BETWEEN A "HEAVENLY" LIFE AND AN "EARTHLY" LIFE: JURISPRUDENCE OF THE COURT OF THE EAEU FROM 2012–2019

VLADISLAV TOLSTYKH,
Novosibirsk State University (Novosibirsk, Russia)

https://doi.org/10.17589/2309-8678-2019-7-3-194-219

In 2012, a new jurisdictional body – the Court of the Eurasian Economic Community – began to operate in post-Soviet space. During the almost seven years of activity, from September 2012 to May 2019, the Court primarily dealt with appeals of economic entities who challenged acts of the Eurasian Economic Commission, as well as requests from Member States and the Commission for interpretations of international treaties. On one hand, the decisions of the Court meet basic international standards and contain certain answers to the questions submitted to the Court. On the other hand, they do not draw detailed arguments and clear conclusions and sometimes reflect the Court's predisposition towards the Commission and Member States. As a result, they successfully perform the task of resolving specific disputes, but do not perform (at least effectively) the general task of strengthening the rule of law of the EAEU. The Court did not formulate major concepts that complement and enrich the law of the EAEU. The author substantiates this conclusion and analyzes the Court use of sources of law and evidence; its participation in judicial dialogue; its technique of argumentation; linguistic features of its decisions; procedural and substantive problems faced by the Court, and options for their solution; the practice of presenting separate opinions; legal concepts formulated by the Court, and its overall influence on the development of EAEU law. The ineffective resolution of problems faced by the Court are attributable to subjective and objective reasons – shortcomings of applicable acts, the Court's isolation from Russian doctrine, the Court's focus on an internal model of legal proceedings, mistrust on the part of Member States, failure of the Court organizational structure to conform to international standards, and the vertical nature of the EAEU. If these factors are not overcome, and the Court does not change its conduct, it risks becoming a decorative body engaged in explaining provisions that are clear (and will repeat the sad fate of the CIS Economic Court). This prospect is discouraging.

Keywords: international courts; international law; customs law; Eurasian integration.

Recommended citation: Vladislav Tolstykh, *Between a "Heavenly" Life and an "Earthly" Life: Jurisprudence of the Court of the EAEU from 2012–2019*, 7(3) Russian Law Journal 194–219 (2019).

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Introduction

In 2012, a new jurisdictional body – the Court of the Eurasian Economic Community – commenced operating in post-Soviet space. The symbolic significance of this event is hard to underestimate. The States that created the EurAsEC and the CU demonstrated a desire to overcome the negative experience of early integration experiments, use progressive models of cooperation, and build their relationship on the base of international law.[1] The activity of the Court became the object of close attention on the part of legal doctrine; it is noteworthy that judges of the Court take part in the discussion. The Court has three important features that no other EAEU body has cumulatively: it does not depend on governments, has supranational powers, and performs judicial functions. In this regard, one would hope that the Court will become a crucial element of Eurasian integration like the ECJ, its "engine." The Court's jurisprudence, however, does not justify this hope.

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[1] The following abbreviations are used in the article: BRI – Basic Rules of Interpretation; CC – Custom Code; CNFEA – Commodity Nomenclature of the Foreign Economic Activity; CU – Custom Union; EAEU – Eurasian Economic Union; ECtHR – European Court of Human Rights; ECJ – European Court of Justice; EES – Eurasian Economic Space; EurAsEC – Eurasian Economic Community; HS – Harmonized Commodity Description and Coding System; ICJ – International Court of Justice; SEEC – Supreme Eurasian Economic Council; WTO – World Trade Organization. The term "Union" is used to designate the EurAsEC and the EAEU; the term "Commission" – the Eurasian Economic Commission and the Commission of the CU, "Treaty" – the 2014 Treaty on the EAEU.

Indeed, the decisions of the Court, on one hand, meet basic international standards and contain certain answers to questions submitted. On the other hand, they do not set out detailed arguments and clear conclusions. As a result, they successfully perform the task of resolving specific disputes, but do not perform (at least effectively) the general task of strengthening the rule of EAEU law. Paraphrasing Karl Marx, one could say that the Court leads a double life, both heavenly and earthly: a life in which it presents itself as an active and impartial organ of integration, and a life in which it acts as an individual, primarily concerned about its own safety and reputation.[2] Such a life can be conducted for a long time, but maintaining a balance between its two poles distracts from the effort and attention of the Court and adversely affects the fulfillment of its main function – ensuring uniform application of EAEU law.

1. Organization and Competence of the Court

Initially, the Court acted on the basis of the Treaty on the Establishment of the EurAsEC signed in 2000, the 2010 Statute, and the 2010 Agreement on the Initiation of Legal Action at the Court of the EurAsEC by Economic Entities. The 2014 Treaty on the EAEU confirmed the Statute of the Court (Appendix No. 2 to the Treaty) and seriously changed its legal regime. The Court was renamed the "Court of the EAEU," its competence was limited, and some organizational and procedural aspects became regulated in a different manner. Despite these modifications, the Court of the EAEU should be considered as the successor of the Court of the EurAsEC.[3] The Court consists of two judges from each Member State, appointed by the SEEC on the recommendation of Member States for a nine-year term (10 judges currently). The judges must meet high moral standards, be highly qualified lawyers, and, as a rule, meet the requirements for judges of the highest national courts. The SEEC approves the candidature of the President of the Court, previously agreed by the judges, and can remove the judges from office.

The Court ensures the uniform application of treaties concluded within the Union and decisions of Union organs. It examines the following categories of cases: (1) cases on the conformity of a treaty concluded within the Union with the Treaty (on request by Member States); (2) cases on the compliance of Member States with the treaties and decisions of the EAEU bodies (on request by other Member States); (3) cases on the conformity of Commission decisions, actions, or failure to act with the treaties of the EAEU and decisions of Union organs (on request by Member States and directly affected business entities); (4) cases on the interpretation of treaties and

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[2] *Маркс К.* К еврейскому вопросу / *Маркс К., Энгельс Ф.* Сочинения. Т. 1 [Karl Marx, *On the Jewish Question* in Karl Marx & Friedrich Engels, *Writings. Vol. 1*] 390–391 (2nd ed., Moscow: Politizdat, 1955).

[3] *See Нешатаева Т.Н.* Единообразное правоприменение – цель Суда ЕврАзЭС // Международное правосудие. 2015. № 2. С. 115–125 [Tatiana N. Neshataeva, *Uniform Application of Law Is the Goal of the EurAsEC Court*, 2 International Justice 115 (2015)].

acts of the EAEU (on request by Member States and Union organs). Unlike the ECJ, the Court does not have the right to give preliminary rulings by request of national courts, nor decide on Commission claims regarding violations of the Union law by Member States. The application is not admissible without the applicant's prior appeal to the State or the Commission.

The Court hears cases in the format of the Grand Panel, Panel, and Appeals Chamber. The Grand Panel consists of all judges and examines complaints by Member States and cases on interpretation. The Panel, which includes one judge from each Member State, examines complaints by economic entities. The Appeals Chamber, which is composed of judges who were not involved in the consideration of the case in the first instance, considers appeals to the decisions of the Panel.[4] The decisions of the Court are binding, and its opinions are advisory. The decision cannot go beyond the scope of the issues indicated in the application and change rules of law. The parties to the dispute independently determine the form and way of execution of the Decision. The Commission must execute the Decision within 60 days. In the event of non-execution, the Member State has the right to apply to the SEEC, and the economic entity – to the Court, which, in turn, applies to the SEEC.

2. General Features of Cases

Between September 2012 and May 2019, the Court mainly considered complaints of economic entities against acts of the Commission (31 complaints). Eleven were rejected; three were discontinued; sixteen were considered on the merits. In the last category the Court supported the Commission thirteen times and supported the claimants only three times (in the first two cases – *Southern Kuzbass* and *ONP*, as well as in the last case – *Oil Marine Group*). In fourteen of fifteen cases referred to the Appeals Chamber, the Chamber supported the Panel and only once reversed its decision and rendered a new one (*Flex-n-Roll*). Business entities from Russia have applied to the Court twenty times, from Belarus – three times, from Kazakhstan – three times, from Ukraine – two times, from India, China, and Germany – once. Since September 2016, there have been ten complaints, and only three considered on the merits.

