COURT OF THE EURASIAN ECONOMIC UNION: THE BEGINNING

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This article is based on 7.5 years of work experience in the Courts of the Eurasian Economic Community (EurAsEC) and Eurasian Economic Union (EAEU) and, therefore, finalizes the major problems the mentioned judicial institutions faced with in the beginning of their functioning. The Eurasian Economic Union in post-Soviet space was created five years ago with minimal established doctrinal and practical perceptions of how such an organization may interact with State sovereignty and whether it constituted the first step for the subsequent emergence of a new State. The authors believe that the EAEU should not be confused with the State and should be considered a new type of international organization, supranational, to which member States transferred competence. In this organization the Court plays an important role – its main function is to ensure the uniform application of Union law by hearing disputes and providing advisory opinions in various spheres of integration and, therefore, establish practice having an erga omnes effect in the law of the Union and national legal systems of States. Just as in other international courts, the main role in the EAEU Court functioning is played by judges nominated by national governments, sometimes without taking into account the sui generis character of their future work. Taking into consideration the valuable experience from other international courts and organizations (such as the International Court of Justice, European Court of Human Rights, International Law Association), the authors suggest ways for improvement of future Court functioning by creating mechanisms that would monitor the qualities of candidates for the post of the EAEU Court judge.

Keywords: EAEU Court; justice; international law; Eurasia.

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Introduction

From the Customs Union through the Common Economic Space, Eurasian integration on 29 May 2014 reached a new level through the establishment of the Eurasian Economic Union (EAEU) pursuant to the Treaty on the EAEU. This institution constitutes a supranational organization, to which its participants (Republic Armenia, Republic Belarus, Republic Kazakhstan, Kyrgyz Republic, and the Russian Federation) transferred competence to establish binding legal norms (common policy) in certain areas of economic relations, as well as to interpretat such rules.

The evolution of Eurasian integration is largely possible thanks to the consistent work of the agencies of integration. The judicial role in this process is played by the EAEU Court, an organ responsible for judicial review and interpretation of the law of the EAEU. This organ has been operative since 1 January 2015,[1] providing judgments and advisory opinions on various issues of integration (for example, customs regulations in the interstate dispute of *Russia v. Belarus*,[2] customs classification,[3] status

[1] From 1 January 2012, to 31 December 2014 the Court of the Eurasian Economic Community, a predecessor of the EAEU Court, was functioning. Its competence was comparable to the present EAEU Court.

[2] Решение Большой коллегии Суда Евразийского экономического союза от 21 февраля 2017 г. по заявлению Российской Федерации по спору о соблюдении Республикой Беларусь Договора о Евразийском экономическом союзе, статьи 125 Таможенного кодекса таможенного союза, статей 11 и 17 Соглашения о взаимной административной помощи таможенных органов государств – членов таможенного союза [Decision of the Grand Chamber of the Court of the Eurasian Economic Union of 21 February 2017 on complaint of the Russian Federation in the dispute concerning compliance of the Republic of Belarus with the Agreement on Eurasian Economic Union of 29 May 2014, with Article 125 of the Customs Code of the Customs Union, Articles 11 and 17 of the Agreement on Mutual Administrative Assistance of Customs Authorities of Member States of the Customs Union] (Jun. 2, 2019), available at http://courteurasian.org/doc-17943.

[3] *See, e.g.*, Постановление Коллегии Суда Евразийского экономического союза от 8 октября 2018 г. о принятии к производству заявления закрытого акционерного общества «Санофи-Авентис

of soft law within the law of the EAEU,[4] antidumping measures,[5] competition law,[6]

Восток» в части признания Решения Коллегии Евразийской экономической комиссии от 3 октября 2017 г. № 132 «О классификации комплектующих для одноразовых шприц-ручек, применяемых для подкожного введения инсулина, в соответствии с единой Товарной номенклатурой внешнеэкономической деятельности Евразийского экономического союза» не соответствующим Договору о Евразийском экономическом союзе от 29 мая 2014 г. и международным договорам в рамках Евразийского экономического союза и нарушающим права и законные интересы хозяйствующего субъекта в сфере предпринимательской и иной экономической деятельности [Ruling of the Chamber of the Court of the Eurasian Economic Union of 8 October 2018 on admissibility of complaint ZAO "Sanofi-Aventis Vostok" in the part of recognition of the Decision of the Eurasian Economic Commission Chamber of 3 October 2017 No. 132 "On Classification of Components for Disposable Pen Syringe Used for Subcutaneous Delivery of Insulin, in Accordance with the Foreign Economic Activity Commodity Nomenclature of the Eurasian Economic Union" as inconsistent with the Agreement on Eurasian Economic Union of 29 May 2014 and with other international agreements within the Eurasian Economic Union and as violating rights and legal interests of subjects in the sphere of business and other types of economic activity] (Jun. 2, 2019), available at http://courteurasian.org/doc-22803.

[4] *See, e.g.*, Постановление Коллегии Суда Евразийского экономического союза от 8 апреля 2016 г. по делу по заявлению общества с ограниченной ответственностью «Производственное предприятие «Ремдизель» (Российская Федерация) о признании дополнительного примечания к позициям 8408 10 110 0 – 8408 10 990 0 Товарной номенклатуры внешнеэкономической деятельности Евразийского экономического союза, содержащегося в таблице Пояснений к единой Товарной номенклатуре внешнеэкономической деятельности Евразийского экономического союза (том 6, разделы I–XXI, группы 1–97), являющихся приложением к Рекомендации Коллегии Евразийской экономической комиссии от 12 марта 2013 г. № 4 «О пояснениях к единой Товарной номенклатуре внешнеэкономической деятельности Евразийского экономического союза», противоречащим статье 5 Договора о Евразийской экономической комиссии от 18 ноября 2011 г., а также Решению Совета Евразийской экономической комиссии от 16 июля 2012 г. № 54 «Об утверждении единой Товарной номенклатуры внешнеэкономической деятельности Евразийского экономического союза и Единого таможенного тарифа Евразийского экономического союза» [Ruling of the Chamber of the Court of the Eurasian Economic Union of 8 April 2016 on the case on complaint of OOO "Production company 'Remdiesel'" (Russian Federation) on recognition of additional note to codes 8408 10 110 0 – 8408 10 990 0 the Foreign Economic Activity Commodity Nomenclature of the Eurasian Economic Union contained in the table of the Explanation to the Foreign Economic Activity Commodity Nomenclature of the Eurasian Economic Union (volume 6, sections I–XXI, groups 1–97), which is the Annex of the Recommendations of the Eurasian Economic Commission Chamber of 12 March 2013 No. 4 "On Notes to the Foreign Economic Activity Commodity Nomenclature of the Eurasian Economic Union," as inconsistent with Article 5 of the Agreement on Eurasian Economic Commission of 18 November 2011, as well as with Decision of the Eurasian Economic Commission Council 16 July 2012 No. 54 "On Establishment of the Foreign Economic Activity Commodity Nomenclature of the Eurasian Economic Union and the Common Customs Tariff of the Eurasian Economic Union"] (Jun. 2, 2019), available at http://courteurasian.org/doc-15473.

