

# ➤ Eurasian Economic Integration: Institutions, Promises and Faultlines

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**W**hen a new initiative for forming a customs union between Russia, Belarus and Kazakhstan was announced in August 2006, there was little indication that this restart of Eurasian integration would differ from previous ineffective post-Soviet projects. Yet it soon became clear that there was something different about this initiative: the political statements were followed by fast action, backed by an improved institutional and legal framework which took into account international rules and practice, with Russia's regional hegemony apparently constrained by a system of multilateral institutions. In short, this appeared to be a new-style project with the ambition of delivering tangible benefits to its members while becoming a pole of attraction in the neighbourhood and a viable alternative to the European Union. This contribution discusses the key instruments and dimensions of integration, or its 'institutional formula', and asks whether the promise behind the claim has been realised. As the project seeks to develop into the Eurasian Economic Union, we argue that there are important institutional and systemic faultlines that circumscribe its effectiveness.

The Customs Union (CU) between Russia, Belarus and Kazakhstan was formally launched in July 2010. This was preceded by intensive work in negotiating a common external tariff, providing common customs regulations and developing common decision-making and regulatory bodies. Indeed, the reality of the customs union today is impossible to ignore. At the same time, the economic integration agenda quickly expanded with the creation of a Single Economic Space (SES). The idea was first discussed in 2009 and was launched in January 2012, accompanied by partial institutional reform to facilitate it. Some aspects of the SES are to be realised only gradually (e.g. in relation to the free movement of capital), but significant progress on other issues has been made (e.g. the development of common technical standards and other measures to eliminate non-tariff barriers to trade). These developments, importantly, were rooted in an institutional formula offering improvements on previous integration efforts.

These achievements have often been overlooked in a policy context increasingly overtaken by geopolitical considerations. Nevertheless, the progress so far raises some important questions. To what degree does the institutional and legal framework of the Eurasian project provide a constructive framework for integration and development? To what extent and in what ways does the Eurasian project take into account the systemic challenges of the political and economic regimes in the CU's member states and the power distribution in the region, with Russia's hegemony being particularly pertinent in this regard? These questions are especially salient in view of the pending 'deepening' of the Eurasian project into the Eurasian Economic Union (EEU) as well as its 'widening' to new members, Armenia being the most immediate candidate. We examine these issues below.

## THE COMMON LEGAL SPACE AND REGULATION

As has already been noted, the most evident progress in the Eurasian project has been in relation to the CU. This development was made possible to a large extent by the adoption of an improved legal framework. A range of international agreements containing the various elements of common customs regulations were signed, the most important being the Customs Code of the CU adopted in November 2009. Provision was made for these agreements to enter into force simultaneously across the CU, thus avoiding previous problems of uneven application.<sup>1</sup> Significantly, the Code replaced the domestic legislation of member states by becoming the law in relation to CU matters. The Code was described as a piece of modern customs legislation simplifying customs requirements and implementing the provisions of key international conventions in the field.<sup>2</sup> Finally, unlike previous integration regimes, the CU and SES provisions developed alongside Russia's accession to the WTO in August 2012.<sup>3</sup> The undertaking was made for existing as well as future agreements to comply with the WTO regime, even in the case of non-WTO members, and for WTO law to prevail over any conflicting CU provisions.<sup>4</sup>

In addition to international agreements, the common law of the CU and SES is contained in the decisions of the Supreme Eurasian Economic Council, the body in charge of strategic decision-making at the level of heads of state and government, and the Eurasian Economic Commission, which is the permanent regulator of integration. The Commission has played a particularly important role in the whole project, being the beneficiary of extensive delegation in the areas of common customs policy and cooperation within SES. Its decisions are required to be officially published and upon their entry into force become directly binding on the member states, thus signalling the strong supranational features of the regime.<sup>5</sup> The Commission is composed of a Council, operating at the level of deputy heads of government, and a Collegium, consisting of independent professionals.<sup>6</sup> In contrast to previous permanent regulatory bodies, the Commission has been conceived as a developed international bureaucracy, endowed with extensive financial resources and staffed with experienced professionals, thus potentially contributing to a better quality of regulation.