The second most common category are interpretation (clarification) cases. The Court issued twelve advisory opinions: five – on request by the Commission, five – on request by national institutions (including three requests of the *Ministry of Economy of Kazakhstan*) and two – at the request of international officials. Ten opinions were

[4] In his Separate Opinion to the Decision in *Sanofi-Aventis Vostok* of 11 March 2019 Judge Chaika criticized this system: "The existing system of formation of judicial structures does not allow to ensure the observance of the principle of independence of judges... Proper implementation by the Appeals Chamber of the functions assigned to it and, as a result, increasing the level of protection of the rights and legitimate interests of business entities will only be possible through the establishment of such a structure of the Court whereby the Panel and its judges will be organizationally separated from the Appeals Chamber, which will ensure their independence and impartiality."

issued in 2017–2018. The Court also issued one preliminary ruling (at the request of the *Supreme Economic Court of Belarus*); one decision in an intergovernmental dispute (*Russia v. Belarus*), one decision regarding an interpretation (*Southern Kuzbass*), two decisions on the discontinuance of the procedure of interpretation (at the request of the *Ministry of Economy of Kazakhstan*), one decision rejecting the request for interpretation (*K.N. Grushenkov*), and one order returning a request for interpretation because of its withdrawal (at the request of the *National Chamber of Entrepreneurs of Kazakhstan "Atameken"*).

3. Sources of Law and Evidence

Until 2015, the list of sources used by the Court was enshrined in Article 11 of the 2012 Rules of Procedure. Paragraph 50 of the 2014 Statute fixed a different list, which included generally-recognized principles and norms of international law; the Treaty on the EAEU, the treaties within the Union and other treaties to which the State-parties are participants; decisions and orders of the EAEU organs; international custom. This list differs from the list of sources of Union law enshrined in Article 6 of the Treaty (the Treaty; treaties within the Union; treaties of the Union with a third party; decisions and orders of the EAEU organs) and raises issues related to the definition of the terms "generally-accepted principles and norms," "treaties within the Union" and "other treaties," as well as the hierarchy of the sources. The Court tried to address some of these issues in its jurisprudence.

The sources that the Court uses *de facto* can be divided into several groups. The *first* group includes the Union treaties and Commission acts (2009 Treaty on the CC of the CU, and the 2010 Treaty on the Initiation of Legal Action, the 2011 Treaty on the Functioning of the CU within the multilateral trading system, the 2014 Treaty on the EAEU, the 2017 Treaty on the CC of the EAEU, and others). Unlike EU law, the law of the EAEU is characterized by three serious shortcomings: *first*, in addition to the EAEU Treaty, there are a large number of other treaties, many of which perform an important regulatory function; *second*, the treaties and decisions of the EAEU organs are adopted in the absence of a single rule-making strategy and often contain mutually exclusive or incorrect provisions; *third*, some do not reflect a reasonable balance between public and private interests. As a result, their harmonization and interpretation are often laborious.[5]

The *second* group includes treaties concluded outside the Union (*external* treaties): some are defined as relating to Union law; others – as not related; the

[5] For example, in the Decision of 28 December 2015 (*Tarasik*), the Panel referred to six treaties of the Union, three decisions of the Commission, the Geneva Agreement and two U.N. Economic Commission for Europe documents (not to mention the norms of the domestic law used as legal facts). In the Decision of 3 March 2016, the Appeals Chamber referred to six treaties of the Union, one decision of the Commission, the 1969 Vienna Convention on the Law of Treaties, as well as a group of sources defined as "subsidiary means for the determination of rules of law."

third set – as subsidiary means for the determination of rules of law (for example, the 1973 Convention on the Simplification and Harmonization of Customs Procedures). In *Novokramatorsky Machine-Building Plant* (Decision of 24 June 2013), the Court indicated that the provisions of the WTO Agreement had become part of CU law by virtue of Article 1(1) of the Treaty on the Functioning of the CU and stated that the relationship between CU agreements and WTO agreements is governed by the maxim *lex specialis derogat lex generali*. Legal doctrine reacted critically to this statement: *first*, the priority of the CU agreements is explicitly excluded by Article 2(1) of the 2011 Treaty on the Functioning of the CU; *second*, in this case the Court did not have to consider relations within the Union, but rather relations with a party from a third state (Ukraine) not bound by CU agreements.[6]

In *Tarasik* (Decision of 3 March 2016), the Court indicated that the 1958 Geneva Agreement concerning the Adoption of Uniform Technical Prescriptions for Wheeled Vehicles was not part of Union law because it was not concluded for the purposes and within the framework of forming the CU and EES law. The participation of Kazakhstan in this agreement did not influence the goals of establishing the CU and EES law. It was concluded that the Commission does not have the right to monitor its implementation. However, another logic is possible: technical regulations fall within the competence of the Union (Sec. X of the Treaty), therefore the Commission should be able to monitor the implementation of the treaties that govern relations in this area. In *General Freight* (Decision of 21 June 2016), the Panel indicated that the treaties not within the Union are applied by the Court under two conditions: (1) all Member States participate in the treaty; (2) the scope of the treaty relates to the area of common policy.[7]

The Court often referred to the Vienna Convention on the Law of Treaties without defining its relation to Union law. This problem was solved by the 2014 Statute (para. 51), which allowed the Court to apply treaties on the settlement of disputes, clarification, and interpretation insofar as they are not contrary to the Statute. The Court most often referred to Article 31 (general rule of interpretation); these references, however, were often ritual and not accompanied by thoughtful analysis of

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[6] *See Смбатян А.С.* Концепция «особости» правопорядка Таможенного союза в решении Суда ЕврАзЭС по прокатным валкам // Евразийский юридический журнал. 2013. № 8. С. 31–36 [Anait S. Smbatyan, *The Concept of "Specificity" of the Customs Union Legal Order in the EurAsEC Court Judgment on Mill Rolls*, 8 Eurasian Law Journal 31 (2013)]; *Толстых В.Л.* Недавние решения Суда ЕврАзЭС: попытка доктринального анализа // Евразийский юридический журнал. 2013. № 8. С. 37–42 [Vladislav L. Tolstykh, *Recent Decisions of the Court of EurAsEC: Attempt of Doctrinal Review*, 8 Eurasian Law Journal 37 (2013)]; *Исполинов А.С.* Вопросы прямого применения права ВТО в правопорядке России // Законодательство. 2014. № 2. С. 68–79 [Alexey S. Ispolinov, *Issues of Direct Application of the WTO Law in the Russian Rule of Law*, 2 Legislation 68 (2014)].

[7] The Decisions in *NMBP* point to the second case of the use of "external" treaties, – when the law of the Union contains a direct reference to such a treaty, for example a reference to the WTO agreements contained in the Treaty on the Functioning of 2011 (these agreements were applied by the Court, despite the fact that Belarus and Kazakhstan did not participate in them).

the semantic context. The Court also referred to Article 24 (entry into force); Article 26 (*pacta sunt servanda*); Article 27 (internal law and observance of treaties); Article 28 (non-retroactivity of treaties); Article 30 (successive treaties); Article 34 (general rule regarding third States); Article 41 (Agreements to modify multilateral treaties); Article 53 (treaties conflicting with a peremptory norm);[8] Article 59 (termination of a treaty implied by conclusion of a later treaty).

The *third* group includes principles of law: the Court has most often referred to the principles of legal certainty, uniform regulation, economic feasibility, and *pacta sunt servanda*; on some occasions it has referred to the principles of non-discrimination, *restitutio in integrum*, separation of powers; *lex specialis, lex posterior*, objectivity, lack of retroactive effect, respect for the right to defense, *ultra petita*, persuasive precedent, *ubi jus ibi remedium*, and judicial economy. As a rule, their nature was not specified: the Court described them as "general," "fundamental" or "generally-accepted," but did not indicate whether they were principles of the law of civilized nations, principles of international law, international customs, or axioms of natural law. The Court did not try to formalize them, that is, establish clear grounds and conditions for their use. Some principles were derived from positive law; others – from the Court's own ideas of justice. An active supporter of their use is Judge Neshataeva, who sees in them manifestations of natural law and a tool to resist unreasonable voluntarism.[9]

Sometimes the Court refers to principles to fill gaps in Union law. The apotheosis in this sense was the Decision in *Southern Kuzbass* of 8 April 2013, in which the Court itself determined the effect of its decisions and its relations with the Commission and national courts. It should be noted that there is a certain selectivity in the use of the principles.[10] Thus, while referring to the principles of legal certainty and uniform regulation in a number of decisions, the Court did not refer to them in *ZabaykalResurs* and *RemDiesel* which would enable it to recognize the binding nature of the Explanatory Notes to the CNFEA.[11] Similarly, in *Sevlad* and *General Freight*, the

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[8] In *Southern Kuzbass* (Decision of 8 April 2013) the Court defined the principle of *pacta sunt servanda* as a *jus cogens* norm. This conclusion provoked a reasonable criticism from the part of the doctrine. *See Исполинов А.С.* Решение Большой коллегии Суда ЕврАзЭС по делу Южного Кузбасса: насколько оправдан судейский активизм? // Евразийский юридический журнал. 2013. № 5. С. 19–26 [Alexey S. Ispolinov, *Decision of the Grand Panel of the Court of the EurAsEC on the Case of South Kuzbass: How Justified the Judicial Activism?*, 5 Eurasian Law Journal 19 (2013)].