[5] *See, e.g.*, Ruling of the Chamber of the Court of the Eurasian Economic Union of 8 October 2018, *supra* note 3.

[6] *See, e.g.*, Консультативное заключение Большой коллегии Суда Евразийского экономического союза от 4 апреля 2017 г. по заявлению Министерства юстиции Республики Беларусь о разъяснении Договора о Евразийском экономическом союзе от 29 мая 2014 г. [Advisory Opinion of the Grand Chamber of the Court of the Eurasian Economic Union of 4 April 2017 on the request of the Ministry of Justice of the Republic of Belarus concerning Interpretation of the Treaty on the Functioning of the Eurasian Economic Union of 29 May 2014] (Jun. 2, 2019), available at http://courteurasian.org/doc-18093.

freedom of movement of sports players within the EAEU,[7] international civil servant pension rights,[8] and others).

This article provides an overview of the main problems the EAEU Court faced with on the stage of beginning of its activity.

1. Understanding the EAEU as a Supranational Organization

Modern economic relations are characterized by the aggravation of the contradictions between their objective and subjective basis. The objective basis is the achievement of scientific and technological progress (for example, the creation of the Internet, artificial intelligence, and as a result – the digitization of all economic processes without borders), which ultimately leads to the creation of an identical, and, subsequently, single global economic system.

The subjective management of new developments depends on sovereign States, naturally seeking to protect their national interests with protectionist actions in favor of national economies, regulated by positive norms of international and national law. In other words, new objective economic relations continue to be governed by older legal mechanisms. But a different approach is impossible: the law is more conservative than the relations regulated by it, for law adapts only to those innovations that comprise a permanent, established system of human affairs.

Such legal regulation is generated slowly, legal discoveries occur less frequently than in other areas of human knowledge.[9] Hence, the method of adapting *lex lata* to new phenomena is widespread: for example, the creations of ancient Rome jurists

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[7] Консультативное заключение Большой коллегии Суда Евразийского экономического союза от 7 декабря 2018 г. по заявлению Евразийской экономической комиссии о разъяснении положений Договора о Евразийском экономическом союзе от 29 мая 2014 г. [Advisory Opinion of the Court of the Eurasian Economic Union of 7 December 2018 on the request of the Eurasian Economic Commission concerning Interpretation of the Treaty on the Functioning of the Eurasian Economic Union of 29 May 2014] (Jun. 2, 2019), available at http://courteurasian.org/doc-22543.

[8] Консультативное заключение Большой коллегии Суда Евразийского экономического союза от 20 декабря 2018 г. по заявлению Евразийской экономической комиссии о разъяснении положений пунктов 53 и 54 Положения о социальных гарантиях, привилегиях и иммунитетах в Евразийском экономическом союзе (приложение № 32 к Договору о Евразийском экономическом союзе от 29 мая 2014 г.) [Advisory Opinion of the Grand Chamber of the Court of the Eurasian Economic Union of 7 December 2018 on the request of the Eurasian Economic Commission concerning interpretation of paragraphs 53, 54 of the Statute on Social Guarantees, Privileges and Immunities in the Eurasian Economic Union (Annex No. 32 of the Treaty on the Functioning of the Eurasian Economic Union of 29 May 2014)] (Jun. 2, 2019), available at http://courteurasian.org/doc-22703.

[9] *Касенова М.Б.* Теория и практика правового регулирования трансграничного функционирования и использования интернета [Madina B. Kasenova, *Theory and Practice of the Transborder Use of Internet*] (Moscow: MGIMO-University, 2015).

continue to influence private law relations,[10] whereas the approaches of the lawyers and philosophers of ancient Greece influence public law.[11]

The objective process of the development of unifying technical and economic relations led to limiting the freedom of action of States. States retain their sovereignty so long as their governments have the opportunity to choose a course of action. State institutions do not identically design new technical phenomena, which ultimately hampers their natural development in the form of a slowdown (for example, if no funds are allocated for development, the economy lags behind) or in the form of anarchic acceleration (for example, digitalization). The legal solution was found in the second half of the twentieth century: establishing international organizations of a new type – supranational organizations.

In an ordinary international organization, governments are involved in the coordination of actions, working out strategy and tactics for the functioning of the secretariat of such an organization. The main function of an international organization is to identify the interests of member States, to achieve their agreement in resolving tasks, and choosing the means of their solution through international legal regulation, operational assistance, and monitoring the implementation of agreements. In other words, the competence of the international organization and its member State remains joint: States transfer only some technical functions to the organization, reserving the decision-making function to themselves.

In a supranational organization, the sovereign decision-making function on a specific issue is transferred from governments to a supranational organization. The concept of supranationalism means the closest form of political, legal, and economic cooperation and association of States which arises as a result of the transfer of competence and resources by States to a higher political level and the creation of a supranational legal system. The European Union is a classic example of a supranational system.

