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Exploring the legal challenges of complying with overlapping international obligations related to public procurement review mechanisms

Case-studies of Armenia and Kazakhstan

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Thesis submitted to the University of Nottingham for the degree of

Doctor of Philosophy

January 2020

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To my grandparents

Acknowledgements

Since I started my PhD journey in 2016, the draft of the acknowledgements was in my mind as a light in the end of the tunnel. The day, when I can put my words of gratitude on paper, has finally arrived.

First and foremost, I would like to thank my super supervisors, Dr Aris Georgopoulos and Dr Narine Ghazaryan, for their unfading professional and personal support, guidance and encouragement all these years. It is Dr Georgopoulos' "fault" that I decided to dive into the world of academic research for which I will be eternally grateful. Dr Ghazaryan spoke Armenian to me and gave me the sense of home when I needed it the most. My PSA Professor Sue Arrowsmith included me in research projects and supported my aspirations to publish. Professor Jeffrey Kenner allowed me to teach. My examiners Mr Robert Anderson and Dr Ping Wang provided insightful comments helping to enhance the thesis.

The School of Law of the University of Nottingham generously covered my tuition fee and the AGBU helped me with living expenses. Without these contributions, the following piece of research would not see the light.

Huge thanks to my colleagues in the EBRD (Eliza Niewiadomska, Evgeny Smirnov), the OECD (Paulo Magina, Lena Diesing), the European Commission (Justyna Balasinska) and Eriks Mezalis for keeping me in the loop of the recent trends in the public procurement area and for their belief in me. I owe special words of gratitude to the WTO Secretariat for accepting me in their Doctoral Support Program and allowing writing up this thesis in a nice office near the Lake. Anna Caroline Mueller was my designated mentor who, besides comments and critical assessment, provided tickets to a relaxing yoga song concert.

More than three years of researching and writing can be an exhausting activity. I am indebted to my friends: Asya for around 15 years of friendship that I know is forever; Anna and Mariam for finding joy in everything; Alice, Arev and Gayane for the years in the Ministry of Finance; Ani for adventures and trips; Richard, Nobel and Sebastian for trust; Usmaan for never-ending kindness; Matt and Sarina for hospitality; Elena and Elisabetta for accepting me into the Italian community; Nina and Lusine for making Amstelveen a second home; Tim for.. well, being Tim; Cerys for being the most amazing house and office-mate anyone could ever wish for; Daniela for the lightness; Ralitsa for being a role model. Your presence in my life is much appreciated and I know, sometimes it was not easy!

It was even less easy for my family that was always by my side. My father Vahram taught me the importance of education and perseverance. My mother Hasmik's advice, guidance and recipes helped me to survive in UK. My sister Lilit is my biggest critic and fan, my sister Mane is a source of happiness, my grandfather Razmik's life is an inspiration for me, my grandmother Julietta is waiting for me to graduate and "finally get married", and I know my grandparents Zhora and Emma would be very proud of me.

Finally, I would like to thank my extended (huge Armenian) family and all the people that were in my life on a long or short-term basis. You are all valued and appreciated!

Abstract

The creation of the World Trade Organisation did not end the practice of signing regional trade agreements with states demonstrating a preference for regionalism over multilateralism. Fragmentation of international trade law and public procurement regulation brought by proliferation of regional trade agreements is a reality and a potential source of conflict of norms. Reflecting on the theory of fragmentation of international trade law in general and public procurement regulation in particular, this thesis analyses procurement review mechanisms found in multiple international trade agreements signed by two countries, namely Armenia and Kazakhstan. The World Trade Organisation Agreement on Government Procurement (GPA), the Eurasian Economic Union Treaty covering 5 post-Soviet states and the most recent EU bilateral agreements with Armenia and Kazakhstan are examined in order to reveal instances of conflict of norms involving procurement review mechanisms. The analysis of the relevant agreements is based on the study of geopolitical realities of both countries, which can have an impact on their international obligations.

Horizontal comparative analysis is conducted to identify cases of conflict of norms among the provisions of the mentioned four trade agreements related to procurement review mechanisms. Through vertical comparative analysis, the compliance of the national legislation of Armenia and Kazakhstan with the requirements of the relevant trade agreements is examined. The thesis reveals that the multiplicity of international treaties can indeed have a negative impact on the simultaneous compliance with (conflicting) international obligations by Armenia and Kazakhstan.