[9] *See* Separate Opinion of Neshataeva in *RemDiesel* (Decision of 8 April 2015); *Нешатаева Т.Н.* Действие актов международного суда в национальных правовых системах: на примере актов Суда ЕАЭС [Tatiana N. Neshataeva, *The Effect of International Court's Acts in National Legal Systems: The Example of the EAEU Court's Acts*] (Jul. 1, 2019), available at http://courteurasian.org/page-22731.

[10] Alexey Ispolinov called this Decision "the first case of judicial activism in the post-Soviet space." Ispolinov 2013, *Decision of the Grand Panel*.

[11] In *ZabaykalResurs* (Decision of 20 May 2014), the Court explained: "Recommending nature of the provisions of the Explanatory Notes to the CNFEA of the CU cannot be considered as a possibility of unmotivated deviation from these rules, or their lack of the normative qualities allowing uniform customs regulation"; and further: "…Uniform application of recommended behavior is achieved

Court did not use the principle of uniform regulation to substantiate the obligatory character of the classification opinions of the HS Committee.[12]

The *fourth* group consists of soft law sources, such as the 2006 Report of the International Law Commission "Fragmentation of International Law," 2011 Articles on the Responsibility of International Organizations, 1996 International Code of Conduct for Public Officials, 2013 Report of the United Nations International Civil Service Commission, and others. In *Tarasik* (Decision of 3 March 2016), the Court described the Articles of 2011 as subsidiary means for the determination of rules of law. In *ZabaykalResurs*, the issue of qualification of the Explanatory Notes to the HS and the CNFEA was central: the applicant insisted on their obligatory nature (which would allow him to insist on the classification of goods different from the classification carried out by the customs authorities), however, in the Decisions of 20 May and 14 October 2014, the Court qualified the Explanatory Notes as a soft law act. This category of references includes references to EU acts that are not legally binding within the EAEU. It is interesting that the Court never referred to customary law.

The Court participates in *judicial dialogue*, that is, refers to decisions and arguments of other forums: most often – to the decisions of the ECJ,[13] less often – to the jurisprudence of other courts.[14] Such references reinforce the position of the Court and, probably, avoid developing its own substantive arguments. They are often accompanied by phrases such as "this approach is consistent with international jurisprudence"; "a similar conclusion was made in...," and so on. In *Tarasik* (Decision of 28 December 2015), the Court stated:

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not through coercion, but through the voluntary, honest, reasonable application of such norms by parties in economic relations."

12 In *Sevlad* (Decision of 7 April 2016), the Court, however, referred to a Classification Opinion, stating that although "it does not give rise to legal obligations for the Union, it nevertheless has an important role in identifying the normative content of the texts of headings, being a significant source of interpretation."

13 Decisions in *Jackpot* (requirement of certainty of customs legislation, admissibility of joint Union and national regulation); *SeverAvtoProkat* (the applicant's failure to substantiate the economic insolvency of the contested act as a reason for rejecting his argument); *Graphite* (rules of anti-dumping investigation, the right to provide explanations under the administrative procedure); *ZabaykalResurs* (non-obligatory nature of the Explanatory Notes to the CNFEA); *Flex-n-Roll* (general characteristics of the product as a decisive classification criterion); *Tarasik* (definition of inaction); *General Freight* (purpose of the product as an objective classification criterion; the need for all members to participate in the treaty and the transfer of authority to a supranational level as a condition of the treaty binding for an integration organization).

14 Decisions in: *ONP* – the jurisprudence of the ECHR (the right of the applicant, who is at the stage of bankruptcy, to apply to the court); *NMBP* – the DSB Jurisprudence (validity of WTO agreements *ratio temporis*); *Tarasik* – the ICJ Decision on the Asylum case of 20 November 1950 (substantiation of the principle *ne eat iudex ultra petita partium*); *Kuznetsova et al.* – the ECHR jurisprudence (exclusion of civil servants from the sphere of labor law regulation), the European Civil Service Tribunal (professional relations between international employees do not mean a conflict of interests) and the U.N. Administrative Tribunal (prohibiting a person with a conflict of interest to select candidates for positions).

> The legal positions and jurisprudence of other courts can be taken into account when deciding on similar issues. This corresponds to the principle of *persuasive precedent* (convincing precedent), according to which, specific court decisions and the views expressed in them do not set a precedent but are taken into account when passing subsequent judicial acts.

The Court also uses its own internal jurisprudence. Sometimes this jurisprudence formed the factual context, that is, reaffirmed the uniform practice of classification affecting the applicant's rights, and others. In other cases, it contributed to the definition of obscure concepts (non-receptive reference); for example, in *Tarasik* (Decision of 28 December 2015) the Court referred to the acts of the highest courts of Member States while determining the concept of inaction. Finally, it sometimes had a prejudicial effect: for example, in *NMBP* (Decision of 24 June 2013), the Court stated that the findings of the Russian Supreme Arbitrazh Court on the legality of an anti-dumping decree of the Government represent information about facts that need not be proved. The Court also referred to its own decisions, determining them as precedents. Thus, in *General Freight* (Decision of 4 April 2016), it stated that the decisions of the EurAsEC Court can be used by the EEAC Court as *stare decisis*.

In some decisions the Court used national legislation. *First*, to clarify obscure concepts (non-receptive reference). Thus, in *Jackpot* (Decision of 31 October 2013), it indicated that the term "transaction" should be determined on the basis of national legislation and referred to the Civil Codes of Member States. *Second*, it referred to national acts which expressed consent to treaties (the consent of all Member States is considered as one of two conditions for attributing the treaty to the Union law). Thus, in *Flex-n-Roll* (Decision of 27 October 2014), and *General Freight* (Decision of 4 April 2016), it established that Member States are bound by the 1973 Convention on the HS. *Third*, in several cases, the Court had to answer the question about the conformity of national laws with the Union law. Each time the Court decided this question in favor of the States.

As an example, in *Vichunai-Rus*, the applicant claimed that the 2006 Russian Law "On the Special Economic Zone in the Kaliningrad Region" contradicts the 2010 Agreement on the issues of free economic zones. In the Decisions of 30 May 2014, and 7 October 2014, the Court did not support this position, stating that the applicant did not prove the non-uniform application of treaties which would confirm the violation of his rights. In *Tarasik* (Decision of 28 December 2015), the Court found that the Tax Code of Kazakhstan does not contradict international treaties, since compiling a list of excisable goods is an exclusive right of a Member State (accordingly, the description of these goods can differ from the description contained in the HS); and has a scope different from that of the 1958 Geneva Agreement on the adoption of uniform technical regulations for wheeled vehicles. In the Decision of 3 March 2016, the Appeals Chamber added an argument according to which the Geneva

Agreement is not part of Union law and, accordingly, its implementation shall not be monitored by the Commission and the Court.

The main source of information for the Court is materials submitted by the parties. In addition, the Court requests: (a) information about facts from subjects connected to the case (enterprises interested in anti-dumping measures; national courts that decided the cases involving the applicant, antimonopoly organs, and so on); (b) information on the practice of customs authorities and higher courts; (c) opinions on technical issues from specialists (characteristics of the goods under the classification; the similarity of the goods subject to anti-dumping measures); (d) opinions on legal and customs issues from the World Customs Organization, European Commission, customs organs, ministries of justice, economics, finance, specialists and universities[15] (the competence of the Commission, the legal force of Explanatory Notes to the CNFEA, the procedure for granting privileges, classification rules). In some cases, witnesses were involved (an employee of the authorized organ in *NMBP*). The Court did not give any explanations regarding the value of different categories of evidence.

4. Argumentation

The main part of Court decisions consists of retelling the facts, citing legal acts, and general remarks regarding the nature of the EAEU – a kind of white noise to which the sophisticated reader pays no attention. The reasoning is short and often inadequate.

First, some Court arguments do not conform to formal logic. For example, in the Opinion of 30 October 2017 (*Commission*), the Court considered that because Article 29(3) of the Treaty does not mention who can introduce restrictions on the turnover of certain categories of goods, Member States can introduce them jointly (para. 5). However, the latter does not necessarily follow from the former. In the Opinion of 11 December 2017 (at the request of *Mr. Adilov*), the Court considered that Article 99 relates to the continuation of labor relations, but did not settle the issue of their termination; however, the continuation excludes the termination.