Unlike interstate cooperation, supranational interaction can lead to a limitation of member State control over supranational bodies (for example, the European Commission, Court of Justice of the European Union (ECJ)). But member States accept such loss because they benefit from supranational decision-making and independent monitoring of the observance of Union law. By transferring competence to the EU level, States receive freedom of action which they did not have before unification.[12]

Unlike other international organizations, States transfer to a supranational organization part of their sovereign rights, that is, a supranational organization can take decisions independently of its member states and these decisions are legally

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[10] *Кофанов Л.Л.* Внешняя система римского права: право природы, право народов и коммерческое право в юридической мысли античности [Leonid L. Kofanov, *External System of Roman Law: Law of Nature, Jus Gentium and Commercial Law*] (Moscow: Statut, 2015).

[11] *Нерсесянц В.С.* Философия права [Vladik S. Nersesyants, *Philosophy of Law*] (Moscow: Norma; INFRA-M, 2018).

[12] *Das Europalexikon* (M. Große Hüttmann & H.-G. Wehling (eds.), 2nd ed., Bonn: Dietz, 2013).

binding on the latter. In EU law, supranationalism is understood as "the constitutional advantage of the public authority of a community over state power."[13] Consequently, a supranational organization becomes an independent political actor in international relations, at least in those areas within its competence.

Many international studies highlight the characteristic features of supranational organizations.[14] The President of the ECJ, Koen Lenaerts, identified the following essential features of such organizations: (a) the presence of institutions independent in composition and action; (b) the use of decision-making procedures by majority vote, which are nonetheless binding on all Member States; (c) the implementation of EU decisions by EU institutions or under their control; and (d) the establishment of rights and obligations with judicial protection through agreements and acts of secondary law.[15] To this should be added that, above all, a supranational organization is characterized by the creation of power organs staffed by independent professionals, technocrats.[16]

In Eurasian space, such an organization is the EAEU, whose permanent organs are the Eurasian Economic Commission (Commission, EEC) and the EAEU Court. Authorities of this supranational organization have the right to take legally binding decisions on matters relating to the unified policy (for example, EEC can regulate competition law on transnational markets between two or more States of the EAEU).[17] Such decisions apply not only to member States of the Union, but also to natural and juridical persons of these States having the right to directly appeal to the organs of the Union in the established procedure.

Considering that the law often adapts older institutions to new relations, many researchers suggest that a supranational organization has common features with the State or seeks to become one.[18] However, this impression is deceptive, because

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[13] Guido Thiemeyer, *Supranationalität als Novum in der Geschichte der Internationalen Politik der fünfziger Jahre*, 2(4) Journal of European Integration History 5, 5–6 (1998).

[14] *See, e.g.*, Amitai Etzioni, *Political Unification Revisited: On Building Supranational Communities* (Lanham: Lexington Books, 2001).

[15] Koen Lenaerts & Piet Van Nuffel, *Constitutional Law of the European Union* 11–18 (R. Bray (ed.), 2nd ed., London: Sweet and Maxwell, 2005).

[16] More extensively in *Мысливский П.П.* Международно-правовое регулирование создания Евразийского экономического союза и способа разрешения споров: Дис. … канд. юрид. наук [Pavel P. Myslivskiy, *International Law Regulation of Creation of the Eurasian Economic Union and Dispute Resolution Mechanism: Thesis for a Candidate Degree in Law Sciences*] 23–36 (Moscow, 2015).

[17] *See, e.g.*, Консультативное заключение Большой коллегии Суда Евразийского экономического союза от 4 апреля 2017 г. по заявлению Министерства юстиции Республики Беларусь о разъяснении положений статей 74–76 Договора о Евразийском экономическом союзе от 29 мая 2014 г. [Advisory Opinion of the Grand Chamber of the Court of the Eurasian Economic Union of 4 April 2017 on the request of the Ministry of Justice of the Republic of Belarus concerning Interpretation of Articles 74–76 of the Treaty on the Functioning of the Eurasian Economic Union of 29 May 2014] (Jun. 2, 2019), available at http://courteurasian.org/doc-18093.

[18] *Ковлер А.И.* Европейская интеграция: федералистский проект (историко-правовой очерк) [Anatoly I. Kovler, *European Integration: Federalist Project (Historic-Legal Review)*] (Moscow: Statut, 2016).

a supranational union is an institution of the new type, combining elements of supranationality and the coordination of interstate actions.

Two EAEU organs act exclusively on the basis of interstate coordination – the Supreme Eurasian Economic Council (heads of member States) and the Eurasian Intergovernmental Council (heads of governments). The Supreme Council develops strategic plans for the development of the Union, creates its professional organs, and the Intergovernmental Council determines the development tactics for a specific period.

At the same time, the EEC and the EAEU Court act as supranational organs: the EEC adopts binding decisions, and the EAEU Court controls the lawfulness, execution, and application thereof. Thus, in the functioning of a supranational union, both the coordination functions of an international organization remain and the power-oriented powers of professional organs appear.

Finally, no supranational union has ever become a State.

2. Principal Functions and Case-Law of EAEU Court in Member States

2.1. Function of EAEU Court Is to Ensure Uniform Application of EAEU Law

The activities of the Court as the chief interpretive body of Union law are defined in paragraph 2 of the Statute of the Court of the EAEU (Appendix No. 2 to the Treaty on the EAEU), which provides that

> [t]he purpose of the Court's activities is to ensure the uniform application of Union Treaty, international treaties within the Union, international treaties of the Union with a third person, and decisions of the Union organs by member States and agencies.

Because the Court ensures the uniform application of law, it can be concluded that one function of the Court is to supervise compliance with Union legal norms in order to verify the uniformity of enforcement; that is, perform judicial review.[19] According to Chapter IV of the Statute, the Court becomes involved only in the event of a legal conflict in the form of a dispute over the implementation of international norms, that is, decisions of national authorities, or in the form of a request from Union authorities, international officials, or the authorities of member States, which are uncertain how to implement international standards. The legal conflict is resolved by the Court through the adoption of binding decisions or recommendatory advisory opinions.

Thus, the principal form of activity of the EAEU Court is judicial control in the sphere of application of law of the EAEU. This control function was transferred by

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[19] *Никитин С.В.* Судебный контроль за нормативными правовыми актами в гражданском и арбитражном процессе: Монография [Sergey V. Nikitin, *Judicial Control Over the Normative Legal Acts in Civil and Arbitral Procedure: Monograph*] (Moscow: Russian Academy of Justice, 2010).

member States to the Court of the EAEU as a supranational body. At the same time, the main conclusion of the EAEU Court concerns the validity or invalidity of Union law, the legality or illegality of the action or failure to act of organs of the Union and the authorities of member States. The Court depriving an international legal act of legal force means the repeal of this act at a certain point in time, with its suspension by the Court itself (Arts. 112 and 113 of the Statute of the Court).