Table of Acronyms

AA	Association Agreement
AMD	Armenian Dram
APEC	Asia Pacific Economic Cooperation
CEPA	Comprehensive and Enhanced Partnership Agreement
CIS	Commonwealth of Independent States
CRTA	Committee on Regional Trade Agreements
CU	Customs Union
DCFTA	Deep and Comprehensive Free Trade Agreement
EAEU	Eurasian Economic Union
EaP	Eastern Partnership
CJEU	Court of Justice of the European Union
EEC	European Economic Community
ENP	European Neighbourhood Policy
EPCA	Enhanced Partnership and Cooperation Agreement
EU	European Union
EUR	euro
EurAsEC	Eurasian Economic Community
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GPA	Agreement on Government Procurement
ICJ	International Court of Justice
ILC	International Law Commission
IP	Intellectual Property
ITO	International Trade Organisation
MFN	Most Favoured Nation
MS	Member State
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisations
OECD	Organisation for Economic Cooperation and Development
OJEU	Official Journal of the European Union
OSCE	Organisation for Security and Cooperation in Europe
PCA	Partnership and Cooperation Agreement
PPP	Public Private Partnership
PRB	Procurement Review Board
PSC	Procurement Support Centre
RTA	Regional Trade Agreement
SME	Small and Medium Enterprise
SPA	State Procurement Agency
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UfM	Union of Mediterranean
UN	United Nations
UN CAC	United Nations Convention Against Corruption
UNCITRAL	United Nations Commission on International Trade Law
USA	United States of America
USD	United States Dollar
USSR	Union of Soviet Socialist Republics
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation
WWI	World War I

WWII	World War II

Chapter 1: Introduction

1. Research background

Trade liberalisation was at stake already in the 19th century when a customs union (CU) was created among 18 German states in 1834,[1] and the Cobden Chevalier Treaty was signed between Britain and France in 1860.[2] Though these and other trade agreements signed afterwards provided for better trade conditions between the signatories, some scholars argue that they "split Europe" leading to WWI.[3] Regional and bilateral agreements were also seen as a major reason for the Great Depression and WWII.[4] Only after WWII was over, countries came together to create a new, multilateral auspice for international trade. As a result, in 1948 the GATT came into force, the main driving force of which was the Most-Favoured Nation (MFN) treatment.[5]

Despite the intention to establish multilateralism as the main mode for regulating international trade, since the end of WWII, an unprecedented number of regional trade agreements (RTAs) have been signed, usually taking the form of free trade agreements (FTA) but also, to a lesser extent, CUs and other types of agreements.[6] Before the creation of the World Trade Organisation (WTO), from 1948 to 1994, 124 regional trade agreements were notified to the GATT Secretariat, whereas 400 additional arrangements were notified to the WTO from 1995 onwards.[7]

Considering that the vast majority of the WTO members are parties to one or more RTAs,[8] it becomes clear that countries undertake commitments in addition to the ones undertaken under the WTO, thus fragmenting trade law and creating what has been termed as a "spaghetti bowl"[9] of different multinational, regional and

[1]See Sungjoon Cho, "Breaking the Barrier Between Regionalism and Multilateralism: A New Prospective on Trade Regionalism", (2001) Harvard International Law Journal, Vol. 42:2, 420.
[2]See Adrian M Johnston and Michael J. Trebilcock, "Fragmentation in international trade law: insights from the global investment regime", (2013) World Trade Review, Vol. 12:4, 621-652.
[3]See Sungjoon Cho, "Defragmenting World Trade", (2006) Northwest Journal of International Law and Business, 27:39, 46.
[4]See Edward D. Mansfield and Helen V. Milner, "The New Wave of Regionalism", (1999) International Organisations 53:3, 597.
[5]See Article I:1 of the GATT, viewed at: https://www.wto.org/english/docs_e/legal_e/gatt47.pdf.
[6]See Viet D. Do and William Watson, "Economic Analysis of Regional Trade Agreements", in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System*, (Oxford University Press 2006, reprinted in 2010), 8.
[7]Official numbers given by WTO can be viewed at: https://www.wto.org/english/tratop_e/region_e/regfac_e.htm.
[8]See RTA database of the WTO. Viewed at: http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx.
[9]See Antoni Estevadeordal and Kati Suominen, "Disciplining Trade Agreements: Toward Multilateralization?", in Antoni Estevadeordal and Kati Suominen (eds), *The sovereign Remedy?: Trade Agreements in a Globalizing World*, (Oxford University Press 2009), 159.

