ON OUR WAY TO 2030: DELIVERING FOR RESILIENT AND PROSPEROUS SOCIETIES

RIGA GRADUATE SCHOOL OF LAW

Norwegian Ministry
of Foreign Affairs

Ministry of
Foreign Affairs
Republic of Latvia

ON OUR WAY TO 2030:
DELIVERING FOR RESILIENT AND PROSPEROUS SOCIETIES

CONFERENCE PAPERS

Riga, 2020

Authors: Anastasiya Griadasova, Daniel Goinic, George Lomtadze,
Hannepes Taychayev, Lucia Leontiev, Rahim Rahimov,
Zhengizkhan Zhanaltay, Dr. Natalia B. Alenkina

Editors: Dr. George Ulrich, Dr. Pietro Sullo, Dr. Žaneta Ozoliņa,
Dr. Filip Cyuńczyk, Dr. Kārlis Bukovskis, Lolita Čigāne, Tjaco van den Hout

Project coordinators: Justīne Elferte, Anastasija Kaplane, Paula Šimkuse

English language editor: Christopher Goddard

Cover design: Anda Nordena

Layout: Anda Nordena

ISBN 978-9934-8684-2-9

Dear Readers,

I am delighted to present this issue of Conference Papers on the theme "On our way to 2030: delivering for resilient and prosperous societies", which inaugurates a 'new tradition' at the Riga Graduate School of Law (RGSL). In this series we host several contributions by graduates of the Advanced and Intensive Programmes in European Law and Economics, providing them with the opportunity to publish and make available the results of their research. The subjects covered in the current issue were debated on 10-11 December 2020 within the conference organised by RGSL in cooperation with the Ministries of Foreign Affairs of the Republic of Latvia and the Kingdom of Norway. These subjects cover the themes of human rights, external action of the European Union, the rule of law, and access to justice – all of great topicality nowadays. I am sure that the debate triggered by these papers will be beneficial beyond a readership consisting exclusively of experts in the related fields.

I could never stress enough the importance of cooperation between RGSL and the Latvian and Norwegian governments in the field of life-long learning, which has led to several achievements, including (but certainly not limited to) the publication of these Conference Papers. RGSL very much looks forward to further strengthening this cooperation and is ready to encourage other graduates of the Advanced and Intensive Programmes in European Law and Economics to conduct research to be published in further issues. With this aim in mind RSGL hopes to organise a new conference next year.

In a challenging time for all of us it is crucial to assure that the right to education – a human right protected under the Universal Declaration of Human Rights – freedom of expression and exchange of ideas with an impact beyond academia are always protected and strengthened.

Unfortunately, the COVID-19 pandemic is jeopardising the enjoyment of fundamental rights worldwide, in particular the right to education. This could have an impact beyond our generation, because the right to education is an

'empowering right', as the UN Committee on Economic, Social and Cultural Rights has stressed. In this difficult context, I want to strongly emphasise that every crisis posits challenges but also provides opportunities. With that in mind, I am glad that the present Conference Papers will be an opportunity not only for our graduates to exchange experience and knowledge but also to make a significant contribution to shape a better, fairer and more inclusive world.

Dr. Pietro Sullo
Rector of the Riga Graduate School of Law

TABLE OF CONTENTS

INTRODUCTION

Several overarching elements distinguish the papers from the conference "On our way to 2030: delivering for resilient and prosperous societies".

Firstly, the authors of these selected papers represent the Alumni of the Advanced and Intensive Programmes in European Law and Economics of Riga Graduate School of Law. The selection of countries embodies the wide geographical scope of the Programme – Kyrgyzstan, Georgia, Moldova, Azerbaijan, Kazakhstan – to name a few. During their stay in Riga throughout the programme, the course participants built new friendships and stay connected across the Eastern Neighbourhood and Central Asia regions upon their graduation. They also maintain their connection to RGSL and its faculty. Each of the papers is supervised by one of the RGSL faculty members who eagerly contribute and assist with further development of the academic and professional careers of the graduates of the Advanced Programme and Intensive Programmes. RGSL is proud of the career development of our former course participants, attesting to the successful transfer of the knowledge and experience gained through this programme.

Secondly, the conference paper selection perfectly demonstrates the thematic scope and priorities that the governments of Latvia and Norway are targeting in cooperation with Riga Graduate School of Law. But how, exactly, do we jointly deliver "for resilient and prosperous societies", as conceptualized by the conference headline and throughout the authors' inputs?

Agenda 2030 offers a suitable toolkit. In 2015 the Heads of State and Government meeting at the UN headquarters in New York called for new global Sustainable Development Goals to be implemented by 2030 through building peaceful, just and inclusive societies and achieving sustained economic growth. These 17 Sustainable Development Goals serve as a backbone for action by international society in setting ambitions and transitions towards economic stability, democracy and security.

It is more than symbolic that Latvia and Norway jointly supported the conference and its publication, as the countries are like-minded partners on these topics in both the UN and NATO. In her introductory speech, Zanda Kalniņa-Lukaševica expressed the support of the Latvian government for the countries of the Eastern Neighbourhood and Central Asia in building resilient societies, good governance and economic stability. The EU needs to keep focused on European Neighbourhood policy and our action needs to be adjusted to the needs of each of the partner countries. In 2021 Norway takes a seat on the UN Security Council as a non-permanent member. During its two-year term Norway will focus on peace and security, conflict prevention and civil society protection, including women and children. As a UN SC member, Norway will actively promote the implementation of Agenda 2030 on the global stage. As expressed by Norwegian ambassador H.E. Kristian Ødegaard in his opening address to the conference: "Sustainable development cannot be reached without inclusion of women and youth." Good governance, human rights, fundamental principles and values are essential for delivering resilient and prosperous societies.

With this approach in mind the conference contributions can be clustered into three thematic segments, namely, fundamental rights and rule of law; good governance; and sustainable economic development.

Daniel Goinic, Legal Officer at the Legal Resources Centre from Moldova (scientific editor Dr. George Ulrich) evaluates the current implementation of judgments of the European Court of Human Rights with respect to Article 18 of the ECHR convention. The author specifically looks at Eastern European countries by examining the reasons for the high number of judgments finding violations of Article 18. This article is a fitting contribution to the conference debate on democracy and rule of law. In its conclusion the paper argues that "the case law of the ECtHR under Article 18 is under transformation. It might be developed as a response to non-democratic regimes". By focusing on the toolkit of the Council of Europe, this paper shows the variety of global and regional organizations where issues of rule of law and human rights may be addressed.

Anastasiya Griadosova, Project Officer at the International Foundation for Electoral Systems in Kyrgyzstan (scientific editor Ms. Lolita Čigāne) views fundamental rights from the perspective of national electoral rights. Through comparative research the author explores access to voting rights by diaspora groups: citizens residing abroad. The paper looks at the legal framework and procedures in place in correlation with voting turnout. This is a highly relevant topic, given the technological changes on the one hand (that offer electronic voting options) and trust in voting security on the other. Yet the main finding of the research – which

compares Estonia with Kyrgyzstan – reveals that turnout is largely affected by the political will of the country to "reach out to its nationals residing abroad". Thus, the article relates to the thematic scope of citizens' fundamental rights.

Lucia Leontiev, PhD candidate at Scuola Superiore Sant' Anna di Pisa and Maastricht University from Moldova (scientific editor Dr. Pietro Sullo) touches upon the highly relevant issue of the core principles of the EU treaties, namely freedom, democracy, human rights and rule of law. The author explains the mechanism of EU normative power in reaching out to the Eastern Neighbourhood countries. While arguing that conditionality is an effective tool in the transformative power of the partner countries, the conclusion also indicates some gaps, in particular that "actions that EU has concluded are not sufficient in the context of de facto States from Eastern Europe (Transnistria, Abkhazia, South Ossetia and Nagorno Karabakh)". Accordingly, the paper establishes a correlation between the EU's normative power to export European values and principles beyond its borders on the one hand, and limitations in terms of protracted conflicts in Europe on the other.

George Lomtadze, Head of the Protocol and Public Relations Department at the Constitutional Court of Georgia (scientific editor Dr. Filip Cyuńczyk) develops his argument in the field of governance and lawmaking. In contrast to other authors, who deal with these issues within international organizations, this contribution focuses on the national level by analysing different aspects of the rule of law and good governance in national lawmaking. The author claims that "parliamentary lawmaking, especially when it concerns fundamental rights and potential restrictions thereof, has to correspond with principles of proportionality, equality and non-discrimination" and offers an empirical case study on regulatory impact assessment evaluation in Georgia. The contribution is highly relevant with respect to the context of the Association Agreement between the EU and Georgia that sets forward concrete criteria for good governance and lawmaking.

Rahim Rahinov, Independent Political Analyst from the Woodrow Wilson International Center for Scholars from Azerbaijan (scientific editor Dr. Žaneta Ozoliņa) has in the same vein focused on relations with the EU. He explains the relations of his country as affected by the official discourse set by President Aliyev, namely, "it has shifted with regard to future relations with the EU from "European integration" to "European cooperation". From the perspective of the European Neighbourhood policy the findings of the paper recall the "Riga Eastern Neighbourhood Summit" in 2015, where Azerbaijan opted for less integration with the EU. The author rightly argues that Azerbaijan tries to "focus more on the economic sphere, which is also important for the EU". This paper perfectly shows

that ENP policy has to remain focused while keeping differentiated with respect to different needs and visions by the partner countries.

Zhengizkhan Zhanaltay, Director of the Eurasian Research Institute from Kazakhstan (scientific editor Dr. Kārlis Bukovskis) approaches sustainability from the economic cooperation and trade perspective. His contribution is empirically rich in analysing trade flows conducted between the EU and Kazakhstan. The author suggests that trading partners should in future diversify both exports and imports: "Kazakhstan could pay attention to developing its capabilities to increase the comparative advantage of its non-energy goods such as oilseeds, fish and machinery". While explaining trade with the EU, the author also touches upon an important issue of relations with the WTO and ratification of the EPCA. Indeed, sustainability goes hand in hand with multilateralism. This is widely acknowledged both by Latvia and Norway and in the framework of international organizations the commitments by our Central Asian partners to multilateralism are most welcome.

Hannepes Taychayev, Lecturer of Law at the American University of Central Asia from Kyrgyzstan, and Natalia B. Alenkina, Associate Professor of Law at the American University of Central Asia, also from Kyrgyzstan, who holds a PhD (scientific editor Tjaco van den Hout) characterize the wide composition of the programme participants and contributors to the conference. Their chapter examines legal mechanisms providing access to civil justice for domestic and international investors under the Investment Law regime of Kyrgyzstan. The article has a practical value as it thoroughly explains the dispute resolution mechanisms in Kyrgyzstan and the limitations for domestic investors in comparison to foreign investors. In the conclusion concrete reforms are proposed for policy makers in order to tackle the disparities in treatment of different groups of investors.

This volume of conference contributions shows that there is no one single way to 2030. Each and every one of the selected routes contributes to delivering resilient and prosperous societies in our partner countries.

Dr. Ilze Rūse
Professor at RGSL

ARTICLE 18 ECHR AS A WARNING SHOT FOR NON-DEMOCRACY IN EASTERN EUROPE

DANIEL GOINIC

Author: Daniel Goinic, Legal Officer at the Legal Resources Centre from Moldova.

Scientific editor: Dr. George Ulrich, European Inter-University Centre for Human Rights and Democratisation (EIUC) Academic Director and Programme Director of the European Master's Degree in Human Rights and Democratisation (EMA).

Abstract
This article aims to examine the untapped potential to protect democracy in Eastern European countries through Article 18 of the European Convention on Human Rights (ECHR). This provision prohibits States from restricting rights for any purpose other than provided in the ECHR. The author studies the impact of the European Court of Human Rights (ECtHR) on Eastern European democracy by examining the reasons for the high number of judgments finding violations of Article 18.

In this chapter, the author attempts to brief a general understanding on the concept of Article 18 ECHR. Further, the author will elucidate the Court's case law on this article regarding Eastern European countries and will aim to describe the current evolution and implementation of these judgments. The chapter then goes on to assess the impact of ECtHR judgments on the legal system of the countries concerned and the impact of individual measures adopted by the Council of Europe towards applicants.

Finally, the author will argue that the case law of the ECtHR under Article 18 is under transformation and would conclude that it might be developed as a response to non-democratic regimes. It is paramount for the ECtHR to consider highly sensitive political contexts in compromised Eastern European democracies.

Keywords: *European Convention on Human Rights, European Court of Human Rights (ECtHR), Article 18, limitations of rights, Eastern Europe.*

1. Introduction

The regional system consecrated by the European Convention on Human Rights[1] (hereinafter "the ECHR" or "the Convention") is regarded as the one of the most successful systems for human rights protection. The history of the ECHR goes hand-in-hand with the establishment of the Council of Europe.[2] This organization was founded in 1949, after the Second World War, to protect human rights and the rule of law, and to promote democracy. The member States' first task was to draw up a treaty to secure basic rights for anyone within their borders, including their own citizens and people of other nationalities. Those obligations are in relation to national human rights laws and are based not only on the Convention itself, but also on the additional protocols, and on the case law developed by the European Court of Human Rights (hereinafter "the ECtHR" or "the Court").[3]

The Convention was developed to ensure that governments would never again be allowed to dehumanize and abuse people's rights. The ECtHR invoked the principle of effective protection of Convention rights and the principle of developing protection of those rights in a way that is tailored to address contemporary needs and threats.[4] In addition to providing justice in individual cases, it is undeniable that in the 21st century the ECHR and the Court perform functions comparable to those performed by national constitutional courts across Europe.[5] Therefore, the ECHR replaced the idea of protecting the individual against state measures with the idea of protecting the individual through state measures.[6]

1 Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5) adopted in Rome on 4 May 1950, entered into force on 3 September 1953.

2 For details see the Statute of the Council of Europe (ETS No. 001) and texts of statutory character, established by the Treaty of London, and signed on 5 May 1949. Each State formally joins the Council of Europe by ratifying the Statute. At this stage, 47 States have ratified the Statute, mostly European States with the exception of Belarus and the Vatican City (the Holy See).

3 The European Court of Human Rights was set up in 1959. Before Protocol No. 11 came into force in 1998 the Court had been a part-time body with jurisdiction only over cases referred to it by the European Commission of Human Rights, or by States.

4 Monika Florczak-Wątor, "The Role of the European Court of Human Rights in Promoting Horizontal Positive Obligations of the State,". *International and Comparative Law Review* vol. 17, (2017): pp. 45–46.

5 Helen Keller and Alec S. Stone, A Europe of Rights: The Impact of the ECHR on National Legal Systems, (Oxford Scholarship Online: 2009), p. 7.

6 Luzius Wildhaber, "Rethinking the European Court of Human Rights." in *The European Court of Human Rights between Law and Politics*, ed. Jonas Christoffersen and Mikael R. Madsen. (Oxford University Press, 2011).

Since the collapse of the Soviet Union, the geographical and cultural influence of the ECHR has progressed eastwards. The Council of Europe has welcomed practically all Eastern European countries into the system. As it strove to maintain and expand the relatively high human rights standards set in the 1980s and 1990s, it became involved in the democratization processes in these countries.

The Eastern European democracies have progressed from totalitarian, or at least authoritarian, to formally democratic legal systems. The integration of these legal and political systems has posed a serious challenge to the Court, but its impact on Eastern Europe cannot be underestimated. It has contributed to forming normative orders based on the rule of law and protection of human rights. It has established the rule of law framework, *de iure*, in which domestic institutions operate. Nevertheless, its influence has been limited, since it has not been possible to convince domestic elites to fully head for the values of the Convention, without restrictions and limitations.

2. General Remarks on Article 18 ECHR

The ECHR elaborated a sort of general theory of Convention rights, subjecting them all – except the right to life, the right not to suffer inhuman or degrading punishment or treatment and prohibition of slavery – to limitations that are legitimate in a democratic society and whose reasonableness and proportionality must be decided on a case-by-case basis.

Article 18 is one of the strangest provisions in the Convention:[7]

> Article 18 ECHR: Limitation on use of restrictions on rights
> The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

It seems therefore that Article 18 must be viewed as a norm intended to prevent member States from abusing the ability to restrict rights to a greater extent than is provided in the Convention. Article 18 concerns limitations of rights not for legitimate aims, but for covert and illegitimate reasons.

Separate examination of a complaint under that Article is only warranted if the claim that a restriction has been applied for a purpose not prescribed by the

7 William A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford: Oxford University Press, 2015), p. 623.

Convention appears to be a fundamental aspect of the case. When considering an allegation under Article 18 the Court must establish: whether the restriction of the applicant's right or freedom was applied for an ulterior purpose; whether the restriction pursued both a purpose prescribed by the Convention and an ulterior one, that is, whether there was a plurality of purposes and, if so, which purpose was predominant.[8]

Vincent Coussirat-Coustere describes it as one "provision apparently inutile", although one that had served a role by influencing the interpretation of the Convention.[9] It has no counterpart in the Universal Declaration of Human Rights or in the human rights treaties adopted within the United Nations frame, nor is it reproduced in the European Union Charter of Fundamental Rights. First and foremost, this is because this article has no autonomous role in the protection of rights and is applied in relation to other articles. It is possible in theory, but in practice there could not be a breach of Article 18 without the breach of another Convention right.

The Court's case law shows an approach in cases where it found no violation of other Convention rights, declaring that as those rights had not been violated, Article 18 was not violated either.[10] However, the problem persists when the right in conjunction with which it was invoked was violated. There is no separate issue under Article 18, even if the case pertains to ulterior purposes.[11] Some judges have acknowledged this problem by avoiding examination by the Court of Article 18 on the merits.[12]

Secondly, the question concerns the provisions with which Article 18 can be invoked as accessory. To date, the Court has only found violations of Article 18 together with Articles 5, 8 and 11 ECHR.[13] However, it remains unclear whether it can be invoked with Article 6 ECHR,[14] which does not contain a limitation clause per se. Even though Article 18 cannot easily be applied to infringements of judicial

8 *Merabishvili* v. *Georgia* [GC], no. 72508/13, ECHR 2017.

9 Schabas, supra note 7.

10 *E.g., Kucheruk* v. *Ukraine*, no. 2570/04, para.177, ECHR 2007.

11 Tan Floris, "The Dawn of Article 18 ECHR: A Safeguard Against European Rule of Law Backsliding?" *Goettingen Journal of International Law* 9, 2018, 109–141, p. 123.

12 Concurring Opinion of Judge Kūris appended to *Tchankotadze* v. *Georgia*, no. 15256/05, paras. 23–26, ECHR 2016.

13 HUDOC database, which provides access to the Court's case law.

14 Joint concurring opinion of judges Sajó, Tsotsoria and Pinto de Albuquerque appended to *Tchankotadze* v. *Georgia*, no. 15256/05, paras. 4–6, ECHR 2016.

independence, evolution in how it is interpreted may support the focus on motives that domestic authorities conceal under formal legality.[15]

The object of this provision is not to allow the State to voluntarily divert from a restriction already provided for its purpose. Both the legality of the restrictive measure and the means used will be controlled by Court. However, an applicant alleging that his rights and freedoms were being limited for an improper reason must convincingly show that the real aim of the authorities was not the same as that proclaimed or which could be reasonably inferred from the context. A mere suspicion that the authorities used their powers for some other purpose than those defined in the Convention is not sufficient to prove that Article 18 has been breached.[16] To a large extent, when the Court is notified that an infringement of Article 18 has been alleged, after a finding of a violation of a "substantial substantive right", it is decided that it is no longer necessary to examine this infringement under Article 18 ECHR.

3. Article 18 ECHR Against Eastern European Countries

As we have seen, the ECHR structure is based on the presumption that States will fulfil their obligations in good faith. Article 18 is rather alone in going against this presumption, and instead focusing on state bad faith. Therefore, its case law is fairly sparse, in comparison with case law resulting from other Convention provisions. Being rarely invoked by the applicants, but also rarely applied by the Court, this provision still has the potential to assess the particular situation in each Eastern European State.

3.1 Moldova

In the case of *Cebotari*,[17] the Court found that the applicant being head of a state-owned company had been placed under arrest and detention for fabricated charges in order to put pressure on him with a view to hindering a private company,

15 Tacik Przemysław, "Habitual deference? Strasbourg standards of judicial independence and challenges of the present," *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego* (2019): p. 63.

16 *Khodorkovskiy* v. *Russia*, no. 5829/04, para. 255, ECHR 2011, and *Khodorkovskiy and Lebedev* v. *Russia*, nos. 11082/06 and 13772/05, ECHR 2013.

17 *Cebotari* v. *Moldova*, no. 35615/06, ECHR 2007.

Oferta Plus S.R.L.,[18] with which he was linked, from pursuing its application to the Court. After the Moldovan Government had been informed about the application lodged by Oferta Plus with the Court in respect of non-enforcement of a final judgment in its favour, that judgment was quashed and criminal proceedings were initiated against its Chief Executive Officer and Mr Cebotari on charges of large-scale embezzlement of state property. The Court found that the restriction of the applicant's right to liberty was applied for a purpose other than the one prescribed by the Convention. The Court based that finding on the fact that the materials in the case could not lead an objective observer reasonably to believe that the applicant could have committed the offence in relation to which he had been detained.[19]

3.2 Azerbaijan

In Azerbaijan the main applicants were an opposition politician (Mr Ilgar Mammadov[20]) and a number of civil society activists and human-rights defenders (Mr Rasul Jafarov,[21] Mr Anar Mammadli,[22] Mr Rashad Hasanov, Mr Zaur Gurbanli, Mr Uzeyir Mammadli, Mr Rashadat Akhundov,[23] Mr Intigam Aliyev[24] and Mr Natig Jafarov).[25] They were all the subject of criminal proceedings which the Court found to constitute a misuse of criminal law, intended to punish and silence them. The Court concluded that the actual purpose of the criminal proceedings was to sentence the applicants for having criticized the government (Ilgar Mammadov); for their activities in the area of human rights or electoral monitoring;[26] for active social and political engagement or to prevent further work as a human rights defender (Aliyev).

Additionally, the Court found that the arrest and detention of each applicant took place in the absence of any reasonable suspicion that they had committed an offence. It also found that the domestic courts had not conducted a genuine review

18 *Oferta Plus S.R.L v. Moldova*, no. 14385/04, ECHR 2006.
19 *Ibid*., paras. 52–53.
20 *Ilgar Mammadov* v. *Azerbaijan*, no. 15172/13, ECHR 2014.
21 *Rasul Jafarov* v. *Azerbaijan*, no. 69981/14, ECHR 2016.
22 *Mammadli* v. *Azerbaijan,* no.47145/14, ECHR 2018.
23 *Rashad Hasanov and Others* v. *Azerbaijan*, nos. 48653/13 and 3 others, ECHR 2018.
24 *Aliyev* v. *Azerbaijan*, nos. 68762/14 and 71200/14, ECHR 2018.
25 *Natig Jafarov* v. *Azerbaijan*, no. 64581/16, ECHR 2019.
26 Violations were found in *Rasul Jafarov, Aliyev, Mammadli*.

of the lawfulness of the detention.[27] For instance, in *Aliyev*, it established that search and seizure operations at the applicant's home and office did not pursue the legitimate aims prescribed by the Convention (violation of Article 8 § 2), in *Rasul Jafarov* it found a violation of the right to an individual petition following suspension of the licence to practice as a lawyer of the applicant's representative (violation of Article 34) and in *Natig Jafarov* besides arbitrary detention for government criticism (violation of Article 5) he was confined in a metal cage during all courtroom proceedings (violation of Article 3).

These notable human rights defenders and civil society activists were arrested and charged to a large extent with similar criminal offences in relation to 'alleged illegal activities' by their non-commercial organizations. Unfortunately, case law evolution demonstrates that Azerbaijan is the country with the most convictions under Article 18 ECHR. In a very recent case, *Ibrahimov and Mammadov*,[28] judgment of 13 February 2020, the Court again found proven inter alia that the applicants were arrested and prosecuted on drugs charges, which they alleged were false and that the real reason for the authorities' actions was that they had painted political slogans on a statue of the former president of Azerbaijan and dissemination of photographs thereof on social networks. Or, in case of *Khadija Ismayilova*,[29] judgment of 27 February 2020, a well-known investigative journalist who published a number of articles criticising members of the government and their families for alleged corruption and illegal business activities, the authorities' actions were driven by improper reasons and that the actual purpose of the impugned measures was to silence and punish the applicant for her journalistic activities.

In Azerbaijan each applicant's situation cannot be viewed in isolation. The Court took a more expansive contextual approach, not only looking at the specific immediate facts surrounding the case, but also the general conditions of treatment of human rights defenders in the country. In so doing, the ECtHR called attention to evidence from the general context of the systemic difficulties that human rights NGOs are facing in Azerbaijan as an Article 18 trigger condition.[30]

27 Violations of Art. 5 § 4 ECHR were found in *Ilgar Mammadov, Rasul Jafarov, Mammadli and Aliyev.*

28 *Ibrahimov and Mammadov* v. *Azerbaijan*, nos. 63571/16 and 5 others, paras. 157–158, ECHR 2020.

29 *Khadija Ismayilova* v. *Azerbaijan* (No.2), no. 30778/15, ECHR 2020.

30 Çali Başak "Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights." *Wisconsin International Law Journal* 35, no.2 (2018), pp. 237–276, p. 268.

3.3 Ukraine

In the case of *Lutsenko*,[31] the applicant, a former Minister of the Interior and opposition leader, was charged with abuse of office soon after a change of political power. Shortly after a newspaper had published an interview in which he denied the accusations against him, he was placed in detention on remand. His detention did not pursue any purpose prescribed by the Convention, as none of the grounds advanced by the authorities were found by the Court to be compatible with the ECHR requirements. As the Court held, when it comes to allegations of political or other ulterior motives in the context of criminal prosecution, it is difficult to dissociate pre-trial detention from the criminal proceedings within which such detention has been ordered. In addition, the fact that the applicant's communication with the media was explicitly indicated as one of such grounds clearly demonstrated an attempt by the authorities to punish him for publicly disagreeing with accusations against him and for asserting his innocence, which he had the right to do.[32] This was qualified as an ulterior purpose contrary to Article 18 in conjunction with Article 5.

The case of *Tymoshenko*[33] also concerned criminal prosecution of an opposition leader and a former prime minister, who was charged with excess of authority and abuse of office soon after a change of power. Many national and international observers, including various non-governmental organizations, media outlets, those in diplomatic circles and individual public figures, considered these events to be part of the politically motivated prosecution of opposition leaders in Ukraine.[34] The Court relied on the statements in the prosecution's request to place the applicant in pre-trial detention and in the corresponding court order which showed that the purpose had been to punish her for disrespect towards the court and perceived obstructive conduct during the hearing. For the Court, her detention pursued solely an ulterior purpose, namely punishment for her conduct during the trial, and thus violation of Article 18. Moreover, it is necessary to take into account the manner in which the investigation was conducted. Although criminal investigations in Ukraine often last for many years, in an extremely complex case involving the applicant they were conducted with remarkable speed, within less than six weeks. Of even greater significance is the fact that the investigations were conducted in such a way that the applicant was completely hindered from

31 *Lutsenko* v. *Ukraine*, no. 6492/11, ECHR 2012.

32 *Ibid*., paras. 108–109.

33 *Tymoshenko* v. *Ukraine*, no. 49872/11, ECHR 2013.

34 *Ibid*., para. 296.

continuing her political activity.[35] The applicant's party had made clear its intention to participate, with the applicant as its leader, in the parliamentary elections that made it necessary to start preparations for the election campaign at the time of pre-trial detention.

3.4 Russian Federation

For decades after the entry into force of the ECHR, the Court largely ignored Article 18. The Court first found a violation in 2004 in *Gusinskiy* v. *Russia*.[36] The applicant was a businessman involved in a commercial dispute with Gazprom, a company controlled by the State. He was arrested and detained for several weeks in connection with a completely separate matter. It's seems that the detention was on a valid basis. Nevertheless, during the detention period an agreement had been struck. He agreed to sell certain interests to Gazprom at a favourable rate. The state minister endorsed the agreement with his signature and later implemented that agreement. Later the investigation against the applicant was cancelled. The ECtHR concluded that the applicant's prosecution was used in order to intimidate him, and it is not the purpose for such public law matters as criminal proceedings and detention to be used as part of commercial bargaining strategies.[37]

The case of *Navalnyy*[38] concerned a well-known Russian opposition leader, blogger, and political activist who had, on seven separate occasions has been arrested at peaceful public gatherings. He was taken to a police station and charged with and later convicted of administrative offences. As a result, the Court went on to examine the reprehensibility of the purpose involved, and noted that the core of the applicant's Article 18 complaint was that he was prosecuted as an opposition politician and not as a private person, thereby negatively affecting not merely the applicant alone, or his fellow opposition activists and supporters, but "the very essence of democracy" as a means of organizing society in which individual freedom may only be limited in the general interest.[39]

To do so, the Court noted the improbability of the pretexts for the applicant's arrests and agreed that he had faced "targeted suppression". The imputed ulterior

35 Joint Concurring Opinion of Judges Jungwiert, Nussberger and Potocki appended to *Tymoshenko* v. *Ukraine*, no. 49872/11, ECHR 2013.

36 *Gusinskiy* v. *Russia*, no. 70276/01, ECHR 2004.

37 *Ibid*., paras. 75–76.

38 *Navalnyyi* v. *Russia*, [GC], nos. 29580/12 and 4 others, ECHR 2018.

39 *Ibid*., para. 174.

aim, namely suppression of political pluralism, was considered established beyond a reasonable doubt, and the Court found violation of Article 18 together with Articles 5 and 11 ECHR.

Some months later, the Court pronounced judgment in *Navalnyy* (no. 2).[40] He complained that he had been placed under house arrest for political reasons. His house arrest, which was imposed in the context of investigations for fraud, included a prohibition on communicating with the outside world. The Court observed that house arrest, together with the restrictions on his freedom of expression, lasted for over ten months. This duration appears inappropriate to the nature of the criminal charges involved, in particular, no such measures were applied to the applicant's brother, who was the main accused in the fraud case. His placement under house arrest with restrictions on communication, correspondence and use of the Internet pursued the aim of curtailing his public activity, including organizing and attending public events.[41] Mr Navalnyy complained under Articles 5 and 10, together with Article 18, but the Court found that it needed to look only at Article 5 together with Article 18, given that the communications ban was "indissociable from the applicant's house arrest".

3.5 Georgia

The case of *Merabishvili*[42] concerned the detention on remand of a leading Georgian politician, who had allegedly been detained not just in order to remove him from the political scene, but also to pressure him to share politically sensitive information unrelated to the suspected offences. This case thus concerned the issue of how to approach coexisting legitimate and illegitimate aims, and how to prove the existence of an illegitimate one.[43] Where an allegation is made under Article 18, the Court focuses its scrutiny on the court decisions ordering and/or extending pre-trial detention. It can also take into account the manner in which the impugned criminal proceedings were conducted.[44] According to the Court, plural legitimate and illegitimate purposes can co-exist simultaneously in the actions of States when they restrict rights. What should trigger Article 18 consideration is whether a bad faith purpose is a "fundamental aspect of the case"

40 *Navalnyyi* v. *Russia* (no.2), no. 43734/14, ECHR 2019.

41 *Ibid*., paras. 95–97.

42 *Merabishvili case, supra* note 8, paras. 320–325.

43 Corina Heri, "Loyalty, Subsidiarity, and Article 18 ECHR: How the ECtHR Deals with Mala Fide Limitations of Rights," *The European Convention on Human Rights Law Review* (2020): p. 30.

44 *Merabishvili, supra* note 8.

at any given time.[45] That is to say that a State's restriction of the Convention right may start with good faith, but this may then become a predominantly bad faith practice if evidence can prove so.

In other words, since *Merabishvili*, it is no longer up to applicants to prove bad faith on the part of the authorities, as previously required, and it is not necessary to demonstrate that a measure exclusively pursues a prohibited purpose. Instead, the Court requires proof "beyond reasonable doubt", and inferences about state behaviour are possible,[46] as it will relate to factual or circumstantial information.

4. Implementation of Judgments

As with the violation of any right, according to Article 46 of the Convention the State must take measures to redress a person's rights and as far as possible return him to the position he was in before the rights were violated. According to the general rule, the State must not only pay compensation decided by the Court, but also explain how the person's rights will be reinstated.

The applicants in the *Cebotari* case are no longer in detention, having been acquitted in June 2007 of all the charges wrongfully brought, while the company Oferta Plus was able successfully to proceed with its complaint to the ECtHR. In terms of general measures, some substantial reforms of the judicial system and of the prosecution service were undertaken, aimed at improving independence from the legislature and executive and establishing their disciplinary accountability. Nevertheless poor motivation of remand judgments is a generally serious problem in Moldova and it generally does not reside in legislation, but rather in deficient judicial practice, which is still influenced by the insufficient independence of judges, prosecutorial bias on the part of many investigative judges and by the widespread phenomenon of application of arrest in the past.[47]

45 Çali Başak, *Merabishvili* v. *Georgia*: *Has the Mountain Given Birth to a Mouse?* Verfassungsblog - On matters constitutional, available on: https://verfassungsblog.de/merabishvili-v-georgia-has-the-mountain-given-birth-to-a-mouse/. Accessed 3 July 2020.

46 Heri, *supra* note 43, p. 31.

47 Council of Europe. *Report on the Research on the application of pre-trial detention in the Republic of Moldova*, available on: https://rm.coe.int/report-research-pre-trial-detention-eng-final/16809cbe15. Accessed 6 August 2020.

As to the case of *Gusinskiy*, according to the available information,[48] the agreement concluded in violation of Article 18 in conjunction with Article 5 was never enforced, the charges against the applicant were dropped and he was rapidly released (before any judicial review of the detention decision). No complaints or additional information have been received from the applicant following the Court's judgment. The Committee of Ministries noted that the type of abuse of power at issue in the *Gusinskiy* case would today be proscribed by the clear legislative framework and subject to effective judicial review, thus making appearance of eliminating the main cause of the violations established by the Court.[49]

In the case of *Ilgar Mammadov*, an Azerbaijani opposition politician and human rights activist who had been imprisoned from 2013 to 2018, the Council of Europe, other international organizations, and many NGOs had been calling for the release of this political prisoner. In the enforcement proceedings the Committee of Ministers stressed the fundamental flaws in the criminal proceedings and called many times for Azerbaijan to release him as an essential step towards redressing the violations the Court had found.

Due to this failure, in May 2019, the Court unanimously found that the steps taken to implement the original judgment of 2014 had only been limited and that as a result it could not be said that Azerbaijan had acted in 'good faith', in a manner compatible with the 'conclusions and spirit' of the *Mammadov* judgment. As a result, the country had failed to fulfil its obligations under article 46 of the ECHR to abide by the Court´s original judgment.[50] This deeply damning appraisal of how Azerbaijan deals with its ECHR obligations obliged the Council of Europe to use so called infringement proceedings for the first time ever. The procedure under Article 46 is not a precondition for suspension and expulsion, but can act as a formal reason for it.

48 Committee of Ministers Notes, the Agenda H46-25 on *Klyakhin group* v. *Russian Federation* from 5 December 2019, available on: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168098dac6. Accessed 27 May 2020.

49 Resolution CM/ResDH(2019)368 *Execution of the judgments of the European Court of Human Rights Forty eight cases against Russian Federation* (adopted by the Committee of Ministers on 5 December 2019 at the 1362nd meeting of the Ministers' Deputies).

50 Proceedings under art. 46 § 4 in the case of *Ilgar Mammadov* v. *Azerbaijan*, Application no. 15172/13, Grand Chamber, ECtHR Judgment of 29 May 2019.