Second, the Court does not explain its reasons for prioritizing the use of a specific method of interpretation. For example, in the Opinion of 20 November 2017 (at the request of the *Ministry of Transport and Roads of Kyrgyzstan*), it used the teleological method and neglected the grammatical one. On the contrary, in the Decision of 8 April 2016 (*RemDiesel*), it used the grammatical method and neglected the teleological

[15] Sometimes the requested person did not respond to the request. Thus, in *Jackpot*, the World Customs Organization did not comment on the interpretation of the CU law, indicating that the issue was not in its competence. Sometimes the Court did not agree with the opinion of the requested person, as happened in *ZabaykalResurs*, where the Court did not accept the interpretation presented by Prof. Sergey Bakhin. In *Oil Marine Group* (Decision of 11 October 2018), the Court did not set out the position of the specialists, apparently due to their inconsistency with the position of the Court itself.

one. In the Opinion of 30 October 2017 (at the request of the *Commission*), the Court tried to give meaning to all three points of Article 29 of the Treaty (the principle of effectiveness), but in the Opinion of 11 December 2017, it refused *de facto* to take into account Article 99 of the Treaty.

Third, the Court does not maintain the balance of descending arguments appealing to justice, and ascending arguments that consider the will of States. The descending pattern prevails in the early decisions (*Southern Kuzbass*, etc.)[16]; the ascending one – in the modern decisions. This imbalance is due to the dominance of the positivist tradition; the Court desire for comfortable relations with Member States and the Commission, as well as a direct ban on judicial activism. The situation is exacerbated by the low quality of regulations, which weakens the ascending pattern, and the uncertainty of the integration project, which weakens the descending pattern.

Fourth, the Court seldom resorts to thoughtful grammatical interpretation, involving deconstruction (breaking the phrase into elements), contextual analysis (ascertainment of the relationship of the interpreted norm to other norms), and analysis of all possible versions,[17] that is, the technique constantly used by the ICJ and often by the ECJ. Instead, it often delves into finding out the meaning of obvious terms, for example, the terms "prohibition" and "criterion of admissibility" (Opinion of 4 April 2017, at the request of the Ministry of Justice of Belarus).

Fifth, the Court emphasizes the independence of the EAEU but often refers to the positions of the ECJ and other international courts and sometimes uses them as the main argument. For example, in the Opinion of 12 September 2017 (at the request of the *Commission*), it outlined the criteria for limiting Commission discretion when taking management and staffing measures from the jurisprudence of the U.N. and ILO Administrative Tribunals (para. 6), without showing how this jurisprudence affects the Union. References to the decisions of the ECJ are regular in the decisions on qualification cases.

The poor quality of the reasoning is compounded by linguistic defects. Decisions of the Court are overloaded with long and complex forms, whose meaning cannot be understood in the course of reading: to do this, one needs to stop and reword the text, removing unnecessary elements. For example, one of the sentences of the Decision of 7 October 2014 (*Vicyunai-Rus*), contains about 80 nouns in different relations with each other (The Decision of the Panel... refused...); one sentence of the Decision of 3 March 2016 (*Tarasik*), contains about 60 nouns ("The Appeals Chamber considers that...").

The Court, in principle, prefers complex wording over simplicity and does not attempt to shorten the text by using pronouns and abbreviations, omitting unnecessary

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[16] This pattern is followed by some judges in their separate opinions – especially by Judges Neshataeva and Chaika. The greatest concentration of ascending arguments is in the Separate Opinion of Neshataeva to the Decision of 8 April 2016 (*RemDizel*), and in the Joint Separate Opinion of Neshataeva and Chaika to the Decision of 8 April 2014 (*Ministry of Economy of Kazakhstan*).

[17] An exception is Separate Opinions of Judge Chaika, in which this technique was used regularly.

details, as other courts do. It writes "involves the implementation of cooperation" instead of "involves cooperation," "fact of implementation" instead of "implementation," "provide for an obligation" instead of "oblige," and so on. Many words are redundant; good editing could reduce the volume of acts by half without losing the meaning.

Unfortunately, almost every decision contains illiterate formulations. By way of example, the Decision of 21 February 2017 (*compliance by Belarus with the Treaty*), states that the decisions of the customs organs "*have* a presumption," and Article 125 of the CU CC "*contains* the mutual recognition of acts"; the Opinion of 11 December 2017 (at the request of *Adilov*), states that "by announcing a competition... the fact should be checked by the Commission." The Opinion of 20 November 2017 (at the request of the *Ministry of Transport of Kyrgyzstan*), mentions the "territory of the State of the Party"; some decisions mention norms (articles, clauses) "regulating legal relations," although legal relations are *already* regulated by law.

Other defects include absence of the subject (Decision of 28 December 2015); tautologies: "a unilateral review of... decisions was a violation of the norms, which... led to a violation of the freedom of movement of goods" (Decision of 21 February 2017), "the objectives of the EAEU determine the focus of the norm... on their achievement" (Opinion of 20 November 2017); long sequences in the genitive – "the fact of compliance of the conditions of the competition" (Opinion of 11 December 2017); inappropriate use of Latin: "sufficient grounds for sending rogatory letters which do not have *an equivocum*" (Decision of 21 February 2017).

The problem is not only the lack of artistic merit: In the end, the judicial decision is not a novel. Rather, the matter is that, when producing a hard-to-read text, the Court neglects its function of ensuring the uniform application of Union law and deprives itself of the right (at least moral) to require that national courts consider its position. An indirect result of this neglect is inattention on the part of the doctrine. According to the publications, besides the employees of the Court, only a few people regularly read its decisions (Ludmila Anufrieva, Alexey Ispolinov, Annait Smbatyan, Vladislav Tolstykh). It is possible that many scientists who try to analyze the Court jurisprudence cannot overcome the "language barrier." The Court approach to drafting has been criticized,[18] but the Court either has not noticed it or does not consider it necessary to react.

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[18] *See Смбатян А.С.* Решения Суда ЕврАзЭС не вызывают научного интереса? // Евразийский юридический журнал. 2014. № 6. С. 63–68 [Anait S. Smbatyan, *Don't the Decisions of the EuraAsEC Court Attract Scientific Interest?*, 6 Eurasian Law Journal 63 (2014)]; *Толстых В.Л.* Развитие практики Суда Евразийского экономического союза (на примере дела «ИП. Тарасик К.П. против Комиссии») // Евразийский юридический журнал. 2016. № 3. С. 16–19 [Vladislav L. Tolstykh, *Development of the Practice of the Court of Eurasian Economic Union (the Case "Tarasik IP v. Commission")*, 3 Eurasian Law Journal 16 (2016)]; *Толстых В.Л.* Практика Суда ЕАЭС/Суда ЕврАзЭС: проблемы правоприменения и некоторые итоги // Международное правосудие. 2016. № 4. С. 114–128 [Vladislav L. Tolstykh, *Jurisprudence of the Court of the EEU/Court of the EEC: Problems of the Application of Law and Some Results*, 4 International Justice 114 (2016)]; *Толстых В.Л.* «Небесная» и «земная» жизнь Суда Евразийского экономического союза: обзор Решения Суда от 21 февраля 2017 года по делу

A specific problem is the lack of a narrative in the decisions that are sensitive to Member States. This technique allows the Court to present the dispute as an abstract and depoliticized question. For example, in the Decision of 21 February 2017 (*compliance by Belarus with the Treaty*), the information on the facts is limited to one (!) phrase that there was a "unilateral review by the customs authorities of the Republic of Belarus of decisions previously adopted by the customs authorities of the Russian Federation."[19] The Opinion of 30 October 2017 mentions that the Commission identified various approaches to the interpretation of Article 29 of the Treaty, but does not disclose in what circumstances they were formulated. The Order of 17 January 2018, issued by the Court at the dismissal request of the Ministry of Economy of Kazakhstan, does not indicate that the request was sent by e-mail and was later confirmed by an unsigned note of the Embassy of Kazakhstan. It should be noted that these efforts of the Court are largely in vain because the missing information is usually reflected in separate opinions.

This practice hardly corresponds to the tasks of justice. *First*, the narrative is a necessary condition for legal qualification; if absent, it is not clear what circumstances the reasoning relates to and how the resume should be implemented. S*econd*, it plays a special role with regards to the Court function of ensuring the uniform application of the Union law: in its absence, national authorities will not be able to uniformly apply Union law in the same circumstances.[20] *Third*, the "respect" shown in relation to Member States turns into disrespect towards national courts and the doctrine, which are forced to make superfluous efforts to comprehend the Court's logic.

о соблюдении Белоруссией Договора о ЕАЭС // Международное правосудие. 2017. № 4. С. 18–25 [Vladislav L. Tolstykh, *The "Heavenly" and "Earthly" Life of the Court of the Eurasian Economic Union: A Review of the Judgment of the Court in the Case Involving Belarus' Adherence to the Treaty on the EEU*, 4 International Justice 18 (2017)].