bilateral trade agreements. The phenomenon of "spaghetti bowl effect", coined as such by Bhagwati in 1995, is a much-debated topic in academic literature.[10] Many commentators, including Bhagwati, consider the phenomenon to have a negative effect on international trade by adding costs,[11] increasing trade diversion[12] and resulting in "significant negative relationship between the number of RTAs concluded by a country and the additional trade value attributed to an RTA conclusion".[13] Others see numerous overlapping RTAs as "building blocs" helping to multilateralise international trade[14] while stressing that the statistical data on the negative effect of "spaghetti bowls" is inconclusive.[15] As discussed in the subsequent chapters of the thesis, the most important consideration is whether the fragmentation of international trade (public procurement regulation) and the "spaghetti bowl effect" can create conflict of norms contained in various trade agreements signed by a single country.

From the perspective of the WTO Agreements, although there are some basic provisions laid down in GATT Article XXIV[16] governing the creation and operation of CUs and FTAs, there is a lack of appropriate ongoing oversight from the WTO. This might result in countries signing RTAs containing provisions contradicting their obligations under the WTO. In some cases, even in the absence of formal contradiction, the signature of many RTAs might render compliance with WTO obligations more cumbersome.

It can be assumed that because of the existence of Article XXIV,[17] the GATT should take precedence over any RTA and hence, multilateralism should be preferred over regionalism. As a matter of international law though, international treaties do not have hierarchical order. Only the UN Charter Article 103 sets out that in case of conflict between the obligations under the Charter and another international

[10] See Jagdish Bhagwati, "US Trade Policy: The Infatuation with FTAs", (1995) Discussion Paper Series No 726, 4.
[11] See Ibid.
[12] See Jayant Menon, "Dealing with the Proliferation of Bilateral Trade Agreements", (2009) World Economy, Vol. 32:10, 1381-1382.
[13] See Zakaria Sorgho, "RTA's Proliferation and Trade-Diversion Effects: Evidence of the "Spaghetti Bowl" Phenomenon", (2016) World Economy, Vol. 39:2, 297.
[14] See Richard Baldwin, "Multilateralising Regionalism: Spaghetti Bowls as Building Blocs on the Path to Global Free Trade", (2006) The World Economy, Vol. 29:11.
[15] See Elina Fergin, "Tangled up in a spaghetti bowl – trade effects of overlapping preferential trade agreements in Africa", (2011) Bachelor Thesis in Economics, University of Lund, 34.
[16]See WTO Analytical Index: Interpretation and Application of WTO Agreements, viewed at: https://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_09_e.htm.
[17]Specifically, Art. XXIV:7(a) mentions that states wishing to conclude CUs, FTAs or interim agreements leading to the signature of one or the other, shall inform other WTO parties and shall provide them with information necessary to adopt "reports and recommendations".

agreement, the Charter obligations prevail.[18] In all other cases, treaties have equal force.[19] This means that there is no obligation for the RTAs as international treaties to comply with the requirements of the WTO agreements as the latter have no higher legal force.

Some scholars suggest looking at the GATT-RTA relationship from a "federalist" perspective, where RTAs are not "exceptions" to the general rules of GATT but rather co-existing systems with the requirement for RTAs to comply with the main GATT provisions.[20] This approach is beneficial from a policy point of view as there might be political pressure for signing some RTAs (e.g. Russia pressuring Armenia to sign the Eurasian Economic Union Treaty (EAEU Treaty) as discussed in Chapter 4).[21] In practical terms, the federalist approach seems to be adhered to, as until now the WTO did not produce reports on any RTA compliance with the GATT. As acknowledged by the WTO Panel in the *Turkey-Restrictions on Imports of Textile and Clothing Products* case: "the Committee… has been unable to finalise reports on any of examinations. Progress in this regard was slowed, inter alia, by the disagreement among Members on the interpretation of certain elements of those rules relating to RTAs, as well as on procedural aspects".[22] Hence, no ruling is issued on a possible hierarchy of the trade agreements or on the compliance of any RTA with the WTO norms.