The Committee of Ministers reiterated the need of *restitutio in integrum* which requires the quashing of the Azerbaijani applicants' convictions, their erasure from their criminal records and the elimination of all other consequences of the criminal charges brought against them, including by fully restoring their civil and political rights. After many efforts, on 23 April 2020 the Azerbaijani Government informed the Committee of Ministers about the quashing of all convictions against *Rasul Jafarov* and *Ilgar Mammadov*, by a decision of the Supreme Court also dated 23 April 2020. *Rasul Jafarov*, was fully compensated,[51] including restoration of his attorney's licence and his right to run in elections.

On 18 May 2020, Mr *Aliyev's* case remains unexamined by the Supreme Court.[52] As a result, his criminal conviction still stands, as do the restrictions stemming from the conviction, such as the ban on leaving the country. There is no basis whatsoever for treating him differently from previous applicants.

On 20 February 2020, *Ivane Merabishvili* was released from prison after serving six years and nine months of imprisonment on the basis of several criminal judgments rendered against him.[53] The Committee of Ministers underlined that the main individual measure required for the execution of this judgment is a thorough new investigation into the facts at the root of the violation of Article 18, to establish the identity and criminal liability of those responsible, and to determine whether the abuse of power found by the Court had any impact on the criminal proceedings against the applicant. The Government of Georgia stated that a renewed investigation is being carried out by the prosecutorial team, independent institutionally and in practice from those allegedly implicated in the incident, as well as from those who were investigating the case beforehand. The Committee of Ministers considers that this is a matter of concern that since the new investigation was opened, certain key witnesses have still not been questioned and important avenues of investigation have not been explored.

51 European Human Rights Advocacy Centre, *Azerbaijani human rights defender Rasul Jafarov cleared of all charges*, available on: https://ehrac.org.uk/news/azerbaijani-human-rights-defender-rasul-jafarov-cleared-of-all-charges/. Accessed 24 May 2020.

52 Communication from the applicant in the case of *Aliyev* v. *Azerbaijan* of 18 May 2020, available on: https://search.coe.int/cm/pages/result_details.aspx?objectid=09000016809ea454. Accessed 6 August 2020.

53 Communication from Government of Georgia concerning the case of *Merabishvili* v. *Georgia*, Action Plan of 29 June 2020, available on: https://search.coe.int/cm/pages/result_details.aspx?objectid=09000016809eee8c. Accessed 6 August 2020.

5. Changing ECtHR Practice Related to Article 18 ECHR

In the past, the Court applied Article 18 restrictively, often failing to examine it entirely or requiring applicants to provide "incontrovertible and direct proof" of States' bad faith.[54] As a result, it has examined over 200 cases regarding possible violation of Article 18 ECHR. From these 40 are from countries from Eastern Europe and at the time of drafting this chapter, I have found violations of Article 18 ECHR in sixteen cases, eight of them being issued since early 2018.

The Court has imposed a high standard of proof for violation of the article concerned. On the one hand, the purpose of proof lies totally with the application since it is presumed that the authorities restricted human rights 'with good intent' and were not misusing power. On the other, proof must be sufficiently convincing. The Court previously noted that there is nothing to support the suggestion that, where a *prima facie* case of improper motive is established, the burden of proof shifts to the respondent Government. The Court considers that the burden of proof in such a context should rest with the applicant.[55]

As a general rule, however, there are exceptions. Where there are incomprehensible elements in the detention or conviction in question the current standard makes it practically impossible for the applicant to prove his or her case. For instance, a number of predominantly Russian cases have featured opposition leaders who have been detained for a relatively short time,[56] in order to prevent them from attending opposition manifestations and protests, where the Court did not find a violation. Therefore, if the Court itself cannot ascertain the domestic courts' reasons for a certain act it would be impossibly difficult to demand that the applicant do so in order to satisfy the standard of proof. This standard results in a practically impossible burden of proof for Article 18 violations.[57]

The Grand Chamber decision in the *Merabishvili* case sets an important precedent for the whole of Europe. No longer will the ECtHR require this "incontrovertible and direct proof". Instead it will apply a more flexible, contextual approach. The essence of the matter is to determine the predominant purpose by evaluating all of the circumstances as they evolved over time; if it was an

54 *Khodorkovskiy, supra* note 16.

55 *Sisojeva and Others* v. *Latvia*, no. 60654/00, para. 129, ECHR 2007.

56 See, e.g., *Nemtsov* v. *Russia*, no. 1774/11, para. 129, ECHR 2014, *Navalnyy and Yashin* v. *Russia*, no. 76204/11, para. 116, ECHR 2014; *Frumkin* v. *Russia*, no. 74568/12, para. 172, ECHR 201; *Kasparov and Others* v. *Russia* (No. 2), no. 51988/07, para. 55, ECHR 2016.

57 Joint Concurring Opinion, Judges Sajó, Tsotsoria, and Pinto de Albuquerque, supra note 14, paras. 7–8.

illegitimate purpose, then Article 18 is violated.[58] This is a welcome development which will assist in exposing the misuse of power.

Further, in *Navalnyy*, the Grand Chamber confirmed its change in approach to Article 18 ECHR, including the normalization of the provision's scope and burden of proof. The Court turned to "look behind appearances" to deal with measures based on a mixture of legitimate and illegitimate purposes. To make its findings, the Court drew on "converging contextual evidence"[59] of the authorities' increasingly severe response not only to the applicant, but also to other activists and infringements of public assemblies.

It is noteworthy that Merabishvili was a "brittle" leading case, because the Article 18 complaint was decided by nine votes to eight, and of the nine majority judges, only five agreed with the majority's reasoning. By confirming many of Merabishvili's core elements with a more solid majority (fourteen judges voting for the finding of a violation of Article 18, and only three against), the *Navalnyy* case consolidated its ascendancy and provided certitude as to the Court's change of approach.

6. Conclusions

Recognition of a violation of Article 18 does not directly entail any particular consequences. However, it is clear that in such cases there is sharp criticism of the State's actions aimed against the principles and spirit of the ECHR. I deem that the ECtHR is seeking to operate more deferentially towards well-established democracies with strong rule of law systems and focus more decisively on serious violations of human rights where the domestic situation of democracies is under threat. Without distinguishing any particular country from Eastern Europe, it can be seen that their aim is often to reduce opponents to silence, to suppress political pluralism and expression as attributes of an effective political democracy. Article 18 could therefore function as a warning when a State is on the way to becoming an illiberal democracy or even of reverting to oligarchy, totalitarianism and to final destruction of the rule of law.

As was highlighted, the Court has examined charges of politically motivated human rights abuses on many occasions. The Court has examined allegations of the following ulterior purposes: intimidation and putting pressure on the

58 *Merabishvili*, *supra* note 8, para. 305.

59 *Gusinskiy, supra* note 36.

applicant with a view to obtaining information or other advantages, punishing and silencing the applicant; political and/or economic motivation behind criminal prosecution and other relevant proceedings. These were most often in connection with violation of Article 18.

Since recent case law, it is rather clear that restrictions on opposition leaders' rights as political figures or civil society members will likely violate Article 18. Nevertheless, it is an open question for Strasbourg judges to extend the possibility whether the provision can or should apply to persons who are not political leaders or widely-known figures, given that in terms of repression the State can act with intent to mislead when it comes to its human rights obligations.

When States limit human rights under false pretences, this violates the rule of law as well. If the domestic courts have been found to have violated Article 6, then from my perspective this should in certain circumstances raise issues of abuse under Article 18. The shortcomings that constitute an Article 6 violation also raise questions about why such shortcomings existed. Article 18 allows for claims arising from these questions. Trials before a court must never be used (but could be) for 'ulterior purposes'. This is the conditio sine qua non; the very basis for the idea of 'fair trial' as understood in the Convention. Taking into account that most Eastern European judicial systems may be characterized by their authoritarian mentality, formalism, political obedience, and even judges' self-censorship, the applicability of Article 6 in conjunction with Article 18 of the Convention has to be clarified in the near future.[60] After all, since the trial of Socrates, 'political justice' has been a most notable form of abuse of justice by the powers-that-be,[61] mainly in authoritarian systems.

I would conclude that selected case law related to Article 18 shows how far the Court has come in terms of human rights emergencies. The Court does not seem inclined to backtrack, and it touches further on sensitive issues. This provision is crucial for a pluralistic democracy in countries from Eastern Europe, and serves an important purpose, which requires it to have real and effective application. From my perspective, the Court has already understood its potential to assist and to extend the growth of democracy in the systems of former Soviet/socialist countries.

60 Joint concurring opinion of Judges *Nussberger, Tsotsoria, O'Leary and Mits*, appended to *Ilgar Mammadov* v. *Azerbaijan* (No. 2), Application No. 919/15, ECtHR Judgment of 16 November 2017, paras. 16–19.

61 Joint concurring opinion of judges Sajó, Tsotsoria and Pinto de Albuquerque appended to *Tchankotadze* case, *supra* note 14.

NORMATIVE POWER EUROPE: TRACING THE UNION'S NORMATIVE POWER APPROACH IN THE CASE OF EASTERN EUROPEAN DE FACTO STATES

LUCIA LEONTIEV

Author: Lucia Leontiev, PhD candidate at Scuola Superiore Sant'Anna di Pisa and Maastricht University.

Scientific editor: Dr. Pietro Sullo, Rector of the Riga Graduate School of Law.

Abstract
This contribution analyses European Union (EU) human rights promotion policy in the *de facto* States of Eastern Europe, through the lenses of the Normative Power Europe (NPE) concept. In doing so, it will first conceptually clarify what a *de facto* State is and what are the main characteristics that Manners attributes to the NPE. Further on, it will analyse how the EU promotes human rights in *de facto* States from Eastern Europe through its normative power by delving into the EU provisions that normatively back up the NPE's actions. Then, this contribution will continue with a discussion regarding the actions that the Union is taking under the NPE umbrella aiming at promoting human rights in *de facto* States. Finally, it will develop some thoughts about the potential impact that these actions may have. It will conclude with some reflections on what the EU is doing right and wrong in its approach towards human rights promotion in *de facto* States and what still needs to be adjusted in order to be a better positioned international actor in its relations with *de facto* States.

Keywords: *European Union, Normative Power Europe, de facto States, human rights, engagement without recognition.*

1. Introduction

The European Union (EU) is seen as a normative hegemon[1] that through its normative power tends to export to the wider world its values and principles, including democracy and human rights. This chapter aims to analyse what role the EU plays in promoting and advancing human rights in *de facto* States through the lenses of the Normative Power Europe concept (NPE). Much has been said about the European Union's policies toward *de facto* States, focusing mainly on conflict resolution, peace negotiation and statehood building processes.[2] Additionally, one can find relatively wide scholarship about the European Union's normative power approach in relations with its external partners, especially in the framework of the Union's Neighbourhood policy.[3] Nevertheless, not much is said about EU normative power towards *de facto* States, especially those from Eastern European Partnership countries. And if in the case of States outside the EU the traceability of the EU's normative power approach is quite an easy task, the situation becomes more challenging in terms of *de facto* States. In this last case, the lack of statehood status plays a crucial role in determining the existence (or lack thereof) and the character of EU-*de facto* State relations.

The spatial limit of this contribution is *de facto* States from the Eastern European partnership countries, namely Transdnistria, Abkhazia, South Ossetia and Nagorno Karabakh. Although they are all *sui generis* cases, a few elements are common to all: their appearance after dissolution of the Soviet Union; the consistency of their independence discourse from the parent State (the State from which the entity seceded); and the existence of an external patron,[4] that is, a State which supports the separatist territory. And usually, poor observance and protection of human rights is observable in these entities,[5] a situation attested to

1 Thomas Diez, "Constructing the Self and Changing Others: Reconsidering "Normative Power Europe"", *Millennium* 33 (2005): p. 3; Adrian Hyde-Price, ""Normative" Power Europe: A Realist Critique", *Journal of European Public Policy* 13 (2006): p. 2.

2 *See* Bruno Coppieters, "'Statehood', 'de facto Authorities' and 'Occupation': Contested Concepts and the EU's Engagement in its European Neighbourhood," *Ethnopolitics* 17 (2018); Stephanie Cohen, "The Carrot, the Stick, and Why: A Comparative Analysis of the European Union's Response to the Occupation of the Crimean Peninsula and the Disputed West Bank Territories," *Transnational Law and Contemporary Problems* 27 (2017); Florian Küchler, *The Role of the European Union in Moldova's Transdnistria Conflict* (Ibidem-Verlag, 2008).

3 *See* Haukkala Hiski, "The European Union as a Regional Normative Hegemon: The Case of European Neighbourhood Policy", *Europe-Asia Studies* 60 (2008).

4 The Russian Federation is acting as the external patron of Transdnistria, Abkhazia and South Ossetia, and Armenia is the external patron of Nagorno Karabakh.

5 Independent Advisory Group on Country Information Report, *Country Policy and Information Note. Moldova: Human rights in Transdnistria* (UK: Home Office, June 2017). Available at: https://www.refworld.org/country,,,,MDA,,59439c794,0.html. Accessed 2 August 2020; International Crisis Group Report, *Moldova: Regional Tensions over Transdniestria* (17 June 2004). Available at:

including by extensive case law of the European Court of Human Rights on the matter.[6] This fact, together with the EU's engagement with Eastern Neighbourhood policy countries aiming at promoting its values and principles, argues in favour of an assessment of the Union's involvement and actions towards human rights promotion in these *de facto* States. In this contribution, that exercise will be done through NPE lenses.

The NPE, a concept originally coined by Ian Manners[7] to describe the distinct role of the EU in the international system, is used in this chapter as the methodological framework for addressing the EU human rights promotion approach in *de facto* States. Conceived as doctrinal research at the margins of legal and international relations disciplines, this contribution will not depict or challenge the original meaning attributed to the NPE concept. It would rather attempt to look at it as a way of shaping and modelling the Union's relations with *de facto* States. That said, in terms of this research, the NPE is taken as a starting point to build on in four different directions. After defining the main concepts of this research, namely *de facto* States and NPE (II), this contribution will delve into EU normative provisions that back up NPE, that is, to search the *norms* that enact *normativity*, always referring to the human rights dimension (III). Then, the actions that the EU is taking through the NPE umbrella in *de facto* States will be discussed (IV). Further on, a tentative assessment will be made of the impact that these actions have on human rights in *de facto* States (V). Lastly, this contribution will conclude with some reflections on what the EU is doing right and wrong in its approach towards human rights promotion in *de facto* States and what still needs to be adjusted in order to be a better positioned international actor in its relations with *de facto* States (VI).

2. Defining the Main Concepts

Before tackling the NPE applied to *de facto* States, it is important to define what a *de facto* State is (A), and what are the main features of the NPE concept (B).

https://www.crisisgroup.org/europe-central-asia/eastern-europe/moldova/moldova-regional-tensions-over-transdniestria. Accessed 2 August 2020.

6 The pioneer case on the matter is considered to be *Ilaşcu and Others* v. *Moldova and Russia*, ECtHR Judgment (8 July 2004), Appl. No. 48787/99.

7 Ian Manners, "Normative Power Europe: A Contradiction in terms?", *Journal of Common Market Studies* 40 (2002): pp. 235–258.

2.1 De facto States

A *de facto* State[8] can be defined as:

> a political entity where there is an organized political leadership which has risen to power through some degree of indigenous capability; receives popular support; and has achieved sufficient capacity to provide governmental services to a given population in a specific territorial area, over which effective control is maintained for a significant period of time. The *de facto* State views itself as capable of entering into relations with other States and it seeks full constitutional independence and widespread international recognition as a sovereign State. It is, however, unable to achieve any degree of substantive recognition and therefore remains illegitimate in the eyes of international society.[9]

Although the discussion regarding the legal nature of these *de facto* territorial entities falls outside this chapter's aim, a brief overview of the main debates regarding their statehood status claim and the issue of recognition is necessary for a better understanding of the subject.

When arguing for recognition, the *de facto* State tries to demonstrate that it fulfils the statehood criteria set out in the Montevideo Convention[10] – territory, population, government and capacity to enter into relations with other States, criteria which at a first glance seem to be satisfied. Apart from these conditions, another important criterion for statehood is independence, which for Crawford[11] represents the 'central' condition. Independence "is really no more than the normal condition of States according to international law; it may also be described as sovereignty, or external sovereignty, by which is meant that the state has over it no other authority than that of international law."[12] Consequently, independence encompasses the existence of the entity as a separate State and the

8 In the extant literature, different terms are attributed to the same political reality, which in this chapter is called *de facto* States, as for instance 'quasi-States', 'unrecognised States', 'pseudo-States' or even 'separatist States'.

9 Scott Pegg, *International society and the de facto state* (Routledge, 1st ed., 1998), p. 26.

10 Art. 1 of the Montevideo Convention on the Rights and Duties of States (December 26, 1933), provides for: a permanent population; a defined territory; a government and the capacity to enter into relations with other States.

11 James Crawford, *The Creation of States in International Law* (Oxford University Press, 2nd ed., 2006), p. 62.

12 Individual Opinion of Judge Anzilotti in *Customs Régime between Austria and Germany*, PCIJ Advisory Opinion No. 20, 1931. In *World Court Reports: A Collection of the Judgments, Orders and Opinions of the Permanent Court of International Justice,* Vol. II, 1927–1932, edited by Manley Ottmer Hudson (Washington: Carnegie Endowment for International Peace, 1935), p. 726.

absence of subjection to the authority of another State.[13] Organized as a State-like polity,[14] *de facto* States have governmental authorities and institutions which perform governmental attributions. What is under question is the existence of real, actual independence of the State-like entity. Cases of substantial illegality of origin, substantial external control of a State and entities created under belligerent occupation represent derogation from actual independence.[15] In the case of the *de facto* States analysed in this chapter, the existence of the above-mentioned elements, conjunctly or individually, jeopardizes their actual independence.

As for recognition, the scholarship debate lies on the issue whether statehood hinges on recognition.[16] On this, the Montevideo Convention provides that "the political existence of the State is independent of recognition by other States."[17] However, lack of recognition gives rise to different treatment, which implies a negation of the identity and status of States.[18] And this is exactly the pattern attested in the case of *de facto* States, including from the EU's side. As will be discussed further on, lack of recognition has heavily marginalized the EU's interaction with *de facto* States from Eastern Europe. Although not fully successful and with considerable political and implementing difficulties, the EU practice of engaging with *de facto* States without recognition can be cited as a unique policy that balances two different pillars, namely, non-recognition and engagement.[19] In terms of this research, assessment of the EU's actions towards human rights promotion in *de facto* States under the said policy will be done by using the NPE conceptual framework.

13 James Crawford, *Brownlie's Principles of Public International Law* (Oxford: Oxford University Press, 8th ed., 2012), p. 66.

14 *E.g.*, the official website of the Government of the Republic of Nagorno-Karabakh introduces us to the story of a land with a flag, a Constitution, a Government, a President who is elected every five years by popular vote, a Judiciary, an army, and basic public services, such as education and healthcare. Available at: http://gov.nkr.am/?lang=en. Accessed 2 August 2020.

15 James Crawford, *supra* note 11, pp. 74–76.

16 James Crawford, *supra* note 13, pp. 145–146.

17 Montevideo Convention on the Rights and Duties of States, *supra* note 10, arts. 1, 3.

18 Shannon Brincat, "Recognition, Conflict, and the Problem of Ethical Community," *Global Discourse* 4 (2014): pp. 397, 403.

19 James Ker-Lindsay, "Engagement Without Recognition: The Limits of Diplomatic Interaction with Contested States," *International Affairs* 91 (2015): pp. 267, 276–81.

2.2 Normative Power Europe

The NPE,[20] a concept introduced by Ian Manners, was equally appreciated and much criticized by scholars given its aspirational character,[21] that is, *how* and/or *what* the EU should be,[22] and not on *what* the EU is doing. Our task here is to bring together these views by applying Manners' idea of NPE on *what* the EU is doing about human rights promotion in *de facto* States. Generally, the normative power concept involves normative justification of specific actions in world politics. This implies that relations and policies with the rest of the world should be normatively sustainable and justifiable to others.[23] For Manners, it has a three-part understanding, namely principles, actions, and impact. As such, normative power should primarily be perceived as legitimate in the principles that are promoted, and which must comply with the coherence and consistency requirement.[24] Among these principles, one can find the core principles of 'freedom, democracy, human rights and rule of law' as provided by Article 2 of the Treaty on European Union (TEU). Further on, normative power needs to be persuasive in the actions taken in order to promote the principles proclaimed. This involves such actions as engagement, institutionalization of relations, and encouragement of dialogue between the participants. The European Union Neighbourhood Policy can be cited as an example in this regard. And the last aspect refers to the impact that these actions have, which is usually difficult to measure.

Having in mind the tripartite understanding of the NPE concept outlined above, the next task will be to look at each of them as a general framework for discussing the EU's human rights promotion actions in *de facto* States through its policy of engagement without recognition.

20 At an earlier stage François Duchêne referred to it as 'civilian power Europe', *see* François Duchêne, "The European Community and the Uncertainties of Interdependence", in *A Nation Writ Large? Foreign-Policy Problems before the European Community*, edited by Max Kohnstamm and Wolfgang Hager (London: Macmillan, 1973).

21 Haukkala Hiski, *supra note 3*, p. 1602.

22 Ian Manners, "The European Union as a Normative Power: A Response to Thomas Diez", *Millennium* 35 (2006): p. 168.

23 Ian Manners, "The EU's Normative Power in Changing World Politics", in *Normative Power Europe in a Changing World: A Discussion*, ed. André Gerrits (Clingendael European Papers No. 5, 2009), p. 11.

24 More on this, *see ibid.*, p. 12.

3. NPE Legitimacy Through the EU's Principles and Values

As previously mentioned, the EU tries through its normative power to export European values and principles outside the European Union's space. The principles on which the NPE conceptually relies are enshrined in the core EU treaties. In this connection, Article 3 (5) TEU provides that "in relations with the wider world, the Union shall uphold and promote its values (as defined in Article 2 TEU) ...."; furthermore, the Union "shall contribute to peace, security, ... and the protection of human rights, (...) as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter." For our discussion here, it is important to underline a few aspects. First, the 'promotion' objective of the Union, and which lies at the foundation of the NPE concept. Then, the softness of the said promotion is complemented by a more active stance and actions requiring the obligation of a 'contribution' by the Union, which must be in accordance with European and international law norms, including international human rights obligations.[25] Although the article's wording sounds to have a more permissive and advisory character, the Court of Justice of the European Union (CJEU) has argued in favour of their normative force.[26] Furthermore, as the above provision clearly states, these European Union actions have as a target the 'wider world', and which undoubtedly can be interpreted as including the *de facto* territorial entities analysed in this chapter.

The reference to the principle of universality and indivisibility of human rights, and qualifying it as a guiding principle and value of the Union which forms the basis of EU actions at the international level, is equally consecrated in Article 21 (1) TEU. Thus, the Union must pursue objectives to "consolidate and support democracy, rule of law, human rights and the principles of international law" unilaterally and cooperatively.[27] In order to strengthen the mentioned provisions, Article 21 (3)(1) goes further by saying that the consecrated principles are to be respected and equally applied to EU external policies and the external actions of the Union's internal policies.[28] This means that the EU must respect human rights in its internal and external policies, and avoid the negative effects

25 Judgment in *Air Transport Association of America*, C–366/10, ECLI:EU:C:2011:864, para. 101.

26 *Ibid*.

27 Art. 21 (2), Treaty on European Union (Consolidated version 2012), OJ C 326/13, 26.10.2012. Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF. Accessed 12 July 2020.

28 Lorand Bartels, "The EU's Extraterritorial Human Rights Obligations", *European Journal of International Law* 25 (2014): p. 1074.

that its policies may have on human rights including outside the Union. Thus, it is clear that there are normative premises which oblige and empower the EU to act in a certain way in order to achieve the objectives that have been set, including those referring to human rights promotion.

These treaty regulations are strengthened by the EU Charter of Fundamental Rights and its provisions. Although their applicability within the EU is evident, there are no rules on their extraterritorial application. As already mentioned, the NPE refers primarily to foreign policy measures targeting the world outside the EU. And to have a clear human rights obligation on the EU side in the extraterritorial context is highly necessary. However, provisions of primary law sources lack clarity on whether fundamental rights obligations are also to be applied to policy measures with extraterritorial effects.[29] Nevertheless, the CJEU in its case law,[30] although tangentially, has shed light on the issue saying that "the duty to respect fundamental rights is imposed,"[31] even in the context of foreign policy measures. Politically, the commitment seems to be more straightforward and conclusive, since the main EU institutions agree on the fact that EU external action has to comply with the rights contained in the EU Charter of Fundamental Rights[32] and that the "Member States should comply with the Union's general provisions on external action, such as consolidating democracy, respect for human rights…".[33]

This duty to respect human rights in foreign policy matters is enshrined in the agreements that the EU has concluded with its external partners. The EU human rights clauses included in these treaties impose EU international human rights obligations. Article 2 of the Association Agreement between the EU and the Republic of Moldova provides that "respect for the democratic principles, human rights and fundamental freedoms… shall be at the basis of domestic and external

29 *Ibid*., p. 1075.

30 Judgment in *Mugraby* v. *Council*, C–581/11, ECLI:EU:C:2012:466; Judgment in *Zaoui*, C-288/03 P, ECLI:EU:C:2004:633. In these cases, the plaintiffs claimed compensation from the EU for damage committed by the EU abroad through its foreign policy measures.

31 Judgment in *Parliament* v. *Council (Al Qaeda)*, C-130/10, ECLI:EU:C:2012:472, para. 83.

32 European Commission and High Representative of the European Union for Foreign Affairs and Security Policy. *Communication on Human Rights and Democracy at the Heart of EU External Action – Towards a More Effective Approach*, COM (2011) 886 final, 12.12.2011, para. 7. Available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0886:FIN:EN:PDF. Accessed 12 July 2020; European Parliament. Resolution on the institutional aspects of setting up the European External Action Service, OJ (2010) C265E9, para. 5. Available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:265E:0009:0014:EN:PDF. Accessed 12 July 2020.

33 Regulation (EU) No 1233/2011 of the European Parliament and of the Council of 16 November 2011 on the application of certain guidelines in the field of officially supported export credits, *OJ* L326/45, 8.12.2011, recital 4.

policies of the Parties and constitutes an essential element of this Agreement."[34] Human rights commitments are at the core of the agreement; references to them are to be found in all regulated domains. It is clear that these provisions contain obligations binding on the parties, although the legal effects of these clauses are not certain.[35] They have a broad scope, applied to both internal and international policies of the parties, which makes us conclude that they govern the extraterritorial effects of at least international policies, although there is not much practice on this issue. Now, an essential observation that comes out from the above is that these agreements are concluded between the EU and its members and another State. From the definition, it excludes *de facto* States as discussed in this chapter. In relation to these entities, the EU accepted engagement without the recognition approach first. The non-recognition pillar is unanimously accepted and followed by the EU and its Member States, whereas the engagement pillar encounters various political and legal challenges in its implementation. Further on, the discussion will turn around the actions that the EU is taking under the umbrella of this policy in *de facto* States.

4. To Engage or Not: Human Rights Marginalised

According to Manners, the actions that the EU must take can be concretized in three ways, namely engagement, institutionalization of relations, and encouragement of dialogue between the participants. Among these, engagement represents a key concept, or a comprehensive understanding of the type of engagement that the EU has with *de facto* States will clarify the level of institutionalization of relations and dialogue between the parties.

To discuss the engagement policies of the EU with *de facto* States, there is a need to turn back to the legal nature of the subjects that we are talking about. As stressed from the beginning, these entities lack legal status and are not recognised as States by the international community. And lack of statehood status seems to be the centrepiece which determines the level of interaction and engagement of the EU with a *de facto* territorial entity. The recognition policy within the Member

34 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, *OJ* L 260, 30.8.2014, Article 2, Title I.

35 Lorand Bartels, *supra* note 28, p. 1079.

States of the EU significantly differs, a fact which explains the lack of European consensus on policies towards these entities. For example, in some of them, Abkhazia and Ossetia, the voice of a particular EU member, for instance, Poland, is more prominent than the Union's. But even if some Member States are more active and involved with a particular entity, none of the EU members recognises them as fully-fledged States.

In trying to find EU-*de facto* State relations, there is a common feeling of avoidance of direct engagement with *de facto* States from the EU side. EU instruments are directed at the parent States, rather than at *de facto* entities. And this is what a close look at the EU instruments towards Eastern European Partnership countries proves, starting from the '90 Partnership and Cooperation Agreements (PCA), the European Neighbourhood Policy of 2004 and the Action Plans (AP), the Eastern Partnership with the track of Association Agreements (AA) and Deep and Comprehensive Free Trade Agreements (DCFTA).

The relatively recent Association Agreements concluded by the EU with the Eastern Neighbourhood countries can, apart from its ultimate economic benefits, be seen as norm diffusion, or legal approximation. In the text of the agreements, the EU partners are called on to approximate their legislation in various fields in order to achieve the desired benefits from implementation of the agreements.[36] And these agreements can be seen as instruments of transposing the NPE through concrete actions by which the EU exports its principles and values, including normatively. But these agreements do not apply to Abkhazia and South Ossetia: for instance, the agreements' protocols recognize that the central government of the Republic of Georgia/Moldova has failed to establish jurisdiction over these disputed territories. In this sense, it is important to underline the parent State's will to inclusiveness of the *de facto* entity. Georgia acts reluctantly towards any kind of engagement by the EU with Abkhazia or Ossetia.[37] For example, Georgia's Law on Occupied Territories adopted in 2009 forbids any economic activity with the separatist entities – even authorization of diplomas of Abkhazia's university is impossible without Georgia's approval. Also, Georgia requires international organizations working there to coordinate all their activities closely with the Georgian authorities.[38] In the case of Moldova, the central government seems to

36 If in the early '90s the ultimate benefit from transplanting and implementing EU principles and values was the EU integration prospect, nowadays this benefit is no longer on the table, and perhaps the main benefits are economic cooperation and a visa-free regime for EU external partners.

37 Georgia. State Strategy on Occupied territories: Engagement Through Cooperation (2010). Available at: http://gov.ge/files/225_31228_851158_15.07.20-StateStrategyonOccupiedTerritories-EngagementThroughCooperation(Final).pdf. Accessed 2 August 2020.

38 Georgia. Law of Georgia on Occupied Territories (2009). Available at: http://www.ilo.org/dyn/natlex/docs/SERIAL/81268/88220/F1630879580/GEO81268.pdf. Accessed 2 August 2020.

be more open towards the EU's engagement with the *de facto* entity. Perhaps this explains the expansion of the DCFTA to the Transdnistrian region, which was achieved following an informal agreement between the authorities of Chisinau and Tiraspol.[39]

At this point, one can draw a line and say that in countries with separatist territories – in our case those from the Eastern European Partnership countries – the EU's NPE targets the parent States. *De facto* entities are left outside the process and, depending on the openness of the EU's partner, the separatist entity will take part in it or not. An explanation of the lack of official interaction between the EU and *de facto* States can also be made through the lenses of international law by invoking the 'respect for territorial integrity' principle which all Member States of the EU, including the Union, need to uphold. But how to engage without jeopardising the State's territorial integrity and sovereignty? And here the 'engagement without recognition' policy comes upfront.[40] This means that, leaving aside the recognition issue, it is possible to engage with a *de facto* territorial entity in many different ways, as for instance meetings between officials, or establishing liaison offices.

Now, let's look at how the EU engagement with *de facto* States has concretised. Institutionally, the EU through the voice of its Parliament at several reprises deplores the human rights violations that occur in these regions. For instance, in its resolutions concerning Transdnistria, it condemned the "lack of respect for fundamental freedoms and human rights."[41] Furthermore, as a response to continuous pressure on Latin-script schools, the EU Council adopted sanctions against some members of the Transdnistrian self-proclaimed authorities by restricting their movement within the EU.[42] As for Abkhazia, the Parliament maintained its official position of a territory occupied by Russia, which ultimately is responsible for human rights violations in Abkhazia.[43]

---

39 Benedikt Harzl, *The Law and Politics of Engaging De Facto States: Injecting New Ideas for an Enhanced EU Role* (Washington: Centre for Transatlantic Relations, 2018), p. 37.

40 Alexander Cooley, Lincoln A. Mitchell, "Engagement without recognition: A new strategy toward Abkhazia and Eurasia's unrecognized States", *The Washington Quarterly* 33(4), (2010): pp. 59–73.

41 European Parliament resolution of 12 July 2007 on Human Rights Violations in Transdnistria (Republic of Moldova), *OJ* C 175E, 10 July 2008.

42 Council Common Position 2008/160/CFSP of 25 February 2008 concerning restrictive measures against the leadership of the Transdnistrian region of the Republic of Moldova, *OJ* L 51/23, 26 February 2008. Extended in 2009, 2010, 2011.

43 European Parliament resolution of 17 November 2011 containing the European Parliament's recommendations to the Council, the Commission and the EEAS on the negotiations of the EU-Georgia Association Agreement, 2011/2133(INI), *OJ* C 153E, 31 May 2013.

With the establishment of the European Union Special Representatives for the South Caucasus (EUSR) in 2009, the EU launched its non-recognition and engagement policy for the South Caucasus.[44] The policy aimed at "opening a political and legal space in which the EU can interact with the separatist regions without compromising its adherence to Georgia's territorial integrity."[45] Although designed for both Abkhazia and South Ossetia, it was operational only in the former. Among other issues, the mandate observed the "implementation of EU human rights policy and EU Guidelines on Human Rights, in particular with regard to children and women in areas affected by conflicts, especially by monitoring and addressing developments in this regard."[46] These human rights policy provisions, being horizontal, apply to all EU Special Representatives (EUSR) mandates, including Moldova/Transdnistria. But there is no guarantee that the *de facto* authorities will follow the recommendations adopted at the high-level political bi- and trilateral dialogue promoted by this institution. With the absorption of the EUSR by the European External Action Service, its functions were split among the EU Delegations. Each delegation has a different level of interaction with *de facto* authorities, starting from more pro-active engagement (e.g. Abkhazia), and ending with lack of it (e.g. Nagorno Karabakh, South Ossetia and Transdnistria). Consequently, one can say that, institutionally, EU engagement with *de facto* states without recognition is very poor in terms of action, most of all if referring to human rights. The EU chose a 'bottom-up' approach in human rights promotion in the *de facto* States through funding projects to support civil society and enhance the confidence-building process.[47] And one can wonder about its effectiveness for human rights promotion and whether this is the right approach.

Financially, the EU through its institutions has supported different projects with the aim of improving the living conditions of the population through econo-

44 Thomas de Waal, "Enhancing the EU's Engagement with Separatist Territories", Carnegie Europe, 17 January 2017. Available at: http://carnegieeurope.eu/2017/01/17/enhancing-eu-s-engagement-with-separatist-territories-pub-67694. Accessed 12 July 2020.

45 Sabine Fischer, "The EU's non-recognition and engagement policy towards Abkhazia and South Ossetia," *ISS Seminar Reports* 6 (2010). Available at: https://www.iss.europa.eu/sites/default/files/EUISSFiles/NREP_report.pdf. Accessed 1 August 2020.

46 Council Decision 2011/518/CFSP of 25 August 2011 appointing the European Union Special Representative for the South Caucasus and the crisis in Georgia, *OJ* L 221/5, 27 August 2011.