An act of the Court of the EAEU is "negative" lawmaking. In addition, as a result of a norm being deemed invalid ("not in compliance with the Treaty" – the wording of Articles 104 and 106 of the Statute) in the Union regulatory and legal system, there may be a gap in legal regulation which can be filled only by the relevant regulatory Union organ. However, the existence of such a gap is impossible because of the purpose set, under which the Court is obliged to ensure uniform law enforcement on a continuing basis in order to create conditions for the stable development of the economies of the member States in order to improve the living standards of their people (Art. 4 of the Treaty).

Realization of the goals of the Union compels the Court, when considering controversial issues, to formulate a provision aimed at overcoming the non-uniformity of law enforcement. This provision governs the behavior of persons involved in economic relations in the Union. The judicial act, which contains the rule of the future behavior of actors in international relations, has been called a "legal position" and, in view of modern lawyers, constitutes a form of lawmaking.[20]

2.2. Case-Law of EAEU Court in Union Member States

Despite the establishment of "direct effect"[21] with regard to the acts of the EEC (Art. 13 of the Statute of the Eurasian Economic Commission, Appendix No. 1 to the Treaty on the EAEU), the question of the effect of acts of the EAEU Court in national law is not directly resolved by the EAEU Treaty.

In legal doctrine there is no uniform definition of "judicial decision."[22] This notion with reference to the EAEU Court is addressed in Article 1 of the Rules of Court,[23] which provide that "decision" refers to "the act of the Court issued as a result of the case," that is, the document that ends the consideration of disputes on the merits.

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[20] *Марченко М.Н.* Судебное правотворчество и судебное право [Mikhail N. Marchenko, *Judicial Law-Making and Judicial Law*] (Moscow: Prospekt, 2011); *Карапетов А.Г.* Борьба за признание судебного правотворчества в европейском и американском праве [Artem G. Karapetov, *Battle for Recognition of Judicial Lawmaking in European and American Law*] (Moscow: Statut, 2011).

[21] For origins of this concept in relation to supranational authority *see Van Gend en Loos v. Nederlandse Administratie der Belastingen*, C-26/62, 5 February 1963, [1963] E.C.R. 1.

[22] *Сахнова Т.В.* Курс гражданского процесса [Tatiana V. Sakhnova, *Course on Judicial Procedure*] 402 (Moscow: Statut, 2008).

[23] Регламент Суда Евразийского экономического союза от 21 декабря 2014 г. [Rules of the Court of the Eurasian Economic Union of 21 December 2014] (Jun. 2, 2019), available at http://courteurasian.org/doc-14143.

According to the classical understanding, decisions of international courts are binding *inter partes*[24] (this corresponds to the obligation of the parties to the dispute to execute the said decision – for example, to review cases in national courts) – they cannot create legal consequences either for third States or for other persons not participating in the dispute, or for the court itself.

Subsequently, however, this approach evolved. The International Court of Justice in the decision on the *Genocide Case (Croatia v. Serbia)* indicated that

> [t]o the extent that the decisions contain findings of law, the Court will treat them as it treats all previous decisions: that is to say that, while those decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so.[25]

Consequently, the International Court of Justice actually recognized that it does not deviate from its previous findings on legal issues.

However, the issue of the binding force of decisions of international courts is not resolved in a broad sense – in particular, decisions of the ECtHR are not binding for third countries that did not participate in the proceedings, although the question of imparting such binding effect to them is being actively discussed.[26]

However, all the above applies to international courts. With regard to supranational judicial institutions that consider cases challenging acts of supranational authority, there are other doctrinal approaches and practices. The rendering by courts of the EU and the EAEU (previously the Court of the EurAsEC in terms of powers to resolve disputes within the Customs Union) of the relevant decision entails other legal consequences. In our opinion, any decisions of a supranational court should be *ab initio* binding and have consequences for all (*erga omnes*) State agencies (including courts) and private individuals – this is the basis of its activities and the principal feature that distinguishes it from classical international courts.

This is confirmed by practice. The situation has arisen when, in the absence of a treaty provision regarding universally binding decisions of the EU Court, national State agencies, in particular national courts, refer to the decisions of the EU Court when resolving specific cases. For example, in 1998 the Supreme Court of Sweden[27]

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[24] Statute of the International Court of Justice, Art. 59 (Jun. 2, 2019), available at https://www.icj-cij.org/en/statute.

[25] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412, para. 53.

[26] Council of Europe, The Longer-Term Future of the System of the European Convention on Human Rights, Report of the Steering Committee for Human Rights (CDDH) adopted on 11 December 2015 (Jun. 2, 2019), available at https://rm.coe.int/the-longer-term-future-of-the-system-of-the-european-convention-on-hum/1680695ad4.

[27] Seventeenth Annual Report on Monitoring the Application of Community Law (1999), COM(2000) 92 final (Jun. 2, 2019), available at http://aei.pitt.edu/40805/1/COM_(2000)_92.pdf.

adopted the legal position of the ECJ (expressed four months before the decision of the Swedish court) in the case of BMW on the legality of fair use by an unauthorized car dealer of the automaker's trademark.[28] In addition, the Belgian courts refer to the decisions of the ECJ, for example, in the context of the international exhaustion of trademark right.[29]

Judges in the United Kingdom are trained to use existing decisions of the ECJ on preliminary requests and make new requests only for the ECJ to review the established legal position.[30]

To be sure, in practice there are cases of ignoring the practice of the ECJ, for example, Greece[31] and Spain;[32] however, such situations are not frequent or they are corrected within the framework of the judicial system, as, for example, in Germany.[33]

These approaches to the perception of ECJ practice in national law and order originate in judicial decisions of the ECJ itself. Cases concerning recognition of a particular EU "secondary" law (for example, directives) complying with (or not) international treaties concluded within the EU, the ECJ indicated that the legal consequences of a decision, for example, recognizing a directive inconsistent with EU primary law, apply to everyone (*erga omnes*).[34]

These legal consequences do not follow from the Treaty on the Functioning of the EU; they are derived from the practice of the ECJ.[35] The explanation for this is that if the recognition of an act as non-compliant with the Treaty would have consequences only for the person applying to the ECJ (or the court for the relevant preliminary detention procedure), this would undermine the idea of building a supranational union with uniform rules for all persons.