At the same time, an effort has been to style the Commission as a business-friendly body. Provision was made for greater public input and business engagement with the Commission's work. The departments of the Commission operate in consultation with 17 Consultative Committees focusing on specialised areas of cooperation. They consist of civil servants, business representatives or experts nominated by the respective national governments.

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1 Protocol on the procedure for entry into force of the international agreements directed to forming the treaty basis of the Customs Union of 6 October 2007.

2 E.g. see 'Otvety na naibolee chasto zadavaemye voprosy otnositel'no osushtestvleniya VED v usloviakh Tamozhennogo soiюза', <http://www.tks.ru/practicum/2010/06/01/01>. Accessed 4 April 2014.

3 The timing of Russia's accession to the WTO and the founding of the CU was a matter of some controversy with the initial plan of entering the WTO as a single bloc replaced in favour of individual accession negotiations. The assurance of the compatibility of the commitments within the CU to Russia's WTO obligations was critical in Russia's accession process. See R. Connolly, 'Russia, the Eurasian Customs Union and the WTO', in R. Dragneva and K. Wolczuk (eds.) *Eurasian Economic Integration: Law, Policy and Politics*, (Cheltenham: Edward Elgar, 2013). While its tariff implications for the remaining CU members were subject to some debate and adjustment, the legitimacy and supremacy of the substantive rules of the WTO were not in question. Thus, the supremacy of the WTO *acquis* strengthens the rule-based nature of the CU legal order.

4 Treaty on the Functioning of the Customs Union in the multilateral trade system of 19 May 2011.

5 Treaty on the Eurasian Economic Commission of 18 November 2011.

6 The Collegium consists of nine members, or Ministers, three from each member state, appointed by the Supreme Eurasian Economic Council. These appointments are formally subject to professional qualification and independence requirements. The departments of the Collegium are staffed on an open, competitive basis, drawing on personnel in related ministries in the member states. See J. Cooper, 'The Development of Eurasian Economic Integration', in R. Dragneva and K. Wolczuk (eds.) *Eurasian Economic Integration: Law, Policy and Politics*, (Cheltenham: Edward Elgar, 2013).

Given the status and scope of the Commission's decisions, a very important institutional development has been the provision of judicial control over its decisions and actions. In particular, commercial actors were given the right to appeal such decisions and actions before the Court of the Eurasian Economic Community.<sup>7</sup> After much delay the Court was finally set up in 2012 and, significantly, its decisions were defined as binding. In its short life, the Court has proved to be active and not averse to ruling against the Commission.

However, despite the noted improvements, the legal regime remained fragmented and complex, lacking clarity and predictability and attracting strong criticism from the business community.<sup>8</sup> In response, a revision of the Code was undertaken, accompanied by the codification of the treaty basis of the Customs Union and the SES as part of the preparation for the Eurasian Economic Union. While the streamlining and simplification of the legal basis is extremely welcome, the quality of this reform process is not necessarily to be taken for granted, as will be discussed further below.

## DOMESTIC IMPLEMENTATIONS

As argued above, the CU and SES were underpinned by investment in the provision of a common body of substantive law, embodied in international agreements and the decisions of the bodies of integration. This investment, however, is not paralleled by sufficient attention to the institutional/organisational practices and domestic capacity in applying that law.

In principle, the alignment of domestic law and the CU/SES law is ensured, firstly, by the direct effect of the decisions of the common bodies on domestic law, and secondly, by the constitutional status of international agreements in domestic law, especially their supremacy over any conflicting provisions. Yet, clearly, the legal basis of the ever more complex economic integration agenda requires the implementing actions of a range of state bodies. This is the area where the credibility of the commitment to the project, as well as the domestic capacity for its implementation, are severely tested.

A noteworthy development has been that the Eurasian Economic Commission has been vested with the power to monitor the implementation of the agreements forming the treaty basis of the CU and SES. If there are grounds to believe that a member state is not implementing these, the Commission notifies it of the need for mandatory compliance within a reasonable period of time. If this does not produce results, the Commission can ultimately lodge a complaint with the Court of the Eurasian Economic Community. It is currently difficult to gauge the practical effectiveness of the monitoring powers of the Commission and its ability to rise to the challenge. Given the priority of preparing the Treaty on the Eurasian Union, codifying legislation as well as discharging its core regulatory duties, there has not been much spare capacity for, and therefore attention given to, monitoring.