47 Catalina Nuta, *Human Rights in Internationally Unrecognised Entities: The Cases of Abkhazia and Transdnistria. What Role for the European Union?*, Master thesis (2012), p. 61 available at https://www.coleurope.eu/fr/research-paper/human-rights-internationally-unrecognized-entities-cases-abkhazia-and-transnistria. Accessed 28 October 2020.

mic means.[48] Through the European Initiative for Democracy and Human Rights tool, starting from 2002 the EU has assisted different initiatives in the Abkhaz region. The Development and Co-operation Instrument, orientated towards civil society development and enhancement of cooperation between it and local authorities, was the most widely used financial modality for funding projects in the *de facto* States. The Instrument for Stability sums up to the previous one, which was designed to address global security and development challenges. It was equally used in South Caucasus and Transdnistria, orienting towards operational and structural issues, as well as promotion of confidence-building measures.[49] In 2017, the EU launched an NGO programme in the South Caucasus "Peacebuilding through Capacity Enhancement and Civic Engagement" which included NGO partners from Armenia, Azerbaijan and Georgia, aiming "to broaden participation of local civil society and grassroots in peace-building activities."[50] The main EU initiative regarding the Nagorno Karabakh conflict is the European Partnership for the Peaceful Settlement of the Conflict over Nagorno-Karabakh (EPNK), a peacebuilding programme led by a consortium of five European NGOs.[51] One of the goals of this initiative is to "increase people's participation in peaceful resolution of the conflict, especially marginalized groups."[52] And again, human rights are only tangentially addressed, the conflict resolution process being the main target of EU-financed projects.

The level of involvement of the EU in human rights issues in these entities differs rather widely. Abkhazia seems to be more open to cooperating with the EU and benefits from more financial assistance,[53] which cannot be said about Ossetia, Nagorno Karabakh and Transdnistria. This can be explained by the active role played by the European Commission Delegation in Tbilisi.[54] In Transdnistria,

48 Nicu Popescu, "Democracy in Secessionism: Transdnistria and Abkhazia's Domestic Policies", Available at http://www.policy.hu/npopescu/ipf%20info/IPF%204%20democracy%20in%20secessionism.pdf. Accessed 12 July 2020.

49 Catalina Nuta, *supra* note 47, p. 65.

50 NGO Monitor Report, *Facilitating Dialogue: EU-Funded NGOs and the Nagorno-Karabakh Conflict* (October 2018), p. 2. Available at: https://www.ngo-monitor.org/nm/wp-content/uploads/2018/12/Armenia-Report.pdf. Accessed 2 August 2020.

51 *Ibid*., p. 1.

52 The European Partnership for the Peaceful Settlement of the Conflict over Nagorno-Karabakh. Available at: https://www.epnk.org/. Accessed 2 August 2020.

53 Thomas de Wall, *supra* note 44.

54 Nicu Popescu, "The EU and Civil Society in the Georgian-Abkhaz Conflict", *MICROCON Policy Working Paper* 15 (2010): p. 25. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1650623. Accessed 12 July 2020.

EU actions in the human rights sphere are almost unperceived. Although the Moldovan parliament called on the Council of Europe, OSCE and the EU for engagement for democratization in Transdnistria, for a long time no significant actions were conducted.[55] Things changed track when the EU started the non-recognition and engagement approach towards these entities in 2009 and initiated confidence-building measures packages. Two assistance packages have been implemented, regarding support for civil society and the establishment of greater confidence in relations between Chisinau and Tiraspol.[56] The low degree of involvement of the EU Delegation in Chisinau in the Transdnistrian region is potentially partially compensated by the actions of some Member States, such as Germany and Sweden, which have adopted individual development programmes in the region. But generally it can be said that EU engagement with *de facto* States has a predominantly economic character, and the EU is mainly a silent observer of the human rights situation in these entities.

5. Impact Assessment

In Manners' words, normative power "should ultimately be envisaged as socializing in the impact of the actions taken to promote the principles",[57] which in our context means human rights in *de facto* States. Furthermore, according to Manners, the impact must involve socialization, "as a part of an open-ended process of engagement, debate and understanding";[58] partnership, as a result of "institutionalized relationships created by the participating parties"[59]; and ownership, as "practices of joint or local ownership as a result of partner involvement and consultation."[60] Our task here is to bring a current interpretation of the impact of the NPE regarding the human rights situation in the *de facto* States, which, as mentioned at the beginning, in Manners' wording, has an aspirational, or even idealistic, character.

55 Nina Caspersen, *Unrecognized States. The Struggle for Sovereignty in the Modern International System* (Cambridge: Polity Press, 2012), p. 136.

56 Catalina Nuta, *supra* note 47, p. 58.

57 Ian Manners, *supra* note 23, p. 13.

58 *Ibid*., p. 13.

59 *Ibid*., p. 14.

60 *Ibid.*, p. 14.

The EU's impact in promoting its principles, namely, human rights in *de facto* States, is very difficult to measure. However, it seems challenging to search and find the *what* of this promotion, as well as the *how* of doing it. There is a lack of clarity and consistency in EU policies and actions which wraps up the general feeling of engagement. And one can convincingly say that the three ways of measuring impact described above simply fail to match with EU actions in the Eastern European *de facto* States.

As previously mentioned, the degree of EU involvement in human rights promotion in the *de facto* States analysed varies case by case. And this approach perhaps could be justified by the peculiarities of the strategies adopted by each of these *de facto* entities in the state-building process, which is also reflected in the human rights situation in these regions. It can be said that in the South Caucasus EU actions have more impact. But even in the region, the EU presence is felt more in Abkhazia, and much less in South Ossetia and Nagorno Karabakh. Financially, the main target of EU funding projects is civil society, the EU having as an aim to develop and enhance civil society in order to promote its own values and principles. And these funding actions have had an immediate impact by addressing the urgent needs of the population who have suffered especially from armed conflicts, for example by financing shelter rehabilitation projects. These short term measures had the aim of paving the way for medium and long term strategies regarding reconstruction projects, as well as enhancement of dialogue between both sides in the conflicts.[61] But the immediate impact of the main economic assistance that the EU is providing has no certainty for positive medium and long term impact. The clashes between ethnicities and different views on what the state-building project should look like represent a factor of instability and uncertainty from the human rights perspective.

The EU has followed mainly the same human rights strategy path in Transdnistria, by financing different projects through civil society. For example, it supported the '3D' strategy of Moldovan NGOs in Transdnistria, which implied demilitarization, decriminalization and democratization. This strategy for civil society from Tiraspol and Chisinau included among others a transformation of the human rights situation in the region through promotion of international human rights standards.[62] It is important to note the absence of direct cooperation between the EU and the Transdnistrian self-proclaimed authorities, a fact which may contribute to politically undermine the small efforts that the EU is making

61 Catalina Nuta, *supra* note 47, pp. 67–68.

62 *Ibid.*, p. 69.

towards human rights promotion in the region. One can argue that the EU is interacting with Tiraspol through socialization in the framework of working groups on human rights of the negotiation process in '5+2' format.[63] But in this case, we cannot speak about direct interaction, but rather indirect and tangential interaction which eventually might have an impact on the human rights situation in the region.

As we discussed in the previous part, these entities are not part of, nor are they included in, the Association Agreements, and their subsequent DCFTAs that the EU concluded with Eastern Neighbourhood partners. The only exception is Transdnistria, which benefits from a DCFTA. As from 1 January 2016, the Deep and Comprehensive Free Trade Area agreement between Moldova (with Transdnistria included) and the EU became operational. Attempts by the Transdnistrian authorities to negotiate an agreement with the EU as an equal partner, in a bilateral format, without Chisinau included, failed. The EU reaffirmed its engagement with the Republic of Moldova and recognized the central government as the only authority to negotiate and sign the agreement. Consequently, in order to join trade and to benefit from it, Transdnistria was asked to do so through Moldova, a condition accepted by the *de facto* authorities. This new trade agreement was perceived by the self-proclaimed authority as a way of boosting its economy. It gives the territory's exports the same tariff-free access to EU markets as other Moldovan goods. Simply said, through DCFTA one can speak about Transdnistrian economic integration with the EU market via Moldova. Thus, going further from simply financial assistance and to include the *de facto* entity in these agreements, by maintaining engagement without a recognition approach, is beneficial for the people living in the region, with a considerable medium and long term impact.

63 Since 2005, the negotiation process for the settlement of the Transdnistrian conflict has the '5+2' format, chaired by the Organisation for Security and Cooperation in Europe, and it includes Chisinau and Tiraspol as parties, Russia and Ukraine as mediators, and EU and United States of America as observers.

6. Conclusions

In the EU legal and political conjunction, human rights play a central role. They are part of the Union's values and principles enshrined in its treaty, and which the Union is committed to promoting abroad. EU normative power represents a comprehensive tool through which the Union, by conducting different actions outside its territory, exports these values and principles. But the actions that the Union have conducted until now are not sufficient in the context of *de facto* States from Eastern Europe. This is mainly for three reasons. First, poor EU engagement in these territorial *de facto* entities. This contribution has shown *what* this engagement looks like. But there are many discussions about how they should be in order to have an impact on the human rights situation in *de facto* entities. For example, some authors argue for people-to-people contacts, inter-societal dialogue, as well as academic mobility in the EU for students from *de facto* States.[64] For de Waal, education seems to be an integral ingredient of an enhanced EU profile in the secessionist entities.[65] Other voices are calling for de-isolation and transformation of these entities by entering into a 'structured dialogue' with the authorities of the *de facto* States.[66] Put differently, there is much more about the idea of 'engagement without recognition' that the EU needs to address in order to promote human rights in *de facto* States.

Second, the general feeling regarding the EU's actions towards *de facto* States is that the EU has preferred to leave human rights issues to other organisations, such as the Council of Europe and the United Nations. And if we look at what has been done by these organisations, one can indeed find some reports and direct dialogue with the self-proclaimed authorities.[67] The EU has preferred to stick with the economic lever. But is this sufficient for human rights promotion in *de facto* States? As this chapter's discussions have unveiled, there is much more about human rights than a purely economic approach.

64 Alexander Cooley, Lincoln Mitchell, *supra* note 40, pp. 59–73, 67.

65 Thomas de Waal, *supra* note 44.

66 Sabine Fischer, *supra* note 45.

67 Thomas Hammarberg, *Report on Human Rights in the Transdnistrian Region of the Republic of Moldova*, UN Senior Expert (2013), p. 17. Available at: http://www2.un.md/key_doc_pub/Senior_Expert_Hammarberg_Report_TN_Human_Rights.pdf. Accessed 12 July 2020.

And third, regarding the impact, it is still too early to assess the impact and the effectiveness of EU policies toward *de facto* States. However, in order to produce medium and long term impact on the human rights situation in the *de facto* States, the EU should reconsider its approach, or at least add some more actions to the policy of 'engagement without recognition' so far embraced.

PRESIDENTIAL DISCOURSE ANALYSIS OF AZERBAIJAN'S EU POLICY OVER 2003–2019

RAHIM RAHIMOV

Author: Rahim Rahimov, Independent Political Analyst, Contributing Analyst for the Woodrow Wilson International Center for Scholars and Eurasia Daily Monitor of the Jamestown Foundation.

Scientific editor: Dr. Žaneta Ozoliņa, Professor at the Department of Political Science at the University of Latvia, Chairwoman of the Board of the Latvian Transatlantic Organisation.

Abstract

This chapter focuses on the role of official discourse in national foreign policy development towards the EU with the case study of Azerbaijan as an Eastern Partnership nation. The European Union and Azerbaijan are still in the process of negotiating a new framework agreement to upgrade their bilateral relations. Earlier they had failed to reach an association agreement in 2015. Eventually, the status of the new framework agreement, which is currently under negotiation, was downgraded from association to partnership agreement. This process of the agreement status downgrading was accompanied and even preceded by discourse shift in Azerbaijan.

Indeed, Azerbaijan's official discourse has significantly shifted with regard to the future of relations with the EU from "European integration" in the early 2000s to "European cooperation and/or partnership" in the 2010s. Azerbaijani president Ilham Aliyev's speeches and remarks represent an example of this shift. During his first term of office, the President clearly used phrasing that Azerbaijan was seeking and moving towards European integration. However, the President's rhetoric and discourse towards the nation's perspective on relations with the European Union has considerably cooled during his subsequent terms of office.

This chapter analyses how the shift in official discourse has affected Azerbaijan's national policy development towards the European Union. First, this chapter analyses how the discourse shift happened, and how it was reflected / imprinted in Azerbaijan's official documents. It also looks at the context of what has led to the change of official discourse in Azerbaijan's attitude to the EU. Second, it examines how the discourse shift affected Azerbaijan's perspective on relations with the EU with comparative cases of other failed association agreement negotiations, the signed partnership priorities document, and partnership agreement, which is still under negotiations.

Methodologically, the chapter uses Foucauldian discourse analysis.

Keywords: *Azerbaijan, EU, Eastern Partnership, discourse.*

1. Introduction

This chapter focuses on the impact of Azerbaijan's official discourse on the development of the nation's foreign policy towards the EU during President Ilham Aliyev's terms of office over 2003–2019. In doing so, particular attention is attached to how the discourse shift has affected negotiations with the EU to upgrade bilateral relations between the two.

This topic is relevant from two perspectives. First, from a practical perspective, there is a gap in research on negotiations between Azerbaijan and the EU to upgrade the bilateral relationship. This chapter intends to contribute towards filling that gap. Yet existing research and papers tend not to focus on the role of discourse on formation of EU-Azerbaijan ties and therefore neglect its implications for bilateral negotiations and impact on the progress of negotiations on related agreements. Therefore, second, this chapter offers the empirical case of Azerbaijan regarding the importance of discourse analysis in the foreign policies and international relations of Eastern Partnership nations and other post-Soviet countries.

Discourse analysis is a qualitative research method for studying the written or spoken language in relation to its context. The major difference of discourse analysis from the linguistic approach is that the former focuses on the contextual meaning of language while the latter focuses only on the rules of use of a language. Discourse normally means conversation or discussion. But its scholarly meaning is different, going beyond the linguistic meaning and encompassing social, political, historical and other contexts. There are various scholarly definitions of discourse and approaches to it. For the purposes of this chapter, Michel Foucault's approach to discourse and related Foucauldian discourse analysis are used.

For Michel Foucault, discourse is a body of statements that are organized in a regular and systematic way. And discourse represents power, which is also positive and disciplining, not just negative or coercive. Foucault views power as relations between individuals and therefore regulating or directing a big chunk of people such as a nation. In other words, discourse is an instrument of power that directs a people or a nation. It is also an effect of power:

> Discourses are not once and for all subservient to power or raised up against it… We must make allowances for the complex and unstable process whereby a discourse can be both an instrument and an effect of power, but also a hindrance, a stumbling point of resistance and a starting point for an opposing strategy. Discourse transmits and produces

> power; it reinforces it, but also undermines and exposes it, renders it fragile and makes it possible to thwart.[1]

Since discourse produces power, it also produces a reality, according to Foucault:

> We must cease once and for all to describe the effects of power in negative terms: it 'excludes', it 'represses', it 'censors', it 'abstracts', it 'masks', it 'conceals'. In fact power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production.[2]

Thus, the Foucauldian version of discourse is both a transmitter and producer of power, and the notion of power is central to discourse. Therefore, Foucauldian discourse theory is regarded as an extension of linguistic discourse theory to political science and international relations, and related to critical theory.

Moreover, discourse is historically situated and changing and developing in relation to the environment or context. Discourse analysis is significant to an understanding of political actors' perspectives because it is discourse that contextualizes the "whole process of making and using meanings … into specific historical, social and political conditions" and because[3]:

> Discourse is the way in which language is used socially to convey broad historical meanings. It is language identified by the social conditions of its use, by who is using it and under what conditions.

This chapter applies analysis of the context of the language used by President Aliyev. The corpus used for discourse analysis in this chapter includes presidential speeches, interviews, and texts that are publicly available in online, open sources. Moreover, for analysis of the effects of discourse shift on relations with the EU, related documents, texts, interviews and speeches are used. The analysis is carried out at the level of vocabulary, that is, words and phrases.

The chapter also investigates the intertextuality of presidential speeches with the nation's high-level official documents such as the National Security Concept.

Accordingly, the chapter will seek to answer two questions: first, how did discourse shift occur and what was the context of that shift? Second, what was the impact of discourse shift on Azerbaijan's perspective on the future of relations with the EU and negotiations on agreements to upgrade the bilateral relationship?

I suggest that from the Foucauldian perspective, Azerbaijani presidential discourse on relations with the EU represents power, which reframes Azerbaijan's

---

1 Michel Foucault. *The History of Sexuality: The Will to Knowledge.* (Penguin, London, 1998), pp. 100–101.

2 Michel Foucault. *Discipline and Punish: The Birth of A Prison.* (Penguin, London, 1991), p. 194.

3 Frances Henry and Carol Tator. Discourses of Domination: Racial Bias in the Canadian English-Language Press, (University of Toronto Press, 2002), pp. 25–26.

perspective from integration to partnership, produces a reality in which future relations are to be built based on the partnership outlook, and therefore, has a substantial impact on the nation's perspective on the EU and related negotiations to upgrade the bilateral relationship. Discourse has a context in which it is formed and therefore must be taken into account to properly understand it.

2. Discourse Shift and its Context

Azerbaijan has maintained relations with the European Union throughout its independence, and all the governments in the country have been at least sympathetic to advancing bilateral ties with the EU. Formal relations between Azerbaijan and the EU started with the EU-Azerbaijan Partnership and Cooperation Agreement in 1996, which entered into force in 1999, under President Heydar Aliyev. Azerbaijan was included in the EU's European Neighbourhood Policy in 2004 and the Eastern Partnership alongside with five other post-soviet nations – Armenia, Belarus, Georgia, Moldova, and Ukraine in 2009. Through the Eastern Partnership, the EU offers political association and economic integration opportunities. Georgia, Moldova, and Ukraine have signed an association agreement, Armenia has signed a comprehensive and enhanced partnership agreement with the EU, while Belarus's engagement is rather symbolic and limited with no such agreement. As regards Azerbaijan, it started negotiations for an association agreement with the EU in 2010 but they failed to reach a deal in 2015. Then, in 2017 Baku and Brussels announced that they had launched negotiations for a new framework agreement to advance the bilateral relationship. The uneasy and protracted negotiation process still continues. Analysis of Azerbaijani presidential discourse over 2003–2019 offers an angle to explore the specifics of bilateral ties, and the opportunities, challenges and troubles in the negotiation process to upgrade relations with the EU.

European Integration in Presidential Discourse 2003–2008

In 2003, Ilham Aliyev was elected president of Azerbaijan for his first term of office. This period was characterized as discursive determination on Azerbaijan's strategic goal of integration with the European Union. The President's discourse was reflected in the nation's official foreign policy documents. Indeed, in May 2004, he was the first South Caucasian leader to have been invited to Brussels within the

framework of the EU's European Neighbourhood Policy programme, where the president stated that "Integration with the European Union is our strategic goal."[4]

Earlier, in his speech at the spring session of the Parliamentary Assembly of the Council of Europe in April 2004, President Aliyev had formulated the nation's position as follows:

> Today, our strategic choice towards integration into Europe and into the European family – European structures – is continuing. We are strongly committed to that policy. We will do our best to ensure that Azerbaijan will meet all the standards and all the criteria that are common in the Council of Europe and in other European countries. That is our policy, which we have been conducting for a long time. What is happening today in Azerbaijan is a continuation of that policy.[5]

The President's discourse was imprinted in official documents. Indeed, consistent with his statements, the Azerbaijani president issued an executive order on 1 June 2005 to create a "State Commission on *Integration* of the Republic of Azerbaijan with the European Union"[6]. This document fixed the country's European integration perspective into an official national document.

Azerbaijan's discourse on European integration was also echoed in international documents and agreements to which Azerbaijan acceded. As a founding State of the Organization for Democracy and Economic Development, known as GUAM – an abbreviation of the member States – Georgia, Ukraine, Azerbaijan, and Moldova – Azerbaijan signed its final charter in Kyiv in 2006. The charter reiterated "adherence to the democratic norms and values and determination to further proceed on the path of European integration."[7] Article 1 of the charter also set out "deepening European integration" as a main purpose of the GUAM nations, including Azerbaijan. Furthermore, the final communique of the Kyiv summit of the presidents of the GUAM nations, including Azerbaijani president Ilham Aliyev, stressed that "deepening of the European integration" was a priority.[8]

---

4 Presidential Library. *Azerbaijan – European Union.* p. 10. Available at: http://files.preslib.az/projects/republic/en/azr2_4.pdf. Accessed 30 April 2020.

5 Ilham Aliyev. *Speech to the PACE.*29 April 2004. Available at: http://www.assembly.coe.int/nw/xml/Speeches/Speech-XML2HTML-EN.asp?SpeechID=7. Accessed 30 April 2020.

6 Ilham Aliyev. *Executive Order of the President of the Republic of Azerbaijan*. 1 June 2005. Available at: http://e-qanun.az/framework/9954. Accessed 30 April 2020.

7 Organization for Democracy and Economic Development - GUAM. *Charter.* May 23, 2006. Available at: https://guam-organization.org/en/charter-of-organization-for-democracy-and-economic-development-guam/. Accessed 30 April 2020.

8 Organization for Democracy and Economic Development - GUAM. *GUAM Summit Final Communique.*23 May 2006. Available at: https://guam-organization.org/en/guam-summit-final-communiqu%c3%a9-23-may-2006-kyiv/. Accessed 30 April 2020.

President Ilham Aliyev approved the National Security Concept of the Republic of Azerbaijan in 2007. The document clearly stated that Azerbaijan pursued the strategic goal of integration into European political, security, economic and other structures, and wanted to contribute to promotion of European values in the Caucasus region.[9] This concept paper is still in force.

Azerbaijan reaffirmed its commitment to European integration and promotion of European values at GUAM's Batumi summit on 1 July 2008, which was held under the motto of "Integrating Europe's East."[10]

Thus, Azerbaijani official discourse on the future of relations with the European Union was incorporated into official national and international documents and policies during the president's first term of office over 2003–2008. However, this trend started shifting during his second term of office over 2008–2013.

Discourse Shift from Integration to Partnership with the EU over 2008–2019

During his first term of office, President Ilham Aliyev articulated that Azerbaijan sought and moved towards "European integration". However, the President's rhetoric and discourse towards the nation's perspective on relations with the European Union considerably cooled during his subsequent terms of office. Instead of European integration, he used the phrase "partnership with Europe" and also stated that Azerbaijan will not integrate with Europe.

Indeed, remarks favouring the future of relations with Europe as integration were largely missing in the President's speeches in this period as contrasted to those in the preceding period. The uncertainty in discourse was conspicuous in the President's 22 September 2011 speech, in which he never used the phrase "integration" with regard to the future of relations with Europe.[11] Instead, he described the new phase of relations with the EU as "mutually beneficial cooperation". Furthermore, he underlined: "Azerbaijan's future lies in the hands of the Azerbaijani people".

9 Azərbaycan Respublikasının Milli Təhlükəsizlik Konsepsiyası (The National Security Concept of the Republic of Azerbaijan), 2007. Available at: http://www.e-qanun.az/framework/13373. Accessed 30 April 2020.

10 Organization for Democracy and Economic Development – GUAM. *Batumi Declaration "GUAM - Integrating Europe's East".* 1 July 2008. Available at: https://guam-organization.org/en/batumi-declaration-guam-integrating-europe-s-east/. Accessed 30 April 2020.

11 Ilham Aliyev. Speech. 23 September 2011. Available at: https://president.az/articles/3158. Accessed 4 May 2020.

President Ilham Aliyev publicly voiced scepticism about the country's European integration aspiration at the Cabinet of Ministers meeting on 17 July 2013. In reference to relations with the EU, he stated: "After all, every country integrating into any structure must know why it is integrating. Blindfold integration is impossible."[12] Two years later, in another cabinet meeting on 13 July 2015, the president sounded even more specific: "We are not integrating anywhere. Wherever we are integrated, that is enough."[13] He warned Azerbaijani officials, MPs and public figures, who called for integration into Europe, against doing so. Simultaneously, the president expressed his vision of the future format of relations with the EU, adopting a concrete and more relevant term – "partnership".

The third term of office witnessed significant shifts in the discourse and official documents. Indeed, on 31 August 2015, the President issued another order to introduce amendments to the executive order to create a "State Commission on Integration of the Republic of Azerbaijan with the European Union". Under the amendments, the phrase "Integration of the Republic of Azerbaijan with the European Union" was replaced with "Cooperation of the Republic of Azerbaijan with the European Union."[14,15] Thus, Azerbaijan's perspective on relations with the European Union was officially downgraded from *integration* to *cooperation*, and then was resettled on *partnership*, a more relevant or natural term to characterize the perspective on the bilateral relationship at least due to the well-established partnership in the energy sphere especially through the Southern Gas Corridor project to deliver Azerbaijani natural gas to Europe.

The fourth term of office of the president has been characterized by turbulence on the positions of the parties and deadlock in related negotiations of the new partnership agreement between Baku and Brussels. President Ilham Aliyev publicly stated in November 2019 that Azerbaijan was not going to integrate with the EU. He also underlined that Azerbaijan would remain committed to its traditional values.[16] This strong message appeared to be alluding to European

12 Ilham Aliyev. *Speech to the Cabinet of Ministers.* 17 July 2003. Available at: https://en.president.az/articles/8744. Accessed 30 April 2020.

13 Ilham Aliyev. *Speech to the Cabinet of Ministers.* 13 July 2015. Available at: https://en.president.az/articles/15823/print. Accessed 30 April2020.

14 Ilham Aliyev. *Executive Order No.834 of the President of the Republic of Azerbaijan*. 1 June 2005. Available at: http://e-qanun.az/framework/9954. Accessed 4 May 2020.

15 Ilham Aliyev. *Executive Order No.1382 of the President of the Republic of Azerbaijan*. 31 August 2015. Available at: http://e-qanun.az/framework/30784. Accessed 4 May 2020.

16 Ilham Aliyev. *Speech at the Baku State University.* 26 November 2019. Available at: https://en.president.az/articles/34985. Accessed 30 April 2020.

integration as potentially undermining those traditional values hence attempting facilitation of the social construction of European integration or values as a threat to Azerbaijani identity and society.

International Context of the Discourse Shift

Azerbaijan received major oil revenues starting from 2006–07 as the Baku-Tbilisi-Ceyhan oil pipeline became operational for the export of Azerbaijani crude to European markets via Georgia and Turkey. This has given rise to views that once Azerbaijan completed the BTC pipeline and became more self-satisfied and less in need of European support, its attitude changed towards European integration. President Aliyev's 2011 accentuation that Azerbaijan's relations with the EU were going to step into a new phase based on mutual benefit and mutual respect epitomized that.[17] Nonetheless, while those views have some legitimacy and indeed, Azerbaijan's changing attitude has to do with the factor of oil revenues, the issue needs to be considered from a different, more nuanced angle as well. As Azerbaijan received major oil revenues and its sovereign currency reserves were on the rise, greater powers attached greater attention to the country and their interests in the region intensified accordingly. Therefore, Azerbaijan sought to avoid getting embroiled in regional geopolitics among larger powers, but yet appeared to be willing to take the opportunity to diversify its foreign policy partnerships. This had an effect on Baku's perspective on relations with the European Union.

The second and third terms of office of the president witnessed major events – the South Ossetian war of August 2008, Crimean annexation, and the outbreak of the Eastern Ukrainian conflict, as well as the Arab Spring (the Syrian crisis in particular). The South Ossetian conflict of August 2008 particularly affected Azerbaijan's view or perception of the European Union. Not only Azerbaijan, but also other countries such as Ukraine were astounded by Europe's euphemistic approach.[18] While South Ossetian events and related recognition of Abkhazia and South Ossetia as independent States were seen as a reaction to Georgia's European aspirations, Brussels's muteness represented an alarm call for Azerbaijan, which suffers from a similar conflict in the Karabakh region – its internationally recognized territory.

17 Ilham Aliyev. Speech. 23 September 2011. Available at: https://president.az/articles/3158. Accessed 4 May 2020.

18 Виктор Ющенко, Грузия 08.08.08 In: Негосударственные Тайны. Заметки На Берегах Памяти, ed. Виктор Ющенко (Kharkiv: Фолио, 2014).

GUAM's Batumi summit on 1 July 2008 was held under the motto of "Integrating Europe's East" but has turned out to have been the last one ever since. There was no involvement from the EU or major EU nations such as pre-Brexit UK, France or Germany in the summit. Only Poland and the Czech Republic participated in the event. For Azerbaijan, the post-South Ossetian war period was a kind of "wait-and-see" mode, which was later crystallised with the Crimean annexation, and the outbreak of the Eastern Ukrainian conflict. Indeed, Azerbaijan joined the Non-Aligned Movement at the organization's summit in Indonesia on 25 May 2011 in a dramatic shift away from Baku's discourse – the stated goal of integration towards Europe. An Azerbaijani Foreign Ministry spokesperson said in 2011 that Baku's European integration ambitions had always been limited in scope, commenting on Azerbaijan's membership of the Non-Aligned Movement: "Integration does not mean becoming a member. Cooperation with … the European Union will continue", he added.[19] Furthermore, Baku also sent a double message to Moscow through joining the NAM: it will not seek integration with those Euro-Atlantic structures that Russia views as rivals on the one hand, but also made clear that Baku has no intention to join a Russia-led Eurasian Economic Union or Collective Security Treaty Organization, on the other hand.

On top of all that, the Turkish factor has also been a consideration in Azerbaijan. Despite the fact that Turkey has been a NATO and Western ally since the Cold War, its accession negotiations with the EU have been protracted for decades. As in Turkey, many in Azerbaijan view Turkey's identity as a major cause for the troubled negotiations. Since Azerbaijan's ties with Turkey are often described as "one nation, two States", and they share ethnic, linguistic, religious and cultural backgrounds, parallels are drawn and often with huge scepticism over the EU's perspective on the future of relations with Azerbaijan. President Aliyev stated in December, 2019 that Turkey was not accepted into the EU because of its identity. "They [Europe] don't hide this anymore" he added. "Then will they accept Azerbaijan? Of course, not", he concluded.[20]

19 RFE/RL. *Azerbaijan Joins Ranks of Non-Aligned Movement.*25 May 2011. Available at: https://www.rferl.org/a/azerbaijan_join_nonaligned_movement/24200776.html. Accessed 30 April 2020.

20 Ilham Aliyev. *Interview.*23 December 2019. Available at: https://president.az/articles/35325. Accessed 30 April 2020.

3. Impact of Discourse Shift on EU-Azerbaijan Negotiations

The shift of Azerbaijan's discourse from integration to partnership has affected negotiations with the EU to upgrade the bilateral relationship. Integration normally means a vertical relationship between the integrating and integrated parties while partnership tends to be horizontal. In integration, normally the party to be integrated is expected to act on the terms of the integrating party rather than vice-versa, and adapt to the conditions and values of the integrating party rather than vice-versa, especially in the case when the integrating party is a powerful 27-nation bloc – the EU. Otherwise, it could be a mission impossible to complete. Unlike integration, partnership in itself implies some level of equality between the partnering parties even without specifically pronouncing an "equal" partnership. Yet in the case of Azerbaijan, equal partnership is oftentimes accentuated. Indeed, President Ilham Aliyev articulated this approach as follows: "The agreement [between Azerbaijan and the EU] must be signed between equal partners. The agreement must be free from all points that contradict equal cooperation."[21] Thus, partnership – in particular the equal partnership discourse – has affected the course of negotiations between Azerbaijan and the European Union to upgrade the bilateral relationship through a failed association agreement, a signed partnership priorities document and a new framework agreement which is still under negotiation. The implications of the equal partnership discourse were conspicuously echoed in the following major topics on the negotiation agenda: political reforms and approaches to settlement of the Karabakh conflict. Moreover, there are less sensitive but still important issues or topics such as economic reforms and the title of the agreement that were also affected by discourse shift.

Association Agreement

After the EU Eastern Partnership summit of 2015 in Riga, Latvia, it became crystal clear that Azerbaijan and the EU had failed to reach an association agreement and abandoned it.

Speaking on a panel at the 2017 Munich Security Conference, Azerbaijani President Ilham Aliyev addressed why his country refused to sign an Association Agreement with the EU in 2015. First, he described the Association Agreement

21 Ilham Aliyev. *Year-end Interview for National Media*. 23 December 2019. Available at: https://azertag.az/en/xeber/President_Ilham_Aliyev_gave_interview_to_a_group_of_local_journalists_on_the_results_of_the_year_VIDEO-1373791. Accessed 8 July 2020.

offered by Brussels as a "unilateral instruction list."[22] It mainly alluded to the reforms that were required by the EU through the association agreement for Azerbaijan to carry out. His remarks highlighted Baku's unwillingness to compromise the country's sovereignty in this way. What the President depicted as a unilateral instruction list is not in line with the spirit of equal partnership. An equal partnership must be on an equal basis between equal parties and bilateral, reciprocal or mutual – but not in the form of a unilateral instruction, and equal partnership is about a horizontal relationship not a vertical one.

Second, President Aliyev said that the agreement lacked precise wording in support of Azerbaijan's territorial integrity. This contrasts with the association agreements extended to Moldova and Georgia, in which the EU unambiguously affirmed those countries' territorial integrity. Indeed, the EU has either kept muted or referred to the principles of international law in general terms on the Karabakh conflict. This has caused ambiguity because it is understood as the territorial integrity principle for Azerbaijan, and self-determination for Armenia. Such an attitude is also regarded as contradictory to equal partnership. Baku's argument is that among Eastern Partnership countries all must be treated equally: if the territorial integrity of Georgia, Moldova or Ukraine are treated by one standard but Azerbaijan's by a different standard, it is simply double standards policy and against Azerbaijan's interests and the principle of equal partnership. Here, equal partnership means not only between Azerbaijan and the EU, but also and more sensitively in relation to Azerbaijan, and other peer Eastern Partnership nations – Georgia, Moldova, and Ukraine.

Partnership Priorities Document

Following the failure of negotiations for an association agreement, in 2015–2016 a crisis in relations between Baku and Brussels – more specifically the European Parliament – resulted in deadlock in bilateral relations. In this light, the signing of partnership priorities between the EU and Azerbaijan on 11 July 2018 can be regarded as rather a compromise than a breakthrough in the deadlocked relations.[23] It set four main areas of partnership between Baku and Brussels as a basis for negotiating a new agreement. In fact, exactly these four priorities had been agreed

22 Ilham Aliyev. *Speech within the "Fault Lines of Eurasia" panel at the Munich Security Conference.* 18 February 2017. Available at: https://en.president.az/articles/22827. Accessed 4 May 2020.

23 European External Action Service. July 11, 2018. Available at: https://eeas.europa.eu/headquarters/headquarters-homepage/48244/partnership-priorities-between-eu-and-azerbaijan-reinforce-bilateral-agenda_en. Accessed 4 May 2020.

on with all the Eastern Partnership countries including Azerbaijan during the EU Eastern Partnership Riga summit in 2015, and reaffirmed in the 20 Deliverables 2020 document during the 2017 Brussels summit, and were imprinted in the joint declarations of the summits respectively by the EU and the Eastern Partners.[24] Nonetheless, the signing of the four priorities document between Azerbaijan and the EU is oftentimes celebrated as a success in the negotiations for a new framework agreement.

The two most sensitive issues – for Azerbaijan, settlement of the Karabakh conflict, and for the EU, political reforms, including human rights and the democratization agenda – were not prioritized but just mentioned in general terms in the context section of the July 2018 partnership priorities document. This structure of the document is regarded as a compromise to unfetter negotiations for the new partnership agreement.

Nonetheless, it did not prevent the parties from issuing their own statements with different interpretations of the priorities document on the day of its signing. A statement from the Azerbaijani Ministry of Foreign Affairs interpreted it as renewing both sides' commitments to the principles of territorial integrity and inviolability of internationally recognized borders as well as to the independence and sovereignty of Azerbaijan. It made no mention of human rights, democratization or the rule of law.[25] In contrast, a press release from the European External Action Service referred to respect for human rights, democracy, the rule of law, and dialogue with civil society as part of the agenda committed to by Baku and Brussels, without a note on the territorial integrity principle and related issues.[26]

Therefore, a key to understanding why Baku and Brussels have not been able to convert the priorities document into an actual agreement lies in the content of the 2018 Partnership Priorities document itself: the EU's approach to the major contentious issues are in conflict with Azerbaijan's equal partnership perspective, and such disagreements were not settled but merely put off to revive the negotiation process for the new framework agreement.