In this case, a paradoxical situation could arise where a rule of law which is not consistent with the primary law would continue to operate from country to country. If at the request of a Greek court the rule would be declared illegal, why should it

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28 *Bayerische Motorenwerke AG (BMW) and BMW Nederland BV v. Ronald Karel Deenik*, C-63/97, 23 February 1999, [1999] E.C.R. I-905.

29 Eighteenth Annual Report on the Application of Community Law (2000), COM(2001) 309 final (Jun. 2, 2019), available at http://aei.pitt.edu/34957/1/COM_(2001)_309_final.pdf.

30 Paul P. Craig, *Report on the United Kingdom* in *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in its Social Context* 144 (A.M. Slaughter et al. (eds.), Oxford: Hart Publishing, 1998).

31 Eighteenth Annual Report, *supra* note 29.

32 Carl Baudenbacher, *The Implementation of Decisions of the ECJ and of the EFTA Court in Member States' Domestic Legal Orders*, 40(3) Texas International Law Journal 383, 400 (2005).

33 *Id*.

34 *Italy v. Commission*, C-372/97, 29 April 2004, [2004] E.C.R. I-3679.

35 Interpretation and Application of CJEU Decisions by National Courts (Jun. 2, 2019), available at http://www.ejtn.eu/Documents/About%20EJTN/Independent%20Seminars/EUIL%2016-17%20June%202014,%20Ljubljana/2_Mirela_Stancu.pdf.

continue to operate, for example, in France only because the French national court or citizen did not apply to the ECJ? It follows that the basis of the conclusion that the legal consequences of decisions of the ECJ apply to everyone is the need for legal certainty. At the same time, this practice has not found due confirmation in doctrine. In this regard scholars maintain that

> [t]he formal absence of a mandatory precedent in the European legal system is a resolving condition that can be invoked by national courts to justify a restrictive approach to the interpretation of the EU Court.[36]

In international legal doctrine and practice, this approach encounters objections from traditional supporters of positivism or sovereignty. It does not take into account that in "pure" form none of these theories is encountered in the practice of international relations. The President of the European Court of Free Trade Association, Carl Baudenbacher, stated that ECJ decisions may be considered binding only for the court which requested the relevant preliminary request.[37]

In relation to the EAEU Court, Russian legal scholars Tolstykh[38] and Ispolinov[39] share a similar opinion, considering that the decisions of this organ cannot be generally binding because the general bindingness of Court decisions does not follow from its constituent documents.

However, a supranational approach is often supported in judicial practice. The EurAsEC Court in its judgment clarifying the decision in the case of *OAO South Kuzbass v. Eurasian Economic Commission* stated a legal position that is essentially similar to the legal position of the EU Court: if the act is declared invalid, this act is invalid for everyone.[40]

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[36] Lisa Conant, *Justice Contained: Law and Politics in the European Union* 68 (Ithaca: Cornell University Press, 2002).

[37] Baudenbacher 2005, at 396.

[38] *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)].

[39] *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 Chamber of the Court of the EurAsEC on the Case of South Kuzbass: How Justified the Judicial Activism?*, 5 Eurasian Law Journal 19 (2013)].

[40] Постановление Большой коллегии Суда Евразийского экономического сообщества от 8 апреля 2013 г. по заявлению открытого акционерного общества «Угольная компания «Южный Кузбасс» о разъяснении Решения Суда Евразийского экономического сообщества от 5 сентября 2012 г., которым был признан не соответствующим международным договорам, действующим в рамках Таможенного союза и Единого экономического пространства, пункт 1 Решения Комиссии Таможенного союза от 17 августа 2010 г. № 335 «О проблемных вопросах, связанных с функционированием единой таможенной территории, и практике реализации механизмов Таможенного союза» [Ruling of the Grand Chamber of the Court of the Eurasian Economic Community

The opinion of the EurAsEC Court on the question of whether its legal positions had consequences for an indefinite number of persons was also perceived in Russian courts. As a result, Russian courts have been referring to the case-law of the EurAsEC and EAEU Courts since Plenary Sessions of the Supreme Arbitrazh Court of the Russian Federation[41] and, subsequently, of the Supreme Court of the Russian Federation[42] stated that courts "should take into consideration the interpretation of the EAEU Court."

Consequently, despite contrary doctrinal opinions, a uniform approach has been formed in practice – the legal positions of the EU and EAEU courts entail legal consequences *erga omnes*, which effectively distinguishes these courts from international courts (for example, ICJ and ECtHR), whose decisions are binding only on the parties to the dispute.

The mechanism for the enactment of the rule of universally binding decisions is identical in the EU and the EAEU – the adoption of these acts by organs of the Unions and national courts. The only difference is the mechanism for the adoption of these decisions and the sanctions for refusing to enforce established norms. The difference is as follows: in the EU, if conflicts arise between Union law and national law, the Union organ or national court may seek clarification concerning the method for resolving conflicts through the ECJ procedure of preliminary reference. The interpretation given by the ECJ will formally be recommendatory, but in fact is binding, for deviating from it entails penalties. Thus, in the EU, the organs and national courts (initiated by juridical and natural persons) begin the procedure for verifying compliance with law, the ECJ makes a decision in the form of a recommendation, and the authorities and national courts execute this recommendation.