The continuing increase of the RTA numbers also highlights the fact that there was a major shift from multilateralism pursued by GATT (and later by the WTO) towards regionalism. This creates the problem of fragmentation of international trade law affecting *inter alia* the area of the focus of the current research, namely, public procurement. Until now, the phenomenon of fragmentation of this area has not attracted the amount of attention from academic commentary that is warranted by the inclusion of public procurement almost as a standard area of coverage in modern trade agreements. Such inclusion requires the members to the RTAs to adapt national legislation according to the norms of respective trade agreements,

[18]See Charter of the United Nations, Chapter XVI: Miscellaneous Provisions, viewed at: http://legal.un.org/repertory/art103.shtml.

[19]See Thomas Cottier and Maria Foltea, "Constitutional Functions of the WTO and Regional Trade Agreements", in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System*, (Oxford University Press 2006, reprinted in 2010), 51.

[20]See supra note 1, 451.

[21]See David G. Tarr, "The Eurasian Economic Union of Russia, Belarus, Kazakhstan, Armenia and the Kyrgyz Republic: Can It Succeed Where Its Predecessors Failed?", (2016) Eastern European Economics 54, 16-17.

[22]See *Turkey-Restrictions on Imports of Textile and Clothing Products,* WT/DS34/AB/R, 22 October 1999, para. 2.9.

some of which may be detailed, revealing the potential tension that may arise as a consequence of the fragmentation.

2. Fragmentation of public procurement regulation

One of the widely accepted definitions of public procurement is "the acquisition of goods, services and works by government authorities required for the fulfilment of their needs".[23] This area is now considered a key part of international trade law helping to open domestic markets for suppliers, goods and services originated in other signatory states.

Though public procurement is currently recognised as an important vehicle for trade liberalisation, this was not always the case. Until the 1970s, public procurement provisions were not included in the main trade agreements.[24] The exclusion of the procurement rules from the Havana Charter for International Trade Organisation and the GATT is largely attributed to the differences between the major players of the field (the USA and the European Economic Community (EEC)).[25] Later, the Organisation for Economic Cooperation and Development (OECD) played an important role by undertaking the "cross-fertilisation" of the USA and EEC policies in the public procurement area and transferring the results of its work to Geneva for the discussions in the Tokyo round.[26] Since then, public procurement was addressed within the context of international trade rounds.

The first WTO Agreement on government procurement (hereinafter GPA or the Agreement) concluded in 1979 was very limited in its coverage[27] but all the subsequent texts of the agreement proved the will of the parties to extend the coverage both in terms of the entities and the sectors covered. The revised Agreement was finalised in March 2012 and entered into force on 6th of April 2014

[23]See for example Sue Arrowsmith, John Linarelli and Don Wallace Jr, *Regulating Public Procurement: National and International Perspective*, (Kluwer Law International 2000), 1.
[24]See Robert D. Anderson and Anna Caroline Muller, "The Revised WTO Agreement on Government Procurement (GPA): Key Design Features and Significance for Global Trade and Development", (2017) 48 Geo J. Int'l L., 956.
[25]See Steve Woolcock, "Policy Diffusion in Public Procurement: The Role of Free Trade Agreements", (2013) International Negotiations 18:1, 162.
[26]Tokyo Round refers to the round of GATT negotiations lasting from 1973 to 1979 with 102 participating countries. It is famous for being the first attempt to reform the system and one third cut of customs duties. See "The GATT Years: From Havana to Marrakesh", viewed at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm; see also Gabriel Marceau and Annet Blank, "History of Government Procurement Negotiations Since 1945", (1996) Public Procurement Law Review, Vol. 5, 77.
[27]See Bernard Hoekman and Petros Mavroidis (eds), *Law and Policy in Public Purchasing: the WTO Agreement on Government Procurement*, (University of Michigan Press 1997), 41.

when two third of Parties deposited their instruments of acceptance.[28] Unlike the vast majority of the agreements under the auspices of the WTO, the GPA is plurilateral, meaning that the countries are not obliged to join the agreement when joining the WTO. This feature will have some implications when discussing the conclusion of RTAs containing public procurement provisions.