24 European Commission. *2017 Eastern Partnership Summit: Stronger together.* Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_4845. Accessed 5 May 2020.

25 The Ministry of Foreign Affairs of the Republic of Azerbaijan. *Statement No.168/18*. 11 July 2018. Available at: http://mfa.gov.az/en/news/5749/no16818-statement-by-the-ministry-of-foreign-affairs-of-the-republic-of-azerbaijan. Accessed 5 May 2020.

26 European External Action Service. *Press Release.* 11 July 2018. Available at: https://eeas.europa.eu/headquarters/headquarters-homepage/48244/partnership-priorities-between-eu-and-azerbaijan-reinforce-bilateral-agenda_en. Accessed 5 May 2020.

New Partnership Agreement

The European Union (EU) and Azerbaijan started negotiations on a new framework agreement to upgrade bilateral relations on 7 February 2017. Although the agreement has yet to be finalized, in Azerbaijan it is oftentimes dubbed the strategic partnership agreement. Azerbaijan seeks to title the new agreement "strategic partnership agreement". The motives are that such a title, in the view of Baku, would show the importance of the agreement signed with Azerbaijan, and more importantly, it is more in line with the equal partnership discourse because powerful countries such as Japan, South Korea and Canada have signed strategic partnership agreements with the EU. Being in the same boat with these nations means prestige for Azerbaijan.

Despite the desire to achieve a deal, there are serious stubborn hindrances to that. Azerbaijan has firmly, unambiguously, and repeatedly made it absolutely clear that it was not going to compromise the territorial integrity of the nation in any way. And the EU has established "the implementation of deep democracy" as a major principle in its relations with Azerbaijan: "the EU will not compromise on the core values of the Eastern Partnership"[27]. The seriousness of the persistent difference in interpretations of the major contentious issues became evident again during the May 2019 Eastern Partnership Brussels summit. First, the Azerbaijani delegation reportedly vetoed the final summit declaration based on the fact that the document failed to voice support for the territorial integrity principle.[28] As a result, the final document was downgraded from a "declaration" to "chair's conclusions" and was signed only by the EU's foreign policy chief, Federica Mogherini, instead of all the participants.[29] Second, the EU published a report on human rights and democracy in Azerbaijan on the same day that Baku vetoed the final EaP summit declaration. The report specifically criticizes Azerbaijan's record of human rights and democratic norms and procedures.[30] Furthermore,

27 European Council. Council of the European Union. *Eastern Partnership. EU Relations with Azerbaijan.*16 June 2020. Available at: https://www.consilium.europa.eu/en/policies/eastern-partnership/azerbaijan/. Accessed: 1 July 2020.

28 http://azeridaily.com/politics/47964. 14 May 2019. Accessed 5 May 2020.

29 European External Action Service. *Chair's Conclusions.*13 May 2019. Available at: https://www.consilium.europa.eu/en/press/press-releases/2019/05/13/eastern-partnership-foreign-ministers-meeting-chair-s-conclusions-on-the-occasion-of-the-eastern-partnership-10th-anniversary/. Accessed 5 May 2020.

30 European External Action Service. *EU Annual report on Human Rights and Democracy in the World (Azerbaijan.)*13 May 2019. Available at: https://eeas.europa.eu/delegations/azerbaijan/62282/eu-annual-report-human-rights-and-democracy-world-azerbaijan_en. Accessed 5 May 2020.

the EU Commissioner for European Neighbourhood Policy and Enlargement Negotiations, Johannes Hahn, said on 14 May 2019 that the human rights issue was responsible for prolonging the negotiations.[31]

Azerbaijan's partnership discourse has a geopolitical dimension too. It is unrealistic to integrate with two or more different structures or communities simultaneously. Therefore, an Eastern Partnership nation choosing to pursue integration is legally and otherwise committed and even obligated to the structure or community it integrates with, that is, the EU or the Eurasian Economic Union. Ukraine's dilemma whether to choose between signing the Association Agreement with the EU and joining the Eurasian Economic Union is a clear case in point. But partnership is different, unlike integration, and is about diversification of foreign policy partnerships. Therefore, a nation can more freely pursue partnerships with absolutely different nations, structures, communities or other actors. Accordingly, Azerbaijan's adoption of the partnership discourse in a drift away from integration with the EU provides more room for diversifying its foreign policy partnerships, at least in Baku's view. Its joining the Non-Aligned Movement in 2011 is just a case in point. Furthermore, President Aliyev stated in 2017 that Azerbaijan did not intend to integrate with any international integration structure but attached importance to diversifying partnerships.[32] In the geopolitical context, by shifting from integration to partnership discourse, the Azerbaijani government distances itself from the EU's offer of participation in political association and economic integration through the Eastern Partnership.

Eastern Partnership countries oftentimes seek financial assistance, visa liberalization perspectives, and other benefits from the EU. This makes them more flexible in negotiations on various issues including those on the political agenda. Azerbaijan, however, does not seek financial or material benefits from the EU and portrays itself as *equal* but not an aid-seeking partner in accordance with the equal partnership discourse. Indeed, President Aliyev made it clear that Azerbaijan didn't seek financial assistance from Brussels:

> Azerbaijan doesn't expect any privilege from the European Union and we [Azerbaijan] are a self-sufficient country unlike some other nations included in the Eastern Partnership programs, we have already become a

31 Azadlıq Radiosu. 15 May 2019. Available at: https://www.azadliq.org/a/xi%CC%87n-h%C9%99r-iki-t%C9%99r%C9%99f-bu-sazi%C5%9Fin-tezlikl%C9%99-imzalanmas%C4%B1nda-maraql%C4%B1d%C4%B1r-amma-/29942138.html. Accessed 5 May 2020.

32 Ilham Aliyev. *Speech within the "Fault Lines of Eurasia" panel at the Munich Security Conference.* 18 February 2017. Available at: https://en.president.az/articles/22827. Accessed 30 June 2020.

> completely donor nation in the report of the International Development Agency. Namely, we are a loan-providing [creditor] nation.[33]

Disagreements on negotiations over the new framework agreement are not confined to the political and conflict spheres only but also to economic matters. According to Commissioner Hahn, Azerbaijan tries to "focus more on the economic sphere, which is also important for the EU."[34] Indeed, economic partnership is essential considering that Azerbaijan's GDP is bigger than the combined GDPs of the three smallest EaP countries – Armenia, Georgia and Moldova – and Azerbaijan plays a key role in safeguarding European energy security. In turn, the EU is Azerbaijan's largest trade partner. Nonetheless, the trade component of their strategic partnership agreement also became bogged down and delayed over technical issues related to Azerbaijan not yet having acceded to the World Trade Organization (WTO).

At his 2019 year-end interview for the Azerbaijan national media, President Ilham Aliyev updated the public on the progress of negotiations with the EU on the new partnership agreement. He explained the deadlocked negotiations with trade and energy factors, both of which are economic:

> Azerbaijan is not a member of the World Trade Organization (WTO). I believe, however, that the time for our membership has not yet come, considering that oil and gas constitute the core of our exports and that we also need to protect the domestic market and domestic manufacturing industries and agriculture. What's more, the WTO is going through a crisis: the United States is reconsidering its membership, and certain countries are fighting trade wars. Our cautious attitude to WTO membership is logical and understandable in this context.

Furthermore, he added:

> First and foremost, this is a question of energy prices. We've been told that we should sell exported gas at domestic prices. What does this mean? Eighty-five percent of the population of Azerbaijan pays a discounted gas price of about 100 manats ($58) per 1,000 cubic meters, while prices in Europe stand at $300 to $500 per 1,000 cubic meters. It looks like we will have to sharply increase domestic prices, which is unacceptable, or export gas at $58, which is impossible. So, we still need to coordinate these two main issues.[35]

---

33 Ilham Aliyev. *Year-end Interview for National Media*. 23 December 2019. Available at: https://president.az/articles/35325. Accessed 4 May 2020.

34 Azadlıq Radiosu. 15 May 2019. Available at: https://www.azadliq.org/a/xi%CC%87n-h%C9%99r-iki-t%C9%99r%C9%99f-bu-sazi%C5%9Fin-tezlikl%C9%99-imzalanmas%C4%B1nda-maraql%C4%B1d%C4%B1r-amma-/29942138.html. Accessed 4 May 2020.

35 Ilham Aliyev. *Year-end Interview for National Media*. 23 December 2019. Available at: https://president.az/articles/35325. Accessed 4 May 2020.

WTO membership is a clear requirement for an Association Agreement with the EU, not for a partnership agreement. However, the proposed partnership agreement would include a trade component and therefore would include provisions on trade issues. It was crystal clear from the very beginning of the negotiation process that Azerbaijan is neither a member of the WTO nor does it intend to finalize and join the organization soon. That is why it was said that, if signed, the EU-Azerbaijan agreement would have been the first free trade deal Brussels had ever reached with a non-WTO country.

As regards gas prices, according to President Aliyev, one does not need to join the WTO in order to sell oil or gas. In particular, the President's statement on the EU's condition regarding the gas price has huge appeal for the domestic audience. No one would like to pay a gas price at the EU level, which is several times higher than the current domestic price. Second, to lower the gas export price to the level of domestic prices is illogical and unacceptable from Azerbaijan's perspective because it has invested billions of dollars in development of offshore gas fields and related transit infrastructure, particularly the multi-billion dollar Southern Gas Corridor.

President Aliyev's statements were neither confirmed nor refuted by any EU official. The EU kept muted on the matter. However, EU Commissioner Hahn's earlier statement on Azerbaijan's focus on the economic sphere on the one hand, and the president's rebuttal of claims relating to the protracted negotiations to Azerbaijan's failure to meet some EU political criteria on the other hand, are curious.

In his year-end interview, President Ilham Aliyev also reiterated that Azerbaijan could not risk its moral, national values for European ones. His statement revealed the sudden relocation of disagreements between Baku and Brussels from political to economic and even societal security domains without security-speak. Thus, the topic is apparently transferred from the political sphere to the economic and societal security spheres. In addition to the Karabakh conflict issue as the top national security priority of Azerbaijan, the above-mentioned gas price issue is portrayed as potentially threatening to undermine Azerbaijan's economic security and thereby destabilise society. Moreover, the values issue can be socially constructed as a threat to societal security. And all those portrayals and constructions, which may ultimately lead to securitization without security-speak of certain items in negotiations over the future of relations with the EU, resonate with Baku's discourse on [*equal*] partnership.

4. Conclusion

In this chapter, the case of Azerbaijan reaffirms that discourse represents power, and is both an instrument and effect of power, and produces a reality as argued by Michel Foucault. Indeed, first, discourse was used as an instrument of power to change and downgrade the perspective of the nation on the relationship with the EU from integration to partnership. Second, the President's discourse is an effect of power as he speaks from a position of power with a strong institutional voice. Therefore, his discourse has had a substantial impact on the nation's perspective on the future of relations with the EU, producing a reality in which Azerbaijan wants an "equal partnership" with the EU instead of association or integration. An equal partnership between a small post-Soviet nation – Azerbaijan and a powerful political-economic bloc of 27 European nations – is not an easy and unambiguous goal to achieve. This reality has much affected the course of negotiations between Azerbaijan and the EU towards signing a new framework agreement to upgrade the bilateral relationship.

Also this case shows that discourse is historically situated and changing and reshaping or developing in relation to the surrounding environment or context, as proposed by Michel Foucault. And so was the Azerbaijani presidential discourse: it started changing in relation to the international context reshaped by the August 2008 crisis between Georgia and Russia in particular. The effect of this new context was conspicuous in the uncertainty in the presidential discourse following the crisis. As the newly emerging context was further and firmly developed by the Crimean annexation and the outbreak of the East Ukrainian conflict, the uncertainty in discourse was crystallised: It clearly resettled from integration to partnership.

This discourse shift was also incorporated into official documents. Indeed, Azerbaijan's official change of discourse from integration to partnership with the European Union took place and was imprinted in official documents. Then, it significantly affected the process and essence of negotiations between Azerbaijan and the EU. The discourse change is sought to be justified by concerns or considerations of security, among other arguments. Ultimately, the discourse shift leads to securitization without security-speak of the nation's previously stated European integration goal and certain items on the agenda of negotiations on the future direction of relations with the EU, effectively transferring and reframing the topic from the political to the security sphere. Security in this context is not necessarily used in its classic meaning of military security against external threats. The term security covers various dimensions of security including

identity, economic, and societal security. This is in line with securitization theory that takes the concept of security "beyond the traditional, realist, state-centric view of security being equal to military issues."[36]

The discourse shift is also about a shift in the nation's perspective. In this case, Azerbaijan's perspective based on analysis of its discourse shift is clear: It seeks cooperation and partnership with the EU but not association or integration with it. And yet Azerbaijan views and frames this important foreign policy matter also through the security lens but without security-speak.

Since discourse analysis reveals how a nation views, frames and reframes its foreign policy matters, a particular benefit is that this chapter finds that discourse analysis offers effective analytical frameworks to understand a State's foreign policy development, its context and related behaviours in changing contexts. This kind of analytical tool is effective for analysing and understanding the shaping of the political agenda and foreign policy development processes in post-Soviet space, where oftentimes the think-tank industry is underdeveloped, a proper culture of public debating and argumentation still needs shaping, and individual leaders have a stronger voice than institutions.

36 Roxanna Sjöstedt. "Securitization Theory and Foreign Policy Analysis", *Oxford Research Encyclopedias: World Politics*, pp. 1–16 (April 2017). Accessed 6 May 2020, doi:10.1093/acrefore/9780190228637.013.47.

CONSTITUTIONAL REQUIREMENTS OF RATIONAL LAWMAKING AND REGULATORY REFORM IN GEORGIA

GEORGE LOMTADZE

Author: George Lomtadze, Head of Protocol and Public Relations Department at the Constitutional Court of Georgia.

Scientific editor: Dr. Filip Cyuńczyk, Associated Researcher at the Centre for Legal Education and Social Theory (University of Wrocław), Visiting Lecturer at the Riga Graduate School of Law.

Abstract

The proposed regulatory reform in Georgia introduces the impact assessment tool as part of the legislative process. While the lawmaker has indicated that it wants to implement the principles of good governance, one may argue that the elements of evidence-based policymaking form part of the paramount principle of the Rule of Law. Also, in the Georgian context, the Association agenda with the EU prescribes certain obligations that may well be interpreted as a requirement to institutionalise evidence-based policymaking. The proposed research will look into the constitutional principle of the Rule of Law and attempt to showcase that the concept of rational lawmaking requires lawmakers to rely on reason whilst legislating. It will also focus on impact assessment as a major analytical tool of evidence-based policymaking to conclude that it has a promising capability to contribute to improving the quality of laws in Georgia.

Keywords: *regulatory reform, rational lawmaking, regulatory impact assessment, Georgia.*

1. Introduction

The Georgian Parliament has recently adopted legislative changes that aim to institutionalise a regulatory impact assessment (RIA) as an element of the legislative process. This is part of the regulatory reform agenda intended to facilitate the implementation of evidence-based policymaking in Georgia that came into force in 2020. Under the proposed system, in certain circumstances, a draft law must be accompanied by an impact assessment, which would contain factual information in order to measure the effects of the proposed law on individuals and the wider community, whereas the legislature should take this assessment into consideration when legislating on the matter.

This chapter focuses on the concept of rational lawmaking by briefly discussing its elements and underlying justification. It will attempt to define the obligation of the legislature, flowing from the rule of law, not to legislate beyond reason. More specifically, parliamentary lawmaking, especially when it concerns fundamental rights and potential restrictions thereof, has to correspond with certain substantive aspects of the rule of law, namely legal certainty, proportionality, equality and non-discrimination. In order to comply, the legislature is under obligation to back up legislative facts/assumptions with evidence/empirical data not to abridge the rule of law.

In particular, the present chapter attempts to deconstruct the elements of the rule of law relevant in relation to lawmaking and to submit that the legislator has a duty to adopt and maintain rational laws. In order to substantiate this proposition, the chapter focuses on judicial case law pertaining to the interpretation procedural rationality of legislation, thereby defining the contours of the lawmaking procedure.

This chapter adopts the hypothesis that the lawmaker is subject to certain substantive and procedural duties of rationality and that, under the concept of rule of law, constitutional jurisprudence has defined the legislative obligation of procedural rationality, monitoring and *ex-post* correction of norms.

This chapter begins with an analysis of the confluent relationship between the concepts of democracy and the rule of law. Once prevailing theoretical scholarship is analysed, it is submitted that the coexistence of these two values helps to legitimise modern governance and ensure its viability. The chapter then focuses on the concept and rationale behind rational lawmaking. It deconstructs the substantive and procedural aspects of rationality. The argument is made that the legislature is obliged not to legislate beyond reason and to regularly correct flaws in existing legislation by conducting respective factual assessment. More specifically,

parliamentary lawmaking, especially when it concerns fundamental rights and potential restrictions thereof, has to correspond with certain substantive aspects of the rule of law – proportionality, equality, and non-discrimination.

The second part of this chapter focuses on extensive jurisprudence of the Federal Constitutional Court of Germany to submit that the obligation of rational lawmaking combines five interrelated stages, namely (1) problem formulation and determination of objectives; (2) determination of facts; (3) prognosis; (4) evaluation and decision; and, (5) monitoring and rectification to ensure compliance with the rationality requirements of consistency, proportionality and correction.

The final part of this chapter initially overviews the legal framework of recent regulatory reform in Georgia and then goes on to assess its scope, process and elements. It is concluded that the institutionalisation of RIA has solid potential to improve the policy process in Georgia by ensuring more informed legislative solutions, broader stakeholder participation and increased overall legitimacy.

The present chapter does not intend to thoroughly study any of the questions discussed. Due to lack of space, this chapter will be limited to not referring to any empirical data which is more than needed, to further delve into the questions addressed here.

2. Correlation Between Democracy and the Rule of Law

2.1 Initial Remarks

It is widely argued that the law in a democratic State ought to be rational in order to acquire legitimacy and become binding on the citizens within a given jurisdiction.[1] Although the essence of this proposition appears uncontested, the idea behind it enjoys deep normative underpinning both in theory and practice.[2] Political and legal pundits all around the world, including authoritative international organisations and academics, regularly refer to the concepts of democracy and the rule of law

1 Bernd Grzeszick. "Rationality Requirements on Parliamentary Legislation Under a Democratic Rule of Law" in Klaus Meßerschmidt and A. Daniel Oliver-Lalana (eds.) *Rational Lawmaking under Review*, (Springer 2016) p. 62.

2 Brian Z. Tamanaha, "The History and Elements of the Rule of Law", *Sing. J. Legal Stud.*, pp. 232–47 (2012).

inseparably as necessary prerequisites of good governance.[3] Nevertheless, it is contended that these two notions are theoretically independent, with democracy implying that holders of political power be elected on the basis of free and regular elections,[4] while the rule of law focuses on the system whereby political power is exercised within the boundaries of generally accepted norms, announced in advance and applied uniformly.[5] From the modern perspective, these traditional definitions may seem too narrow, but they by no means attenuate the uneasy interrelation that persists between them.

Indeed, the very idea that the rule of law puts certain constraints on the policy options of electoral majorities, presupposes inherent conflict with the idea of representative democracy.[6] Nevertheless, there is veritable quantitative evidence globally suggesting a strong confluence between the two.[7] It is therefore intriguing to delve into the reasons that might explain strong interdependence between democracy and the rule of law.

2.2 Salience of Fundamental Rights and Freedoms

It is widely argued that democracy inherently implies an extensive array of civil rights that can only be reinforced through a formidable rule of law.[8] According to this apparently liberal understanding of democracy, a democratic polity ought to protect individual freedoms – for example, freedom of expression and that of religion, the right to peaceful enjoyment of property, and protection from undue state interference. Indeed, it has been argued that the three main objectives of an ideal democracy are civil and political freedoms, popular sovereignty implying

3 *See* G.A. Res. 67/1, &5, U.N. Doc. A/RES/67/1 (30 November 2012) (reaffirming that "human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations."); Expertise, Rule of Law, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), https://www.giz.de/expertise/html/1944.html. Accessed 30 August 2020.

4 Larry Diamond and Leonardo Morlino, "Introduction" x–ix (in Larry Diamond & Leonardo Morlino eds., *Assessing the Quality of Democracy*, (Johns Hopkins University Press, 2005).

5 Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)"?, 21 *Law & Phil*. (2009) pp. 137-140.

6 Ofer Raban, "The Rationalization of Policy: On the Relation between Democracy and the Rule of Law", *New York University Journal of Legislation and Public Policy*. 18(45) (2015), p. 48.

7 Rule of Law Index 2017-2018, The World Justice Project, available at: https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2017%E2%80%932018/methodology. Accessed 11 August 2020.

8 Steven Levitsky & Lucan Way, "Assessing the Quality of Democracy", *Journal of Democracy*, 2002, p. 51.

control over public policies and decision-makers, and genuine political equality.[9] The foregoing exposition admittedly represents a broad definition of democracy and is barely questioned worldwide. And yet it has a solid theoretical foundation.

Firstly, there is a longstanding argument that liberal freedoms are naturally linked with the idea of free electoral choice.[10] This concept presupposes the existence of freedom of opinion and expression and the right of association. At the same time, it also requires tolerance towards lifestyles that are different in order to allow the electorate to assess alternatives and make an informed choice. Therefore, pluralistic tolerance is a necessary precondition for real democracy and lack thereof would mean that a given country is not democratic even if it holds regular elections.[11]

Alternately, Dworkin notoriously argued that the intrinsic merger of democracy with civil liberties is based on a postulate of moral equality among individuals, which is duly translated into equal treatment from the State.[12] This means that in liberal systems different social groups – ideological, religious, racial, gender etc. minorities – are equally protected by the law. In essence, democracy implies individual rights as the corollary of moral equality.

The abovementioned propositions suggest that an organic linkage exists between democracy and the rule of law. Namely, if democracy must respect an array of fundamental rights and freedoms, it becomes ever more necessary to put in place a robust rule of law in order to ensure these legal rights are effectively protected.[13] In other words, practices that may be insulting to the majority – for example, public expression of political, religious or other views – ought to be secured by a workable legal system. It has been emphatically argued, "in the absence of the rule of law, contemporary constitutional democracy would be impossible."[14] This chapter takes the view that a democratic system, as we know it, cannot exist without the rule of law.

---

9 *Supra* note 4, p. xi.

10 Albert Weale, "Democracy, Rights and Constitutionalism", in *Democracy*, 2nd edition, 2002. pp. 189–196.

11 *Supra* note 7; *see also*: CDL-AD(2016)007-e: Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e; Freedom in the World 2018, Freedom House, available at: https://freedomhouse.org/report/methodology-freedom-world-2018. Accessed 11 August 2020.

12 Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality*, (Harvard University Press, 2000), p. 212.

13 *Supra* note 6, p. 50.

14 Michel Rosenfeld, "The Rule of Law and the Legitimacy of Constitutional Democracy", 74 S. *Cal. L. Rev.* (2001), p. 1307.

It is important to emphasise the ideological dominance of liberalism, which in essence has brought the rule of law as a desideratum of a free democratic polity.[15] No less significant is to perceive the extent of fundamental rights and freedoms that is necessary for the viability of democracy.

3. The Rationality Requirements in Lawmaking

3.1 Normative Framework

It should be mentioned from the outset that the rule of law is not the sole normative justification that argues for limited government. Democracy itself, which is based on collective decision-making with the goal of arriving at solutions acceptable to many interest groups, is naturally tilted towards favouring non-arbitrary and rational compromises. This explanation is at the heart of the concept of deliberative democracy, which attests rational policymaking to the pluralistic legislative discourse.[16] This approach, however, does little to account for those instances where the majority in the legislature may almost unanimously decide to pass policies encroaching upon fundamental rights of minorities. Evidently, irrational decisions are likely to be taken in a less pluralistic deliberative assembly, as illustrated in recent political developments worldwide.[17]

The rule of law intrinsically presupposes rationality by requiring coherence within a legal system and the publicity of adopted laws.[18] Yet, in order to deconstruct the idea of the rule of law and identify specific elements that are essential to its realisation in practice, and also provide the legal basis for the obligation of rational lawmaking, Tom Bingham's following definition is most appropriate – "all persons and authorities within the State, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts".[19]

15 F.A. Hayek. *The Road to Serfdom*, (Chicago: University of Chicago Press, 1944), pp. 81–82.

16 Dennis F. Thompson, (2008). "Deliberative Democratic Theory and Empirical Political Science", 11 *Ann. Rev. Poli. Sci*, p. 497.

17 *See, inter alia,* Chrostopher Zurn, *Deliberative Democracy and the Institutions of Judicial Review,* (New York: Cambridge University Press, 2007), p. 32–33.

18 Lon L. Fuller, *The Morality of Law*, (New Haven: Yale University Press, 1964), pp. 39–2.

19 Tom Bingham, *The Rule of Law*, (London: Allen Lane 2010), pp. 64–67.

This definition is widely accepted today by the international community,[20] as it combines a wide array of formal, procedural and substantive elements. With respect to formal aspects of the rule of law, Fuller's famous eight principles of generality, publicity, prospectivity, intelligibility, consistency, practicability, stability, and congruence.[21] These elements concern the form of legal norm(s) to be applied to the conduct of a legal subject. For instance, one of the key features of a formal understanding of the rule of law is the generality requirement. Generality is an important aspect of legality and relates to the principle of non-discrimination. It implies the idea that laws ought to be designed in the framework of open and relatively stable general rules – rules that should operate impartially and impersonally.[22] Apart from the pure form, the rule of law envisages legal norms to be public by being promulgated in advance to allow its addressees sufficient time to comply.

Another essential feature of the formal understanding of the rule of law is the requirement of clarity, which goes beyond publicity of laws and adds to that the elements of accessibility and intelligibility. Despite the fact that modern law is quite technical in form, it still should be comprehensible enough to give a lay person general knowledge how to manage their conduct and comply.[23]

Along with the formal dimension, there are equally indispensable procedural principles inherent to the rule of law. As already touched upon above, from a constitutional perspective, the procedural requirement of an institutionally independent and impartial judiciary is crucial. This relates to the principle of separation of powers and assigns special significance to distinct stages in the process of lawmaking and application of rules.[24] Apart from that, the procedural guarantees of a fair hearing, representation by counsel at such a hearing, the right to be present, to examine witnesses, and to make legal argument on an equal footing, and the right to a reasoned judgment from a court of law are all part of the essential procedural framework of the rule of law.[25]

20 *Supra* note 11, The Rule of Law Checklist.

21 *Supra* note 18.

22 Joseph Raz, "The Rule of Law and its Virtue", in *The Authority of Law*, (Oxford: Oxford University Press, 1979), p. 213.

23 CDL-AD(2011)003rev: Report on the Rule of Law adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011), pp. 9–10.

24 Jeremy Waldron, 2013, "Separation of Powers in Thought and Practice", *Boston College Law Review*, 54. pp. 433–35.

25 Wallace Tashima, 2008, "The War on Terror and the Rule of Law", *Asian American Law Journal*, 15, p. 264.

In addition, some scholars go further than Raz[26] to identify a substantive dimension of the rule of law. It is argued that formal and procedural aspects give rise to a certain momentum towards a substantive direction. In particular, generality is said to contain the germ of justice, and that clarity, publicity and stability indicate a close connection between the rule of law and the principle of liberty.[27] Moreover, a strong argument has been made that there is a special link between the rule of law and protection of private property.[28]

The rationale behind the substantive argument attempts to add the human rights component to the formal and procedural conception of the rule of law. Fuller's proposition that the principles of the inner morality of law are valued to the extent they respect human dignity channels this idea.[29] The foregoing argument gives important consideration to the procedural dimension and effectively links it with the principle of dignity. Nevertheless, as a consequence of normative entrenchment, in the modern constitutional setting certain requirements of rationality in legislation can be identified.

3.2 Substantive and Procedural Requirements

It follows from the confluence of democracy and the rule of law that the legislature is constrained in its decision-making power by constitutional reason. Namely, the salience of fundamental rights in the present day architecture obliges the lawmaker to observe both substantive and procedural aspects.[30] This proposition further combines the protection of inherent principles of proportionality and of equality.

Since the legislator has to make balancing decisions in many ways, the principle of proportionality plays a major role. Proportionality aims at protecting the fundamental rights of individuals from unwarranted interference by the State through the balancing requirement between the ends which a given state measure

26 *Supra* note 22, p. 211. Joseph Raz famously argued that "the rule of law is just one of the virtues which a legal system may possess and by which it is to be judged", and that it should not be read to imply other considerations about democracy, human rights, and social justice.

27 Hart, H.L.A. *The Concept of Law*, 3rd edition, (Oxford: Clarendon Press, 2012), ch. 8.

28 Ronald Cass, "Property Rights Systems and the Rule of Law", *The Elgar Companion to the Economics of Property Right,* E. Colombatto, (ed.), (Oxford: Edward Elgar Publications 2004), p. 131.

29 *Supra* note 23, p. 162.

30 Including the context of the indirect or if necessary direct third-party effect. *See supra* note 1, pp. 62–64.

pursues and the means employed.[31] It is normally applied through a three-stage analysis. The first element of the consideration checks whether the means that were applied in fact promote the legitimate goal (suitability); subsequently, it is assessed whether the State opted for the least restrictive means to advance its regulatory objective (necessity); finally, careful analysis is devoted to evaluating whether the benefits of the State's objective are strictly proportionate to the infringement of constitutional right(s) (balancing).[32]

In the lawmaking context, proportionality seems to work in the following manner. A regulation is suitable if ensures that the purpose determined by the legislator can be achieved. This requirement is not normally difficult to comply with. Nevertheless, the question of the extent to which the desired goal(s) can be achieved with the help of the chosen regulation requires factual data to be able to make a prognosis. This calculation should adopt parameters that would enable to forecast the behaviour of the addressees.[33] The legislature, as a policymaker, enjoys considerable leeway in choosing the most appropriate regulatory measure. Yet discretion needs to be exercised in a proportionate way, which can be realistically assured by an informed policymaking process.

Similar to proportionality, the principle of equality permeates almost all areas of law. There is a close linkage between the two as they both seek to establish a balance, therefore presuppose the measurability of state action and presume every state measure as rational.[34] It is argued that for fulfilment of the principle of equality, factual justice and consistency are essential.[35] The latter gains relevance in the context of lawmaking. Consistency arises from the requirement that all holders of fundamental rights should be burdened as equally as possible. When the legislator takes steps in the design of a regulatory concept, it is important to consistently implement the decision. This is especially germane to restrictive regulations, which burden their addressees.

31 Moshe Cohen-Eliya and Iddo Porat, "American balancing and German proportionality: The historical origins" (2010). 8(2) ICON, 270-272. Cohen-Eliya & MI Porat, *Proportionality and Constitutional Culture* (1st edn., Cambridge University Press 2013) pp. 10–11.

32 Cohen-Eliya & Porat, *Proportionality and Constitutional Culture, supra* note 32, p. 464.

33 Christian Bickenbach, "Legislative Margins of Appreciation as the Result of Rational Lawmaking" in Klaus Meßerschmidt and A. Daniel Oliver-Lalana (eds.) *Rational Lawmaking under Review*, (Springer 2016), pp. 235–236.

34 *Supra* note 1, p. 64.

35 Paul Kirchhof. 1992: Der allgemeine Gleichheitssatz, HStR V, § 124, p. 205.

As regards the procedural duty of the legislator, monitoring implementation, which may also include detailed empirical studies, has been established.[36] As procedural requirements, to a certain degree, derive from and are intrinsically linked with judicial standards, the following parts of this chapter will elaborate in some detail on this argument. It would suffice to say at this point that it is barely enough to analyse the regulations separately, rather it is needed to look at the real conditions of their application in practice. Accordingly, the legislator must ensure that "the data necessary for assessing the effects of the law are collected, collated and evaluated as planned".[37] On the basis of determination of the facts of the case, the legislature ought to prepare a prognosis, which forms the basis for an assessment *ex post*.

3.3 Summary So Far

The section above focused on the interdependence of the rule of law and democracy in the modern constitutional setting. It is submitted that lawmaking is the result of political will, which is inherently constrained by the overarching principles of the rule of law. The main actor in constraining the legislator's discretion in this regard is the body of constitutional review, which derives its legitimacy from the institutional framework of the modern democratic polity conceived in the rule of law.

With regard to rational lawmaking, respect for fundamental rights, as well as principles of proportionality and equality gains salience. These limitations, as determined by the rule of law, serve as the source of legitimacy for democratic governance. Rationality is thereby the guiding theme of the modern polity. The rule of law establishes a benchmark for legislation, which must comply with principles of consistency and equality by, inter alia, adhering to necessary procedural requirements.

36 Reference here is made to the German system, where the Constitutional Court has been active in closely scrutinising the national legislative procedure. *See*: Ittai Bar-Siman-Tov. "Semiprocedural Judicial Review" *Legisprudence* 6:3, (2012) p. 272ff.

37 BVerfG vom 28.5.1993 - 2 BvF 2/90 u.a. - E 88, 203/310, cited in Klaus Meßerschmidt. (2012). "The Race to Rationality Review and the Score of the German Federal Constitutional Court". *Legisprudence* 6(3), p. 348.

4. Constitutional Standards of Rationality in Lawmaking: a Judicial Perspective

The number of authoritative tribunals worldwide has moved towards rationality review to varying degrees.[38] It was famously argued by Ely that courts' expertise in process and their external institutional position render them particularly suitable to act as arbiters that enforce the rules of the political process.[39] Apart from this, it is submitted that the legislative process tends to systematically undervalue procedural requirements and that a combination of the legislative process and the judicial process (that places higher emphasis on procedure) can create a proper balance between procedural norms and competing aspects in the lawmaking process.[40]

It is the essential function of constitutional tribunals to check the lawmaking process substantively and procedurally once it is completed and to remedy deficiencies that occurred in the process. Judicial scrutiny is perceived as helping compliance with rationality requirements by the legislature, since the latter may often lack sufficient capacity to ensure the optimal level of observance in the legislative process.[41] The reason for this tendency seems to be the realities of the modern legislative process, which is characterised by legislating vastly, under immense time-pressure. Indeed, it has been suggested in the descriptive scholarship that, in such a reality, mistakes are simply inevitable.[42] Therefore, judicial control of legislative business is seen as a positive development in increasing compliance with the rationality requirements of lawmaking. In this context, the question of the everlasting tension between the judiciary and the legislature needs to be accounted for.

Despite rather novel developments in manifold apex courts worldwide, the example of Germany stands out since its Constitutional Court has been able to develop extensive case law on the matter of rationality in lawmaking with

38 D. Keyaerts, "Courts as Regulatory Watchdogs: Does the European Court of Justice Bark or Bite?" in P. Popelier, A. Mazmanyan and W. Vandenbruwaene (eds.), *The Role of Constitutional Courts in a Context of Multilevel Governance* (Intersentia 2012).

39 John H Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980).

40 Ittai Bar-Siman-Tov. (2016). "The role of courts in improving the legislative process", *The Theory and Practice of Legislation* 3 (3), p. 299.

41 *Ibid*. pp. 300–302.

42 Ittai Bar-Siman-Tov, "Legislative Supremacy in the United States?: Rethinking the Enrolled Bill Doctrine" (2009) 97 *Georgetown Law Journal*, p. 323.

considerable success in practice. Hence, the following sub-chapters will largely focus on jurisprudence from Germany in an effort to present judicial standards of rationality in legislation.