In the EAEU, juridical persons themselves initiate the procedure (normally, after an appeal to national courts), which makes this mechanism more democratic and familiar to national courts. For example, the EAEU Court resolves a dispute concerning the

on the application of the Open Joint Stock Company "Coal Company 'South Kuzbass'" for clarification and enforcement of the Judgment of the Chamber of the Court of 5 September 2012 by which paragraph 1 of the decision of the Commission of the Customs Union of 17 August 2010 No. 335 "On Issues of Concern Related to the Functioning of the Common Customs Territory, and Implementation of the Customs Union's Mechanisms" was recognized non-compliant to the treaties, enforceable within the Customs Union and the Common Economic Space] (Jun. 2, 2019), available at http://www.eurasiancommission.org/ru/Lists/EECDocs/635194337652937490.pdf.

41 Постановление Пленума Высшего Арбитражного Суда Российской Федерации от 8 ноября 2013 г. № 79 «О некоторых вопросах применения таможенного законодательства» // Вестник Высшего Арбитражного Суда Российской Федерации. 2014. № 1 [Ruling of the Plenary Session of the Supreme Arbitrazh Court of the Russian Federation No. 79 of 8 November 2013. On Some Questions of Application of Customs Law, Bulletin of the Supreme Arbitrazh Court of the Russian Federation, 2014, No. 1], para. 1.

42 Постановление Пленума Верховного Суда Российской Федерации от 12 мая 2016 г. № 18 «О некоторых вопросах применения судами таможенного законодательства» // Бюллетень Верховного Суда Российской Федерации. 2016. № 7 [Ruling of the Plenary Session of the Supreme Court of the Russian Federation No. 7 of 12 May 2016. On Some Questions of Application of Customs Laws by Courts, Bulletin of the Supreme Court of the Russian Federation, 2016, No. 7], para. 3.

consistency of lower level acts with higher level acts. The national supreme courts, in turn, provide clarification to national courts recommending that the interpretation of the EAEU Court should be taken into account when resolving specific disputes.

Thus, by virtue of point 1(1) of the Decree of the Plenum of the Supreme Court of the Russian Federation of 12 May 2016 No. 18, Russian courts should take into account acts of the Court of the Eurasian Economic Union (that is, decisions, rulings, advisory opinions) issued in accordance with Article 39 of the Statute of the Court concerning results related to the implementation of the Treaty, other international treaties within the Union, and/or decisions of organs of the Union. If the EAEU Court changes the given interpretation, it may appeal to the Supreme Eurasian Economic Council, indicating failure to execute its decision in a particular case (Art. 115 of the Statute of the EAEU Court), and without reference to it (Art. 120 of the Statute of the EAEU Court).

Taking into account the fact that, by virtue of Article 61 the Court leaves without consideration a demand for damages or other property demands, the sanctions mechanism is not monetary, but political.

In both instances, the universality of decisions is ensured by political will: in the EU, indirectly through penalties; in the EAEU – directly through an appeal to the Presidents who are members of the Supreme Eurasian Economic Council.

Of course, both mechanisms are imperfect and indirectly can become a source of contradictions and conflicts that arise at the stage of executing decisions of a supranational court. The courts are seeking mechanisms to resolve these conflicts, which at the first stage will be consolidated in judicial acts.

EurAsEC Court case-law was evaluated by the Russian Constitutional Court. The latter stated in Decision of 3 March 2015 No. 417-O that practices of the Court of EAEU

> cannot by themselves serve as a basis for derogating from the requirement contained in Article 17(1) of the Constitution of the Russian Federation concerning recognition and guaranteeing of human and civil rights and freedoms not only in accordance with generally-accepted principles and norms of international law, but also in accordance with the Constitution of the Russian Federation.

In other words, the Constitutional Court of the Russian Federation formulated a provision stating that a higher standard of protection of rights cannot be "lowered" by a supranational court.

Furthermore, the Constitutional Court stated:

> Applying point 4 of the Decree of the Customs Union Commission of 15 July 2011 No. 728, the competent public authorities of the Russian Federation and officials are obliged to take into account the conditions under which the customs privileges were granted for goods imported into the Russian Federation as a contribution to share capital, and, if this took place in

accordance with Decree of the Government of the Russian Federation of 23 July 1996 No. 883, prior to the entry into force of this Procedure (that is, before 18 August 2011), avoid revising the legal regime of use (or termination) contrary to the general legal principle "the law is not retroactive."

In this case the Constitutional Court did not pay attention to the thesis on retroactivity having been excluded in the final decision of the Appeals Chamber of the EurAsEC Court and had no influence on the uniform practice of application of norms of the Customs Union.

However, the provision on retroactivity formulated by the Constitutional Court of the Russian Federation is repeated in point 2(3) of Decree of the Plenum of the Supreme Court of the Russian Federation of 12 May 2016 No. 18, which states that courts need to take into account that the conflict priority of the Union right cannot lead to violating the rights and freedoms of citizens (or organizations) guaranteed by the Constitution of the Russian Federation. When applying Union law, which establishes (modifies, terminates) the rights and obligations to pay customs duties or use customs privileges, the principle of the inadmissibility of giving retroactive force to new customs regulation, thereby worsening the situation of participants of continuing legal relations, should be taken into account.

In this regard, we can assume that the mechanism for the enforcement of decisions of the EAEU Court was created by acts of the Constitutional and Supreme Court: decisions of the EAEU Court have *erga omnes* effect, if they do not reduce the level of protection of the rights of entrepreneurs.

3. Selection of Judges at the Court of the Eurasian Economic Union

The requirements for individuals applying for the position of international judge are generally the same for various international courts: (1) high moral character; (2) high professionalism that meets the requirements for appointment to high judicial positions; (3) generally-recognized legal authority. Similar requirements have been formulated in many statutes, for example, Article 21 of the 1950 European Convention on Human Rights, Article 9 of the Statute of the EAEU Court.

However, the experience of international courts has shown that such general formulations, not accompanied by procedural mechanisms for the selection of judges from several candidates in the open, transparent procedure, sometimes lead to a result that complicates the work of an international court. Many international organizations and courts are involved in selecting personnel for international courts.

In the Council of Europe this topic was discussed by an expert committee in 2015.[43] The procedures for appointing judges at the ECtHR consist of two stages –

[43] Steering Committee for Human Rights, Drafting Group "F" on the Reform of the Court (GT-GDR-F), Meeting Report, GT-GDR-F(2015)R8, 14–16 October 2015 (Jun. 2, 2019), available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806946aa.

national and international. The ECtHR establishes selection commissions under the ministries and departments of the member States (national stage), and then three nationally selected candidate judges are discussed in the Parliamentary Assembly of the Council of Europe, which makes the final selection (international stage). However, this mechanism is not effective because the choice depends on an extremely politicized body, hardly able to form a view on those legal parameters proposed by Article 21 of the ECtHR: high moral and professional qualities.