19 Alexey Ispolinov writes about this Decision: "The whole situation was presented not as a 'culprit-victim' pair, but as a different understanding, interpreting and applying the relevant norms of the Union law. This allowed the defendant to save face and drastically reduced the possibility of using this Decision of the Court for political purposes. It is one thing to incriminate, saying that someone's fault is proven by the court, and it's completely different to have a decision that speaks only about the difference of interpretations..." *Исполинов А.* Решение Суда ЕАЭС по спору Российская Федерация против Республики Беларусь: правосудие посреди политического конфликта // Закон.ru. 17 марта 2017 г. [Alexey Ispolinov, *The Decision of the Court of the EAEU on the Dispute of the Russian Federation Against the Republic of Belarus: Justice in the Middle of a Political Conflict?*, Zakon.ru, 17 March 2017] (Jul. 1, 2019), available at https://zakon.ru/blog/2017/3/17/reshenie_suda_eaes_po_sporu_rossijskaya_federaciya_protiv_respubliki_belarus_pravosudie_posredi_poli.

20 Judge Chaika drew attention to this point in the Separate Opinion to the Opinion of 30 October 2017: "The subject of explanation is not only an abstract interpretation... but a clarification of the significance of legal norms in relation to specific circumstances... Interpretation *in concreto* contributes to the implementation by the Court of the Union of the task of ensuring uniform application of the Union Treaty by the Member States and the Union's organs, as it allows to give an answer to the question put to the Union's Court not only in legal but also in factual context... It is important that in interpreting the Union norm the Union's Court must have sufficient information about the subject of the request and the factual circumstances that served as the basis for applying to the Union's Court, and also to set it out in the text of the judicial act."

These problems have several causes. *First*, the shortcomings of the decisions are partly due to the shortcomings of the applicable acts. Thus, in the Opinion of 4 April 2017, the Court had to interpret the obscure Article 76(4) of the Treaty, and in the Opinion of 30 October 2017 – the unclear Article 29. *Second*, because of its presence in Minsk, the Court is distant from Moscow and, more generally, from Russian academia, which could provide it with valuable expert assistance, including through the Scientific Advisory Board, whose establishment is long overdue. *Third*, there are subjective reasons: the focus of the Court on the internal model of legal proceedings, which does not imply a detailed argument; insufficient use of international standards; organizational difficulties (for example, the absence of literary editing), etc.

5. Procedural Issues

The issues related to the determination of its competence and the procedural rights of the parties were most difficult for the Court. These difficulties are explained, *first*, by the ambiguity of the procedural rules, the responsibility for which lies partly on the Court itself; *second*, by the politicization of substantive issues, the solutions of which the Court tried to avoid by adopting procedural acts; *third*, by the Court's aspiration, especially in the early cases, to expand its influence on the integration. Therefore, many of the Court's procedural solutions seem vulnerable.

(1) In the first case (*Southern Kuzbass*) the Court faced the problem of the execution of its decisions. In the Decision on the merits, it recognized that the Commission decision is inconsistent with international treaties, however, the Commission amended the decision only 4.5 months after the decision; moreover, the amendments were to take effect a month after their publication. At the same time, the 2010 Agreement on the Initiation of Legal Action only gave the Commission 60 days to execute the Court decision. In the Decision of 8 April 2013, the Court expressed indignation about Commission conduct, stating that its delayed response "disavows the Court decision, upsets the balance of powers and makes the execution of the Court's decisions dependent on the discretion and will of the executive which violates the principle of separation of powers." It also pointed out that its decisions entail the invalidity of the Commission acts *ab initio*, applying *erga omnes* can indicate the execution towards the Commission, Member States, and national courts. Perhaps the Court was guided by the model of the ECtHR "pilot" decisions. On one hand, in light of the ambiguity of the 2010 Treaty, it had no other choice; on the other hand, some conclusions were made *ultra petita*, and the peremptory character of the Decision turned its potential allies (the Commission and national courts) away from it.

(2) In *RemDiesel*, the Court analyzed its jurisdiction in relation to the recommendations of the Commission. According to the footnote to the Subheading 8408 10 of the CNFEA, contained in Commission Recommendation No. 4 of 2013, this subheading does not include engines used on ships for purposes other than

propulsion. The claimant qualified the engines imported by it in Subheadings 8408 10 (engines for ship power plants, the custom rate is 0%); in 2014, the customs authorities re-qualified this product for Subheading 8408 90 (other engines, the rate is 9%). The Court opened the proceedings, but the Commission asked to discontinue, stating that in accordance with paragraph 39(2) of the Statute only its *decisions* can be contested before the Court (according to Article 5 of the 2011 Treaty on the Commission and paragraph 13 of the Commission Statute, the Commission adopts decisions and recommendations). In the Decision of 8 April 2016, the Court agreed with this assertion, stating that the decisions and recommendations of the Commission differ in nature, objectives, and strength: the recommendations are not legally binding, not included in the Union law (Art. 6 of the Treaty), and cannot be challenged before the Court. The Court position looks too literal: a ban on challenging recommendations can be interpreted teleologically: it makes sense when it applies to Member States that may refuse to comply with them; however, they bind economic entities *de facto*, and the only remedy is to bring the case to the Court.[21]

(3) Some procedural problems are systemic. An example is the problem of challenging the Commission inaction in monitoring the implementation of treaties. Before the entry into force of the Treaty, this procedure was governed by Article 20 of the 2011 Treaty on the Commission: The College of the Commission based on the results of monitoring could send the Party a notice of the need for implementation, refer the matter to the Council of the Commission or appeal to the Court. At present, the monitoring is regulated by the Commission Statute (Appendix No. 1 to the Treaty): The College monitors implementation of treaties and notifies Member States about the need to implement treaties and decisions, and the Council reviews the results of monitoring. The Commission was deprived of the right to appeal to the Court; such right belongs only to Member States. At the same time, there is no clear provision in Union law on whether the Commission should react to the requests of economic entities who ask it to monitor the implementation of treaties and whether these entities can appeal against its failure to act.

In *Vichunai-Rus* (Decision of 30 May 2014), the Panel indicated that the Commission should apply to the Court only when the ambiguity of Union law had violated the applicant's rights, and it considered that the applicant did not provide evidence of such a violation (although it was subject to administrative sanctions). The Appeals Chamber in the Decision of 7 October 2014 specified that such a violation may be evidenced by the non-uniform practice of application of treaties. In *Orda Munai Trade* (Decision of 14 October 2014), the Court rejected the claim because the applicant

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[21] In *Commission v. Council* (Decision of 31 March 1971), the ECJ emphasized the possibility of appeal against all acts of EU bodies, whatever their nature or form, "which are intended to cause legal consequences" (para. 42). In *IBM v. the Commission* (Decision of 11 November 1981), it reaffirmed this conclusion and noted that "the form in which acts, or decisions were adopted is, in principle, irrelevant for establishing the possibility of challenging them" (para. 9).

did not present evidence confirming the absence of the uniform practice of treaty application. In *Tarasik* (Decisions of 28 December 2015 and 3 March 2016), the Court adjusted its position, indicating that the monitoring may be carried out not only in the case of non-uniform application of treaties, but also in the case of their non-performance. Such evidence, according to the Court, was not presented. Thus, in these three cases, the Court rejected claims of business entities, referring to their failure to provide the necessary evidence. This position is vulnerable because in some cases, there was evidence to conclude that the State did not comply with treaties and decisions. However, the Court has consistently maintained a common line.

In *Oil Marin Group* (Decision of 11 October 2018), the Court decided to cease this practice. At first, it described in general terms the monitoring procedure and indicated that business entities have a legitimate interest in the execution of treaties, and accordingly, in monitoring; their appeals are not an absolute basis for monitoring but can be sources of information. Then, it unexpectedly referred to the meeting of the Working Group held in 2014 (long before the economic entity applied to the Commission) at which a certificate about the non-uniform application of the norm (Art. 347(1) of the CC) was submitted. After that, it reproached the Commission for not studying law-enforcement practice and declared its failure to act as inconsistent with the Commission Regulation. The position of the Court is unconvincing. The applicant did not ask and, for natural reasons, could not ask the Commission to carry out monitoring throughout the entire period of validity of the relevant acts; it wanted the Commission to monitor *after* its appeal (2017). The Court could not consider the Commission inaction until the applicant's appeal. Because it did not affect the applicant, the applicant did not appeal it and the negotiation mechanisms required by paragraph 43 of the Statute were not exhausted with respect to it. Consideration of this inaction on the Court's own initiative, without relying on the applicant's statement (*ultra petita*), is, in fact, an attempt by the Court to arrogate the right of general control over the Commission's activities.