4.1 *Ex Post* Monitoring and Correction of Legislation

Under German constitutional case law, the monitoring and correction obligation only applies should legislation be likely to violate a constitutional provision, usually a fundamental right, namely, economic freedom, the right to property, freedom of science, or personal freedom.[43]

This particular obligation is interesting insofar as to know at what moment legislation may be considered in violation of the Constitution. The German Constitutional Court, in its case law on the monitoring and correction obligation, has clearly indicated that a law might originally be consistent with the Constitution and later become contrary thereto as the relevant circumstances evolve.[44] Moreover, per German constitutional jurisprudence, the legislator's adherence to the constitutional order extends beyond the duty to respect the constitutional framework when legislation is adopted to encompass the responsibility of ensuring that enacted laws are constitutional.[45]

The obligation of monitoring and correction is likely to arise in the following two situations: when a law, which was constitutional when it was adopted, has become unconstitutional due to a subsequent fundamental change in the factual situation or in the context of an uncertain factual situation, based on assumptions that were plausible when the legislation was adopted but that turned out to be incorrect.[46] Hence, the duty to correct legislation is triggered when it later emerges that legislation is based on incorrect assumptions or where the facts change or new facts unfold, resulting in breach of the Constitution. The German Constitutional Court has developed extensive jurisprudence, which affects many realms of legal reality.

In criminal law, concerning the sentencing of young offenders for instance, assumptions were debatable. The Court stated that to reflect reality as closely as

43 Alexandre Fluckiger (2016) "Case-law sources for evaluating the impact of legislation: an application of the precautionary principle to fundamental rights", *The Theory and Practice of Legislation*, 4:2, pp. 267–268.

44 *Mayer*; 18BVerfGE 88, 203.

45 *Supra* note 40, p. 269.

46 *Ibid.* pp. 269–271.

possible, the legislature needs to study up-to-date experience in order to draw on their lessons by collecting reliable, comparable data that can be used to determine successes and failures, in particular the frequency of repeat offences.[47] In view of criminology studies involving the use of GPS combined with video surveillance, the Constitutional Court instructed the legislator to observe whether current procedural provisions will always be able to safeguard fundamental rights given uncertainties as to future innovations in technology.[48] Also, regarding the effects of use of cannabis, the Court indicated to observe the impacts of the present legislative solution and to examine experience in other countries.[49]

In addition, economic prognosis has also been a key subject. As regards repayment of loans made to farming co-operatives in the former German Democratic Republic, uncertainty concerned the efficacy of measures. Legislation on the participation of employee representatives conflicted with the question of the uncertain effects of these new measures and was subjected to a monitoring and correction obligation in the event of significant complications.[50]

The jurisprudence also covers the appropriateness of taxation, in this case where the constitutionality of collecting and allocating a compensation tax under legislation governing severely disabled persons. The Court indicated that although a new political contribution system does not encroach on equal opportunity, the legislator is still obliged to verify the accuracy of its figures concerning legislative impact assessment; it has to collect the necessary statistical data, and correct the set percentage where necessary.[51]

The academic environment has also been relevant. The Court stated that the use of inadequate evaluation criteria when assessing the quality of academic education and research threatens the freedom of science, as science assessment practices are a work in progress. The Court requires that the legislator observe this evolution and correct legislation as soon as a threat to freedoms materialises.[52]

These are just some instances from the breadth of judicial decisions affecting a great many fields of regulation. It should be stressed that the Constitutional Court sets great store by effective enforcement of this obligation. Its mandatory nature is a product of the formulas used by the German Constitutional Court, it still does

47 *Ibid*.

48 BVerfGE 2 BvR 581/01 12.04.2005.

49 BVerfGE 90, 145, 194, Cannabis, 09.03.1994.

50 *Supra* note 40, p. 272.

51 *Ibid.*

52 *Ibid.* pp. 272–273.

require reconsideration, because failure to comply with the obligation to monitor laws would not be penalised, in contrast with failure to comply with the obligation to correct laws that are to be analysed based on the outcome of the judgment.[53]

Nevertheless, it should be said that due to the nature of the line of business in politics, the obligation to correct legislation is not always respected.[54] This by all means supports the case for more active judicial control in conducting rationality review, on the one hand, and also a clearer procedural framework of lawmaking for legislative action.

4.2 Procedural Requirements of Rationality Deconstructed: *Ex Ante* and *Ex Post* Perspectives

Bearing in mind the extensive jurisprudence of German Constitutional law and developments in legisprudence globally, it is fitting to focus on the requirements of rationality in order to systematise a procedural framework for the legislature. The procedural requirements derive from the constitutional obligation of the rule of law and aim at covering the demands on the legislator that have evolved over time in the case law and are supported by rich academic scholarship.

From the practical standpoint, it is rare for the legislature to enter a previously undiscovered new territory of law and start legislating from scratch. Rather, it is usually a matter of changing or amending the existing regulatory framework. From a constitutional law perspective, it matters what is the subject matter of lawmaking – existing regulation (*lex lata*) or a fresh legislative solution that needs to be put in place (*lex ferenda*).[55]

The initial step when contemplating a legislative solution is identification of a problem and determination of objectives. It so happens in practice that ten times as much legislative action is needed to amend legislation already adopted, so that observation of the regulatory effects of existing laws becomes relevant. As mentioned above, the legislator is not always willing or able to effectively monitor the effects of existing laws, which makes the starting point of lawmaking problematic. Nevertheless, there are five stages in lawmaking, the observation of which is essential for the realisation of rule of law requirements. These are: (1) problem formulation and determination of objectives; (2) determination of facts; (3)

53 *Ibid.*

54 *Ibid.*

55 Martin Fuhr. (1998). Rationale Gesetzgebung – Systematisierung verfassungsrechtlicher Anforderungen, *Sofia-Diskussions- beitrage zur Institutionenanalyse* Nr. 98-2, p. 26.

prognosis; (4) evaluation and decision; and (5) monitoring and rectification.[56] The suggested framework resembles the five stages of the drafting process, famously espoused by Thornton, who quite cleverly linked the lawmaking procedure with the policy process.[57] From the perspective of constitutional law, in order to analyse the requirements of the rule of law in lawmaking this chapter focuses on the former categorisation.

4.2.1 Problem Formulation and Determination of Objectives

When the matter comes to legislating, the initial step in the process is a description of the problem that the potential legislation aims to solve and to define the main regulatory objectives.[58] It is also important at the beginning to focus on secondary goals of regulation, especially to identify conflicting objectives. It is very important for constitutional compliance to properly weigh the regulatory objectives from the outset. The legislator needs to be clear about existing conflicts and what legal interests are affected.

As already noted above, the actual start of the legislative process usually takes place in the last phase. The need for improvement of the regulatory framework may result from monitoring actual developments under the existing regulatory concept as to whether and to what extent deficiencies in realisation of the stated objectives can be addressed.[59] The reference point for *ex post* monitoring is thus objectives already defined. It is also important to formally reflect the desired objectives in the law and the legislative materials. This would give clarity to the obligation of the legislator and will serve as a valid point of reference for all subsequent steps.

4.2.2 Determination of Facts

Fact-finding plays a central role, both in the rare case of new regulation and in the case of amendments to existing regulation. Only on that basis can the demand for 'factual correctness' be realised.[60] The post-legislative monitoring phase must also be based on empirical evidence. The fact-finding process fulfils this function. In this context, great importance is given to impact assessment, also to determination of the behaviour of the actors and its effects on legal interests and regulatory objectives. The consultation process that opens up the lawmaking

56 *Ibid*. pp. 26-29.

57 Helen Xanthaki *Thornton's Legislative Drafting*. 5th ed., (Bloomsbury 2013), p. 146.

58 *Supra* note 55, pp. 26–27.

59 *Ibid*.

60 *Ibid*. p. 27.

procedure for external stakeholders is highly relevant.[61] In addition, emphasis should be placed upon an understanding and forecasting of the behaviour of the regulation's addressees. This calls for the disciplines of behavioural science with a special focus on empirical social research.

In order to determine whether the legislator's duty of monitoring and correction is observed, it is particularly relevant in this context to know whether the regulation has proven to be appropriate and consistent. Further, deficiencies in the achievement of objectives and undesirable consequences of the regulation need also to be investigated.[62]

4.2.3 Prognosis

If doubts arise with regard to the efficacy of the existing law, it must be clarified whether and what regulatory alternatives are available for its solution. The impact of possible changes in the regulatory framework must also be analysed with regard to the associated contribution to the achievement of objectives, and also in view of the impairment of the legal condition of the addressees. In the latter respect, the substantive requirement of equality, as noted above, is relevant in order to assess the severity of proposed regulation and its burden on equality.[63]

This consideration of alternative thinking is at the core of present-day democratic governance, which should be oriented towards the rationality requirements of legislation (both substantive and procedural) and also make use of the methodology of behavioural science (the disciplines of the social sciences that deal with analysis and prognosis of the behaviour of individuals and legal persons; that is, economics, sociology, psychology, law, and political science) for informed analysis.

4.2.4 Evaluation and Decision

On the basis of fact-finding and prognosis, the legislature is entitled, yet again, to exercise its legislative discretion within the boundaries of constitutional requirements (especially, the principles of proportionality and of equality, as well as the State's objectives) and in accordance with the political maxims of the day. Bearing this in mind, the following questions are crucial at this stage for the legislator to consider when contemplating legislative action:

61 Elmer A. Driedger. *The Composition of Legislation.* 2nd edition (Department of Justice Ottawa 1976), xv.

62 *Supra* note 55, p. 28.

63 *Ibid*.

- Is there a need for legislative action?
- What objective (overall objective/sub-objectives) should be pursued?
- How are conflicting legal interests to be accommodated with one another?[64]

Here, therefore, the central question of defining objectives and weighing conflicting legal spheres reappears again and is relevant for decision-making. In order to guarantee compliance with rationality requirements, both determination of purpose and corresponding justification should be included in the explanatory memorandum of the draft law.

It is essential to analyse and take into account the parameters determining the behaviour of the addressees of the regulation and then, adapted to it, get on with legally formulating a regulation concept and structure. Importantly, the respective empirical and prognostic data should also be reflected in the explanatory memorandum.[65]

4.2.5 Monitoring and Rectification

In reality, legislative business, as noted above, is characterised by the fact that the legislator deals with an existing regulatory framework. Insofar as substantive constitutional requirements are met, the legislator is also obliged to monitor the practical effects of regulations.[66] This requires continuous or periodic evaluation of the law. On that basis, the legislator can evaluate the existing regulatory framework with regard to deficiencies in achievement of objectives and problems in allocation of conflicting legal interests. If the legislator comes to the conclusion that problems arise, it can initiate a new legislative procedure. If the constitutional duty to rectify the situation is clear, then the legislator is also obliged to address it.

This is probably the most acute point in the legislative drafting process, though is not sufficiently valued and observed by policymakers but yet it is a duty emanating from the rule of law and to which more stringent judicial supervision is needed, as illustrated by the German experience.

64 *Ibid*. pp. 28–29.
65 *Ibid*. pp. 29–30.
66 *Ibid*.

5. Regulatory Reform in Georgia: A Step Towards Rational Lawmaking

5.1 Context

In January 2020, changes to the "Organic Law of Georgia on Normative Acts" came into force, which effectively envisages the institutionalisation of regulatory impact assessment (RIA) as part of the legislative process in Georgia. According to a widely accepted view, RIA is a systematic approach to critically assessing the positive and negative effects of proposed and existing regulations and non-regulatory alternatives.[67] It represents a process which identifies and evaluates the expected outcomes and impact stemming from proposed regulation.[68]

In the EU, RIA is part of the Better Regulation package, along with stakeholder consultation, monitoring and evaluating the implementation and application of laws. In its recent report, the European Court of Auditors acknowledged that the foregoing set of tools have substantially improved EU policy-making for nearly 20 years.[69] It thus cannot be denied that RIA, if properly implemented, may contribute to ensuring high quality legislation throughout the entire cycle of policy making, starting from problem analysis and an outline of the projected outcomes of regulation, to determine the most viable solution (*ex-ante* evaluation), and ending with evaluation and monitoring of enacted legislation (*ex-post* evaluation).[70] It exists to assist policy makers in adopting efficient and effective regulatory options (including 'no regulation') by applying the proportionality principle and by resorting to evidence-based techniques to justify the best alternative.[71] RIA may help authorities ensure that administrative burdens stemming from newly adopted regulations will not outweigh the existing burden.

67 Organisation for Economic Co-operation and Development (OECD), available at: https://www.oecd.org/regreform/regulatory-policy/ria.htm. Accessed 27 August 2020.

68 Introductory Handbook for Undertaking Regulatory Impact Analysis (RIA), 2008, *Organisation for Economic Co-operation and Development (OECD)*, available at: http://www.oecd.org/gov/regulatory-policy/44789472.pdf. Accessed 27 August 2020.

69 Law-making in the European Union after almost 20 years of Better Regulation, *The European Court of Auditors*, 2020, available at: https://www.eca.europa.eu/lists/ecadocuments/rw20_02/rw_better_regulation_en.pdf. Accessed 27 August 2020.

70 Philippe Thion, Questioning Alternatives to Legal Regulation, in: Luc J. Wintgens (editor), *Legislation in Context: Essays in Legisprudence*, p. 110.

71 Impact Assessment Guidelines, European Commission, 2009, available at: http://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/iag_2009_en.pdf. Accessed 27 August 2020.

5.2 EU-Georgia Association Agenda and the Legal Framework of RIA

Georgia's regulatory activity has been rather hectic in recent years due to the approximation agenda with the EU. The Association agreement with the EU (concluded in 2014)[72] obliges Georgia to gradually harmonise its legislation with the EU *acquis*. In practice, this has caused adoption of a plethora of laws and sub-laws in areas less explored in Georgia. For example, the Ministry of Agriculture alone has an obligation to transpose 272 European instruments for the next 10 years.[73] The government alone issues almost 600 ordinances every year.[74] It is fair to note that apart from parliamentary legislation, secondary regulations such as government ordinances and ministry regulations may have significant economic, social and environmental impacts.

The practice of explanatory notes attached to draft normative acts that are intended to provide an analysis of the potential impact of a proposed regulation is deemed insufficient. Under internationally recognised standards on good governance,[75] more thorough analysis and consultation with respective stakeholders are needed prior to adoption of a new law to ensure increased legitimacy of the policy process and contribute to the effectiveness of proposed legislation.

For this reason, regulatory reform has been discussed intensively by the government and other stakeholders in Georgia, which eventually culminated in legislative changes, effectively introducing RIA in the Georgian legislative process.

According to organic law (Article 171), the government is obliged to submit a RIA in the case of (a) preparation of a draft law periodically defined by the government ordinance if the initiator is the government; and (b) in separate cases, by the government's decision, when a draft law is prepared by an executive institution. Also, the author or initiator of a draft law (except for the government) can choose to present a RIA.

Besides, a RIA may be prepared if the author/initiator of the bill wishes to do so. The impact of a regulation may also be assessed during the preparation of a

72 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, available at: https://eeas.europa.eu/sites/eeas/files/association_agreement.pdf. Accessed 27 August 2020.

73 Institutionalisation of Regulatory Impact Assessment in Georgia and the Position of Interest Groups, *Business and Economic Centre*, 2016, p. 3-4, available in Georgian at: https://bit.ly/3hBrwQ3. Accessed 27 August 2020.

74 *Ibid.*

75 The rule of law, consultation, transparency, inclusiveness and accountability, effectiveness and efficiency are key elements of good governance, *see*: https://www.unescap.org/sites/default/files/good-governance.pdf. Accessed 27 August 2020.

draft normative (including by-law) act by its author/initiator – the government or a state institution of executive power.

Article 17^1 of the law lists the exceptions that are not subject to RIA: a) budgetary issues (including the draft annual budget law), state security, defence, penitentiaries, non-custodial sentences and probation; b) changes relating to the date (term) or of a terminological nature provided by law, other technical changes or correction of a defect in the law but not changing the general principle and basic provisions of the law; c) changes in legislation to ensure compliance with higher legislative acts; d) a proposed change is included in the legislative package as an accompanying draft law and does not contain issues not provided for in the main draft law.

In addition, in exceptional cases when delay in preparation and submission of a draft law is unjustified, the government may, on the basis of a reasoned proposal, fully or partially release the relevant executive institution from the obligation to present a RIA.

As for the cases where RIA is mandatory, and where the author or initiator of the draft evaluates the impact of the regulation on its own, the draft law will be included in the RIA Report, which will combine:[76] (1) the essence and analysis of the existing problem; (2) the goal the regulation intends to achieve; (3) alternative options for achieving the goal; (4) arguments underpinning the solution presented; (5) expected results (economic, fiscal, social, ecological, etc.); (6) ways of enforcing the law, the role and functions of the bodies responsible for enforcement; (7) ways of monitoring and assessing enforcement of the law.

The government's regulation on the methodology of RIA further states that the principles of proportionality, transparency, efficiency, feasibility and respect for Sustainable Development Goals are to be observed by the RIA report.[77]

5.3 Analysis of the Reform

The principles of the rule of law and good governance are at the heart of the Association Agreement between the EU and Georgia. The document, among others, envisages cooperation on the impact of regulatory policy and regulation by sharing information and sharing best practices.[78]

76 Art. 17.1^2 of the Organic Law on Normative Acts.

77 Art. 4 of the Government of Georgia Regulation on the Methodology of the Regulatory Impact Assessment, available in Georgian at: www.matsne.gov.ge. Accessed 27 August 2020.

78 Art. 225 of the Association Agreement (*supra* note 72).

It follows that the institutionalisation of RIA in the Georgian legislative process is certainly a positive development, which will help policymakers devise and pass effective regulations with broader public support and a higher compliance rate. Although the reformed regulatory framework allows significant scope for potential legislation to be left out of the realm of RIA, at the nascent stage of its introduction, it will ensure experience and expertise are gradually accumulated both in government agencies and independent actors. It is however important that subordinate legal acts, issued by Ministers or other executive agencies, also be subject to RIA, provided their potential regulatory effects are tangible for addressees.

Moreover, the obligation to conduct RIA may be extended to legislative initiatives in Parliament if the initiative concerns key sectors of business, the economy or the environment, whereas in the future, the following fields should also be covered by an RIA report: budget, competition, the public sector, etc. According to international best practice, to ensure a RIA is carried out thoroughly, it is recommended to set up a specialised structure that will oversee the quality of the RIA.[79] For instance, at the EU level the Regulatory Scrutiny Board exists to ensure quality assurance of Commission impact assessments at the initial stage of lawmaking.[80] As more experience is accumulated when conducting RIA in Georgia, the creation of a quality control mechanism, whether centralised or fragmented, should be considered.

Despite any potential systemic shortcomings that may exist at this stage and are likely to emerge with time, the institutionalisation of RIA will be beneficial for policymaking in Georgia. It will contribute to a more inclusive policy process, with wider stakeholders involved and it will allow for more informed decision-making. The requirement to reason a proposed legislative solution and provide solid factual justification is likely to increase the incidence of rational regulatory choices, which will garner broader public support and lay the groundwork for its effectiveness. With its elements of problem identification, determining the goal, weighing of options, underpinning the proposed regulatory solution with facts and providing a prognosis of its impact in practice, the RIA proves to be an effective regulatory tool that serves to uphold the very principles of the rule of law. It focuses on the procedural aspects of rationality, the importance of which may often be overlooked but which are key elements of the rule of law concept.

79 *See, e.g.*, Oversight mechanism for regulatory impact assessment: comparative study of five CEE countries, Katarína Staroňová, Comenius University, Institute of Public Policy.

80 *See*: https://ec.europa.eu/info/law/law-making-process/regulatory-scrutiny-board_en. Accessed 27 August 2020.

6. Conclusion

The rule of law represents the foundational pillar of a democratic State. Governance has evolved to the point where democracy and the rule of law coexist together. The principle of the rule of law permeates the whole range of regulatory aspects of a State and implies the idea of limited government. In essence, it constrains the majorities of the day by defining the boundaries for legislative (government) action. Lawmakers, who are bestowed with direct representative legitimacy, are subject to the substantive and procedural requirements of the rule of law. This presupposes the idea that the final product of lawmaking has to be in compliance with the substantive values of the rule of law, and also, the lawmaking procedure is bound by certain procedural requirements.

The recent regulatory reform in Georgia has institutionalised RIA as part of the national legislative process. This chapter has deconstructed its structure and elements in order to emphasise the prevalence of factual information in designing regulations, and by comparing with the best international practice it is submitted that, although at the nascent stage, the newly introduced RIA mechanism is likely to contribute to increasing the quality of laws in Georgia. Although the reformed legal design for RIA in the Georgian legislative process (namely, preconditions for its application, the methodology thereof, the need for a continuous monitoring and correction mechanism) leaves room for improvement, the potential benefits of the new system cannot be denied. Evidence-based policy choices, a transparent and open process with the possibility to include voices from concerned parties, will make the legislative process more inclusive and legitimate. This, in turn, may well contribute to ensuring higher compliance and streamline regulatory policies.

This chapter highlights that regulatory impact assessment, if properly effectuated in practice, is a major mechanism in the legislative toolkit that could contribute to improving the quality of legislation. By appropriately institutionalising RIA the Georgian legal system will move substantially towards complying with the prerequisites of the rule of law and obligations emanating from the EU cooperation platform.

ROLE OF THE EURASIAN ECONOMIC UNION IN TRADE DYNAMICS BETWEEN THE EUROPEAN UNION AND KAZAKHSTAN

ZHENGIZKHAN ZHANALTAY

Author: Zhengizkhan Zhanaltay, Deputy Director of the Eurasian Research Institute.

Scientific editor: Dr. Kārlis Bukovskis, Deputy Director at the Latvian Institute of International Affairs.

Abstract

Trade relations between Kazakhstan and the European Union (EU) have been developing over the last two decades. Currently, trade volume between the parties reached $30.8 billion in 2018 or eight times greater compared with 2000. The rapid development of trade relations between the parties also put the EU as one of the top trading partners of Kazakhstan. Looking at the structure of trade ties between them we can see that Kazakhstan has developed strong trade relations with only a few selected EU members. Moreover, the majority of the goods in trade are based on exporting oil and other raw materials and import of mainly machinery and transport equipment and medicaments. Thus, there is a need for diversification and the indeed the results of this research indicate a number of opportunities that could allow this to happen. For instance, among Kazakhstan's exports, oilseed, fish products and machinery as well as transport equipment have good potential for development. As for the EU, the expected boost in its exports to Kazakhstan could occur mainly in two directions: either by increasing the major export partners' trade volume or by enhancing the performance of other EU economies in exports to Kazakhstan. In addition, this chapter has taken a look at the role of the Eurasian Economic Union (EAEU) in trade relations between the EU and Kazakhstan to present a broader understanding of potential trade cooperation between the

parties. Analysis of Kazakhstan's membership in the EAEU adds various positive and negative factors into economic relations between the EU and Kazakhstan. In terms of trade dynamics, being a member of the EAEU has quite a small effect on trade transactions between the EU and Kazakhstan, whereas a bigger obstacle exists in the EU's future potential for deepening its economic cooperation with Kazakhstan.

Keywords: *EU, Kazakhstan, trade indices, economic cooperation, EAEU.*

1. Introduction

Diplomatic relations between the European Union (EU) and Kazakhstan started after the collapse of the Soviet Union with the EU's recognition of the independence of Kazakhstan, which was declared on 16 December 1991. Starting from this period relations between the parties developed in the economic, cultural, and political spheres gradually throughout the years and building strong ties among the EU and its member countries with Kazakhstan. Due to expanding relations between the European Community (EC), which transformed into the European Union, and Kazakhstan the parties had decided to institutionalize their ties by signing a Partnership Cooperation Agreement (PCA) in 1994 which entered into force in 1999.[1] The PCA until 2015 was the main guideline on handling relations between the parties and was replaced by the Enhanced Cooperation Agreement (EPCA) that entered into force on 1 March 2020.[2]

Kazakhstan is located in the heart of Central Asia and with its rich natural resources, especially oil and natural gas, has become more visible in the international arena and attracted the attention of the international community including the EU. Despite the geographical distance, the EU alongside other important players in the region such as Russia, China, the United States and Turkey, had also been motivated to develop relations with Kazakhstan and other energy-rich countries in the region. For a newly independent Kazakhstan, it was important to develop good relations with these major powers and regional actors to manage its multi-vector diplomacy that has been the main foundation of the foreign relations strategy of the country.[3]

This mutual interest in strengthening relations is also seen in the economic sphere where trade volume between the EU and Kazakhstan has grown over the years and the EU has become the main trade partner of Kazakhstan with $27.9 billion in 2019. The trade balance has been more favourable for Kazakhstan where the EU imports $20.8 billion while exports were worth $7 billion in 2019. On this point, it is important to mention that almost 90% of the EU's imports from Kazakhstan is petroleum products and crude oil, an increase from around 70% in 2000.[4]

1 European Commission. *Countries and Regions: Kazakhstan*, available at: https://ec.europa.eu/trade/policy/countries-and-regions/countries/kazakhstan/. Accessed 20 April 2020.

2 *Ibid*.

3 Akorda.kz. *On the Concept of the Foreign Policy of the Republic of Kazakhstan for 2020-2030*, available at: http://www.akorda.kz/en/legal_acts/decrees/on-the-concept-of-the-foreign-policy-of-the-republic-of-kazakhstan-for-2020-2030. Accessed 20 April 2020.

4 Uncomtrade. *United Nations Comtrade Database - International Trade Statistics*. Available at: https://comtrade.un.org/ Accessed 4 April 2020.

Thus, the importance of petroleum products in its import structure in terms of value has gained much more strength over the years despite the diversification of goods that are traded between the parties.

During the 1990s trade relations between the EU and Kazakhstan could be divided into two periods: 1993–1997 and after 1997 wherein the former EU's exports ranged between $500–600 million while imports stood at around $200–300 million. However, after 1997 trade figures for export and import have seen a remarkable increase and rapidly reached their 2000 level.[5] Afterwards in the following period trade volume has gradually risen – to $4.8 billion in 2000, $27.5 billion in 2010 and after a period of fluctuations in trade relations the amount reached $27.9 billion in 2019.[6]

This research with its detailed analysis of EU and Kazakhstan will identify the sectors that have an influence over trade flow and reveal the top trading partners of Kazakhstan within the EU and the main product groups which have potential for further development. Therefore, this research is focused on trade relations between the EU and Kazakhstan to understand the scope and depth of their relations using data collected from the United Nations International Trade Statistics Database (UNcomtrade) taking into consideration EU-28 and Kazakhstan trade data from 2000 to 2019. The reason for the chosen period is related to the availability of data provided by UNcomtrade that exists only after 2000. Therefore, this chapter aims to provide a deeper understanding of trade dynamics between the EU and Kazakhstan and to explain the nature and reasons for their trade interactions. A proper assessment of the EU's weight in the total trade dynamics of Kazakhstan would open the way for more valid analysis to explore potential areas to develop economic relations.

This chapter has six sections. This introduction is the first section followed by a literature review in the second, then an analysis of the multi-vectoral economic diplomacy of Kazakhstan as the third section. In the fourth section the main trade indicators will be analysed including goods and their sectoral distribution. Analysis of trade indices such as trade complementarity and trade intensity will take place in the fifth section. Finally, in the sixth section a conclusion and recommendations will be provided.

5 Eurostat. *External and Intra-European Union Trade Statistical Yearbook*, available at: https://ec.europa.eu/eurostat/documents/3217494/5642633/KS-CV-03-001-EN.PDF/7e4ada1c-9803-4c36-bd48-e55dd1adc935 Accessed 5 May 2020.

6 Uncomtrade, *supra* note 4.

2. Literature Review

The existing academic and analytical literature on Kazakhstan-European Union trade relations is a less detailed account of the problematic. Most of the existing research investigates the general economic trends between the EU and Kazakhstan and potential cooperation or interference from the EAEU's role in it. Also, some research focuses on the potential of agreements between the parties, for instance, PCA, EPCA and some other bilateral ones among EU Member States and Kazakhstan. Existing research does not go beyond describing trade patterns, while this chapter seeks to explain both economic and political reasons for trade relations. Therefore, the significance of this research is that it touches upon a well-known topic from a different perspective with traditional methods and trade indices to shed light on the nature of trade relations between the EU and Kazakhstan with taking into consideration agreements, investment flows and existing scientific research. On the other hand, while numerous technical reports are published by international organizations on this matter, nevertheless their scope is too limited to give a general perspective and mainly touches upon bureaucratic and technical trade procedures and giving their recommendations on specific issues.

Economic integration issues between the EU and the EAEU attract the attention of many scholars interested to see the potential there with a background of how it could affect bilateral relations between EU and EAEU member countries. Konopelko (2018)[7] looks into this topic by analysing the economic influence of the EAEU over the Central Asian region, particularly Kazakhstan – the largest trade partner of the EU in the region. In his article Konopelko states that there is an ongoing economic integration competition between the EU and Russia where the EU lags behind in Central Asia, though meanwhile having some success among EU neighbourhood countries. This study also takes Kazakhstan into its focus, indicating that there is a strong willingness to deepen economic relations between the EU and Kazakhstan which grows carefully in balance with membership of the EAEU.

Umbach and Raszewski (2016)[8] look at relations between the EU and Kazakhstan from both a bilateral and geo-strategic perspective. On the one hand, they are focused on the economic and energy-related topics that shape the main direction of relations between the EU and Kazakhstan. On the other, they point

7 Agnieszka Konopelko, "Eurasian Economic Union: A Challenge for EU Policy Towards Kazakhstan", *Asia Europe Journal*, Vol. 16, No. 1, (2018), pp. 1–17. Accessed 18 August 2020. Springer.

8 Frank Umbach, Slawomir Raszewski, "Strategic Perspectives for Bilateral Energy Cooperation between the EU and Kazakhstan", *Konrad-Adenauer-Stiftung.* Accessed 8 August 2020. Kas.de.

out the power balance structure in the region displaying who stands where in their relations with Kazakhstan – referring to Russia, China and Turkey and their relations with the EU mainly in energy topics. References to trade relations in this article are mainly focused on the energy sector, which could be understandable.

Talking about trade relations between the EU and the EAEU, Togt (2020)[9] focuses on the advantages that it would bring to both unions. In his article, he states that strained relations between the EU and Russia have restricted their trade relations, whereas the EU tends to conduct trade connections with the EAEU member countries bilaterally. Delivering his thought on a deeper relationship between the EU and the EAEU in the Eurasian region, Togt indicates that it would be a better choice for the union and a balancing factor against rising Chinese influence in the region.

Golam and Monowar (2018)[10] analyse the EAEU from different perspectives and look at its history, establishment process and current achievements. During this process, they mention that many ideas within the EAEU are modelled by taking the EU as an example and structured by the EAEU in its own way. Moreover, they touch upon trade relations between the EU and China, with EAEU members indicating that the EAEU is functioning as reducing the economic influence of non-member countries – mainly China – in the Eurasian region.

3. Multi-vectoral Economic Diplomacy: Dynamics Between the EAEU, the EU and Kazakhstan

In terms of trade relations between the parties it is quite important to know under what kind of institutional structure these connections are building and the general trade dynamics of those countries. Therefore, it would be useful to look at the agreements that have occurred between both sides. In this research the EU is considered as one part of that relationship; therefore, this chapter mainly focuses on EU agreements with Kazakhstan. On this point, two main agreements have paved the way like a guideline for the EU to build and expand its relations with Kazakhstan. Firstly, the PCA which was signed in 1994 and ratified in

9 Togt Tony van der. "EU & Eurasian Economic Union: A Common Chinese Challenge", Institutfuer Sicherheitspolitik.

10 Golam Mostafaa, Monowar Mahmood. "Eurasian Economic Union: Evolution, Challenges and Possible Future Directions", *Journal of Eurasian Studies*, Vol. 9, No. 2 (2018), pp. 163–172. Accessed 8 August 2020. ScienceDirect.

1999 establishes the main structure not only for economics but as a handbook for managing relations between the EU and Kazakhstan.[11] The PCA includes a balanced structure between political, economic, and social issues where the main goal was to establish a good political dialogue and promote respect for democracy, principles of international law and human rights.

In time, economic aspects gained far more weight and developed faster than other fields. Considering the changes in the international economic arena, a need for new guidance has arisen over the years. This is especially true after the global financial crisis in 2009, when this necessity to become even stronger occurred where countries were looking to diversify and strengthen their economic ties with their partners. On this point, Kazakhstan's efforts on speeding up negotiations with the World Trade Organization (WTO) are also considered within the perspective of easing the technical and bureaucratic foundations of establishing new connections and agreements.[12] For instance, an EPCA could be a good example of this line of thought where during the development process of an EPCA certain parts of this agreement rely on or copy Kazakhstan's agreements with the WTO.[13] Thus, it is no coincidence that Kazakhstan's joining the WTO and the signing of the EPCA occurred in 2015. In line with these developments, special attention within the EPCA is given to modifying and developing the economic part of the agreement to provide solutions to certain technical trade barriers. As the EPCA entered into force on 1 March 2020 one could expect an improvement in trade relations between the EU and Kazakhstan in the following years.

So if the PCA's main aim is to establish connections and strengthen ties between the EU and Kazakhstan, as a next step the EPCA could be considered as an economic opening of the EU that is targeting focus on putting more effort into strengthening economic ties by aiming to boost trade with a new enhanced guideline.[14] The EPCA brings numerous changes where the economy and trade take up a large part within the agreement. This is due to numerous details on various issues that are capable of answering current difficulties where special emphasis is put on technical barriers which are sought to be handled under the WTO agreement on technical barriers to trade. The EPCA aims to enhance economic cooperation in 29 key sectors ranging from the economy to education,

11 Zhenis Kembayev, "Partnership between the European Union and the Republic of Kazakhstan: Problems and Perspectives", *European Foreign Affairs Review*, Vol. 21, No. 2, (2016), pp. 185-203. Accessed 24 April 2020. SSRN.

12 *Ibid*.

13 Albina Muratbekova, "EU-Kazakhstan Relations: Enhanced Partnership in Action", 24 April 2020. Eurasian Research Institute.

14 Zhenis Kembayev, *supra* note 11.

climate change to nuclear safety and other areas such as transport, employment culture and others.

The establishment of the EAEU in 2015 might also not be a coincidence and could be considered as Russia's attempt to consolidate its economic integration efforts among post-Soviet countries, especially in Central Asia where Moscow still has a significant political and economic influence in the region. In line with Moscow's concern about the rising economic influence of China and expanding relations with the EU, establishment of the economic union would make it difficult for member countries to further develop their economic and trade relations with non-members. On this point, Russian President Vladimir Putin has put forward the idea of liberalizing trade from Vladivostok to Lisbon in 2012 to developing Russia's trade ties with the EU and potentially considered that establishing an economic union could provide a good platform to serve this purpose by avoiding criticism against Russia within the EU as well.[15] Meanwhile, Russia tries to convince as many post-Soviet countries as possible to join the Eurasian Customs Union, which was established in 2010 and turned into the EAEU in 2015. On this point participation by Ukraine could have given a good impulse for the prospects of the Eurasian Customs Union which would eventually turn into an economic union. However, strained relations between Ukraine and Russia including the annexation of Crimea severely reduced the potential of this attempt to reach any positive outcome. Afterward, sanctions against Russia by the EU deteriorated relations between these parties.

In the last decade, the EU is undeniably strengthening its cooperation initiatives with many post-Soviet countries with its Eastern Neighbourhood policy, launched in 2009, and new Central Asia policies. It could be said that these strategies seek to further develop economic cooperation within the investment and trade areas with these countries which could be perceived by Russia as competition for influence. So far within this competition game the EU signed an Association Agreement with Moldova and Georgia in 2014 ratified in 2016 including a Deep Comprehensive Free Trade Agreement (DCFTA). Moreover, negotiations were being conducted with Armenia in 2013 on signing an Association agreement including a DCFTA which would contradict EAEU regulations. Therefore, potentially with diplomatic attempts by Russia, Armenia decided not to sign the agreement and

15 Rilka Dragneva. "The Eurasian Economic Union: Putin's Geopolitical Project", *Foreign Policy Research Institute*, available at: https://www.fpri.org/article/2018/10/the-eurasian-economic-union-putins-geopolitical-project/. Accessed 14 October 2020.

joined the EAEU in 2015.[16] [17] [18] When we piece together these initiatives one can argue that it looks as if there is a race going on between the EU and Russia for solidifying their economic cooperation so the other party cannot expand their strength based on economic agreements.[19] Thus, having lost ground in Eastern Europe and the Caucasus, Moscow might want to speed up the establishment of the economic union.