The organisation, capacity and accountability of domestic administrative agencies, not unlike the case of other regional integration groupings, remain primarily a domestic affair. Other groupings, like the EU, contain or rely on the rule of law and good governance as an explicit aspect of the common project. So the strength of regional institutions is to a large degree a function of the level of political and economic development of the member states. In other words, the success of regional institutions ultimately depends on the quality of political and economic governance in the participating states.

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<sup>7</sup> Treaty on the application of commercial subjects to the Court of the Eurasian Economic Community in relation to disputes within the Customs Union of 5 July 2010.

<sup>8</sup> R. Dragneva, 'The Legal and Institutional Dimensions of the Eurasian Customs Union' in R. Dragneva and K. Wolczuk (eds.) *Eurasian Economic Integration: Law, Policy and Politics*, (Cheltenham: Edward Elgar, 2013).

In that respect, poor governance characterising the current and prospective member states – Russia, Belarus, Kazakhstan and Armenia – presents a severe test to the effective functioning of the union as a rules-based regime pursuing deep economic integration. Certainly, there are important differences between the member states: Belarus is largely free of low-level corruption, whereas Kazakhstan has the most business-friendly regulatory framework.<sup>9</sup> Nevertheless, there are important similarities: in all four countries policy-making and preference-formation are highly centralised at the top of the political establishment with the presidential institution being the main locus of power. This means that the objectives and visions of the presidents and the existing system of power (so-called *vertikal*) are primary determinants of the country's participation in Eurasian integration. Even if there is full commitment from the presidents, the sheer speed and scope of integration make its implementation unrealistic without broader fundamental reform and the modernisation of domestic institutions. This is a major faultline within the project.

As it is, new rules tend to be followed because the presidents have consented and given orders to adhere to them rather than because of the importance of complying with rules as an institutional characteristic of the rule of law in the member states. In that respect, the integration regime reproduces the domestic style of governance. In practice this means that it is those with access to the presidents who are most likely to influence the pace and degree of domestic implementation. In such a personality- and relationship-dependent context, the modernisation of domestic institutions – especially when they directly infringe on the vested interests of those close to the presidents – is unlikely to happen.

Indeed, it is possible to see that dominant business interests in the respective member states (primarily organised in the influential national business associations, which in some countries, are the only such body and is sponsored by the government) have been given privileged access to the key decision-making bodies of the CU and SES. The role of the 17 Consultative Committees in the work of the Commission has already been mentioned. A further step was taken in December 2012 when the Commission set up a Consultative Committee with the Belarus-Russia-Kazakhstan Business Dialogue with the task to provide input into the strategic direction and development of the CU/SES.

The importance of domestic factors has been recognised by some architects of the project. One argument expressed by a senior member of the Eurasian Economic Commission is that the very fact of having a modern framework based on open markets will lead to regulatory competition in favour of countries with better governance and increased pressure to remove administrative barriers across the CU.<sup>10</sup> While the argument is valid, this is a slow and uncertain option. Decades of transition experience in Eastern Europe have shown that economic liberalisation in itself, even with new laws on the books, does not nurture rule of law instincts in market actors, nor is it powerful enough to overthrow the deeply embedded *sistema* (system) of informal relations, corruption and oligarchic business.

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9 N. Kassenova 'Kazakhstan and Eurasian economic integration: quick start, mixed results and uncertain future' in R. Dragneva and K. Wolczuk (eds.) *Eurasian Economic Integration: Law, Policy and Politics*, (Cheltenham: Edward Elgar, 2013).

10 Authors' Interview, Moscow, 19 March 2014.

## CONSTRAINTS ON SOVEREIGNTY AND HEGEMONY

One of the persistent features of post-Soviet integration has been the reluctance of member states to sacrifice their newly-won sovereignty in favour of binding common arrangements. Accordingly, regional institutions were strictly intergovernmental and weak. Even when commitments were undertaken, they were rarely implemented. This dynamic was complicated owing to the hegemonic position of Russia in the region. Asymmetry has been a strong feature of integration and was invariably reflected in the institutional arrangements (for example, in the decision-making rules of the permanent regulators preceding the Eurasian Economic Commission where the distribution of weighted votes and the required majorities always ensured Russia's dominant position).