Thus, before 2011, the GPA was largely considered an "elite club" as at that time only developed countries with well-functioning economies were parties to it.[29] Though the GPA parties covered a large volume of procurement[30] developing countries were reluctant to join the agreement thus limiting its potential impact. From 2011 onwards, a new trend can be observed amongst developing countries especially from the post-Soviet region towards joining the GPA.[31]

Though the GPA is becoming more attractive and gains more weight in international trade, still the limited membership and coverage[32] might not suit the procurement liberalisation plans of the current GPA parties. This leads to proliferation of procurement rules in regional trade agreements signed by them.[33] Recent research showed that most of the RTAs notified to the WTO contain some provisions on procurement (some have extensive provisions regulating the procurement process and introducing coverage, the others contain just one or two lines on the desirability of opening of procurement markets for foreign competition).[34] The analysis also showed that many countries used the GPA as a source of inspiration when drafting

[28]See WTO: 2014 News Items, "Revised WTO Agreement on Government Procurement Enters into Force", 6 April 2014. Viewed at: https://www.wto.org/english/news_e/news14_e/gpro_07apr14_e.htm.

[29]See Christopher R. Yukins and Johannes S. Schnitzer, "GPA Accession: Lessons Learned on the Strengths and Weaknesses of the WTO Government Procurement Agreement", (2015) 7 Trade Law & Development Journal, 102.

[30]See supra note 26, 289.

[31]Moldova and Ukraine joined the GPA in 2016. Georgia, Kyrgyz Republic, Russian Federation and Tajikistan are in the list of acceding countries and Kazakhstan and Belarus were granted observer status.

[32]As of June 2019, the GPA has 20 Parties (EU and its 28 Member States are counted as one Party), 9 more countries are in the process of accession. See Parties, Observers and Accessions, viewed at: https://www.wto.org/English/tratop_e/gproc_e/memobs_e.htm.
Regarding the coverage, Parties list central entities, sub-central entities and other entities as well as covered goods, services and works as Annexes to their Agreement. The Agreement applies only to the procurement value of which is above the thresholds mentioned in the Annexes of each Party to the Agreement.

[33]See Stephanie Rickard and Daniel Kono, "Think Globally, Buy Locally: International Agreements and Government Procurement", (2014) Rev. Int.Organ 9, 336.

[34]See Robert Anderson, Anna Caroline Mueller, Kodjo Osei-Lah, Josefita Pardo de Leon and Philippe Pelletier, "Government Procurement Provisions in Regional Trade Agreements: A Stepping Stone to GPA Accession?" in Sue Arrowsmith and Robert Anderson (eds), *The WTO Regime on Government Procurement: Challenges and Reform,* (Cambridge University Press 2011), 577.

the public procurement chapters of RTAs.[35] As a result, commentators observed that there is "relatively little "spaghetti bowl" effect" in terms of public procurement regulation.[36]

Even though the discussed analysis is an in-depth study of the RTAs containing procurement provisions, it should be noted that the public procurement chapter of the EAEU Treaty[37] – a new emerging reality in the post-Soviet area – was not considered. Interestingly, the procurement provisions of the EAEU Treaty (Article 88 and Annex 25) are constructed on a completely different logic than the legislations of the most GPA parties and the GPA itself. This can be explained by the fact that Russia as a founding member of the EAEU and the so-called "hub country" pushed its own legislation as a basis for the EAEU procurement rules. None of the founding members of the EAEU (Russia, Kazakhstan, Belarus) is currently a GPA party[38] so they have no legal obligation to amend the EAEU Treaty or to bring their procurement legislation in compliance with the GPA mandatory requirements. The same cannot be claimed for Armenia.

3. The research question and the hypothesis

The co-existence of the plurilateral GPA and increasing number of RTAs with detailed procurement provisions may give rise to fragmentation that renders the compliance with commitments that arise from different international regulatory instruments legally and/or practically difficult. The present thesis tries to explore the extent to which such challenges exist by exploring the legal and practical difficulties that arise for signatories of various international trade agreements in a specific area of procurement regulation: the creation and operation of public procurement review mechanisms.