However, the idea of establishing a Eurasian Economic Union originally belongs to the First President of Kazakhstan, Elbasi Nursultan Nazarbayev in 1994, with the aim of strengthening economic cooperation in the region.[20] The initiative is mainly set in motion and led by the political will of Russia. Therefore, joining the EAEU has blocked Kazakhstan from deepening its economic cooperation with the EU unlike in the cases of Moldova and Georgia. Nevertheless, it could be said that there are several advantages that bring the EU and Kazakhstan closer. For instance, the EAEU has taken many EU regulation formats as an example and created similar ones that Kazakhstan has gone through to comply with EAEU rules.[21] Considering reducing non-tariff barriers and differences in technical standards between the EU and Kazakhstan is one of the important objectives of the EPCA as well, as it could be easier for Kazakhstan to comply with EU standards to a certain extent in the near future.

Moreover, Moscow's other concern for its economic influence in the region is China with its large investment profiles, attractive loan schedules and cheap products flooding into Central Asian countries' markets, allowing China to raise its economic visibility in the region. With the establishment of the EAEU, the prices of many imported goods have risen in the Kazakhstani market, curbing attention to Chinese goods to a certain level and diverting the attention of buyers to more expensive but better quality products – a positive occurrence for goods imported from the EU alongside Russian and Turkish goods. Therefore, on the one hand Russia might block the opportunity to strengthen economic cooperation between

16 European Commission. *Countries and Regions: Georgia*, available at: https://ec.europa.eu/trade/policy/countries-and-regions/countries/georgia/. Accessed 6 July 2020.

17 European Commission. *Countries and Regions: Moldova*, available at: https://ec.europa.eu/trade/policy/countries-and-regions/countries/moldova/. Accessed 6 July 2020.

18 European Commission. *Countries and Regions: Armenia,* available at: https://ec.europa.eu/trade/policy/countries-and-regions/countries/armenia/. Accessed 6 July 2020.

19 Agnieszka Konopelko, *supra* note 7.

20 Akorda.kz. Speech by the President of Kazakhstan Nursultan Nazarbayev at the Lomonosov Moscow State University, available at: http://www.akorda.kz/en/speeches/external_political_affairs/ext_speeches_and_addresses/speech-of-the-president-of-kazakhstan-nursultan-nazarbayev-at-the-lomonosov-moscow-state-university. Accessed 22 July 2020.

21 Golam Mostafa & Monowar Mahmood *supra* note 10.

the EU and Kazakhstan, but on the other hand provide the potential to increase the comparative advantage of goods that are being imported to Kazakhstan from the EU.

Among the issues mentioned above, joining the WTO has come with its own complications. This is mainly due to related different tariff level commitments of Kazakhstan to the WTO and the EAEU. On this point, Kazakhstan has accepted Article XXIV of the General Agreement on Tariffs and Trade, which indicates that member countries are obligated to stick with their WTO commitments in terms of average bound tariff lines. This means that, if Kazakhstan's WTO commitments conflict with another organization's regulations, then WTO commitments prevail.[22] Currently, the EAEU's average tariff level is set to 7.4% which is higher than Kazakhstan's commitments to WTO at 6.5%.[23] Therefore, in its harmonization process to the EAEU 3,500 tariff lines are being exempted from its commitments to the EAEU which accounts for almost half of Kazakhstan's imports.[24] In addition, negotiations by Kazakhstan to increase the tariff levels to catch up with EAEU levels will start in 2024 whereas Kyrgyzstan has to start in 2020 and Armenia in 2022. Belarus is not a member of the WTO and Russia's WTO simple average tariff bound is 7.6%.[25] [26] And, taking into consideration that negotiations with the EAEU might take at least several years or longer under current conditions Kazakhstan could import goods from non-EAEU members under its WTO commitments for a while without contradicting its commitments to the EAEU. Only after the negotiation process would we be able to see how this conflicting situation would take shape where Russia promised Kyrgyzstan to provide support on covering compensation which could occur due to not abiding with their WTO commitment in order to comply with the EAEU standard.

Analysis of the role of the EAEU over Kazakhstan's trade relations under the current situation suggests that Nur-Sultan has shown political allegiance to Moscow despite losing greatly in its trade balance reaching an $8.6 billion deficit

22 World Trade Organization. Basic Rules for Goods. Regional Trade Agreements. Available at: https://www.wto.org/english/tratop_e/region_e/regatt_e.htm. Accessed 23 April 2020.

23 Victor Kovalev, Oksana Falchenko, Aleksandr Linetsky, Aleksey Tarasov, "Influence of the Customs Instruments on Implementing the Common Agricultural Policy in the Eurasian Economic Union". *Economy of Region,* Vol. 15, No. 2, (2019). Accessed 8 August 2020, doi: 10.17059/2019-2-17.

24 Rilka Dragneva *supra* note 15.

25 *Ibid*.

26 World Trade Organization. Tariffs and Imports: Summary and Duty Ranges. Available at: https://www.wto.org/english/res_e/statis_e/daily_update_e/tariff_profiles/RU_E.pdf. Accessed 8 August 2020.

mainly to Russia and the biggest amount within the union.[27] At the same time, Kazakhstan is continuing to further develop its connectivity with global markets by joining the WTO where a formal application was made in 1996 and negotiations rapidly speeded up in 2013 leading to its accession in 2015.[28] In addition, Kazakhstan sought to enhance its cooperation with the EU by starting negotiations for an EPCA in 2011 and signed it in 2015.[29] With these alternative initiatives, Kazakhstan has created for itself a necessary free space to be able to pursue its multi-vector policy in the economic sphere to counterbalance dependence on Russia. Within this complication, if the EU and Kazakhstan could find a way to accomplish certain tailored solutions such as in the case of Armenia where the EU and Armenia signed a Comprehensive Partnership Cooperation Agreement in 2017 which is a lighter version of an Association agreement that does not contradict Armenia's commitment to the EAEU, it could pave an alternative way to deepening economic relations among them. For instance, finding common ground on reducing technical barriers and potentially even on tariff levels would have a positive impact on their trade relations within the areas that have good potential to develop.

4. Main Trade Indicators

When considering economic relations between the EU and Kazakhstan, trade indicator trends would be useful to draw a general picture before starting to take a deeper look at their trade ties. In terms of economic relations, besides agreements investment flows are also an essential part where the EU takes the lead. Since independence, Kazakhstan has attracted $330 billion of foreign direct investment (FDI) from 120 countries where more than half of it comes from the EU with the Netherlands taking the lead with $90.4 billion. This is followed by Switzerland, France, Italy, Belgium and Germany with $25.8 billion, $16.1 billion, $8.7 billion, $7.6 billion, $5.2 billion respectively and other EU countries. Besides the EU, FDI flows from the United States consist of one of the largest shares with $48.4 billion. If we take into account the last decade, for instance, after the global financial crisis in 2009 economies around the world have been trying to recover and push forward

27 Eurasian Commission. Eurasian Economic Union Internal Trade Statistics. Available at: http://www.eurasiancommission.org/ru/act/integr_i_makroec/dep_stat/tradestat/tables/intra/Pages/default.aspx. Accessed 16 August 2020.

28 World Trade Organization. Accessions Kazakhstan. Available at: https://www.wto.org/english/thewto_e/acc_e/a1_kazakhstan_e.htm. Accessed 8 August 2020.

29 European Commission, *supra* note 1.

in continuing their economic growth. Relations between the EU and Kazakhstan in terms of FDI have continued in their path where 650 FDI projects have been proposed during the last decade since 2010 of which 185 come from the EU, which is notably higher than Russia with 111, Turkey 80 and China 55.[30]

However, one interesting fact needs to be taken into consideration, namely that the EU in terms of amount and project numbers is the clear leader in Kazakhstan but does not appear at the top of the list of the number of companies that are operating with foreign investor involvement. According to the figures, by August 2019 some 19,000 such firms were operating in the country, with Russian companies being 35.3%, followed by Turkish with 9.5% of all and others.[31] According to Mukhtar Tileuberdi, the Minister of Foreign Affairs of Kazakhstan, there are 4,000 companies with European participation and 2,000 joint ventures in Kazakhstan.[32] So it seems the EU mainly exists in the FDI map of Kazakhstan solely for projects with its capital but does not have a significant number of companies that operate in the country.

In addition, the EU and Russia are more visible in high-tech projects involving technology transfer areas. In the last 10 years China – another important investor – has been raising its visibility since 2015 in mechanical engineering, the chemical industry, renewable energy and agribusiness.[33] Thus, the EU's investment strategy or way of doing business is mostly project-based rather than establishing firms and staying more permanently in the country. On trade relations, EU-Kazakhstan seems to have a steadily growing exchange except for the times when it is affected by international events as in 2009 and 2015.[34]

Table 4.1

EU-Kazakhstan Trade Volume 2000-2019 (Billion $)

Year	Export	Growth (%)	Import	Growth (%)
2000	1.31		3.52	
2001	1.62	23.56	3.11	-11.66
2002	1.77	8.96	3.99	28.62
2003	2.37	34.23	4.59	15.03
2004	4.06	71.43	8.62	87.64

30 Dilshat Zhussupova, "Kazakhstan Attracts $330 Billion FDI Since 1991", 1 May 2020. *Astana Times*.

31 *Ibid*.

32 Mukhtar Tileuberdi, "Kazakhstan-EU Relations Entering a New Stage", 1 May 2020. Euractiv.

33 Dilshat, *supra* note 30.

34 Uncomtrade, *supra* note 4.

2005	4.45	9.51	12.76	48.02
2006	6.25	40.46	17.56	37.59
2007	8.29	32.62	18.34	4.48
2008	8.38	1.03	26.36	43.69
2009	7.43	-11.35	15.10	-42.72
2010	6.90	-7.06	20.66	36.84
2011	8.25	19.58	31.35	51.73
2012	8.86	7.34	31.10	-0.78
2013	9.87	11.42	31.37	0.83
2014	8.92	-9.65	31.20	-0.51
2015	6.83	-23.39	17.75	-43.10
2016	5.58	-18.25	13.89	-21.74
2017	5.69	1.80	19.55	40.75
2018	6.82	19.90	23.73	21.37
2019	7.04	3.29	20.88	-12.01

Source: Author's calculations using SITC Rev.3 from UNcomtrade.com http://comtrade.un.org/ (Accessed: 12 April 2020).

Starting from 2000 trade volume rose to $4.8 billion of which $1.3 billion are exports and $3.52 billion are imports. This growing trend continued until 2009 with an average growth rate of 27% for exports and 31% for imports reaching $34.7 billion in 2008 with $8.3 billion exports and $26.4 billion imports. In the following period, trade dynamics fluctuated due to different international events influencing the economies of both sides. During the 2009–2013 period, trade volume fell sharply mainly in the sector of imports of the EU from Kazakhstan reducing from $26.4 billion to $15.1 billion (42%) whereas its exports to Kazakhstan faced a much smaller contraction equal to $0.9 billion or 11% falling to $7.4 billion in 2009. Starting from 2010 until 2013 imports show a rapid recovery while the trend in exports is more gradual. In 2013 the EU's total trade volume with Kazakhstan reached a peak with $41.2 billion of which $9.8 billion was exports and $31.4 billion was imports. The same trend occurred during 2014–2016 where the trade amount declined to a record low level in 2016 falling behind the 2006 volume with $19.4 billion. In the following three years exports increased by 10% where this figure for imports reached 31% on average managing to lift the trade volume to $27.9 billion.[35]

35 Uncomtrade, *supra* note 4.

Total figures of trade volumes describe that the EU's imports are much larger than its exports where oil dominates the import part whereas in export more detailed analysis is required. Therefore, it would be useful to look at the major trade partners of Kazakhstan within the EU. The figures indicate that Kazakhstan has four main trade partners namely Germany, France, Italy and Poland which together consist of 60% of its share with the EU. In addition, traded goods between them are concentrated on a number of products with a large share. For instance, in imports from Kazakhstan, as could be guessed, oil takes up a huge part while in exports to Kazakhstan the top trade partners export their goods which have a comparative advantage not only in the Kazakhstani market but in general in their trade dynamics with other countries as well including EAEU members. Therefore, it could be said that one of the main factors for developing trade ties with these countries rather than others could be associated with their comparative advantage in goods that are in high demand in Kazakhstan's import needs.

Among the EU Member States, Germany could be a good example where the country is the leading trade partner of Kazakhstan with $1.64 billion in exports and $3.54 billion in imports. The top 10 exported products consisted of 65% of Germany's total exports to Kazakhstan where five of them are listed in the top 10 exports of the EU to Kazakhstan. The same could be said for the other main trade partners as well where at least three of their top exported products to Kazakhstan are within the top 10 exported goods list from the EU. The current trade dynamic indicates that, within the EU, it seems these countries have been most successful in delivering what Kazakhstan requires to import from the Union, mainly machinery and transport equipment alongside medical goods which could be seen in 2019 as well.

However, this creates a volatile situation that could be significantly changed with shifts in demand and supply for these top products which would have a macro-level effect on trade relations between the EU and Kazakhstan, which suggests a need to develop the diversification process in trade dealing between the parties. On this point when we look at the trade dynamics in terms of the number of products, we see positive development where the EU has added 32 new products to its exports to Kazakhstan worth $96 million with Kazakhstan being able to increase the number of goods exported to the EU by 55 worth $338 million.[36]

For instance, between 2000–2019 in the EU's exports to Kazakhstan 32 products have been added and their 2019 value is around $96 million in total. On the other hand, these figures for imports are 55 goods with a total worth of $338 million.[37]

36 *Ibid.*

37 Uncomtrade, *supra* note 4.

Thus, there is an ongoing process that needs to push forward an increase in the volume of traded goods so they could bring balance and diversification to the trade structure between the EU and Kazakhstan. Within them, Kazakhstan could pay more attention to exports of oilseeds, fish products and machinery and transport equipment to the EU. In the case of the EU, rising trade volumes of other EU economies in their exports to Kazakhstan could play an important role in boosting the overall trade volume to Kazakhstan and reduce potential fluctuations within trade transactions between the EU and Kazakhstan. On this point, the potential of EPCA agreements needs to be fully used by EU countries to provide good potential for boosting their trade intensity with Kazakhstan. Poland is a good example, which sparks an interest in its different trade dynamic with Kazakhstan. Poland's exports to Kazakhstan rose rapidly between 2000–2010, with an import volume increase after 2010. In addition, and interestingly, Poland has been able to increase its trade amount with Kazakhstan successfully compared with many EU members even after 2015 where total trade volume has sharply fallen in Kazakhstan.

When we look at the trade dynamics between Kazakhstan and other EAEU members, starting from 2015 we see that sanctions against Russia and a sharp drop in oil prices have caused a significant spillover effect to Kazakhstan's trade with EAEU members alongside other main partners. Within the trade analysis between Kazakhstan and the EAEU, we take the 2013–2019 period to allow us healthier results due to significant fluctuations in the economic conditions of the EAEU since its establishment. Under the influence of external shocks to EAEU countries, their internal trade dynamics had a bad start, with trade volume shrinking to $42.9 billion in 2016 between EAEU members from $69.2 billion in 2013.[38] [39] [40]

However, starting from 2017 with improvements in the economic conditions of EAEU countries, total export volume reached $61 billion in 2019.[41] In order to see the scope of economic integration among members, we could look at the weight of their trade within the EAEU compared to their total trade volume. The share of internal trade volume grew from 12% in 2013 to 14% in 2019 among the members where the largest increase belongs to Kazakhstan: 4% rising from 18%

38 Eurasian Commission. Eurasian Economic Union Internal Trade Statistics. Available at: http://www.eurasiancommission.org/ru/act/integr_i_makroec/dep_stat/tradestat/tables/intra/Pages/2013_180.aspx. Accessed 16 August 2020.

39 Eurasian Commission. Eurasian Economic Union Internal Trade Statistics. Available at: http://www.eurasiancommission.org/ru/act/integr_i_makroec/dep_stat/tradestat/tables/intra/Pages/2016/12_180.aspx. Accessed 16 August 2020.

40 Eurasian Commission. Eurasian Economic Union Internal Trade Statistics. Available at: http://www.eurasiancommission.org/ru/act/integr_i_makroec/dep_stat/tradestat/tables/intra/Pages/2019/12_180.aspx. Accessed 16 August 2020.

41 *Ibid.*

in 2013 to 22% in 2019. As for other members, their internal trade share increased by 1% within their total trade volume. Thus, establishment of the EAEU so far has brought only a 2% increase in trade share within the union. Meanwhile, we observed a 1% decrease in the share of trade with the EU within the total trade volume of Kazakhstan.[42]

So if the PCA's main aim is to establish connections and strengthen ties between the EU and Kazakhstan, then as a next step the EPCA could be considered as an economic opening of the EU that is targeting to focus on putting more effort into strengthening economic ties by aiming to boost trade with a new enhanced guideline.[43] The EPCA brings numerous changes where the economy and trade take up a large part within the agreement. This is due to numerous details on various issues that are capable of answering current difficulties where special emphasis is put on technical barriers which are sought to be handled under the WTO agreement on technical barriers to trade. The EPCA aims to enhance economic cooperation in 29 key sectors ranging from the economy to education, climate change to nuclear safety and other areas like transport, employment culture and others.

Figure 4.1

EU Imports from Kazakhstan

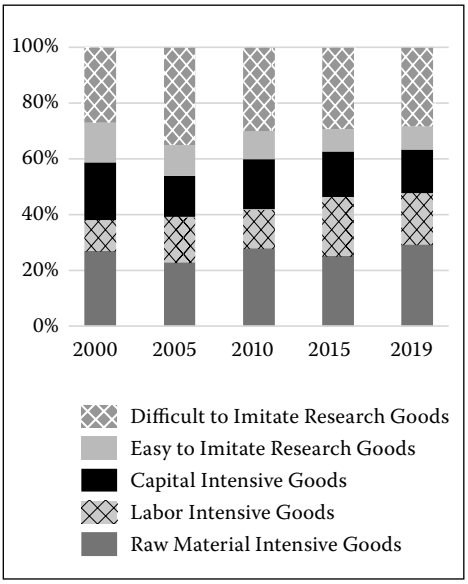
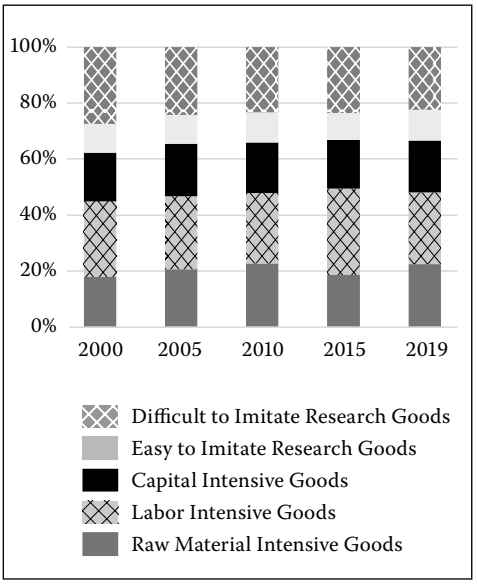


Figure 4.2

EU Exports to Kazakhstan



Source: Author's calculations using SITC Rev.3 from UNcomtrade.com http://comtrade.un.org/ (Accessed: 12 April 2020).

42 *Ibid.*

43 Zhenis Kembayev, *supra* note 11.

It is quite important to have a general roadmap when making plans to reach the targeted goals. However, it is also essential to know how to do it in practice where a deeper understanding of trade relations between the parties would assist in finding areas and products that have the potential to make changes that would have an actual impact on trade figures. Therefore, when providing this information this chapter has taken into consideration products that have higher trade value than $100 000.00, which also represents around 98% for both exports and imports.[44] Within its analysis to have a better understanding of the export and import structure of the EU and Kazakhstan, this chapter takes a look at the products; numbers, groupings, and values to display a more comprehensive picture of their trade relations.

Within the United Nations International Trade Statistics Database, goods that are traded over the world have been gathered under 255 product groupings. Moreover, in this research, these products are been categorized under several groups in order to frame the general analysis in a convenient way. Analysis of sectoral share of the EU's export and import dynamics with Kazakhstan for 2000–2019 shows us that under the shadow of top traded goods numerous changes occur within trade structure. In the EU's export structure, we see that labour-intensive goods (LIG) and difficult-to-imitate goods (DIG) take the lead with 54 and 47 products respectively. Meanwhile in its imports from Kazakhstan surprisingly DIG products come second with 31 products. This means that the diversification of goods that we are talking about is actually taking place naturally, even though their trade value within total imports is quite small.

After the global financial crisis in 2009 and in order to diversify its export structure, Kazakhstan launched several national industrialization programs during 2010–2014. The National Program of forced industrial and innovative development of the Republic of Kazakhstan and the Business Roadmap 2020 are among the major initiatives launched with great ambition to ignite a boost for the production of manufactured goods. In addition, Nur-Sultan heavily invested in renewing its transport infrastructure both with its national Nurly Zhol program launched in 2014 and by joining international transport corridor initiatives like the One Belt One Road that aims to improve the transport infrastructure from China to Europe. The positive outcomes of these programs could be seen in Kazakhstan's exports to EAEU members where trade volume multiplied by three times reaching $489 million in 2019 from $158 million in 2016 (Eurasian Commission, 2020).[45] Moreover, it has become the fastest-growing sector in Kazakhstan's exports to

44 Uncomtrade, *supra* note 4.

45 Eurasian Commission, *supra* note 27.

EAEU countries. Therefore observation of similar changes in Kazakhstan's trade dynamic with the EAEU could be a good indicator to find out the growing sectors in the economy of Kazakhstan which could guide policies aiming to increase trade relations with the EU and selecting the sectors for investment in the country. On this point, a similar technological level among EAEU members with a potential price advantage for Kazakhstan did provide this achievement for the country.

Looking at the top 10 traded products list we see that they have a significant share in total trade where certain products shape trade ties between the EU and Kazakhstan. For instance, in 2000 the share of the top 10 imported goods consisted of 89.6% where this figure for exports was 43%. Throughout the years the import and export dynamics of the EU to Kazakhstan have followed a different path where the EU's export structure has been diversified more and its share has fallen to 39.4% whereas in imports this number reached 97.5% in 2019.[46]

Table 4.2

EU's Top 10 Export Products with Kazakhstan 2019 (Million $)

Group	Code	Name	Value	Share
EIG	542	Medicaments	546.7	7.82%
DIG	716	Rotating Electric Plant	468.6	6.70%
DIG	792	Aircraft, Assoctd. Equipnt	357.4	5.11%
DIG	747	Taps, Cocks, Valves, Etc.	307.2	4.40%
DIG	743	Pumps Nes, Centrifugs Etc	229.7	3.29%
DIG	728	Oth. Mach, Pts, Spcl Indust	198.2	2.84%
CIG	679	Tubes, Pipes, Etc. Iron, Stl	172.9	2.47%
DIG	874	Measure, Control Instrmnt	171.8	2.46%
DIG	764	Telecomm. Equip. Parts	156.4	2.24%
DIG	723	Civil Engineering Equipt	146	2.09%

Table 4.3

EU's Top 10 Import Products with Kazakhstan 2019 (Million $)

Group	Code	Name	Value	Share
RIG	333	Petroleum Oils, Crude	18764.7	89.85%
CIG	681	Silver, Platinum, Etc.	422.3	2.02%
CIG	684	Aluminium	233.9	1.12%

46 Uncomtrade, *supra* note 4.

CIG	682	Copper	227.0	1.09%
EIG	522	Inorganic Chem. Elements	220.0	1.06%
RIG	223	Oilseed (Oth.Fix.Veg. Oil)	163.3	0.78%
RIG	321	Coal, Not Agglomerated	109.8	0.53%
CIG	671	Pig Iron, Spiegeleisen, Etc	84.8	0.41%
RIG	342	Liquefied Propane, Butane	73.2	0.35%
RIG	41	Wheat, Meslin, Unmilled	69.0	0.33%

Source: Author's calculations using SITC Rev.3 from UNcomtrade.com http://comtrade.un.org/ (Accessed: 12 April 2020).

These are products that have a significant weight within the trade conducted between the EU and Kazakhstan. Their composition indicates that the EU mainly exports medicaments and goods that could be considered as machinery and transport equipment mainly consisting of DIG. In its imports predictably the lion's share belongs to crude petroleum which single-handedly covers almost 90% of total imports. An interesting factor here is that the EU is the largest trade partner of Kazakhstan for many top export products. For instance, Kazakhstan seems to be importing 61% of its rotating electric plants (716) and 60% of its medicaments (542) from the EU which is followed by others within a scale of 15–61%. Thus, these products and major trading partners of Kazakhstan in the EU not only dominate trade relations between the parties but also maintain a major part for providing them to Kazakhstan as well.

These export and import data could be useful when aiming to increase trade volumes between the parties within the possibility of arranging certain modifications in regulations, tariff levels and other areas that could have a significant impact on trade relations between the EU and Kazakhstan. However, it might be difficult to arrange necessary adjustments since both sides have different commitments to regional and international trade organizations. But as an idea, if there is a way, then these product groups would have an impact on trade dynamics. Adding to this the above-mentioned potential of RIG and LIG in terms of exports and DIG and LIG in terms of Kazakhstan's exports to the EU could contribute to enhancing trade relations between the EU and Kazakhstan. Therefore, it is quite important to take a deeper look at trade relations to be able to provide practical policy recommendations.

5. Trade Indices

5.1 Trade Complementarity Index (TCI)

The Trade Complementarity Index introduced by Michael Michaely in 1996 allows us to analyse the trade structure of countries with their trading partners.[47] This means that this index provides information on how compatible the export and import structure is with the measured partner country to identify the harmony between trade relations. In other words, it measures how suitably one country's export structure fits with the second country's import structure, which in turn could be useful to give an idea about the potential of trade between these two parties. It is also useful to determine the potential of trade agreements between the parties if compatibility is high.[48]

$TC_{ij} = (1 - sum(|m_{ik} - x_{ij}|/ 2))$

In this calculation the formula x_{ij} represents the share of good i in global exports of country j and m_{ik} is the share of good i in all imports of country k.[49]

Table 5.1

Trade Complementarity Index 2000-2019

Years	EU-Kazakhstan	Kazakhstan-EU
2000	0.37	0.44
2010	0.30	0.64
2015	0.27	0.65
2019	0.28	0.61

Source: Calculated by authors using SITC Rev.3 from UNcomtrade.com http://comtrade.un.org/ (Accessed: 12 April 2020).

Within the measurement scale, TCI goes from zero to one where a higher score is closer to one, meaning higher compatibility of this country's export structure with its partner country's import structure. Thus in the case of one, they perfectly complement each other's trade demand while a score close to zero indicates that they are perfect competitors or their trade structure is not compatible with each

47 Michael Michaely, "Trade Preferential Agreements in Latin America an Ex-Ante Assessment". *Policy Research Working Paper Series* 1583 (1996): pp. 1–55. Accessed 4 April 2020, doi: 10.1596/1813-9450-1583.

48 World Bank. Trade Indicators World Integrated Trade Solutions. Available at: http://wits.worldbank.org/wits/wits/witshelp/Content/Utilities/e1.trade_indicators.htm. Accessed 4 April 2020.

49 *Ibid.*

other at all.[50] TCI calculation results for EU-Kazakhstan for the 2000–2019 period show that the EU's export structure is continuously decreasing which indicates that there are certain issues where the EU's export structure does not fit well with the import structure of Kazakhstan. However, in the case of Kazakhstan-EU, there is a different trend where Kazakhstan exports with an increasing trend are in demand in the EU's import structure. On this point considering the large part of the EU's imports from Kazakhstan consists of natural resources – mainly oil – such an indication could be understandable. However, within the EU's export structure there seem to be certain issues that exist on not being able to provide what Kazakhstan needs to import. This situation might also be associated with the share of certain products that consists of a large part within the EU's exports to Kazakhstan and in Kazakhstan's total imports where significant shifts in trade volume might have a macro-level effect over general trade dynamics. Although the number of exported products rises over the years it seems they are not imported on a large scale where geography, trade barriers and consumer preferences might play a role here. So within this general reasoning, two out of three could find a solution with working towards reducing technical barriers which are the main aim of the EPCA that entered into force.

In the case of the Kazakhstan-EU direction, this could be associated with the increasing export of natural resources – especially oil – where export volume has dramatically increased over the years and respectively its share in Kazakhstan's exports to the EU. Therefore, this relationship is single-handedly strong enough to pull the TCI figure close to one. Besides oil, Kazakhstan also increased the number of products that are being exported to the EU – mainly non-oil raw materials, EIG and DIG product groups.

5.2 Trade Intensity Index (TII)

The trade intensity calculation model was created by Brown in 1949 and revised and developed by Kojima in 1964. As could be seen from its name it also measures the intensity of trade between partners. In other words, it shows whether one country's exports to/imports from its partner are more than its average to the world or not. From this measurement, we can have an idea of the importance of trade partners to each other. TII is calculated as

$$T_{ij} = (x_{ij}/X_{it})/(x_{wj}/X_{wt})$$

In this calculation x_{ij} and x_{wj} are the values of a country i's exports and of world exports to country j and where Xit and Xwt are country i's total exports and total

50 *Ibid.*

world exports respectively. As a measurement, if the result is higher/lower than one than expected, then exports/imports are more/less than the world average.[51]

Table 5.2

Trade Intensity Index

	EU		Kazakhstan	
	Exports	**Imports**	**Exports**	**Imports**
2000	2.13	2.87	514	196.50
2010	2.39	2.69	226.07	79.48
2015	1.81	3.26	203.59	76.10
2019	0.72	1.56	85.34	31.73

Source: Calculated by authors using SITC Rev.3 from UNcomtrade.com http://comtrade.un.org/ (Accessed: 12 April 2020).

Taking the EU as a single bloc boosts the numbers greatly for Kazakhstan. However, if we pay attention to the trends in it we see that the EU is gradually reducing its intensity of trade with Kazakhstan both in exports and imports where in 2019 for exports the number falls below one, indicating that the export preference of the EU is diverting to other partners than Kazakhstan. As for imports, although the intensity is higher compared with exports, nevertheless in 2015 there is a declining trend in the intensity of imports from Kazakhstan. On this point, it is interesting to see that despite the EU's imports from Kazakhstan starting from 2016 recovery in relatively good shape, the intensity of imports of the EU from Kazakhstan seems to be declining continuously. TCI and TII findings indicate a parallel result where the EU-KZ TCI index is gradually falling and the EU's trade intensity with Kazakhstan is reducing, which indicates that either both parties are trading less with each other – which is not true according to the comparison of trade volumes over the years – or they are trading more with their other partners. Meaning that both parties seem to prefer to conduct their trade relations on a higher scale with other trade partners rather than with each other.

6. Conclusion

The findings of this research indicate that trade conducted between the EU and Kazakhstan has mainly circulated around the same products with an increased amount over the years for both exports and imports. Therefore, this chapter

51 World Bank, *supra* note 48.

recommends that the parties focus on diversification of traded goods and find ways for EU Member States to increase their trade volume with Kazakhstan. In its exports, Kazakhstan could pay attention to developing its capabilities to increase the comparative advantage of its non-energy goods like oilseeds, fish products and machinery and transport equipment by providing certain subsidies to those particular goods groups. As for the EU, it could be strengthening trade ties between major trade partners of Kazakhstan within the union and boosting trade with other member countries. On this point, the potential benefits of the EPCA on reducing technical differences between the EU and Kazakhstan could provide good opportunities to ignite enhanced trade connectivity among EU countries and Kazakhstan.

In a broader perspective, being an EAEU member did not cause any significant change in Kazakhstan's trade with the EU, resulting in only 1% in the EU's total trade share with Kazakhstan. However, EAEU membership prevents deepening of economic cooperation with Kazakhstan; therefore the parties need to find alternative possibly tailored solutions rather than aiming for signing general agreements such as an association agreement. Nevertheless, going through the harmonization process within the EAEU Kazakhstan is accustomed to many rules and regulations in the EAEU where many EU-similar templates would eventually play an important positive role in reducing differences in technical standards.

However, a deeper analysis of trade indices represents another issue for EU and Kazakhstan trade relations, where the parties are slowly losing the complementary nature of their trade and reducing the intensity of trade with each other, meaning that they are more inclined to trade with their other partners. Since 2010 they are strengthening their trade ties much better with their other partners compared with each other. The current situation to some extent might be associated with Kazakhstan's EAEU membership, where significant falls occur after 2015; nevertheless, a broader analysis could shed light on the remaining reasons for this trend.

In the near future, we would be able to gather more information regarding the advantages and disadvantages of membership of the EAEU, the WTO and ratification of the EPCA for economic relations between the EU and Kazakhstan. Currently, Kazakhstan is conducting a significant amount of its trade with non-member countries under its WTO commitments, meanwhile grasping the benefits of better market access in the EAEU and continuing its multi-vectoral economic strategy in balance. It would be interesting to see how Kazakhstan would continue to strengthen its position in geo-economic competition between Russia and the EU and what kind of role China could play in this equation.

OUT-OF-COUNTRY VOTING IN ESTONIA AND KYRGYZSTAN: ALTERNATIVE VOTING FOR VOTERS ABROAD

ANASTASIYA GRIADASOVA

Author: Anastasiya Griadasova, Project Officer at the International Foundation for Electoral Systems in Kyrgyzstan.

Scientific editor: Lolita Čigāne, International Consultant in Good Governance, Election and EU Affairs.

Abstract

This chapter offers a comparative analysis of external voting procedures in Estonia and Kyrgyzstan, exploring how both countries provide access to migrants and citizens residing abroad to exercise their constitutional right to vote. The research examines the legal framework for voting abroad, external voting procedures and the impact on turnout. Additionally, this chapter sheds light on the complexity of procedures in these countries as well as discussing alternative ways for election management bodies to ensure the right to vote for migrants and citizens abroad.

Keywords: *out-of-country voting, external voting, internet voting, migrants, citizens abroad.*

1. Introduction

The role of external voting is increasing in the globalized world. Technological changes give new opportunities for the right to vote to be exercised. The notion of out-of-country voting can be described in a number of ways in different countries depending on how it is reflected in legislation – "external voting, emigrant voting, expatriate voting, diaspora voting, absentee voting, out-of-country voting, extraterritorial voting, transnational voting, distance voting, and remote voting – which do not necessarily cover the same practice."[1] Out-of-country voting has a political nature due to migration, which is a part of the globalization process. The reasons for migration are diverse; as a result, there are different types of migrants such as economic migrants, climate migrants, political migrants, and others. For some countries, a large number of their citizens are living outside of their home countries; however, they are granted a right to vote and exercise it. Universal suffrage implies, along with other conditions "the right to vote and to be elected which may be accorded to citizens residing abroad."[2] Possessing a right to vote for migrants contributes to their feeling of attachment to their home countries as many of them are temporarily in foreign countries and normally plan to return.