At the same time, the Court ignored the issue of the Commission's *duty* to monitor at the request of the economic entity, and the corresponding right of this entity to appeal the Commission inaction, apparently realizing that the only correct solution was to establish the absence of this duty. Indeed, *first*, the Commission, being an organ of the Union, does not have the right to interact with economic entities outside the limits established by the Treaty; *second*, its main function is rulemaking (not dispute resolution); *third*, its inaction does not *directly* affect the rights of the applicant (a monitoring, even culminating in finding a violation, would not restore these rights: In addition, it is necessary that the Commission request a relevant Member State, which will satisfy this claim, the appeal of the economic entity to the national court for a review of the case, and so on; *fourth*, business entities challenging the Commission refusal to monitor can be qualified as circumvention of the law, aimed at overcoming the negative consequences of the absence of procedural opportunities for these entities and the Commission, to appeal to the

Court against Member States. Thus, the Court should have justified the discretion of the Commission when deciding whether an appeal to the Court is about the inaction of the Commission (this is how the issue is resolved by the ECJ).[22]

(4) Another systemic problem is withdrawals of requests for interpretation, made at the later stages of the process. Thereby, the applicants are trying to avoid unfavorable decisions that the Court is ready to render. In the *first* case, the Supreme Economic Court of Belarus requested a prejudicial interpretation of the Commission's decisions on customs exemptions; on 22 April 2013, the request was accepted, and on 6 May, it was withdrawn. On 20 May, the Court rejected the withdrawal, referring to the interests of procedural economy, the possible delay in the consideration of the case, the work already done, and the absence of a national decision to reopen the proceeding. This position was possible because Article 37(1c) provides that the termination of the case by withdrawal was allowed if "the withdrawal is accepted by the Court."[23]

In the *second* case, the Ministry of Economy of Kazakhstan requested an interpretation of the 2010 Agreement on Public Procurement. In the Decision of 8 April 2014, the Court quoted Article 18 of the Agreement, according to which the disputes of the parties should be settled by negotiations, and only if they are unsuccessful, the Court shall settle the disputes, referring to the ongoing negotiations to amend the Agreement and ceasing the proceeding. Kazakhstan did not object; one can assume that it was the main concerned party.[24] Thus, the advisory procedure was discontinued on the basis of the rules governing dispute proceedings. The Court did not delimit these proceedings, did not explain why its task could not be carried out, and created a dangerous precedent that allows blocking the advisory function by referring to interstate negotiations.[25]

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[22] *See Исполинов А.С.* Первое решение Суда ЕАЭС: ревизия наследства и испытание искушением // Российский юридический журнал. 2016. № 4. С. 85–93 [Alexey S. Ispolinov, *The First Decision of the Court of the EAEU: Audit of the Inheritance and the Test of Temptation*, 4 Russian Juridical Journal 85 (2016)]; *Кембаев Ж.М.* Сравнительно-правовой анализ функционирования Суда ЕАЭС // Международное правосудие. 2016. № 2. С. 39–40 [Zhenis M. Kembaev, *The Comparative Study of Functioning of the Court of the Eurasian Economic Union*, 2 International Justice 30, 39–40 (2016)].

[23] Alexey Ispolinov called this approach of the Court "peremptory, if not to say degrading national court" and predicted the growing isolation of the Court. *Исполинов А.С.* Навязанный монолог: первое преюдициальное заключение Суда ЕврАзЭС // Евразийский юридический журнал. 2013. № 8. С. 29–30 [Alexey S. Ispolinov, *An Imposed Monologue: The First Preliminary Ruling of the Court of the Eurasian Economic Community*, 8 Eurasian Law Journal 21, 29–30 (2013)]. These predictions came true: The new Statute deprived the Court of the powers of prejudicial interpretation and banned any manifestations of activism, and Article 76(1) of the new Rules of the Court allows the withdrawal of the request at any time prior to the delivery of the opinion.

[24] This follows from the Separate Opinion of Tatiana Neshataeva to the Decision of 17 January 2018, p. 3.

[25] Judges Neshataeva and Chaika rightly criticized this approach in the Joint Separate Opinion. In *Aegean Sea Continental Shelf* (Judgment of 19 December 1978) the ICJ indicated: "The fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function" (para. 29).

In the *third* case, the Ministry of Economy of Kazakhstan requested an interpretation of the Protocol on the Procedure for Deposit and Distribution of Import Customs Duties. Kazakhstan did not apply the Protocol to the duties paid under contracts in the field of subsoil use, believing that it is part of the customs legislation of the CU, which by virtue of Article 372 of the CU CC, does not apply to these contracts. On 16 November 2017, the Court initiated the proceedings. On 16 January 2018, the Court received an e-mail with a copy of the applicant's withdrawal; on 17 January, an unsigned note from the Embassy of Kazakhstan in Belarus about forwarding this copy was received. In the Decision of 17 January 2018, the Court considered that the necessary formalities were completed and ceased proceedings with reference to Article 76(1) of the new Rules.

At present, there are two opposite opinions on this issue. According to Judge Neshataeva, there is a "common line" in international jurisprudence pursuant to which the withdrawal of an application is not allowed if the applicant knows the draft decision. This is because that the court operates on taxpayer money, which must be spent efficiently, and deserves respect, especially if it has carried out the preparatory work and drafted the decision. This line is reflected in Article 100(1) of the Rules of Procedure of the ECJ. Discontinuance at a later stage violates the principles of independence and impartiality of the Court. There is a risk that the draft decisions will become known to the applicants "by negligence" of someone at the Court; such "negligence" is an offense against justice. The Court must find a way to resolve this problem and influence a change in the Statute.[26] According to Ispolinov, a reference to the work accomplished is contrary to the principles of justice. The withdrawal of an application is within the exclusive discretion of the applicant. This is confirmed by examples from the practice of the ECJ, in particular, by the Decisions in *Cartesio Oktató* of 16 October 2008. The idea of a respectful and equal dialogue between the ECJ and the national courts implies the right of the latter to withdraw its request.[27]

Both positions are vulnerable. *First*, they refer to the practice of withdrawing requests for preliminary ruling, which are related to specific cases before national courts. That is exactly what Article 100 of the Rules of Procedure of the ECJ means. However, the preliminary ruling proceeding is different from an advisory one carried out at the request of States. Whereas the State is usually interested in the general aspect, the national court seeks to consider a specific case, and its interest could disappear due to procedural facts, for example, because of an amicable settlement or dismissal. The advisory proceedings are regulated by Section VII of the Rules of Procedure of the ECJ (Arts. 196–200), which does not mention an option of withdrawal of the request. *Second*, both positions use

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[26] *See* Separate Opinion of Judge Neshataeva to the Decision of 17 January 2018.

[27] *See* Ispolinov 2013, *An Imposed Monologue*; *Исполинов А.С.* Особые мнения в международных судах: доктрина и практика // Право. Журнал Высшей школы экономики. 2018. № 1. С. 229–231 [Alexey S. Ispolinov, *Separate Opinions in International Courts: Doctrine and Practice*, 1 Law. Journal of the Higher School of Economics 218, 229–231 (2018)].

an argument based on the need for "respect": either towards the Court of the EAEU (Neshataeva) or towards national courts (Ispolinov). However, respect for the authority is determined by its function, which should serve as a measure when deciding the issue of withdrawal: if the EAEU Court considers that the problem exposed by the State is of a general nature (that is, associated with uniform application), it must refuse to accept withdrawal. The analogy here is not to a civil lawsuit, but to a public prosecution in a criminal proceeding. Such an approach could relieve tensions; currently, however, it is excluded by Article 76(1) of the Rules.

6. Separate Opinions

As a rule, important acts of the Court are accompanied by separate opinions; the Decision of 21 February 2017 (*compliance by Belarus with the Treaty*), holds the record and is accompanied by five opinions. Separate opinions indicate that the decision was taken as a result of lively discussion and reflect natural disagreements among the judges.[28] In world practice, this issue is not solved uniformly. The statutes of some courts (ICJ, ITLOS, ECtHR) permit separate opinions, whereas the statutes of other courts (ECJ) do not. Some authors believe that separate opinions contribute to the dialogue between the judges, development of law, and so on;[29] others cite the need for a unified position, in the absence of which the integration process will be difficult. The last argument is of particular importance in the EAEU, which provides great opportunities for States to resist the integration impulse. However, this order has a large deficit of informal legal structures and accordingly a need for an intense judicial and doctrinal discussion which could stimulate their creation. That is why the separate opinions are quite useful.