The focus on the review mechanism is justified considering the following elements. First, the transposition of commitments regarding the review mechanism that arise from various international trade agreements raises challenges that involve not only the process of law making but also of institution building.

[35]See Robert Anderson, Anna Caroline Mueller and Philippe Pelletier, "Regional Trade Agreements and Procurement Rules: Facilitators or Hindrances?", EUI Working Papers, RSCAS 2015/81, 9.
[36]See supra note 33, 656.
[37]See the English translation of the EAEU Treaty. Viewed at: http://www.un.org/en/ga/sixth/70/docs/treaty_on_eeu.pdf.
[38]See supra note 31.

Second, the existence of a national review mechanism is important for both international trade and local suppliers. From the perspective of international trade, the WTO (RTA) dispute settlement accommodates the resolution of disputes between the states only.[39] The aggrieved international suppliers in fact have limited chance to protect their rights and redress their grievances through these dispute settlement systems for a number of reasons. To begin with, it is a difficult and usually a politically sensitive issue to persuade the state to bring a complaint using the WTO or RTA dispute settlement mechanisms. Moreover, the settlement of disputes on such a high level takes a long time and the momentum to remedy the (in)action is lost. The importance of having domestic review mechanism was also highlighted by the outcome of the *Trondheim* case, where the Panel failed to prescribe any specific action, although it found Norway responsible for violating its obligations.[40] From the local perspective, the reasons for having an unbiased review system are numerous, including the fight against corruption[41], prevention of illegal actions by the procuring entities[42] and development of future procurement legislation.

As a starting point for this research and as a working hypothesis it will be assumed that in practice it is possible to comply with the requirements of different international trade agreements in relation to procurement review mechanisms, but this comes at a cost. States might have fewer policy options concerning the institutional set up and procedural rules of their review forums. They would also most probably have to undertake legislative reform to comply with all international obligations.

To illustrate the research question, it is worth referring to and comparing the provisions of the GPA and the EAEU Treaty that establish the obligations of signatories regarding the institutional set-up of review mechanisms. Art. XXVIII of the GPA *obliges* the parties to allow the aggrieved suppliers to refer complaints either to the judicial review or to an impartial administrative body that is independent of its procuring entities. If the review body is not a court, it shall follow special procedural rules of Art. XVIII:6 or decisions should be subject to judicial

[39]See Art. XX:2 and Art. XX:3 of the GPA.

[40]See Isabel Dendauw, "New WTO Agreement on Government Procurement: an Analysis of the Framework for Bid Challenge Procedures and the Question of Direct Effect", (2000) Journal of Energy and Natural Resources Law, Vol. 18:3, 255.

[41]See Wayne Sandholtz and Mark Gray, "International Integration and National Corruption", (2003) International Organization, Volume 57: 4, 761-800.

[42]See Steven L Schooner, "Implementing GPA compliant domestic review procedures: insights from International Experience", viewed at: https://www.wto.org/english/tratop_e/gproc_e/symp_feb10_e/schooner_5_e.pdf.

review. The GPA, hence, provides its parties with several options. They can have a system allowing a review within the procuring entity; the review can also take place in a non-independent administrative body (this can be e.g. the regulatory and/or controlling body); and, finally, the supplier can refer to administrative independent body or judicial authority. Except for the review by an independent administrative or judicial body, the other two tiers can be either optional or mandatory.

Point 37 of Annex 25 of the EAEU Treaty rules that each Member State (MS) shall ensure availability of regulatory and/or controlling authorities in the sphere of public procurement. The provision goes on to explain that the functions of control (inspections); review of complaints; prevention and detection of violations of the procurement legislation of the MS; taking measures to remedy the violations as well as creation and maintenance of a mala fide suppliers list can be carried out by a single authority. From the text of the EAEU Treaty it becomes obvious that the MS essentially have two possibilities for the institutional set-up of their review bodies: either to entrust the review to existing controlling/monitoring bodies or to have a tiered system (controlling/monitoring body combined with judicial review as a second tier).