In a globalized and digitalized world, some countries have adopted laws allowing their citizens to vote no matter what their location. This measure has been expanded with the increased role of technologies in our societies and based on the needs of populations. There are countries that extend opportunities for citizens abroad to take part in different types of elections and introduce practices simplifying participation in the electoral process. This can be referred to as the introduction of internet voting, which has gained popularity and is used in Switzerland and Estonia. However, this right is not exercised everywhere: "Forty-five of the 115 countries and territories with provisions for external voting apply it to only one type of election, but a number allow it for two or more types of elections."[3] For instance, the legal framework of Azerbaijan does not imply the possibility for external voting in parliamentary elections, although voters residing

1 Jean-Michel Lafleur, "The enfranchisement of citizens abroad: variations and explanations," *Democratization* Vol. 22 2015, issue 5, Voting Rights in the Age of Globalization, eds. Daniele Caramani & Florian Grotz (February 2015): p. 845, available at: https://www.tandfonline.com/doi/abs/10.1080/13510347.2014.979163. Accessed 10 November 2020.

2 European Commission on democracy through law. *Code of good practice in electoral matters* (30 October 2002), available at: https://rm.coe.int/090000168092af01. Accessed 22 June 2020.

3 IDEA Handbook. *Voting from abroad* (2007), available at: https://www.idea.int/sites/default/files/publications/voting-from-abroad-the-international-idea-handbook.pdf. Accessed 25 August 2020.

abroad can exercise their right in a presidential election. A similar practice can be observed in Afghanistan, Mexico, Venezuela, for example.

This chapter explores policies and procedures that ensure the right to vote of citizens residing abroad as implemented in Estonia and Kyrgyzstan. Estonia and Kyrgyzstan are selected for comparative purposes as countries with a history of high migration outflow and for the purpose of exploring differences in approach to out-of-country voting. Moreover, the research will examine how Kyrgyzstan has organized the external voting procedure for the Parliamentary Elections held on 4 October 2020 amid the COVID-19 pandemic and how the Estonian example of internet voting for voters outside of the country may have an influence on participation in elections.

2. Background: A Historical Review

Enfranchisement of citizens residing abroad has been practised for quite a long time:

> In more recent times, the earliest known use of external voting took place in 1862, when Wisconsin became the first of a number of US states which enacted provisions to allow absentee voting by soldiers fighting in the Union army during the Civil War.[4]

Thus, voting from abroad has been in place for more than 150 years. Historically, "military and diplomatic personnel stationed abroad were traditionally the citizens who were most often allowed to vote from outside their national territory."[5]

Provision of rights on external voting addresses the requirement of universal suffrage enshrined in the Universal Declaration of Human Rights of 1948. The right to elect and be elected is embodied in Article 25 of the International Pact on Civic and Political Rights, which is legally binding for signatory countries as well in Article 41 of the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. However, in some countries there is no legal basis to ensure access to out-of-country voting. For instance, in Ireland "public officials employed at diplomatic missions and members of the armed forces are the only categories of elector permitted to vote while abroad."[6]

4 The electoral knowledge network. Out of country voting, available at: https://aceproject.org/ace-en/topics/va/onePage. Accessed 20 July 2020.

5 Jean-Michel Lafleur, *supra* note 1.

6 The electoral knowledge network, *supra* note 4.

This topic is on the political agenda and is being raised from time to time in some countries. The main arguments against giving the right to voters abroad "related to territoriality of citizenship rights and difficulties in managing the process, as well as the possibility of low-turnout versus higher cost compared to in-country voting."[7] Another argument against it is that a large number of citizens permanently residing abroad may have an impact on internal policies without being present there.

In 2019, the UN reported that "the number of international migrants globally reached an estimated 272 million, an increase of 51 million since 2010. Currently, international migrants comprise 3.5 per cent of the global population, compared to 2.8 per cent in the year 2000."[8] One of the reasons why outflows of migrants started in Estonia and Kyrgyzstan is the collapse of the Soviet Union, which resulted in economic collapse and displaced many people, including those looking for better living conditions.

Significant numbers of migrants from Kyrgyzstan are residing abroad. "About 800 thousand Kyrgyz citizens [reside] abroad in labour migration, 80% of them in Russia, 30 thousand each in Turkey and Korea, etc."[9] The State Migration Service under the Government of the Kyrgyz Republic reported 640 thousand Kyrgyzstanis registered in Russia for migration in 2018. According to unofficial data, over one million citizens of Kyrgyzstan are labour migrants in the near abroad.

Migrants from Kyrgyzstan play an essential role in the country's economy as they sent remittances back home. The National Bank of the Kyrgyz Republic (NBKR) reported that for the period of January–December 2019 remittances to Kyrgyzstan amounted to $ 2 billion 192 million. This is a significant share of GDP. Migrant incomes make up approximately one-third of Kyrgyzstan's GDP and often exceed total treasury income.

In the Estonian case, it is estimated that "the total population of Estonia decreased from 1,565,600 inhabitants in the 1989 census to 1,370,100 in the 2000

7 Zeynep Mencütek, "External Voting: Mapping Motivations of Emigrants and Concerns of Host Countries", *Insight Turkey* (2015): p. 13.

8 United Nations. The number of international migrants reaches 272 million, continuing an upward trend in all world regions, 2019. Available at: https://www.un.org/development/desa/en/news/population/international-migrant-stock-2019.html. Accessed 10 June 2020.

9 Kabar. *Kyrgyz migrants transfer to Kyrgyzstan more than USD 161,7mln since beginning of 2019,* available at: http://banking.einnews.com/article/487311722?lcf= 0e9J0B8YNfl4ELwzQH2uGV5Qv7ySprw9sS_s9WW7Yds%3D. Accessed 15 June 2020.

census, a decline of 195,500, or 12 percentage points."[10] According to Statistics of Estonia,[11] the outflow of people from Estonia has been the case up until 2014 and then since 2015 net migration became positive. Since then the trend is now upward:

The biggest Estonian Diaspora resides in Russia, Sweden, the USA, Canada and Australia. There are important differences in migration to the East and West. While migration to the East is mainly return migration of ethnic minorities back to their home country, migration to western countries is mostly temporary, in the form of short-term studies and employment abroad and often involves return migration to Estonia.[12]

Despite the fact that many citizens return back and reunify with their families, a significant number of Estonian citizens reside across the European Union, enjoying free movement of labour, which is a building block of the EU Single Market. The Estonian Human Development Report[13] indicated that around 10–15% of Estonians live abroad. For a country with a population of 1, 329 million, this is a significant percentage.

Although migration flows in Estonia and Kyrgyzstan are diverse in nature and their tendencies vary, it is essential to examine how both countries ensure citizens' political engagement, especially given that the scenarios in these two countries after the collapse of the Soviet Union in the immediate post-collapse period of the early 1990s were similar. This chapter is premised on the belief that migration flows are hard to stop or manage as people are always looking for better living opportunities or fleeing conflicts; however, conditions have to be placed in legislation for citizens to have their right to elect. Therefore, election management bodies have to seek possible solutions and explore new opportunities to ensure their access to participation in one of the most important public participation events for their countries.

10 European Commission. Social Impact of Emigration and Rural-Urban Migration in Central and Eastern Europe (2012), available at: https://ec.europa.eu/social/BlobServlet?docId=8854&langId=en. Accessed 22 July 2020.

11 Population of Estonia. National Statistics, available at: https://www.stat.ee/news-release-2017-048. Accessed 21 June 2020.

12 European Commission. *Social Impact of Emigration and Rural-Urban Migration in Central and Eastern Europe* (2012), available at: https://ec.europa.eu/social/BlobServlet?docId=8854&langId=en. Accessed 22 July 2020.

13 Kumer-Haukanõmm, Kaja and Telve, Keiu, *Estonian Human Development Report 2016-2017*, available at: https://2017.inimareng.ee/en/open-to-the-world/estonians-in-the-world/. Accessed 5 July 2020.

3. Legal Framework for 'Out-of-Country Voting'

In Kyrgyzstan and Estonia electoral legislation has undergone many amendments. Kyrgyzstan has adopted a new model for the electoral process in accordance with the Decision of the National Council for Sustainable Development of the Kyrgyz Republic as of 2014 and the provisions of the constitutional Law of the Kyrgyz Republic "On elections of the President of the Kyrgyz Republic and deputies of the Jogorku Kenesh of the Kyrgyz Republic".[14] Since 2015, automatic scanning ballot boxes are used at polling stations across the country and for external voting. Estonia has chosen another model for handling elections. Indeed, Estonia has become a pioneer in internet voting by introducing and piloting this voting model as early as 2003 in national elections. Since then the model is widely used in different types of election. Against all odds, changes of voting models have been applied to out-of-country voting.

External voting in Estonia is enshrined in Chapter 9 of the Electoral Law**.** Voters residing abroad can vote using electronic means, vote by post, or can cast their votes by coming physically to Estonian missions in foreign States. Voting outside Estonia is organized by Estonian foreign missions. Estonian citizens are also allowed to vote in international waters on ships, as prescribed by Article 56 of the Electoral Law. This is possible if the master of a ship has applied to the National Electoral Committee to hold voting on board ship. Due to electoral legislation as amended in 2002, Estonian voters abroad can cast their vote independently from their geolocation using "the ID card as the new generation's primary identification document, with dual purpose: besides being a physical document, it also functions as an electronic identity".[15]

In Kyrgyzstan, the most recent document ensuring the right of out-of-country voting is the Regulation of the Central Election Commission (CEC) as of 26 June 2020 (decision #120) on the organization of participation of citizens of the Kyrgyz Republic residing outside its territory during the election of the President of the Kyrgyz Republic, deputies of the Jogorku Kenesh of the Kyrgyz Republic and referenda of the Kyrgyz Republic. It has been revised each time during the post-electoral period and in accordance with the needs of citizens and diasporas.

14 Central Election Commission of the Kyrgyz Republic. News updates, available at: https://shailoo.gov.kg/ru/news/1186/. Accessed 25 June 2020.

15 Estonian Internet voting. CEF Digital Connecting Europe, available at: https://ec.europa.eu/cefdigital/wiki/display/CEFDIGITAL/2019/07/29/Estonian+Internet+voting. Accessed 1 September 2020.

Legal amendments to electoral legislation in Estonia and Kyrgyzstan have made it possible for citizens to vote using various mechanisms: "The legal and procedural options chosen (by a country) regarding a set of basic aspects of the characteristics and reach of an external voting mechanism … will largely determine its ability to effectively include migrant workers."[16] While Kyrgyzstani citizens have to come to polling stations, Estonian citizens are privileged in that they can cast their vote no matter what their location.

4. Voting Procedures

The voter registration procedure for citizens residing abroad may directly affect turnout. If the process is time-consuming and requires a lot of effort, such as verifying inclusion in the voter's list or registering at the embassy/consulate, voters might give up the idea of casting a vote due to the overburdening bureaucratic process they have to go through.

Estonian voters are automatically included in the voters' list once they turn 18, the eligible age for voting in Estonia. The list of voters is formed from the Population Register. Estonian voters abroad are given a wide variety of ways to exercise their right to vote. According to the Electoral Law, to be eligible to vote by post, voters residing abroad have to be registered in the list of voters as permanently residing in a foreign State. At the last Parliamentary Elections in 2019, "a total of 77,881 citizens were registered as permanently residing abroad."[17] They should be provided with an electronic voter card not later than on the sixtieth day before Election Day. If they are not registered, they have to fill in an application form providing identification documents thirty days before Election Day. A voter who has not submitted an application form in time is allowed to vote at the foreign mission "on at least two days in the period between fifteen days and ten days before the election day".[18] Another unique opportunity to vote for Estonians is internet voting:

> A voter shall identify himself or herself by a certificate which enables digital identification, issued on the basis of the Identity Documents Act.

16 IDEA Handbook 2007, *supra* note 3.

17 OSCE/ODIHR ODIHR Final Report on the results of Parliamentary Elections, 3 March 2019, available at: https://www.osce.org/files/f/documents/8/e/424229.pdf. Accessed 20 July 2020.

18 Art. 54 of the Electoral law in Estonia.

> A voter has an opportunity to verify whether the application used for electronic voting has transferred the vote cast by the voter to the electronic voting system according to the voter's wish.[19]

Internet voting in Estonia has become a milestone event, as public trust in internet voting is increasing although a voter can use this means of voting only in advance. "The current design of the Internet voting system constitutes a significant improvement over earlier versions".[20] Estonian electoral legislation (Article 48) allows its citizens to vote in advance of Election Day: "Internet voting is possible only during the 7 days of advance polls – from the 10th day until the 4th day prior to Election Day. This is necessary in order to ensure that there would be time to eliminate double votes by the end of the Election Day."[21]

Advance voting is considered an essential advantage as it gives more opportunities for citizens to cast their votes. The OSCE/ODIHR has positively assessed advance voting at the last Parliamentary Elections in Estonia: "Clear procedures for handling advance voting materials and voter lists served to ensure integrity and to safeguard against multiple voting."[22] Voting is allowed only once through any of the means as everywhere else which is crosschecked by the election commissions.

The voters' list mechanism in Kyrgyzstan is passive. As in Estonia, voters in Kyrgyzstan are automatically included from the Population Register on the list of voters. Eligible Kyrgyzstani voters abroad who have deposited their biometric data and registered with the consulate are automatically included in voter's list at the polling station. To be registered in the consular office, citizens must be present physically or send a scanned passport and completed application to the MFA portal. Biometric data can be deposited in overseas relevant institutions or in population service centres in Kyrgyzstan. Voters can check if they are included in the voter's list at the portal "tizme.gov.kg" or at the polling station, consular office or diplomatic corps. Citizens who are temporarily residing abroad who wish to cast their vote have to fill in Form 2 to be included in the voter's list two weeks before Election Day.

Unfortunately, the number of registered voters during the election period and the actual number of people residing in a particular country has discrepancies (for instance, the number of migrants from Kyrgyzstan in the Russian Federation), not

19 Art. 48 of the Electoral law in Estonia.

20 OSCE/ODIHR ODIHR Final Report on the results of Parliamentary Elections, *supra* note 17.

21 Estonian Internet voting. CEF Digital Connecting Europe, available at: https://ec.europa.eu/cefdigital/wiki/display/CEFDIGITAL/2019/07/29/Estonian+Internet+voting. Accessed 1 September 2020.

22 OSCE/ODIHR ODIHR Final Report on the results of Parliamentary Elections, *supra* note 17.

only because some people have not reached voting age but due to lack of mechanisms or complicated procedures for registering voters with embassies/consular officers. In some cases, absence of an obligation to be registered with the embassy or unofficial residence in a country makes it impossible to be included in the voter's list. Voting procedures for citizens abroad are most likely to be amended amid invalidation of the Parliamentary election results in Kyrgyzstan and upcoming electoral reform. The availability of diverse methods of voting depending on the circumstances of a voter (in-country or abroad) may positively result in their desire to cast a vote. The Estonian example will be explored in depth to test this.

4.1 Effectiveness of Voting Procedures on Turnout

In order to understand the efficiency of voting procedures for voters residing abroad, it is essential to look at the actual turnout from elections in Estonia and Kyrgyzstan. Although voters are driven to take part in elections by diverse reasons, awareness of possible voting opportunities may have an effect on voter participation.

Ahead of the 2020 Parliamentary elections in Kyrgyzstan, the CEC reported 32,602 registered voters abroad out of which almost 27 per cent cast their votes. To compare, according to the final ODIHR report on the 2017 Presidential election in Kyrgyzstan, the number of registered out-of-country voters was 18,580, which resulted in approximately 25 per cent turnout abroad, substantially lower than in the country itself. Despite an increase in registered voters abroad by approximately two times, given the unofficial data of 1 million migrants residing in the Russian Federation, the number of registered voters and the turnout is very low. Despite the fact that Kyrgyzstan has no agreement with any other country on dual nationality, many of the migrants do have Russian and Kyrgyz passports which technically allows them to take part in elections in both countries. However, for various reasons citizens are not registering themselves with embassies/consulates and are thus not included in the voters' list as registration with the embassy/consulate is a mandatory precondition for eligibility to be on the voters' list.

Estonian voters residing abroad or travelling during the election period are entitled to postal voting and internet voting at their choice: "In the 2015 Parliamentary Elections, Internet voting accounted for 30.5 percent of the votes cast. Estonians worldwide cast their votes from 116 different countries."[23] Internet voting made it possible even without an embassy and consular office in each

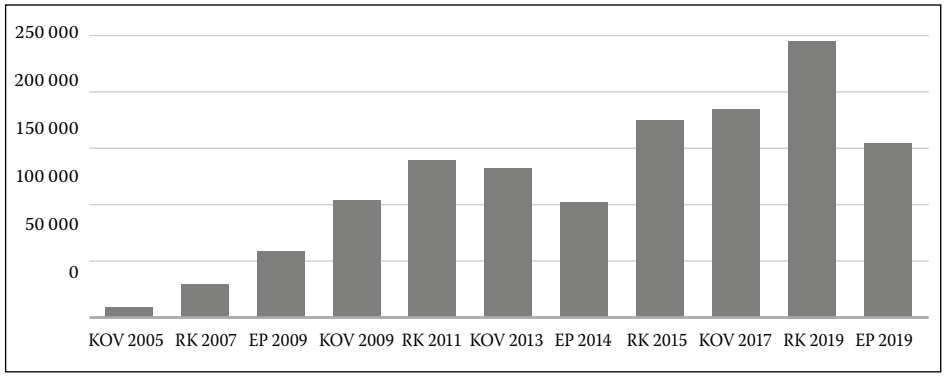
23 Estonian Internet voting, *supra* note 21.

country. The statistics show that the number of voters using internet voting has increased since its introduction in 2003. During the last Parliamentary elections "almost half the counted votes were cast online – 247,232 out of 561,131."[24]

The tendency of internet voting usage is upward and it may encourage more and more people abroad to use it and it already does if to analyse statistics. Table 4.1[25] below demonstrates the number of voters that used internet voting for the period from 2005 to 2019.

Table 4.1

Number of votes cast through internet voting throughout since 2005



Source*:* https://www.valimised.ee/

The percentage of votes cast from abroad using the online system has also increased throughout the years. According to the data of Election Commission in Estonia, in 2019 6.3% of the votes were cast from abroad online, while in 2007 – 2% of the votes were cast online from abroad.

The turnout among citizens of Estonia and Kyrgyzstan living or staying abroad is still relatively low. The causes may vary; it might be a weak outreach of political parties' candidates to citizens, apoliticism, unavailability for the dates, and other reasons. Overall, not enough work is done by any of the electoral stakeholders to provide an inclusive environment for the electorate. All these issues directly affect overall turnout. However, for instance in Estonia the situation is changing from one election to another. The 2016 report of the International Institute for Democracy and Electoral Assistance (IDEA) mentioned that "higher voter turnout is in most

24 ZDNet. Estonia uncovered, available at: https://www.zdnet.com/article/online-voting-now-estonia-teaches-the-world-a-lesson-in-electronic-elections/. Accessed 2 September 2020.

25 Estonian National Electoral Committee archives. Available at: https://www.valimised.ee/et/valimiste-arhiiv/elektroonilise-h%C3%A4%C3%A4letamise-statistika. Accessed 7 September 2020.

cases a sign of the vitality of democracy, while lower turnout is usually associated with voter apathy and mistrust of the political process."[26] This report in general observed overall "global decline in voter turnout … occurred in parallel with the emergence of many negative voices about the state of democracy around the world."[27] Despite downward statistics in turnout globally, technological progress and digitalization of public services may actually simplify the electoral process and work to boost turnout. The Estonian example shows that a wide range of voting possibilities for voters has an effect on turnout if to look at it in the longer-term as demonstrated in the above table.

4.2 Alternative Developments for Out-of-Country Voting

Election management bodies seek solutions on increasing participation in the democratic process in order to provide an opportunity for citizens to cast their vote. Postal voting is practised in a number of countries such as the United States, Norway and Austria, while internet voting (I-voting) is the most debated alternative to the traditional voting model, which has already been introduced, along with Estonia, in Switzerland, Denmark, the UK and others. Meddling in elections through hacking the system and cyberattacks are the biggest challenges to internet voting. However, these two types of voting may become a useful instrument to ensure inclusiveness for countries with high migration outflow.

Although introduction of I-voting might not solve the issue of timely access to information about candidates'/political parties' programmes, on the other hand it may attract the interest of new voters to try the system. To what extent more traditional societies perceive I-voting has to be examined as well as a way to ensure security of results and trust of the population in technologies. Despite the many questions that e-voting raises, it has proven its relevance especially amid a deeper globalization process.

Another opportunity to apply these two types of voting can be considered widely amid the outbreak of infections, especially by countries that have not introduced any of them. In 2020, COVID-19 posed a threat to the democratic process of organizing elections in dozens of countries. Many have postponed elections until further notice, but some – despite a difficult public health situation – have held elections. The COVID-19 pandemic presents new challenges that need to be addressed through the prism of elections. The pandemic is an opportunity to

26 Abdurashid Solijonov, "Voter turnout trends around the world," *IDEA* (2016): p. 13.

27 Solijonov, *supra* note 25.

adapt to new realities by applying new approaches but also a threat that can cause low turnout, especially if necessary measures are not in place. As a response to the pandemic, election administrations will have not only to organize the process applying social distancing but also to consider new technologies that would ensure secrecy of voting and safety of voters. While people trust their funds to banking systems, technologies may contribute to greater turnout including out-of-country voting ensuring electoral principles.

The Estonian case demonstrates that the growing role of new technologies is already playing an essential role in the out-of-country election process. However, it is worth studying to what extent older generations have adapted to technological changes and what is the percentage of younger/older people preferring internet voting to traditional voting. New challenges are already putting pressure on election management bodies to address and respond to current difficulties in order to ensure the integrity and inclusivity of the voting process. The existing pandemic and potential second wave is one of the challenges for election administrators. Despite the fact that many migrants were repatriated by host countries, many remain in their countries of destination and wish to cast their votes. This year Kyrgyz voters abroad already experienced obstacles to being on the voters' list due to lockdowns in some countries and restricted movement. This is so especially given the fact that embassies are busy with repatriation procedures amid the pandemic. Therefore, the pandemic has a great impact on turnout in some countries. At the beginning of August 2020, a group of migrants from Kyrgyzstan residing in Russia addressed the President of the Kyrgyz Republic and the CEC with a request to provide an opportunity to vote by organizing online voting for citizens.[28] Although the request was not satisfied for the Parliamentary elections, it triggered a debate among high-level officials in particular after the election results were invalidated. Electoral management bodies are in their capacity to organize the process for voters stranded abroad and ensure greater engagement in this process through civic and voter education campaigns, which might take time and effort. Candidates can also play an essential role in involvement of the electorate abroad. In some countries voters abroad can change the overall political landscape through exercising active suffrage, one of such recent examples is Presidential elections in Moldova held on 1 November 2020.

28 Today.kg. *Migrants in Russia request organization of online voting*, available at: https://today.kg/news/315788/?utm_source=sitemap. Accessed 31 July 2020.

5. Conclusion

The topic of enfranchisement of migrants is gaining more relevance with globalization processes. Candidates, political parties as well as election administrations may consider migrants as a vulnerable group that is hard to reach and deliver messages to. However, this group requires a guarantee of their political right to vote, which is part of universal suffrage. This cannot be neglected by any of the electoral stakeholders. Voting means being part of one of the main political processes of a country and it is one of the few attachments to the motherland and identity: "Through the exercise of this right, migrant workers seek not only to maintain or reinforce their sense of belonging to their original national political community but also to redefine the terms of their relations with the country they feel to be their own."[29] Therefore, it should be of utmost importance for election management bodies to ensure their participation especially given that some countries have a large number of external voters.

Out-of-country voting in Kyrgyzstan and Estonia is organized very differently. The voting model chosen by Estonia in the early 2000s demonstrates good results in the long-term and is a model that many countries look at as the system has so far proved its reliability and sustainability. The Estonian model of voting is more convenient for voters travelling or residing abroad as they can use internet voting from any location in the world. Extending voting rights by expanding voting methods through amending electoral legislation is the path that democracies should be pursuing. Diversification of choices is becoming a necessity.

Kyrgyzstan also provides its citizens with the right to vote; however, the number of registered voters in embassies and consular offices as well as turnout is extremely low. Kyrgyzstan has to consider applying best practice and introducing new voting methods to provide more opportunities for voters abroad. Additionally, it has to consider eliminating administrative barriers for voters abroad such as depositing biometric data and registering with the embassy. One option could be distant registration at the embassy/consular office to be included in the voters' list and the possibility to deposit biometric data at airports/railway and bus stations where migrants usually depart. Another opportunity for Kyrgyzstan is to introduce postal voting and/or internet voting in the long-term perspective that will simplify participation by voters abroad.

For its part, Estonia should look at opportunities to protect the system from cyberattacks that became the tool of interested players intending to meddle

29 IDEA Handbook 2007, *supra* note 3.

in the electoral process. Internet voting raises many issues such as hindered election observation, secrecy of votes, safety of servers, and so on. Improvement of external voting is essential, given the pace of globalization and new challenges like the pandemic that prevents people from going physically to register or to vote at polling stations. Internet voting may contribute to engagement of more voters, thereby strengthening the real representativeness of the elected institutions of power. The post-electoral period can be used for evaluating gaps in legislation regarding external voting as well as for assessing the needs of the diaspora abroad and negotiating with host countries on administration.

The issue of external voting raises another topic of the outreach of political parties and candidates in countries of destination for displaced people. This makes it difficult to maintain dialogue with citizens abroad and influence their decision to vote. Jean-Michel Lafleur (2013) states that out-of-country voting touches upon "sensitive issues regarding state-diaspora relations, the definition of polity membership, dual loyalty, and migrant integration in host societies."[30] In this regard, future research can focus on access to information by migrants through diaspora relations, and outreach by candidates/political parties with diasporas and their campaign abroad.

30 Jean-Michel Lafleur, "Transnational Politics and the State: The External Voting Rights of Diasporas," *Routledge*, (2013): p. 1.

ACCESS TO JUSTICE FOR DOMESTIC AND INTERNATIONAL INVESTORS UNDER THE INVESTMENT LAW REGIME OF KYRGYZSTAN

DR. NATALIA B. ALENKINA, HANNEPES TAYCHAYEV

Authors: Dr. Natalia B. Alenkina, Associate Professor of Law at the American University of Central Asia; Arbitrator at the International Court of Arbitration in affiliation with the Chamber of Commerce and Industry of the Kyrgyz Republic; Hannepes Taychayev, Lecturer of Law at the American University of Central Asia.

Scientific editor: Tjaco van den Hout, former Deputy Secretary General of the Dutch Foreign Ministry and Ambassador of the Netherlands to Thailand, Myanmar (Burma), Cambodia and Laos, former Secretary-General of the Permanent Court of Arbitration (PCA).

Abstract

The ISDS clause of the Law on Investments of the Kyrgyz Republic has been a focus of heated debates. On the one hand, Kyrgyzstan has been subject to several investor claims in international arbitration. Because of this the Government wants to limit direct access of foreign investors to international arbitration. On the other hand, local investors have been reproaching the Government for lack of access to justice. As a result, several alternative law reform projects are now to be introduced to the parliament of Kyrgyzstan. Some of them were lobbied by the business community, others by government institutions and parliamentary deputies. All of them aim at redrafting the dispute settlement clause in the domestic Law on Investments of the Kyrgyz Republic. They differ in their approach to the issue: on one end of the spectrum is a liberal approach that provides for unhindered access to arbitration and on the other an approach that restricts access to any sort of alternative dispute resolution mechanisms. This chapter examines competing versions of law reform project drafts.

Keywords: *ISDS, International Investment Law, Arbitration.*

1. Introduction

Lately the ISDS clause of the Law on Investments of the Kyrgyz Republic has been a focus of heated debates. On the one hand, Kyrgyzstan has been drowning in investor claims in international arbitration. Because of this the Government wants to limit direct access by foreign investors to international arbitration. According to government officials, the total amount of investment claims brought against Kyrgyzstan is estimated to be between USD 800 million to a billion.[1] To put this amount into perspective, the GDP of Kyrgyzstan in 2018 was USD 8.093bln. As such, it is fair to say that USD 800 million is a substantial amount of money that, instead of being spent to satisfy claims by foreign investors, could have been spent on public needs domestically. The position of the Government, in a nutshell, is that the existing investment laws are susceptible to partisan use and can be exploited in bad faith by investors as an opportunity to make money for their failing business projects.[2] The officials also hold that the existing investment framework limits the authority of the Government in exercising its public powers.

On the other hand, local investors have been reproaching the Government for lack of access to justice. The political crisis in 2010 set off a wave of nationalization. Unlike foreign investors who had access to international arbitration, local investors did not. As a result, not a single local investor managed to protect their property rights in the local courts. Several survey results indicate that there is a great degree of dissatisfaction with the administration of justice by local courts. The local courts favour the State in their dispute settlement endeavours. For example, in 2018, 98% of tax disputes decided in the local courts were in favour of the State. The opportunity presented itself to the business community to improve access to justice in 2018 when the Ministry of Economy of the Kyrgyz Republic announced that they were initiating public consultations on draft legislation of the Kyrgyz Republic on the Law on Investments, the Law on Arbitration Courts and the Law on Mediation. The business community managed to lobby their interests through the Ministry of Economy in the first iteration of the draft law to amendments to the Law on Investments. However, the initial draft was met with a great degree of resistance from other state bodies who presented their own version of the law.

As a result, now several alternative law reform projects are to be introduced to the parliament of Kyrgyzstan. Some of them were lobbied by the business

1 Interview with Aliaskar Abdyldayev, Head of the Investment Policy Division, on New Amendments to the Investment Law (27 January 2020) (Hannepes Taychayev ed.).

2 Interview with Aliaskar Abdyldayev, Head of the Investment Policy Division, on New Amendments to the Investment Law (27 January 2020).

community, others by government institutions and parliamentary deputies. All of them aim at redrafting the dispute settlement clause in the domestic Law on Investments of the Kyrgyz Republic. They differ in their approach to the issue: on one end of the spectrum is a liberal approach that provides for unhindered access to arbitration and on the other end an approach that restricts access to any sort of alternative dispute resolution mechanisms. In what follows, an overview of competing draft versions of law reform project are presented for consideration.

This chapter examines the merits of the proposed amendments to the dispute settlement clause of the Investment Law of Kyrgyzstan. In other words, from a procedural perspective it is important to examine if the proposed means provide meaningful ways for dispute resolution. The efficiency and meaningfulness of the proposed amendments will be examined against the backdrop of existing jurisprudence of national and international courts and tribunals. And in a broader perspective the goal is to examine existing legal mechanisms that provide access to civil justice for domestic and international investors under the Investment Law regime of Kyrgyzstan.

1.1 An Overview of the Current Situation: Relevance of the Problem

According to World Bank data, Foreign Direct Investment in Kyrgyzstan has been decreasing since 2015.[3] This is a troubling tendency as the government of Kyrgyzstan announced that FDI was a key element in boosting the economy in the coming years.[4] A number of factors could have contributed to this trend.

Within the optics of the present research one factor stands out as a relevant and promising area of enquiry – the immaturity and unpredictability of the legal regime. As a rule, foreign investors are reluctant to enter a country with weak legal and banking institutions and rampant corruption.[5] For this reason many countries have adopted Bilateral Investment Agreements to grant the protection of international law to foreign investors. BITs are the very fabric of the international investment law regime. The regime was originally designed to protect the interests

3 World Bank Group, *FDI to Kyrgyz Republic* https://data.worldbank.org/indicator/BX.KLT.DINV.WD.GD.ZS?end=2017&locations=KG-&start=2014. Accessed 30 May 2020.

4 The Transnational Institute (TNI), *Kyrgyz Republic's Experience with Investment Treaties and Arbitration Cases* https://www.tni.org/en/publication/kyrgyz-republics-experience-with-investment-treaties-and-arbitration-cases. Accessed 05 November 2020.

5 *The Economist,* available at: https://www.economist.com/asia/2016/06/30/stans-undelivered Accessed 28 February 2019.

of investors from developed countries in the developing world.[6] This is a special regime intended to protect foreign investment in developing countries because it is believed that developing States lack adequate legal systems that could provide protection to foreign investors.[7]

Kyrgyzstan has 37 BITs and Treaties with Investment Protection Provisions.[8] The government of Kyrgyzstan has 12 more agreements under development in progress.[9] They are at the very foundation of the legal regime that grants many foreign investors the protection of international law in case of violation of their rights. This, however, puts local investors in a somewhat disadvantaged position compared to their foreign counterparts. Unequal access to justice between foreign and the domestic investors can be demonstrated by way of example by cases where the government has expropriated the property of investors. To compensate for this shortcoming the government of Kyrgyzstan intends to shift the burden of delivering justice from the court system to arbitration tribunals.[10] The proposed amendments shape the general policy outline and indicate the overall direction that the government is willing to take but does not provide a detailed plan. To that end this chapter aims to discuss the legal technicalities of the proposed transition and amendments.

The scientific and theoretical basis of this study was largely composed of publications by foreign authors in the fields of investment law, available dispute resolution mechanisms, as well as international and other branches of law. Against the backdrop of increasing steady interest in investment law issues, a rather limited amount of domestic legal research is specifically devoted to this topic. As of today, in Kyrgyzstan there are no significant fundamental scientific works on the topic of investment arbitration. No scientific dissertations have been defended. Only a small number of articles are related to certain issues of arbitration, and international commercial and investment arbitration spheres. Among them are the collection of articles "Arbitration court in Kyrgyzstan: establishment and development",

6 Chittharanjan F. Amerasinghe, *Jurisdiction of Specific International Tribunals* (Brill | Nijhoff, 2009) p. 1.

7 M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015) p. 50.

8 UNCTAD, Investment Policy Hub Kyrgyzstan https://investmentpolicy.unctad.org/international-investment-agreements/countries/113/kyrgyzstan. Accessed 31 May 2020.

9 The Ministry of Economy of the Kyrgyz Republic, *InformationonKRBITs* http://mineconom.gov.kg/ru/direct/7/64 Accessed 05 November, 2020

10 The President of the Kyrgyz Republic, *Strategy for Stable Development of the Kyrgyz Republic for 2018-2040* http://www.president.kg/sys/media/download/52135/. Accessed 05 November 2020.

Bishkek, 2005, as well as the annual collection of articles published by IAC CCIKR "Arbitration in the Kyrgyz Republic: current challenges and solutions".

A similar situation exists in the entire Central Asian region as a whole. In one of the latest books on the legislation and practice of international arbitration in the CIS countries, Kyrgyzstan is completely ignored, while adequate attention is paid to other former Soviet States, such as Russia, Ukraine, Kazakhstan and other countries of the Commonwealth of Independent States. In that regard, this chapter will partly fill the existing research gap in this area.

The structure and discussion of the topic will be based on the following questions:

a. Do the proposed draft investment laws improve access to justice for domestic investors?
b. How do the proposed laws address the unequal treatment of legal subjects *vis-à-vis* one another?
c. How do the rights of beneficiaries of the law(s) enjoy change with the introduction of arbitration as the primary tool for access to justice?
d. What legal changes are necessary to improve reasonable legal predictability of the system and the rule of law in the country?

In the process of writing this chapter, the following methods of collecting and analysing information were used. All of them together are aimed at ensuring the objectivity and accuracy of the expected results of the study.

a. Legal analysis of international treaties, governmental programmes and legislation related to investment disputes to identify the current situation in the field of ensuring investors' access to dispute resolution mechanisms in the Kyrgyz Republic.
b. Collection and analysis of decisions by arbitration courts on arbitration disputes in which the Kyrgyz Republic was involved.
c. Qualitative data collection method: interviews with experts in the field of investment law and arbitration.

The questions presented herein will be guiding ones that will shape the overall tone and frame the discussion of the problem proposed for discussion in this chapter.

1.2 Historical Development of the Kyrgyz Legal System

Kyrgyzstan is a civil law jurisdiction that, to a great extent has inherited its legal foundations from the Soviet Union. The political organization of the country was designed after the traditional model of separation of powers: executive, legislative (aka *JogorkuKenesh)* and the judiciary. The system nominally warrants

independence of one branch of government from another. However, in practice it has become clear that the executive power vested with the president wielded too much power.