In theory, separate opinions should challenge or develop the conclusions contained in the main act, fill gaps, suggest alternative options, and the like. The practice of the Court, however, follows a different path: the objecting judges often discuss irrelevant issues. *First*, they describe the facts omitted in the decision, thereby doing the work of the Court. *Second*, they discuss issues not addressed at this stage: for example, in Opinions to the Decision of 21 February 2017, the objecting judges paid much attention to the already resolved issue of the Court jurisdiction. Conversely, Judge Chaika proposed his own version of the merits in his Opinion to the Order on discontinuance of 17 January 2018, justifying this by saying that the applicant

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[28] Alexey Ispolinov writes: "The presence of a significant number of dissenting opinions in the most radical way weakens the perception of the Decision by all interested parties, calls into question its persuasiveness and even legitimacy." Ispolinov, *supra* note 19.

[29] Judge Neshataeva writes: "The Institute of Separate Opinion helps to formalize various approaches. If the judges propose several legal constructions, this is better for the future development of law…" *Нешатаева Т.Н.* Суд ЕАЭС в действии. Интервью // Евразийский юридический журнал. 2016. № 9. С. 12 [Tatiana N. Neshataeva, *The Court of the Eurasian Economic Union in Action. Interview*, 9 Eurasian Law Journal 11, 12 (2016)].

withdrew the application at the final stage.[30] *Third*, they present purely theoretical positions having no direct connection with the decision, or make general complaints against the majority, publicizing the situation of conflict within the Court and thereby damaging its authority. As a result, separate opinions cease to perform their main function, but become a platform for the sounding of purely theoretical concepts, propositions *de lege ferenda*, picking on other judges, and sophistic exercises. The solution lies on the ethical and organizational plane, not the legal one.

7. Substantive Issues

Appeals of economic entities mostly related to the classification of goods in the CNFEA, anti-dumping duties, and the use of customs privileges. In *Sevlad* (Decision of 7 April 2016), the Court *de facto* adjusted Article 45 of the Rules, which requires to verify the powers of the Commission and establish the fact of violation of the rights and the conformity of the decision itself with the treaties while considering applications for challenging the Commission decision. The Court noted that Article 45 does not establish a sequence of proving, and indicated that

> [w]ithout assessing the conformity of the Commission's decision with the Union's law, it is not possible to establish the fact of violation of the rights and legitimate interests of a business entity provided by the Treaty and/or international treaties.

Thus, the tautology enshrined in Union law was overcome (the violation of the rights granted by the treaties always implies the violation of the treaties themselves).

In the vast majority of classification cases the Court supported the Commission (one exception is *ONP*); its position on the application of customs law, however, was not always consistent and well-founded. The apotheosis in this regard is *Sanofi-Aventis Vostok*, which dealt with the classification of the cartridge holders and the mechanical parts used to make insulin-containing medicines produced in the form of disposable (one-off) syringe-pens. The applicant classified the goods according to code 9018 90 840 9 – "Instruments and devices used in medicine... – tools and equipment." On 3 October 2017, the Commission Board adopted Decision No. 132, according to which the classification of these goods was carried out in subheadings 9018 31 – "Devices used in medicine... – syringes, needles." This led to an increase of the tariff burden for the applicant. The Court supported the Commission (Decisions of 21 December 2018 and 7 March 2019). However, Judge Chaika, in his separate opinion, subjected the Court's position to convincing criticism. He indicated that according to Article 22(1) of the EAEU CC, the decision of the Commission on

[30] Alexey Ispolinov correctly notes that "this can put the EAEU Court in a very delicate situation if it will receive the same applicant's repeated appeal on the same issue." Ispolinov 2018, at 228.

classification can be made only if there is a non-uniform practice of applying the CNFEA, but in this case this did not take place. In addition, the Court was to compare the properties of the components for the syringe pen with the product named in subheading 9018 31 "syringes with needles or without needles." Syringes-pens and syringes have different properties: the syringe-pen is used exclusively for injecting fluid, and not for removing it; and the syringe suggests the possibility of piston movement in both directions.

In anti-dumping cases, the greatest difficulties were raised by the collection and assessment of evidence. Here there was evidence collected and analyzed by the organ of anti-dumping investigation, but the business entity questioned the conclusions made on the basis of this evidence or presented new evidence. In *NMBP*, the Court assessed the actions of the authorized organ and also made an independent analysis about the presence of dumping based on the materials collected by this organ and new evidence (Decision of 24 June 2013). In *Graphite*, the Court stepped back from this position, abstained from such independent research, and confined itself to retelling the information collected by the Commission and its conclusions (Decision of 24 March 2014).[31] In *Angang* case, the Court merely confined itself to checking the investigation procedure (Decisions of 9 and 29 December 2014). Thus, the Court's position with regard to the subject of proof and the burden of proof has been changed; the new standard was fixed in Article 45(2) of the new Rules.

In *ArcelorMittal Kryvyi Rih* (Ukraine), the main issue was whether the anti-dumping procedure was correct. The Commission launched an investigation in 2013; in 2016, that is, 28 months later, it introduced the antidumping duty (Decision No. 28). In the Decision of 27 April 2017 the Court recognized its actions as lawful, stating that the investigation period did not exceed eighteen months, established by Article 30 (13-2) of the 2008 Agreement on the Application of Special Protective, Anti-Dumping, and Countervailing Measures and paragraph 217(2) of the Protocol on the application of these measures to third countries (Appendix No. 8 to the Treaty). In its opinion, the date of completion of the investigation is the date when the Commission considers the report on the results of the investigation and the draft decision (para. 219 of the Protocol), and not the date of the decision itself because the Agreement and the Protocol do not fix specific deadlines for the decision. The position of the Court was criticized by Judge Chaika, who indicated in his Separate Opinion that the phrase

[31] The Court pointed out: "According to the established international jurisprudence, the determination whether the damage was caused to industry and, if so, was associated with dumping or subsidized imports, and whether imports from other countries or other known factors affected the damage, involves the evaluation of complex economic issues for which [state] institutions enjoy wide discretionary powers. Consequently, the consideration by the courts of assessments given by the institutions should be limited to establishing compliance with procedural rules, the accuracy of the facts on which the contested decision is based, and the presence of any obvious evaluative errors or abuse of authority." The Court also stated that it "agrees with the conclusion of the organ that conducted the investigation, since the applicants produce to the Court no evidence to disprove the information contained in the materials of the anti-dumping investigation."

"the Commission's consideration of a report" means that within eighteen months not only the report and the draft decision should be submitted, but the decision itself must be made; the decision completes the investigation, and the preclusive period guarantees legal certainty. Indeed, the logic adopted by the Court, according to which Member States set a deadline for a separate stage of the procedure but did not set a deadline for the procedure as a whole, raises strong doubts.

In *Tarasik*, the Court had to answer the question of whether the tax legislation of Kazakhstan, which describes the goods differently from customs legislation and technical regulations, complies with Union law. In the Decisions of 28 December 2015 and 3 March 2016, the Court found that all three legal corpus have different scopes – accordingly, their strict correlation is not necessary.[32] In a similar manner, the Court considered one applicant's arguments in *Sevlad*: in the Decisions of 7 April 2016 and 2 June 2016, stating that the emergence of additional obligations to pay VAT due to a change in the classification code does not violate the rights granted by the Union law because the latter does not regulate tax relations (such violation can only be presumed in the case of additional customs duties).

The advisory opinions of the Court addressed issues of customs declaration, the Commission competence, the status of its staff, legal assistance in customs matters, labor migration, distribution of customs payments between States, among others. Many opinions addressed simple questions; while answers formulated by the Court were also quite obvious.

The Opinion of 3 June 2016 (at the request of *Kuznetsova et al*.) clarifies the procedure of attestation of the Commission staff. The Opinion of 1 November 2016 (at the request of the *Ministry of National Economy of Kazakhstan*) states that preferential rates for quotable goods are applied if the goods are imported and the custom declaration is filed during the period of validity of the import license. The Opinion of 4 April 2017 (at the request of the *Ministry of Justice of Belarus*) indicates that the States could not establish the criteria for admissibility of "vertical" agreements (between the seller and the buyer) other than those provided for by the Treaty. The Opinion of 12 September 2017 (at the request of the *Commission*) explains the relationship between the Union law and *lex loci laboris* (Russian law) during the retrenchment of the Commission staff. The Opinion of 30 October 2017 (at the request of the *Commission*) explains Article 29 of the Treaty ("Exceptions to the Functioning of the Domestic Market for Goods"). The Opinion of 20 November 2017 (at the request of the *Ministry of Transport and Roads of Kyrgyzstan*) explains the use of a unified tariff for rail transportation. The Opinion of 10 July 2018 (at the request of Belarus) indicates that the decisions of the CU Commission form part of Union law. The Opinion of 15 October 2018 (at the request of the *Ministry of National Economy of Kazakhstan*) indicates that individuals must declare a currency of more than 10,000 dollars when traveling from

[32] It should be noted that a reference to the principle of legal certainty in this case could lead to different results (this argument was used in the Separate Opinions of Judges Neshataeva and Chaika).

one Member State to another in transit through the territory of third countries if they are in the transfer zone. The Opinion of 17 December 2018 (at the request of the *Commission*) clarifies some general rules of competition. The Opinion of 7 December 2018 (at the request of the *Commission*) establishes that the principle of freedom of movement of labor applies to professional athletes. The Opinion of 20 December 2018 (at the request of the *Commission*) explains the ratio of the length of civil service and the length of service at the Commission when calculating pensions.

