Court apparently means that previous cases constitute, to use the words of a WTO panel, 'useful and persuasive guidance',[1] rather than formally binding precedent.

The jurisprudence of the Court is — and should be — heavily shaped by its Statute, which was carefully crafted to prevent the judiciary of the Union from slipping out of the bounds set for it by the Member States and taking on a role in the Eurasian integration process beyond that which the Member States were willing to accord it. In enforcing Union law, the Court is cautious not to encroach, to the extent possible, on the territory over which the Member States may claim sovereignty and, despite the admonition of some of the judges that the Court should not shy away from gap-filling,[2] should protect the weaker party in procedural terms[3] and take into consideration its legitimate expectations in substantive matters,[4] the Court prefers to manifest loyalty to black-letter law and distant neutrality, which in the eyes of the beholder may at times come off as deference to the national authorities or the Commission. In this context, the recent first win for a private claimant in *Oil Marine Group v. Commission* may give the Court a boost in confidence from the business community in the Member States and lay the first stone in the reputation of the Court as an independent and impartial dispute settlement forum.

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1 WTO Panel Report, Brazil — Measures Affecting Desiccated Coconut (Brazil — Desiccated Coconut), WT/DS22/R, adopted 20 March 1997, para 258.

2 Remdiesel v. Commission, Order of the Panel of 8 April 2016, Dissenting Opinion of Judge Neshataeva, p. 16.

3 Tarasik v. Commission, Decision of the Appeals Chamber of 03 March 2016, Dissenting Opinion of Judge Neshataeva, pp. 9–10; Tarasik v. Commission, Decision of the Appeals Chamber of 03 March 2016, Dissenting Opinion of Judge Chaika, p. 14.

4 Remdiesel v. Commission, Order of the Panel of 8 April 2016, Dissenting Opinion of Judge Neshataeva, pp. 13–14.

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Ровнов Ю.Е., Спорышева Н.А.[1]

Суд Евразийского экономического союза: особенности первых судебных процессов[2]

В статье приводится обзор первых лет судебных процессов в Суде Евразийского экономического союза, который начал функционировать 1 января 2015 г. Освещены вопросы различного характера, в т.ч. процедурные, как касающиеся досудебных разбирательств и заявлений в ходе судебных заседаний, взаимного признания решений таможенных органов и увеличению срока введения антидемпинговых мер относительно максимальной длительности антидемпингового расследования.

Ключевые слова: ЕАЭС, ВТО, разрешение споров**.**

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