This led to reforms in the political system of the country. In a bid to bring equilibrium to the political landscape, in 2010 the people of Kyrgyzstan adopted a new Constitution transforming the political form of organization from a presidential to a parliamentary one.[11] Now it is the prime minister who is head of government.

Arbitration as an institution of civil self-governance is not a novel idea to the country *per se*. Nomadic traditions run strong within Kyrgyz society. They have influenced many aspects of social, political and legal traditions of the country.[12] Amongst those traditions and traditional institutions one that bears particular relevance to the purposes of this chapter is the Court of Aksakals. These courts have found their place in the existing edition of the Civil Procedural Code of the Kyrgyz Republic.[13] The jurisdiction of the Court of Aksakals is primarily limited to civil and family disputes. The decisions of the Court of Aksakals can be revised and challenged before courts of law. The Court of Aksakals is the institution that carries a certain degree of semblance to arbitration as we know it today.

Under Soviet rule the idea of arbitration as a dispute settlement mechanism underwent a mutation in light of the peculiarities of Soviet Socialist ideology. This led to the development of a two-track system: one for international arbitration disputes and the other one a surrogate of arbitration – a system of domestic arbitrazh courts.[14] Despite a phonetic semblance between "*arbitration*" and "*arbitrazh*" they are two difference systems.[15] Arbitration is primarily seen as an institution of civil self-governance, an independent body from the state court system that draws its powers from agreement between the parties to submit a dispute to a private dispute settlement body.[16] In contrast, arbitrazh court systems are part of the judicial system of a State. And arbitration tribunals are known as "*treteyskiesudy*"

11 BBC, available at https://www.bbc.com/news/world-asia-16185772. Accessed 05 November, 2020.

12 Kamila Mateeva, *The Legal Status of the Population Under the Customary Law of the Kyrgyz XIX-Early XX Centuries* (Thesis for PhD degree in specialty 120001 Theory and history of law and State; The history of the teachings of law and the State 2018).

13 The Kyrgyz Republic, chapter 74 of the Civil Procedural Code of the Kyrgyz Republic No. 14 (25 January 2017)

14 Paul Fisher, "The Soviet Union's Approach to Arbitration and Its Enduring Influence Upon Arbitration in the Former Soviet Space" 5 *Russian Law Journal* 129 (2015) p. 138. Accessed November 2020, https://doi.org/10.17589/2309-8678-2017-5-4-129-150

15 Russian Arbitration Association, *Arbitration in Russia* https://arbitration.ru/en/dispute-resolution/arbitration-in-russia.phpa. Accessed 30 May 2020.

16 *Ibid.*

that are private dispute resolution mechanisms.[17] It is noteworthy that until 2003 the Law on Arbitration was known as the Law on Private Arbitrazh (Законом о третейских арбитражах в КР).[18] This was so as to have it differentiated from the phonetically similar sounding state-run arbitrazh courts. This could have led to a misconception and confusion for parties in choosing a forum for their dispute settlement.

In Kyrgyzstan the system of arbitrazh courts was transformed into inter-district courts that dealt with economic civil disputes also known as commercial ones. Now in the parlance of legal jargon of Kyrgyzstan arbitrazh stands to denote arbitration. In other words, the concepts of "*arbitrazh*", "*arbitration*" and "*treteyskiysud*" are tantamount to one another. In practice this still leads to a great deal of confusion. Because some CIS countries maintain the old ways and others do not, in some situations one court is confused with the other and judgments of arbitrazh courts will be enforced on the basis of the New York Convention of 1958.[19] Needless to say, the New York Convention is not the right instrument for recognition and enforcement of foreign court judgments.

Recently Islamic law principles began to be introduced into the Civil Code of Kyrgyzstan. On 16 December 2017, the government of Kyrgyzstan signed a law introducing changes to the Civil Code of Kyrgyzstan.[20] The changes are aimed at reflecting the principles of Islamic law which, in effect, makes Sharia one of the sources of law in Kyrgyzstan.[21] To what extent this will affect the law and practice of arbitration in the country is not yet clear.

1.3 International Law and the National Law of Kyrgyzstan

After the fall of the USSR in 1991 all five Central Asian States embarked on grand nation-building projects and started redesigning their legal systems. A number of former Soviet States rejected the traditional Soviet approach to international

17 *Ibid.*

18 The Kyrgyz Republic, the Law of the Kyrgyz Republic On Amending the Law of the Kyrgyz Republic and On Arbitration in the Kyrgyz Republic N93 (15 May 2003).

19 Dmytro Marchukov and Oleksandr Volkov, "Ukraine: Arbitrazh Courts and Arbitration – What's in a Name?" *GAR* http://epam.ru/en/media/view/ukraine-arbitrazh-courts-and-arbitration-whats-in-a-name (2009). Accessed November 2020.

20 *VESTI.KG*, available at https://vesti.kg/zxc/item/44613-printsipyi-shariata-otrazhenyi-teper-i-v-grazhdanskom-kodekse-kr?.html. Accessed 05 November 2020.

21 *Stan Radar*, available at https://stanradar.com/news/full/23970-shariat-stal-istochnikom-grazhdanskogo-prava-v-kyrgyzstane-umestno-li.html. Accessed 30 May 2020.

law.[22] Kyrgyzstan does not have a well-defined doctrine on the role of international law in the domestic system of the country.[23] Depending on the nature of a treaty or a rule of international law the government is changing its position with regard to the subject matter. For instance, the position of the government of Kyrgyzstan with regard to the Treaty on the Eurasian Economic Union is that it prevails over the domestic law of Kyrgyzstan. However, with regard to other treaties its position shifts towards a more 'balanced' position which prescribes that domestic law supersedes international treaties in the case of a conflict between the two.

Kyrgyzstan acceded to the Vienna Convention on the Law of the Treaties in 1997.[24] The status of international law in the domestic legal system of Kyrgyzstan is governed by the Constitution of the Kyrgyz Republic and the Law of Kyrgyzstan on International Treaties.[25] Under Article 6.3 of the Constitution of Kyrgyzstan, international treaties and generally recognized principles of international law are an integral part of the domestic legal system of Kyrgyzstan.[26] The Constitution does not provide specific rules in the case of conflict between an international treaty and the domestic law of the country.

This provision of the Constitution has a number of implications for the issue in question.[27] First of all, the Constitution identifies international treaties as an integral component of the domestic legal system as opposed to domestic legislation as was defined previously. Hence, international law has full effect not only on the level of legislation but also other regulations of public relations. International treaties will also have elements of the legal development of society, namely its legal ideology, judicial practice and legal consciousness.

Secondly, in the existing edition of the Constitution and the Law of the Kyrgyz Republic on Normative Legal Acts there are no direct indications of priority of international treaties over domestic law. Moreover, the position of international

22 Kaj Hober, *Law and Practice of International Arbitration in the CIS Region* (Wolters Kluwer, 2017) p. 349.

23 Musabekova Ch. A., "International Law in the Domestic Legal system of the Kyrgyz Republic," *Vestnik KRSU* 12, pp. 36–39, available at: http://vestnik.krsu.edu.kg/archive/103.

24 The Ministry of Justice of the Kyrgyz Republic, *Vienna Convention on the Law of Treaties (1969).* Available at http://cbd.minjust.gov.kg/act/preview/ky-kg/17859/10?mode=tekst Accessed November 2020.

25 The Kyrgyz Republic, *The Law of the Kyrgyz Republic on International Treaties (2014).* Available at: http://cbd.minjust.gov.kg/act/view/ru-ru/205286 Accessed November 2020.

26 The Kyrgyz Republic, the Constitution of the Kyrgyz Republic. (27 June, 2020) available at: http://cbd.minjust.gov.kg/act/view/ru-ru/202913.

27 Alenkina N., Halitov R., "Legal Regulations of Investment Disputes in the Kyrgyz Republic: A Review of Legal Framework," *Akademicheskiy Vestnik AUCA* №1 (2013), available at: https://review.auca.kg/uploads/bulletins/aucareview9.pdf. Accessed 16 February 2020.

treaties has been redefined in industry-specific fields of law. For instance, Article 6 of the Civil Code and Article 2 of the Law of the Kyrgyz Republic on Investments in the Kyrgyz Republic had a norm prescribing the supremacy of international law over the civil and investment laws of the country. In the present edition of the laws those provisions have been eliminated.

The doctrine of systematic interpretation of norms of law based on Article 27 of the Vienna Convention on the Law of the Treaties, norms of the Constitution of the Kyrgyz Republic, and the Law of the Kyrgyz Republic on International Treaties of the Kyrgyz Republic, suggest a differentiated approach to solving the matter of the relationship between domestic and international law. This means the issue is to be solved on a case by case basis based on the nature of each and every treaty and laws in question. According to Professor Musabekova Chinara, depending on the way Kyrgyzstan has provided its consent to an international treaty, its legal nature changes accordingly. In the case of a collision, international treaties that are part of the legal system have priority over legal acts that were used to express consent to an international obligation or acts that empower a state body to sign international agreements provided that there is no need to issue extra-legal normative acts.[28,29]

1.4 Available Dispute Resolution Mechanisms

The existing legal regime for investment protection in Kyrgyzstan grants the protection of international law and unhindered access to arbitration for foreign investors only. Domestic investors have to rely on the local courts for remedies in case of violation of their rights. This gives foreign investors an advantage compared to domestic ones in protecting and vindicating their rights. This is of no surprise bearing in mind the way international law has developed so as to afford more preferential treatment to foreigners by virtue of the International Minimum Standard of Treatment.[30] The issue here for domestic investors is that the national system of remedies is not effective enough to protect the rights of the local investor. This shortcoming has been recognized by state officials in the country. The development plan of the President of Kyrgyzstan "Strategy on Sustainable Development of the Kyrgyz Republic 2018–2040" reckons that corruption has penetrated into almost all fields of state activity, becoming the major impediment

28 Musabekova Ch. A., *Legal Basis for Ratification and Denunciation of International Treaties in the Kyrgyz Republic* (KRSU 2015), p. 34.

29 Musabekova, *supra* note 26.

30 John Dugard, *Diplomatic Protection* https://legal.un.org/avl/ls/Dugard_DP.html. Accessed 05 November 2020.

for development.[31] The judicial system of the country is no exception and hence it was proposed to institutionalize arbitration as a mechanism to improve access to justice in the country. In what follows, an overview of remedies available under the domestic system is presented. On the basis of that overview it will be clear why arbitration should be institutionalized as the primary mechanism for access to civil justice in the country.

1.4.1 Judicial

The civil court system of Kyrgyzstan represents a three-tier system with the Supreme Court on top of the chain[32] and a system of local courts subordinated to it. The local court system is composed of the first instance/trial courts and the second instance/courts of appeal. The trial courts branch out into a sub-system of district courts, district courts in a city, and inter-district courts.[33] The second instance court system is composed of regional courts and the Bishkek City Court. The system of Arbitrazh Courts was phased out in 2003 by decree of the president of Kyrgyzstan and Arbitrazh Courts have been integrated into the system of local courts given the name "Economic Courts".[34] Building on its Soviet legacy, the Constitution of Kyrgyzstan envisions the court system as the sole administrator of justice in the Republic.[35] One could say that there is no clear consensus as to the legal nature of arbitration, that is, if arbitration is a recognized mechanism to achieve civil justice.[36]

Given the fact that the government of Kyrgyzstan itself has recognized rampant corruption within state institutions,[37] the judicial branch as a mechanism for achieving justice warrants no further discussion.

1.4.2 Mediation

The latest edition of the Civil Procedural Code of the Kyrgyz Republic (CPCKR) recognizes mediation as a dispute settlement procedure.[38] The courts of Kyrgyzstan

31 The Ministry of Economy of the Kyrgyz Republic, National Development Strategy of the Kyrgyz Republic 2018–2040, available at: http://mineconom.gov.kg/storage/directs/documents/209/15421950795bec078718fff.pdf. Accessed November 2020.

32 The Constitution of the Kyrgyz Republic, *supra* note 29, art. 96.

33 Civil Procedural Code of the Kyrgyz Republic, *supra* note 16, art. 2.

34 The Ministry of Justice of the Kyrgyz Republic, Presidential Decree on Matters of Integration of Arbitration Courts of Regions and Bishkek City into the Structure of Local Courts of the Kyrgyz Republic 2003, available at: http://cbd.minjust.gov.kg/act/view/ky-kg/4020

35 Constitution of the Kyrgyz Republic, *supra* note 29, art. 93.

36 Fisher, *supra* note 17, p. 144.

37 The Ministry of Economy of the Kyrgyz Republic, *supra* note 34.

38 Civil Procedural Code of the Kyrgyz Republic, *supra* note 16.

are now required to inform the parties about the possibility of settling their disputes via mediation as an alternative to litigation.[39] The new CPCKR also provides courts with powers to force parties to a dispute to attend consultations with a mediator.[40]

The Law on Mediation of the Kyrgyz Republic further qualifies the procedure for mediation. It stipulates basic principles of mediation and provides legal requirements for a mediated dispute settlement procedure. Mediation Agreements are contract that are recognized by law as enforceable and there is no need to have the results of disputes processed and validated in a court of general jurisdiction.

The scope of the new mediation law covers issues arising out of civil, family and labour relations.[41] It follows that so long as an investment dispute can be qualified as a private dispute then at least theoretically it can fall within the ambit of mediation law. However, in Kyrgyzstan most investment disputes are not private in nature and arise out of administrative relations such as licensing, expropriation, and the like. Hence, they do not fall under the scope of the mediation law. Another restraining factor is a limitation imposed on the type of subjects that can be a party in the mediation process. State bodies are not mentioned therein.[42]

1.4.3 Arbitration

In the way of academic debates not much has been written about arbitration law in Kyrgyzstan.[43] It is one of the least studied in Central Asia. Not much attention has been paid to the study of the law and practice of arbitration in the country.[44] One recent book on the Law and Practice of International Arbitration in the CIS Region[45] wholly neglects the country while giving sufficient attention to other former Soviet republics such as Russia, Ukraine, Kazakhstan, and the other States in the Commonwealth of Independent States.

39 *Ibid.,* art. 153.13.

40 *Ibid.,* art. 153.13.

41 *Ibid.,* art. 1.

42 *Ibid.,* art. 2.

43 As of today, no substantial research has been performed on the study of arbitration. There has been no thesis defended related to the subject matter. To name a few publications: collection of essays and articles "Arbitration in Kyrgyzstan: Formation and Development" (Bishkek, 2005) and yearly publications of IAC CCI "Arbitration in the Kyrgyz Republic: Modern Challenges and Further ways for Development. Available at: http://arbitr.kg/web/index.php?act=view_cat&id=14 (25 June 2019). Other than that, there are only a few articles that focus on topical issues.

44 Natalia Alenkina and Hannepes Taychayev, *Arbitration in Kyrgyzstan: Evolution and Next Steps Ahead* (*Kluwer Arbitration Blog)* available at http://arbitrationblog.kluwerarbitration.com/author/hannepes-taychayev/. Accessed 14 October 2020.

45 Hober, *supra* note 25.

In the same way as its neighbours in Central Asia, and as was pointed out earlier, the legal foundation of Kyrgyzstan was inherited from the Soviet Union. In the USSR, arbitration as a private dispute settlement mechanism based on consent of the parties, alternative to the state judicial system, was limited. However, Article 162 of the Constitution of the Kyrgyz Soviet Socialist Republic (1978) guaranteed the citizens of the Soviet Kyrgyz Republic settlement of commercial disputes between enterprises, institutions and organizations through state-run arbitration courts. Here it is important to remind ourselves of the distinction between arbitration as an independent institution of "civil self-governance" for dispute resolution, where the parties by mutual agreement submit a dispute to an arbitral tribunal that renders a binding decision, on the one hand, and the system of Arbitration Courts (Arbitrazh Courts) which are part of the judicial system of a State, on the other.

Arbitration as a semi-independent private dispute settlement institution found its way into the Constitution of independent Kyrgyzstan. Article 85 of the 1993 Constitution of the Kyrgyz Republic gave significance to the institution of arbitration. Article 85 empowered local bodies of self-administration to establish arbitration tribunals who had the power to rule on disputes between two private parties where the parties so agreed. Their power to entertain cases was limited to issues pertaining to property and family matters. The decisions of arbitration tribunals were binding unless they contradicted the law of the Republic. Interestingly enough, Article 79 of the Constitution of 1993 identified arbitration tribunals along with arbitrazh courts and other courts of the country as part of the judicial system. This in effect made it an institution of first instance within the judicial system, not an independent institution of civil self-governance for dispute resolution.

At present, arbitration is recognized as independent from the judicial system. Article 58 in the chapter on Citizenship and the Rights and Duties of a Citizen of the Constitution states:

> For extrajudicial settlement of disputes arising from civil legal relations, citizens of the Kyrgyz Republic are entitled to establish arbitration courts. The order of establishment and functioning of arbitration courts shall be determined by law. *(Unofficial translation)*

Besides the legal norms laid down in the Constitution arbitration is regulated by the Law of the Kyrgyz Republic No. 135 of July 30, 2002 "On Arbitration Courts in the Kyrgyz Republic"[46] and Civil Procedure Code No.14 of January 25, 2017.

46 The Law of the Kyrgyz Republic on Arbitrazh/On arbitration tribunals in the Kyrgyz Republic #135 (30 July 2002) was renamed in 2003 into the Law of the Kyrgyz Republic on Arbitration. Available at: http://en.cci.kg/podderzhka-biznesa/mezhdunarodnyjj-tretejjskijj-sud.html.

The Law of the Kyrgyz Republic on the Arbitration Courts of the Kyrgyz Republic lays down the legal framework for operation of arbitration tribunals in the country. The Law does not differentiate between domestic arbitration and international arbitration, for instance, where one of the parties is a foreign national.

To date, there are four institutional arbitration courts in the Kyrgyz Republic. The leading institution that manages and deals with international commercial arbitration in Kyrgyzstan is the International Arbitration Court under the Chamber of Commerce and Industry of the Kyrgyz Republic (IAC CCIKR).[47] The Institution was included in the list of bodies that assist in arbitral proceedings by the Permanent Court of Arbitration in The Hague.[48] As of November 1, 2019 the Court has arbitrated 1056 cases.[49] In 2013, a new arbitration court was created in the Jalal-Abad[50] region of Kyrgyzstan, followed by the Arbitration Court of Central Asia[51] and Bishkek Arbitration Court on Subsoil and Commerce.[52]

Arbitration Courts' main goals and aims are to provide an effective extrajudicial dispute resolution means for civil and commercial disputes to legal entities and/or citizens of Kyrgyzstan. Specifically, under Article1 of the Law of the Kyrgyz Republic on the Arbitration Courts of Kyrgyz Republic the scope of application of the Law is:

> This Law is applied at the agreement of parties for consideration by the arbitration tribunal of disputes arising from civil relationships, including investment disputes within the jurisdiction of the competent court with exclusion of disputes established by this Law. *(Unofficial translation)*

At the same time, Article 45 of the Law stipulates a list of cases that cannot be considered by the arbitral tribunal:

47 International Arbitration Court at the Chamber of Commerce and Industry of the Kyrgyz Republic http://www.arbitr.kg/web/index.php. Accessed 30 May 2020.

48 *International Arbitration Court*, available at http://www.arbitr.kg/web/index.php. Accessed 05 November 2020

49 IAC CCI Statistics, available at http://arbitr.kg/web/index.php?act=view_material&id=95. Accessed 30 May 2020.

50 Jalal-Abad Regional Arbitration Court, available at: https://register.minjust.gov.kg/register/Public.seam?publicId=260279https://register.minjust.gov.kg/register/Public.seam?publicId=260279. Accessed 30 May 2020. It also opened a branch in Osh city in the South of the country in 2018, *see*: https://register.minjust.gov.kg/register/Public.seam?publicId=519194. Accessed 18 June 2019.

51 The 'Foundation "Arbitration Court of Central Asia" was established on 10 November 2015 according to the Ministry of Justice of the Kyrgyz Republic Legal Entities Registry' https://register.minjust.gov.kg/register/Public.seam?publicId=362834. Accessed 30 May 2020.

52 The Ministry of Justice, the 'Foundation "Bishkek Arbitration Court on Subsoil and Commerce" was established on 10 June 2019 according to the Ministry of Justice of the Kyrgyz Republic Legal Entities Registry' available at: https://register.minjust.gov.kg/register/Public.seam?publicId=553878. Accessed 05 November 2020.

- Disputes on claims on resolutions or other actions (inaction, refusal in commitment of action) by the officer of the court (bailiff).
- Disputes on establishing facts having legal sense (legal facts).
- Disputes on restoration of rights for securities lost.
- Disputes on bankruptcy (insolvency).
- Disputes on recovering damage inflicted to the life or health of a citizen.
- Disputes on protection of honour, dignity and business reputation.
- Disputes on hereditary legal relationships.
- Disputes on procedure and terms for marriage and termination of marriage.
- Disputes with regard to personal and non-property relationships arising in a family between spouses, parents and children and other family members.
- Disputes arising with regard to adoption, trusteeship and guardianship, farming.
- Disputes arising when registering civil acts (relationships).
- Other disputes impossible to be transmitted to Arbitration for settlement in accordance with the law. (*Unofficial translation*)

A number of sectoral laws exist other than the Law of the Kyrgyz Republic on Arbitration Courts. They specifically provide for dispute settlement via arbitration for certain types of disputes. For instance, the Law on Mortgages in Article 7 reads:

> The parties may provide for an "arbitration clause" in the pledge agreement to refer all or certain disputes that may arise between them in connection with a pledge relationship to an arbitral tribunal. An arbitration agreement may also be formalized as a separate agreement. The conditions and procedure for concluding an arbitration agreement are provided for by the relevant law.[53] *(Unofficial translation)*

The Law on Concessions in Article 24 provides for the following dispute settlement procedure:

> Disputes of concessionaires with concession bodies, state authorities and management bodies, legal entities and individuals as well as disputes between concessionaires on issues related to their activities are subject to litigation in the courts (including international), as well as by agreement between the parties – in arbitration courts.[54] *(Unofficial translation)*

The Law on Immovable Property Registration allows for disputes related to state registration on property rights to be settled via arbitration. In effect it provides for

53 The Kyrgyz Republic, Art. 10 of the Law of the Kyrgyz Republic 'On the Pledge' of 12 March 2005, N 49.

54 The Kyrgyz Republic, Art. 24 of the Law of the Kyrgyz Republic 'On Concessions and Concession Enterprises in the Kyrgyz Republic' of 6 March 1992 N 850-XII.

administrative disputes to be settled via a private dispute settlement mechanism. It reads:

> Disputes related to state registration of rights are considered by the Interdepartmental Expert Commission of the authorized state body in the field of registration of rights to real estate, the arbitration court and the courts.[55] *(Unofficial translation)*

Since 2019 the Law on State Procurement also provides for challenging tender results in arbitration courts as an alternative to litigation. The law in relevant parts reads:

> Disputes between suppliers (contractors) and the procuring entity arising from the implementation of procurement procedures, as well as decisions of the procuring entity, an independent interdepartmental commission... shall be appealed to the arbitration court or court of general jurisdiction in the manner prescribed by the legislation of the Kyrgyz Republic.[56] *(Unofficial translation)*

The new law on Public Private Partnership adopted in 2019 allows for dispute settlement between state and private partners via arbitration:

> Disputes arising between the parties to a PPP agreement in connection with the conclusion, execution and termination of the PPP agreement are resolved through negotiations in accordance with the provisions of the PPP agreement. If it is impossible for the parties to resolve the dispute through negotiations, the dispute is subject to consideration by the judicial authorities of the Kyrgyz Republic in accordance with the legislation of the Kyrgyz Republic, unless the parties agree on a different procedure for resolving disputes, including by the arbitration courts of the Kyrgyz Republic or international commercial arbitration.[57]

The government of Kyrgyzstan in its development plan "Strategy for Sustainable Development of the Kyrgyz Republic 2018-2040" proposes to institutionalize arbitration as a mechanism for improving access to justice. The Plan reckons that corruption has virtually penetrated into all fields of activity of the State, hence becoming a major impediment for development. For this reason, *inter alia*, it aims at easing the load on the judicial system of the country by delivering all civil disputes to commercial arbitration tribunals and arbitration courts while the judicial system will focus on dealing with criminal cases only. The role of the

55 The Kyrgyz Republic, Art. 48 the Law of the Kyrgyz Republic 'On the State Registration of Rights to Real Estate and Transactions therewith' N 153(22 December 1998).

56 The Kyrgyz Republic, Art. 48 of the Law of the Kyrgyz Republic 'On public procurement' N 72 (3 April 2015).

57 The Kyrgyz Republic, Art. 27 of the Law of the Kyrgyz Republic 'On public-private partnership' N 95 (22 July 2019).

commercial arbitration tribunals will be to examine the merits of civil disputes and render an award that will be reviewed by courts of general jurisdiction.

Further, for the purposes of improving the business environment in the country, the government is proposing to develop a system of dispute settlement between entrepreneurs and administrative state bodies in the International Arbitration Court of the Kyrgyz Republic.[58] The proposition assumes that the existing mechanism of dispute settlement between state bodies and the business community cannot adequately address the issues arising between the two. The new dispute settlement mechanism is to be designed so as to address the needs of both the domestic and the international business community in their disputes between the state bodies of Kyrgyzstan. According to the Ministry of Economy of Kyrgyzstan, compared to the existing mechanism the new one is going to be quick. This is because it will allow settlement of disputes with recourse to a single legal authority with no possibility of appeal. It will be more efficient, confidential and will allow choice of applicable law, as well as the place and language of the proceedings. The new legislation is to expand arbitrable disputes arising from the State's exercise of its administrative functions such as taxation and customs.[59]

From the foregoing it is reasonable to argue that further development of arbitration in Kyrgyzstan should not be in expanding the competencies of arbitral tribunals beyond the inherent functions they were designed for and contrary to constitutional provisions restricting the competence of arbitration. Rather the direction should be in effective use of the unfulfilled potential of the arbitration regime in Kyrgyzstan in general.

2. Proposed Reforms

At the moment a number of alternative projects aim at redrafting the dispute settlement clause in the Law on Investments of the Kyrgyz Republic. They differ in their approaches to the issue and are antagonistic to one another. This helps to prove the importance and pressing nature of the issue at the current stage of

58 The Ministry of Economy of the Kyrgyz Republic, "Kyrgyzstan Plans to Introduce Arbitration System for Businesses at International Arbitration Court" (2018), available at: http://mineconom.gov.kg/ru/post/5217. Accessed 05 November 2020.

59 The Ministry of Economy of the Kyrgyz Republic, "New Opportunities Provide for Submitting Tax Disputes to Arbitration", available at: http://mineconom.gov.kg/ru/post/6069. Accessed 05 November 2020.

development of the legal system of the country. In what follows, an overview of competing versions of the draft law is presented for examination.

In the course of this chapter the authors held a number of talks with well-known academics, professors and arbitrators on the proposed amendments to the law. There is nothing wrong in the desire of the government to overhaul its investment law. However, it is important to strike a balance between containing the negative externalities of unhindered access to international arbitration and avoiding the chilling effect on the investment climate in the country by subjecting all disputes to the domestic courts of the country.

It has to be noted right at the outset that the notes reproduced herein from the discussions were taken in an informal setting. All the notes reproduced herein have been interpreted and adopted by the authors of this chapter and they alone carry sole responsibility for any misinterpretation.

2.1 The Law Reform Project Lobbied by the Business Community Through the Ministry of Economy (2018)

A number of project draft laws related to foreign investment are being developed by the Ministry of Economy of Kyrgyzstan. These are draft laws on introducing changes and amendments to the Law on Investments in the Kyrgyz Republic, on Arbitration Courts, and on Mediation.[60] The initial version of the law aimed at improving access to justice for both domestic and foreign investors via arbitration by expanding the definition of investment disputes.[61] Under the proposed changes investment disputes are to be understood not only as those between a foreign investor and the State but also:[62]

> … disputes that emerge in the process of investment or/and economic activities between an investor including enterprises that are being invested in and state bodies, officials of Kyrgyz Republic and other entities.[63] *(Unofficial translation)*

60 The Ministry of Economy of the Kyrgyz Republic, Draft Law on Amendments to ADR Laws of the KR, available at http://mineconom.gov.kg/ru/post/5467. Accessed 05 November 2020.

61 A draft of the Law was presented for public discussion on 6 September 2018 on the Government's webpage at www.gov.kg. As of 05 November 2020 the note has been taken down.

62 For latest developments, *see*: N. Alenkina and Hannepes Taychayev, *ISDS Clause in the Investment Law of the Kyrgyz Republic is Set for an Overhaul* (Kluwer Arbitration Blog, 2020). Forthcoming publication.

63 *See* ANNEX III.

The suggested definition of investment disputes blurs the lines between investment and economic activities. This in effects renders the concepts of an investor and investment innocuous.

Another important aspect of the initial draft law was the list of fora offered for dispute settlement. Besides ICISID and arbitration based on UNCITRAL rules and regulations, the IAC CCIKR was to make a comeback. The draft also provided for an option to establish an international arbitration tribunal so long as it was in accordance with the laws of the Kyrgyz Republic. In the explanatory note to the draft law it was stated that this would allow the Kyrgyz Republic to settle any investment disputes between state bodies and international investors inside the country, hence avoiding the high costs associated with foreign arbitral institutions. The law also provided for an opportunity for state bodies to act both in the capacity of a defendant and claimant to protect state interests. This sort of approach to investment dispute settlement would have allowed matters to be solved inside the country and avoid undue pressure on investors on the part of the State.

The problem with the draft law is that it fails to consider Article 58 of the Constitution which defines the scope of arbitrable issues. According to this, only issues arising out of civil relations can be subjected to arbitration. The same also follows from Article 1 of the Arbitration Law, which allows investment disputes to be settled via arbitration so long as they arise out of civil relations. Accordingly, international arbitrations formed based on the law of Kyrgyzstan cannot decide investment disputes that arise out of administrative relations – meaning those related to tenders, licensing, taxation, customs duties, and the like.

Nor do Kyrgyz laws provide for ways to challenge arbitral awards and decisions in the case of procedural violations by arbitral tribunals. This means that international arbitral tribunals formed on the basis of Kyrgyz laws would suffer from this shortcoming.

The initial draft of the law was supported by the business community of the country but was met with a great degree of resistance from state bodies. The Supreme Court of Kyrgyzstan and the Centre of Judicial Representation under the Government of the Kyrgyz Republic did not agree with many of the provisions of the proposed amendments by the business community.

2.2 The Law Reform Project of State Bodies Presented to the Ministry of Economy KR (2019)

In light of the criticism received, the Ministry of Economy redrafted its proposal. In a bid to limit direct access by foreign investors to international arbitration it conducted an overhaul of the ISDS clause of its proposal. In its existing reiteration Article 18 of the Investment Law of Kyrgyzstan reads:

1. Investment disputes shall be resolved in accordance with previously agreed procedures between the investor and state bodies of the Kyrgyz Republic.
2. In the absence of such agreement, investment disputes shall be resolved through consultations between the sides by addressing the matter to the authorized person on the protection of rights of business entities (Business Ombudsman) for a period of six months from the date of the first written request for consultations.
3. If the investment dispute cannot be settled amicably in accordance with the provisions of paragraph (1) and (2) of this Article, the dispute shall be settled through the judiciary of the Kyrgyz Republic within six months.
4. If the investment dispute cannot be settled in accordance with the provisions of paragraph (1), (2) and (3) of this Article, the dispute shall be settled in accordance with international treaties of the Kyrgyz Republic or through international arbitration based on the agreement of the parties.
5. Any investment dispute between a foreign and a domestic investor shall be settled through the judiciary of the Kyrgyz Republic, unless the parties agree on any other procedure for resolving the dispute.[64]

To what extent the new iteration will meet the expectations of the government is yet to be seen.

A brief overview of the draft law proposals suggests that the amendments presented therein will be in conflict with the BITs ratified by the Kyrgyz Republic. It is not enough to introduce amendments to the domestic law(s) alone. The effects of the law will be limited only to those investors who are from countries with which the Kyrgyz Republic has no BITs.

Another issue has to do with the timeframes proposed for settlement of disputes. A period of six months for conciliation and negotiations is too long. And

64 Unofficial translation. Not publicly available.

the time afforded to have claims processed in the courts of the Kyrgyz Republic is too short. In other words, there is a degree of disconnectedness between the timeframes proposed in law and what can in fact be achieved in practice. Moreover, considering the overall political situation in the country the idea of submitting investment disputes to local courts is not an attractive one.

2.3 Draft Law Proposed by Deputy A.T. Mamasheva (2020)

Parliamentary Deputy Mamashevaha announced her initiative to propose amendments to the Law on Investments of the Kyrgyz Republic.[65] Her proposal is in line with the second iteration of the ISDS clause proposed by the Ministry of Economy in trying to limit access of investors to international arbitration. The basic idea behind her proposal is to allow investors to make claims in international arbitrational tribunals only after receiving consent from the Government.

The drafters of the law point to the fact that between 2015–2019, Kyrgyzstan did not manage to challenge the jurisdiction of international arbitral tribunals successfully. Neither has Kyrgyzstan won a single case against foreign investors in international arbitration. According to the Deputy, the fundamental reason for this is Article 18 of the existing Law on Investments of the Kyrgyz Republic, which provides unconditional access to international arbitration for foreign investors. She argues that it is an unjustified limitation on the sovereignty of the country.

The initiator of the proposal states that the national interest of the country should not be compromised at the expense of developing investment attractiveness. The deputy proposes to have government level approve contracts with large corporations that would specifically provide for international arbitration if it is deemed necessary by the Government. Her position is similar to that of the Centre of Judicial Representation under the Government of Kyrgyzstan.

There seems to be a degree of misunderstand here. It is not enough to amend the domestic law on investment to revoke consent to arbitrate given in the BITs. In this regard introducing amendments to the Law in hopes of limiting foreign investors' access to international arbitration is doomed to fail.

65 NTS, available at https://www.youtube.com/watch?v=0KlVC5ESIqA&app=desktop. Accessed 08 November 2020.

3. Conclusions and Recommendations

This chapter discussed the evolution and development of arbitration in Kyrgyzstan and offered an opportunity to discuss possible amendments to the Law on Investments of the Kyrgyz Republic. Examination of historical dynamics in the investment law of Kyrgyzstan suggests that there is a trend towards more rigid regulation of ISDS in the country. However, it also suggests that the government is not approaching the issue in a comprehensive manner namely by paying too much attention to drafting and redrafting investment laws at a national level and ignoring to do so at the supranational level. It follows that a reasonable and balanced approach for the government of Kyrgyzstan is to take this opportunity not only to make changes at national level but also at the international level while there is momentum.

The proposed amendments not only limit access to justice to foreign investors but also leave domestic investors vulnerable to a corrupt judicial system where recourse to local remedies is an empty legal process. The unequal position of domestic and foreign investors is equalized not by means of improving the position of domestic investors but rather by downgrading the position of foreign ones.

Based on the analysis in the chapter, the following recommendations are proposed:

a. To conduct a detailed examination of the decisions of international arbitration tribunals on disputes involving the Kyrgyz Republic. It is necessary to identify and analyse the causes of their occurrence and draw lessons, especially on "lost" cases, for preventing their occurrence in the future.
b. To develop a more precise formulation on the procedure for resolving investment disputes that is aimed at securing the right to resolve an investment dispute while guaranteeing protection of investor's rights and avoiding a negative impact on the investment environment.
c. Review international investment treaties along with the changes proposed in domestic law.
d. Like many other countries that have decided to review and reform their arbitration clauses, Kyrgyzstan needs to develop a model BIT in order to bring it into line with modern practice.
e. To introduce mediation into the procedure for consideration of investment disputes, either through mechanisms of compulsory recourse to mediation or by creating conditions under which it will be disadvantageous for a party to avoid following the mediation procedure.