The launch of the CU and especially the SES, however, introduced limitations on both sovereignty and asymmetry. First, the power of the common bodies, the Eurasian Economic Commission in particular, to issue directly binding decisions has already been mentioned. Second, the lower tier of the Commission, the Collegium, was empowered to decide by a two thirds majority, thereby meaning that a country could be outvoted. In a break with previous practices, votes are allocated on a 'one country-one vote' principle, thus for the first time making it possible for Russia to be outvoted in the Collegium. Third, in the event of a dispute involving a member-state before the Court, the decision of that Court is binding on the member state. Thus, a ruling against Russia should bind Russia.

Upon closer inspection, however, this change in formal design is not as radical as it may seem. Firstly, sensitive decisions are placed not with the Collegium, but instead with the upper tier of the Commission, the Council, which decides by consensus. If the Commission Council cannot reach consensus, the matter is brought before the Supreme Eurasian Economic Council which also works by consensus. Secondly, any member state can request the revocation of any decision of the Collegium within 10 days of its adoption. In any event, a head of government may bring before the Supreme Council any decision of the Commission before it has entered into force. Finally, while the decisions of the Court are deemed to be binding, there is no guaranteed enforcement of those decisions.<sup>11</sup> The Statute of the Court provides that if there is no implementation within a given period of time, the aggrieved party can turn to the Supreme Council, or in other words, seek a high-level, political remedy.

Thus, existing arrangements do not include an irreversible delegation of decision-making on any issue or a rule-based restriction on the commitment of member states if they deem it to be contrary to their interests. Clearly, much depends on the actual commitment to implementation and compliance, formulated by and directed from the highest level of policy-making. But it is also evident that the flexibility of commitment remains prized. Given the massive asymmetries between Russia and other post-Soviet states, Russia has not needed to pool sovereignty with smaller and weaker partners, and has asserted its superior bargaining power using a variety of means, such as bilateral 'energy diplomacy' vis-à-vis Belarus.<sup>12</sup> This tendency, as recent geopolitical developments in Ukraine show, is unlikely to diminish in the least. Russia's partners, in turn, have reasons to be reluctant to cede excessive powers to such a grouping. Ultimately, to placate concerns over sovereignty as well as to achieve the greater geopolitical goal of region-building, some concessions towards the smaller member states have been made at the formal level. They are likely to be retained in the new EEU.

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<sup>11</sup> Most decisions of the Court to date have concerned acts of the Commission, which has complied with the rulings made. It is yet to be seen how a member state will behave in a ruling against it, especially if sensitive issues are concerned. As the only inter-state dispute related to the Customs Union shows (i.e. the complaint filed by Belarus against Russia's export tariffs on oil and petrochemicals in 2011), it was ultimately dealt with not by judicial but diplomatic means.

<sup>12</sup> For example, while unable to secure the concessions on export tariffs and taxation within the Customs Union, Belarus signed the Customs Code in July 2010 after Russia threatened to cut energy supplies to Belarus. See M. Frear 'Belarus: Player and Pawn in the Integration Game' in R. Dragneva and K. Wolczuk (eds.) *Eurasian Economic Integration: Law, Policy and Politics*, (Cheltenham: Edward Elgar, 2013).

Asymmetries in the bargaining power of the member states undoubtedly remain a pivotal feature of the integration regime. Given the nature of dependencies, Russia will retain the last say in determining trade-offs, at least with regard to Belarus and Armenia. For example, as energy remains outside the multilateral framework, Belarus will continue to be highly sensitive to bilateral bargaining with Russia. Similarly, Armenia's security and economic dependencies on Russia are likely to limit any divergence from the Russian position (something already demonstrated by the Armenian position on the annexation of Crimea). Thus, even if the official discourse of 'equality' of partnership within the EEU is maintained, these dependencies render formal, treaty-related constraints on asymmetry of lesser relevance.

## DEEPENING INTEGRATION

The Eurasian integration project has undergone rapid development from the launch of the Customs Union in 2010 to the Eurasian Economic Union currently planned for 2015. The analysis of the development of integration shows that its directions, scope and time frame are decided *a priori* at the highest level of policy-making. These tend to be preferences driven primarily by political or geo-political considerations, formulated at the peak of political power (the so-called *vertikal*) in the respective member states. This combination of top-down and rapid nature of the integration process has several important implications for the viability of the project.