Another approach should be considered: the introduction of additional criteria for the appointment of judges. It was proposed to consider legal experience in the State that nominates the judge. Following this criterion would allow the court to pay more attention to the distinctiveness of the legal system of a State and, as a result, lead to the possibility of reducing the number of judgments diverging from the fundamental principles of national legal system.

It was also proposed to specify the requirements for nominated candidates: for the selection of judges of the ECtHR, a mechanism may be similar to that established by Article 255 of the Treaty on the Functioning of the EU: judicial experience and legal experience, availability of publications, knowledge of foreign languages, impartiality, and independence. Transparency of the national selection procedure supplemented by that at the international stage should also be provided.

In the EAEU, the selection mechanism exists only at the national level, and there is no international approval of candidates. The development of such procedures is *de lege ferenda*. Previous experience, education, and specialization are keys to predicting their judgments in the future. Thus, we can confidently rely on studies conducted in relation to other international courts:

(a) Former scholars are more inclined to "activist" judicial behavior when dealing with legal lacunae, that is, more boldly and widely apply the principles of law and formulate new legal positions unknown to existing positive law;

(b) Former government officials tend towards conservative judicial interpretation of law in conflict situations in favor of the public interest, fitting existing positive norms to new public relationships;

(c) Former members of the highest national courts tend to look for a more balanced approach as between these approaches.

In addition, statistics show that ECtHR practice demonstrates professional experience is useful for determining political preferences. Former lawyers practicing in the field of private law 14% more often than judges – lawyers or officials found a violation of human rights (including several juridical persons), whereas the latter are 13% more likely to rule in favor of the respondent State (including for the supranational authority).[44]

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[44] Sébastien Jodoin, *Understanding the Behaviour of International Courts: An Examination of Decision-Making at the Ad Hoc International Criminal Tribunals*, 6(1) Journal of International Law and International Relations 1, 11 (2010).

One should also consider "cloning the skills of the former professions":[45] judges who were previously prosecutors or investigators tend to vote conservatively in matters of civil freedoms, as well as in economic matters, and as a rule tend to support government authority. Therefore, the body forming an international court may take into account the findings of analytical studies on the stereotypes of the behavior of lawyers based on their previous experience and type of education. Such an analysis should be carried out as both nationally and internationally. Perhaps the second stage allows create the most balanced list of judges to be created who are able to deal with emerging issues without addictions deriving from former professional experience.

However, the main purpose of international courts is judicial review of compliance by States with international standards and the obligations arising from them. In this case, as the experience of the most successful courts (ECtHR, EU Court, International Court of Justice) shows, they managed to gain credibility by expanding the scope of international law without replacing it by national legal regulation, sometimes making decisions contrary to the interests of a particular State at the time of the dispute, but in accordance with the interests of States in the long run, formulating a legal position for future.

To be able to perform a similar function and work on the development perspective of an international court and international law, all candidates for judges must have one of the most essential qualities – independence.

Unlike national courts that possess a long history and traditions and are trustworthy, international courts are in a difficult situation: despite their "youth," they must prove their independence and impartiality, their ability to handle cases on the basis of existing international law. And being isolated from their own traditions, international judges are obliged to combine in their practice various international legal approaches to interpretation and the application of international law (literal, historical, teleological, and others). In this case, an international judge should certainly abandon a narrow reading of these norms, a challenge difficult to achieve.

On the example of changing the requirements for the judge (from the "specialist in international law"[46] (1899 Permanent Court of Arbitration) to "the impossibility [for a judge] to act as an agent, consultant or attorney of the party"[47] (1907 Hague Convention)), it can be seen how the understanding of issues related to the national affiliation of judges was changing.

The first direct mention of the independence of international judges is contained in Article 2 of the 1920 Statute of the Permanent Court of the International Justice:

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[45] *Piersack v. Belgium*, Application No. 8692/79, Judgment, 1 October 1982.

[46] Convention pour le règlement pacifique des conflits internationaux, conclue à La Haye le 29 juillet 1899, Art. 23 (Jun. 2, 2019), available at https://wetten.overheid.nl/BWBV0005494/1900-09-04.

[47] Convention pour le règlement pacifique des conflits internationaux, conclue à La Haye le 18 octobre 1907 (Jun. 2, 2019), available at https://wetten.overheid.nl/BWBV0005617/1910-01-26.

> The Permanent Court of International Justice shall be composed of a body of independent judges elected regardless of their nationality from amongst persons of high moral characters, who possess the qualifications required in the respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

Article 2 of the 1945 Statute of the International Court of Justice is similar to Article 2 of the Statute of the PCIJ.

Articles 16(1) and 17(1) of the ICJ Statute contain provisions from the PCIJ Statute that a judge may not exercise any political or administrative function, or engage in any other occupation of a professional nature, act as agent, counsel, or advocate in any case.

Another important aspect is that independence of an international judge, "a judge must be independent in the exercise of its functions and is not entitled to receive instructions from the government or from some other source,"[48] that is, must be independent of external pressure.

The foundations of the independence of judges enshrined in the statutes of courts are developed in precedents, regulations, internal rules, recommendations, and codes of ethics. We need to emphasize that internal rules are of importance for courts, enshrining independence provisions from administrative authority in a particular court and from the authority of the State, in which the headquarters of the court is situated, as well as from other power organs. We should stress that the judge must be independent not only from external, but also from internal, pressure. Especially dangerous for an international court: international judges are outside their social environment and their professional and corporate communications. In such a situation, all kinds of psychological pressure: tears, orders, insults, cunning use of decision-making procedures, financial inequality, administrative or intellectual coercion such as other forms of mobbing (group pressure on one) are capable distorting the behavior of an independent judge and, as a result, contributing to unjust decisions.