If a country is a member to the GPA and the EAEU Treaty, it does not have all the options described above. The country cannot trust only its judicial system for the review, as the EAEU Treaty does not envisage such possibility. Trusting the regulatory and/or controlling body might be acceptable for the GPA only in case its decisions are subject to judicial review (a possibility that again could not be found in the EAEU Treaty, but which, as will be discussed later, is possible considering the Constitutions of the countries under examination). The creation of an independent administrative body is also unacceptable under the EAEU Treaty, as this option could not be found in the text of the agreement. Hence, the only viable solution for a country member to both treaties is to entrust the review to a non-independent body with a further possibility of judicial review.

This shows that signatories of more than one trade agreement containing procurement provisions may find themselves with limited choices regarding the implementation of the overlapping commitments. The “spaghetti bowl” of treaties in the field of international trade law covering to some extent also the area of public procurement is an indisputable reality. This does not mean that the norms of these treaties should be in "real" conflict thus depriving the signatory states from the possibility to comply with all the undertaken obligations. It might well be the case that after careful examination the “conflict” will just be an "apparent" one in which case the states can still comply with their obligations but they might not be able to

fully utilise their rights related to the set-up and operation of procurement review mechanisms. [43]

4. The choice of the case studies

The thesis tests the main hypothesis through two case studies. The Republic of Armenia, one of the case studies, is in the centre of the "spaghetti bowl": it is the only country that is a member to the GPA (from 15th of September of 2011)[44] and the EAEU Treaty (from 2nd of January 2015),[45] both containing mandatory provisions on procurement review mechanisms. In addition, Armenia also signed the Comprehensive and Enhanced Partnership Agreement (CEPA) with the EU in November 2017.[46]

The second case study is the Republic of Kazakhstan. The selection is made considering that both Armenia and Kazakhstan have joined (or are in the process of joining) some of the same trade agreements. Kazakhstan being a founding member of the EAEU Treaty, signed an Enhanced Partnership and Cooperation Agreement (EPCA) with the EU in December 2015,[47] and was granted an observer status to the GPA in October 2016.[48] It is obliged to start GPA accession negotiations within four years after the WTO accession.[49]

Though the content of the EAEU Treaty procurement chapter and the GPA is the same for both countries, the contents of the EPCA and the CEPA differ. In addition, while Armenia and Kazakhstan share a common past in that they were part of the USSR, the comparison will reveal distinctions due to the size of the countries, level of economic development and other internal and external factors affecting their legal obligations in the field of public procurement review mechanisms.

[43]Definition of conflict of norms and its types will be discussed in Chapter 2.
[44]See supra note 31.
[45]See Eurasian Commission, "The Treaty on the Eurasian Economic Union is Effective", dated 01/01/2015. Viewed at: http://www.eurasiancommission.org/en/nae/news/Pages/01-01-2015-1.aspx.
[46]See Comprehensive and Enhanced Partnership Agreement Between the European Union and the European Atomic Energy Community and Their Member States, On the One Part, and the Republic of Armenia, on the Other Part, OJEU L 23/4, 26.1.2018.
[47]See Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part, OJEU L 29/3, 4.2.2016.
[48]See "Continuing Solid Progress on Pending Accessions to Government Procurement Pact". Viewed at: https://www.wto.org/english/news_e/news16_e/gpro_19oct16_e.htm.
[49]See "Overview of Kazakhstan's Commitments". Viewed at: https://www.wto.org/english/news_e/news15_e/kazakhannex_e.pdf.

5. Methodology

As the current thesis explores mainly legal texts and case law (when available), it is largely based on doctrinal analysis considered the core method for researching law. It is defined as a method that "provides a systemic exposition of the laws governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future development".[50] Other "non-legal" methodologies are not seen as substituting the doctrinal research method but rather coming on top and being combined with it.[51]

The doctrinal method is used in the current thesis to examine the fragmentation of international trade law and international public procurement regulation. The definition of conflict of norms and its typology are analysed using academic materials such as articles and books. Doctrinal methodology is utilised also for the examination of the requirements of four international trade agreements containing provisions on the procurement review mechanisms – the GPA, the EAEU Treaty, the CEPA and the EPCA. The overall aim will be to differentiate between the mandatory and optional requirements of the mentioned treaties in relation with procurement review mechanisms and to have a solid understanding of the options that these treaties provide to signatory states. Relevant provisions of the Armenian and Kazakh national procurement legislation will be analysed with the intention to highlight the (non)compliances with the signed international trade agreements. A clear limitation of the usage of doctrinal method for the current research project is that there are no official commentaries, court decisions or any guidelines for the interpretation of the procurement provisions of the treaties or the national legislation under examination. Hence, the analysis will be largely based on academic works in that area as well as author's own interpretation of the legal provisions.