First, even if politically or geopolitically motivated this is a project with huge economic consequences. Yet there is little evidence that economic rationalisation has determined the pre-scripted scope and pace of integration. There is very little economic justification or evaluation of respective 'integration steps' before they are taken. In fact, given the overlap and multiplicity of processes, such an evaluation is likely to be highly problematic and inaccurate. Certainly, there has been no comprehensive cost-benefit analysis in individual member states. Some analysis has been undertaken by the Eurasian Development Bank, yet it has focused specifically on the potential expansion of the Union. Furthermore, the origin of Eurasian integration cannot be traced to 'domestic coalitions' favouring modernisation, thus offering little evidence of bottom-up demand by domestic state and economic actors in the member states.

Second, the top-down drive of the project means also that its legitimacy and sustainability have become closely connected with the personality of the respective leaders promoting it. Apart from the obvious vulnerability to leadership changes, which the nature of political regimes at present minimises, the success of integration becomes dependent on perpetuating those political regimes.

Third, the fast development of integration with tight, politically-driven deadlines also has important implications for the quality of regulation. There are few signs of thorough deliberations on the justification, desirability and functionality of the regulatory templates that are being adopted at such a rapid pace. The reference to ready-made regional and international models certainly reduces *ex ante* costs, yet does not guarantee *ex post* effectiveness, as evidenced by decades of worldwide experience in legal transplants from international to domestic law. Especially over the last couple of years, attention has been directed at negotiating a new comprehensive treaty on the EEU as well as codifying the legal basis of the CU and SES, discharging core regulatory duties and preparing for enlargement. The scale of the task is enormous not only because of the breadth of the agenda but also due to the state of the pre-existing legal regime, which is characterised by fragmentation and incremental development, with numerous cross-references and grey areas. Thus, the fast and top-down integration formula carries a high risk of being decoupled from officially proclaimed goals and actual achievements.

## EXPANDING THE UNION

In parallel to the deepening of integration, the expansion of the Union has been pursued vigorously. However, it is highly indicative that it is Russia who has favoured simultaneous widening and deepening of the integration regime, whereas other member states, particularly Belarus and Kazakhstan, have been much less vocal on expansion.

Even though the Kazakh leadership enthuses over the Eurasian project in domestic debates, in interactions with his Russian and Belarussian counterparts, President Nazarbayev stresses the importance of ensuring that the regime lives up to expectations and delivers economic benefits for the existing member states. The Kazakh motivation to join the Eurasian regime is predominantly political, but it is clear that the economic implications cannot be neglected, especially as large parts of the business community in Kazakhstan have been adversely affected by higher tariffs, which seems to favour Russian producers. Belarus is not preoccupied with enlargement either. Belarus's interest is actually in maintaining the Eurasian regime as a relatively exclusive club thereby enhancing the relative importance of Belarus for Russia. However, despite the low priority of enlargement for Belarus and Kazakhstan, neither of them appear to object to Russia's quest for expansion and, most importantly, to the means by which this is to be achieved.

Russia has strong geopolitical motives for bringing new members in, not least to contain the influence of the EU vis-à-vis such countries as Ukraine, Armenia and Moldova. However, the expansion has been problematic. Only two Central Asian states, Kyrgyzstan and Tajikistan, expressed an interest in joining the ECU on a voluntary basis and only one of them, Kyrgyzstan, is actually negotiating accession. However, it is recognised that the country is far from able to take on the commitments related to participation in the EEU single market. It is not only the general weakness of domestic institutions but also the fact that Kyrgyzstan is unable to secure its borders which makes the country's accession to the customs union alone a very ambitious goal. In economic terms, Kyrgyzstan would add little and indeed the participation of such an economically weak and institutionally underdeveloped country is regarded by many as a liability for the Eurasian project.

The accession of Armenia, which is progressing faster, provides further insights into the 'mechanics' of enlargement, as outlined in Laure Delcour's contribution in this report.<sup>13</sup> However, it also raises two important interrelated issues:

First, the quest to admit new members before the actual union is well established and consolidated carries significant risks. In many respects, it replicates the problems observed in the progress of integration: the generation of many regulations with insufficient attention paid to implementation in the prospective member states. Thus the lopsided nature of integration – observable in the existing member states – will be replicated in the new ones. With regard to new members, this problem is compounded by a lack of diffusion networks with officials trained and familiar with the newly developed regulatory templates.