Many judges face such negative phenomena, which lead to discussions of how to overcome the phenomena of mobbing and inequality. Practical guidelines can have a significant impact on the independence of international judges. The first step in creating such recommendations was the adoption of the 1985 United Nations Basic Principles of the Independence of the Judiciary[49] and the 2002 Bangalore Principles of Judicial Conduct.[50]

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[48] Erik Møse, *The Independence of International Judges* in *The Independence of Judges* 187, 191 (N.A. Engstad et al. (eds.), The Hague: Eleven International Publishing, 2014).

[49] United Nations Basic Principles of the Independence of the Judiciary (1985) (Jun. 2, 2019), available at https://www.un.org/ruleoflaw/blog/document/basic-principles-on-the-independence-of-the-judiciary/.

[50] The Bangalore Principles of Judicial Conduct (2002) (Jun. 2, 2019), available at https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf.

These acts subsequently led to the adoption of national codes of ethics for judges based on them.[51]

In relation to international judges, to overcome the violation of their independence a different method is used: internationally-accepted documents combining "best practices." Special place among them is occupied by the Burgh House Principles on the Independence of the International Judiciary[52] ("Burgh House Principles") adopted in Berlin on basis of the results of a Conference of the International Law Association in 2004. This document contains practical recommendations in seventeen directions, has abstract form, represents a minimum set of standards, and takes into account the fact that each court and tribunal has its own characteristics.

Taken together, these standards can overcome the violation of independence and equality of judges. Thus, the principle of independence of international judges includes institutional and personal aspects. According to principle 1.1 of the Burgh House Principles, judges must exercise their authority freely and independently of interference or influence of any person or body.

The issue of institutional independence may arise in relationships between the institution that established the court and by the court itself. This is reflected in principle 1.2 of the Burgh House Principles:

> [J]udges shall exercise their judicial functions free from interference from other organs or authorities of that organization. This freedom shall apply both to the judicial process in pending cases, including the assignment of cases to particular judges, and to the operation of the court and its registry.

The principle of independence is evident in procedural activities: judicial and organizational. It is especially difficult to comply in organizational matters. International courts are financed from the general budget of the organization, under which are established the staff of the court, subject to the requirements concerning recruitment of staff at the international organization.

This can produce tensions in the relationship between the court and other organs for general administrative matters. The solution to this problem is often difficult to find, but priority in any conflict situation should be given to the independence of the court and judges. For example, in International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda the judges were independent in issues of recruiting assistants to judges. The ECtHR is independent of the Council of Europe in its organizational matters.

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[51] *See, e.g.*, Кодекс судейской этики Российской Федерации от 19 декабря 2012 г. // СПС «КонсультантПлюс» [Judges' Ethics Code of the Russian Federation of 19 December 2012, SPS "ConsultantPlus"].

[52] The Burgh House Principles on the Independence of the International Judiciary (2004) (Jun. 2, 2019), available at https://www.ucl.ac.uk/international-courts/sites/international-courts/files/burgh_final_21204.pdf.

According to principle 1.3 of the Burgh House Principles,

> The court shall be free to determine the conditions for its internal administration, including staff recruitment policy, information systems and allocation of budgetary expenditure.

Proper financing is the key to implementation of the principle of the independence of the court and judges. Principle 6 of the Burgh House Principles states that adequate funding must be provided to international court.

With regard to the EAEU Court, elements of independence are mostly provided in statutory and internal documents. According to Article 5 of the Statute of the Court, the Court is developing proposals for financing the activities of the Court and administering the funds allocated to ensure its activities in accordance with budget regulations of the EAEU (institutional aspect of external independence).

According to Article 20 of the Statute of the Court of Justice, the judges while administrating justice are equal and have the same status. The Chairman of the Court and his Deputy may not undertake actions aimed at obtaining any unlawful advantages (internal aspect). The latter means that all issues are decided jointly after discussion and voting.

The element of independence includes the possibility of attaching separate opinions to judicial acts (present in the EAEU) or the possibility of adopting decisions on organizational and procedural matters by consensus (there is no regulation in the EAEU). In practical activities of the Court the picture may be distorted due to external pressure on the court as a whole (for example, through budget processes) and due to internal pressure on an "uncomfortable" judge denying corporate interests for the sake of practical independence.

In practice, problems may arise when audit officers perform EAEU Court auditing and, in the absence of financial irregularities, may offer to change internal regulations (for example, financial control is replaced by legal supervision), and then court administrators using similar expert proposals to exert pressure on judges who disagree with such approach. As a result, both forms of violation of independence – external and internal – unite and pervert the moral and ethical atmosphere in the court and adversely affect judicial activities in both its forms: organizational and the consideration of cases.

Therefore, the appointment of judges should be performed after comprehensive assessment of the experience of the candidate in the manifestation of their own independence and respectful acceptance of the independence of another judge.

Conclusion

This analysis allows us to conclude that when establishing an international court some basic standards should be drawn upon, including, above all, proper education

in international law, perhaps not only diplomas of respected universities, but also publications on international law, as well as knowledge of foreign languages (*see*, for example, Art. 253 of the Treaty on the Functioning of the EU).

An equally important requirement is sufficient work experience in the legal profession: as a judge of the national court top level or other legal experience allowing the candidate to apply for such a position. Add to this a balanced ratio of individuals who have practiced private and public law. Particular attention should be paid to compliance with gender balance in an international court. Gender equality is infrequently mentioned in international legal documents, but doctrinal studies convincingly prove that equilibrium in this matter leads to the creation of a more sustainable body.[53]

In addition, all previous life experience of a candidate judge should testify that he did not commit immoral or unethical acts, was not involved in corporatism, did not engage in servility to superiors, manipulative behavior, impolite attitude towards other people, did not allow conflict of interest, and proved to be an independent personality. In order to make the choice consistent and reliable, it should be held in two stages: national, which identifies several candidates, and international, when an authorized body chooses one of the candidates.

This procedure does not insure against any roughness in the formation of the court, but may significantly reduce the probability of regret expressed by the president of one State, that there were four mistakes in his life and they are all in the Supreme Court of the country. However, this remark is more indicative of the fact that the president was not mistaken in recommending these persons to the court, as all candidates proved to be independent and serve the development of the legal system.

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