Some opinions contain controversial conclusions. An example is the Opinion of 11 December 2017. The applicant, B.M. Adilov, citizen of Kazakhstan, was appointed as a Deputy Director of the Commission department in 2014. In 2016, another Kazakhstan citizen was appointed as a Director of this department. In 2017, the Commission informed the applicant that he had been laid off, indicating that according to Article 9(2) of the Treaty, department managers may not be citizens of one State. Adilov appealed to the Court, referring to Article 99(3), according to which the directors and their deputies whose contracts were concluded before the entry into force of the Treaty, to perform these duties until their contract expiration. The Court found that Article 99 regulates the continuation and not the termination of labor relations; in these conditions the law of the host country is applied; the reason for dismissal may be a retrenchment of staff, which should be exercised by the organization discretionally, but in accordance with the law. Thus, the Court *de facto* excluded the effect of Article 99. In her Separate Opinion, Judge Neshataeva indicated that Article 99 prohibits dismissal, but also does not allow him to occupy the former position in violation of Article 9; under these conditions, the Commission had the right to dismiss Adilov. Both positions are vulnerable: the problem resulted from the violation of Article 9(2) by the Commission itself; a more logical solution would be the annulment of the second appointment or recognition of Article 99(3) as an exception.

An international court does not exist in a vacuum and must take into account political tendencies, especially since, unlike the domestic court, it is established by a treaty whose "owners" are States. However, when making decisions, it must take an objective position, consider all factual circumstances, analyze all relevant arguments, and dispense justice in accordance with the law. This is not only a moral duty, but also a functional duty: a court that does not adhere to these principles ceases to be a court and becomes unnecessary. Unfortunately, statistics and analysis of specific cases show that the Court is predisposed to the Commission and Member States. This is not about bias or other malicious intent, but about the Court's chosen course of conduct, which it regards as expedient and appropriate, but which, upon close examination, is characterized by a certain selectivity. The statistics, according to which only 10% of applications (3 out of 31) are satisfied, are difficult to attribute to the illiteracy of business entities or the discretionary nature of the Court's powers.

This predisposition has several causes. *First*, the Court seems to remember the lesson taught in 2014, when, in response to the activism it showed, Member States

deprived it of a number of important powers, including the preliminary ruling competence. *Second*, the procedure for the appointment and dismissal of the judges makes them more vulnerable to States than judges of other regional courts: For example, judges of the EAEU are dismissed by the SEEC, whereas in the ECJ this issue is decided by the Court itself. *Third*, the EEAC is a community of the vertical type, the fate of which remains in the hands of the executive. Unlike the ECJ, the EAEU Court cannot use the contradictions between Member States and the Commission, because the latter expresses the interests of the former and consists of their representatives[33] and cannot form a political union with the national courts, for it was deprived of preliminary ruling competence and became isolated from them. The solution to this problem should be linked to other measures aimed at democratizing the Union.

8. Impact on EAEU Law

To date, the merits of the Court include:

– Determination of the procedure for the execution of the Court decisions by the Commission (Decision of 8 April 2013, *Southern Kuzbass*);

– Determination of the place of "external treaties" in the Union legal order (*NMBP, Tarasik*, and *General Freight*);

– Clarification of the methods of customs classification, provision of customs exemptions and anti-dumping investigations;

– Identification of attributes of prohibited "vertical agreements" (Opinion of 4 April 2017, at the request of the *Ministry of Justice of Belarus*);

– Explanation of the application of unified tariffs for rail transportation (Opinion of 20 November 2017, at the request of the *Ministry of Transport and Roads of Kyrgyzstan*);

– Determination of the procedure for legal assistance in customs matters (Decision of 21 February 2017, *Russia v. Belarus*).

These issues, while important for the applicants, are not principal for the general vector of integration; some could well be resolved by national courts. Some are simple and suggest obvious answers (sometimes artificially complicated by the Court).

At the same time, the Court could not convincingly answer certain questions:

– It did not clearly define the procedure to monitor the implementation of international treaties by the Commission and the procedure for interaction of the Commission with business entities (*Vichunai-Rus, Orda Munai Trade*, and *Tarasik*);

– Formulated a vulnerable position with regard to appealing Commission recommendations (Decision of 8 April 2016, *RemDesel*);

– *De facto* cancelled Article 99 of the Treaty, which guarantees the continuance of labor contracts of international staff who concluded these contracts before the entry into force of the Treaty (Opinion of 11 December 2017, at the request of *Adilov*);

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[33] It is about the Council of the Commission (para. 23 of the Statute of the Commission); members of the Council are independent of state organs (para. 34).

– Suggested an unconvincing interpretation of Article 217(2) of the Protocol on the Application of Special Protective, Anti-Dumping, and Countervailing Measures in Relation to Third Countries (Decision of 27 April 2017, *ArcelorMittal Kryvyi Rih*);

– Resolved a number of procedural issues in a controversial way, for example, the issue of the form of withdrawal of the request for interpretation (Order of 17 January 2018).

In general, for seven years the Court has not formulated any major concepts that complement and enrich the law of the EAEU; even its resounding decision in *Southern Kuzbass* can hardly be considered innovative, since it rather fills the gap and eliminates ambiguity. At the same time, the need for these concepts is great: many issues related to the operation of Union law in the national legal order, hierarchy of sources, interaction with WTO law, and functioning of the common economic space remain unresolved. Some judges try to answer these questions in their separate opinions, whose impact, however, is limited.

Conclusion

The potential of the Court (as well as the EAEU as a whole) is enormous. Any integration project needs a court, which effectively resolves disputes and ensures uniform application and development of the Union law. This is not a formal need for a corps of judges, but rather a substantive need for a comprehensive legal discourse. The Court is able not only to deal with customs affairs or clarify the status of the Commission staff, but also to interpret technical regulations, resolve interstate disputes, formulate new legal concepts, promote harmonization of national orders, protect human rights, promote the expansion of the EAEU, and much more. Just as the ECJ, it can become a powerful engine of integration, and, unlike the ECJ, an architect of a real new community, desired by millions of people who consider the territory of the former USSR as their common home and perceive its collapse as "a major geopolitical disaster of the century."[34]

Currently, the Court has not taken its worthy place in the Eurasian order. Its attempt to declare itself as an independent actor, undertaken at the first stage of its activity, was severely suppressed by the States, which significantly limited its powers in the 2014 Statute. This shows not only the dissatisfaction with specific decisions of the Court, but also the perception of the Court as a secondary instance. The relationship of the Court with the Commission was not balanced. After a short period of confrontation (*Southern Kuzbass*), the Court took an opportunistic position, supporting the decisions of the Commission, even if there were obvious grounds for their cancellation. Thereby, the Court seems to have reached an understanding with

[34] Annual Address to the Federal Assembly of the Russian Federation, President of Russia, 25 April 2005 (Jul. 1, 2019), available at http://en.kremlin.ru/events/president/transcripts/22931.

the Commission, consequently turning away from the business community: almost all recent decisions were not in their favor. Such a dynamic makes it unnecessary to go to the Court. Finally, the only attempt to establish a dialogue between the Court and the national courts (initiated by the request of the Supreme Economic Court of Belarus) turned out to be a disappointment.

Thus, the potential of the Court has not been realized, and the general line of its behavior, characterized by caution, predictability, creative passivity, and an apology for the interests of States and the Commission does not meet the development needs of the EAEU. Moreover, some decisions of the Court caused distrust of EAEU law and in this regard inhibited the development of integration. If this behavior is not changed, the Court runs the risk of becoming a decorative body, busy explaining already clear provisions (and in this sense will repeat the sad fate of the CIS Economic Court). This prospect is discouraging.

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Information about the author

Vladislav Tolstykh (Novosibirsk, Russia) – Professor, Head of the International Law Department, Novosibirsk State University (1 Pirogova St., Novosibirsk, 630090, Russia; e-mail: vlt73@mail.ru).