Second, the type of 'invitation' also undermines the credibility of commitment with regard to Armenia. The top-heavy, secretive discussions between the Russian and Armenian presidents, which resulted in the decision on Armenia to join the Eurasian regime in September 2013, were not preceded by any debates inside the country on the economic justification and rationale for such a move. Inside the country, Armenia's accession is regarded as a security decision rather than a commitment to participate in the common regulatory regime as evidenced by the limited interest amongst the domestic state and non-state actors in the content of the roadmap on Armenia's preparations for accession. Russia's clear geopolitical interest in securing Armenia's membership is matched by and reflected in the strength of Armenia's security motives. While this combination accounts for Armenia's U-turn, it casts doubt over the genuine commitment to the formally proclaimed goal of integration, namely the creation of a single market.

<sup>13</sup> pages 38-45

The deployment of SES/EEU as a foreign policy tool by Russia thus has important longer-term implications for the viability of the project, especially given the weak credibility of commitment amongst the member states. It could be argued that the more geopolitical the project becomes for Russia, the less attention will be paid to its economic underpinnings and rationale amongst the other member states. This is another significant faultline.

## **CONCLUSION: BETWEEN INTEGRATION AND GEOPOLITICS**

The Eurasian project has increasingly been seen as Putin's attempt to remedy the collapse of the Soviet Union and reassert Russia's role as a geopolitical leader and its status as a great power. Accordingly, much of the legal and institutional content of the CU and SES has been overlooked, including the important domestic implications of its existence. This content, we argue, contains elements which distinguish it clearly from previous regional integration initiatives in the post-Soviet space. This regime – and certainly the CU at its core – is not likely to disappear. International and domestic businesses are already affected by it – from customs clearance and food safety certification to anti-dumping proceedings.

Yet, it is also clear that the corpus of rules of the regime remains firmly embedded in and dependent upon the dominant political and economic systems of the member states. The integration project is also critically tested through a process of fast and simultaneous deepening and widening. This poses significant questions about the effectiveness and sufficiency of the steps taken at the level of formal design.

Importantly, Russia's policy towards Ukraine has become an important stress-test for the new integration regime. So far, the position that Belarus, Kazakhstan and Armenia have taken on Crimea suggests that the SES is a pliant tool for Russian foreign policymaking. But it will be the sensitive issue of the formal recognition of Crimea as a legitimate subject of the Russian Federation that will indicate the extent to which membership of the EEU translates into compliance with the geopolitical interests of the dominant state.

Moreover, Russia has indicated its willingness and determination to 'punish' Ukraine as well as other countries, such as Moldova and Georgia, for pursuing closer economic integration with the EU through Association Agreements. However, with the SES/EEU, Russia's ability to use some of their instruments, such as the application of anti-dumping duties, is constrained by the fact that these are now clearly competencies of the SES/EEU as a whole.<sup>14</sup> So it remains to be seen whether the current and prospective member states will agree on the adoption of punitive duties vis-à-vis other post-Soviet states.

Nonetheless, using the SES/EEU as a geopolitical device is unlikely to be a cost-free policy without consequences for the integration project at large. On the one hand, it will underline the hegemonic position of Russia within the bloc, thereby triggering sovereignty sensitivities in the member states. On the other hand, if the other member states, such as Belarus and Armenia, comply with Russian geopolitical preferences on the external trade relations with non-member states, it is likely that these states may demand pay-offs and concessions for their 'geopolitical loyalty' within the common economic regime. With particular interests prevailing, this would weaken the viability of the proposed single Eurasian market, even though the project is unlikely to be abandoned any time soon. Notwithstanding all the achievements and improvements in the macro-design, it remains to be seen whether the project will share the fate of other 'virtual' integration projects in the post-Soviet space. ■

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<sup>14</sup> The trade restrictions imposed on Ukraine by Russia in the summer of 2013 were applied on a bilateral basis and no acts were adopted by the Customs Union as a whole, although some discussions are likely to have taken place. Belarus and Kazakhstan imposed some restrictions on Ukrainian exports on a bilateral basis but on a lesser scale than Russia.