Moreover, the doctrinal method does not provide for the context in which the legislation is adopted or implemented. The law must have some substance and the substance should come from "sources outside of law itself".[52] Thus, to give some background on why and how the international treaties under examination were signed, the thesis will make use of the socio-legal method of analysis. This method is also very often called "the law in context" which "points to the many ways legal

[50]See Terry Hutchinson and Nigel Duncan, "Defining and Describing What We Do: Doctrinal Legal Research", (2012) Deakin Law Review, Vol. 17:1, 101.
[51]See Rob Van Gestel and Hans-Wolfgang Micklitz, "Why Methods Matter in European Legal Scholarship", (2014) European Law Journal, Vol. 20:3, 314.
[52]See Sidney Post Simpson and Ruth Field, "Law and the Social Sciences", (1946) Virginia Law Review, Vol. 32:4, 862.

norms and institutions are conditioned by culture and social organisation".[53] For the purposes of the current thesis, the socio-legal method will be used to analyse the geopolitical and economic situation in the Caucasus and Central Asia in order to understand the rationale behind the signature of several RTAs covering *inter alia* the area of public procurement. The relations of two countries with the EAEU will receive special attention as they were once part of the USSR. A conclusion will be drawn on whether this RTA entails deeper integration with other members (Russia, Belarus and Kyrgyz Republic) resembling the relations within the USSR. It should be acknowledged that a thorough understanding of social phenomena, history, political situation and challenges that countries are facing is a right prism through which legal provisions should be analysed. Unfortunately, one of the major limitations of the socio-legal research method is that the academics usually have limited understanding of the societal challenges, legal realities and the context in which law applies. As such, it should be emphasised that the current thesis is not aimed at comprehensive analysis of societal and legal challenges of Armenia and Kazakhstan. Instead, the socio-legal analysis will be deployed to the extent necessary to understand the context of concluding international trade agreements and their transposition into national legislation.

Another method used in the current thesis is the comparative legal method. The latter is particularly important currently due to globalisation,[54] harmonisation activities, as well as the creation of international model instruments such as UNCITRAL Model Laws.[55] International law with its numerous subsystems, different courts interpreting the provisions of international treaties and different states being party to the same economic unions resulted in a shift of legal scholarship from purely national law to the comparative aspects of international law. There is no common definition of comparative law but it can be viewed as a method that "deals with various national legal orders in order to describe and to explain their common features, their differences and their peculiarities, in order to analyse and to comprehend their approximations to each other and their distances from each other, and in order to ascertain and to understand their similarities, their strangenesses and their mutual influences".[56] For the purposes of the current thesis, the comparative method will be used in two ways: first, to look at how the

[53]See Philip Selznick, "Law in Context" Revised", (2003) Journal of Law and Society, Vol.30:2, 177.
[54]See Jurgen Basedow, "Comparative Law and its Clients", (2014) The American Journal of Comparative Law, Vol.62, 822.
[55]Ibid, 850.
[56]See Michael Martinek, "Comparative Jurisprudence: What Good Does it Do? History, Tasks, Methods, Achievements and Perspectives of an Indispensable Discipline of Legal Research and Education", (2013) J. S. Afr. L. 39, 40.

legal norms of international treaties relate to each other and, second, how the norms of the national legislation of Armenia and Kazakhstan relate to the norms of international treaties. Thus, two levels of examination will be carried out using the comparative method: *horizontal* (among the mandatory provisions of four international treaties under examination) and *vertical* (between the treaties and the respective national legislation). This method will help to highlight the tensions among the provisions related to procurement review mechanisms found in the trade agreements under consideration as well as to assess their transposition into the national legislation of Armenia and Kazakhstan.

6. Scope and structure of the thesis

The thesis has been written in the face of rapidly growing number of RTAs containing provisions on different aspects of public procurement and increasing the risk of having a "spaghetti bowl" effect. It is structured as follows: the second chapter sets the theoretical background on fragmentation of international trade law, public procurement regulation and definition of conflict of norms. Based on this narrative, the following chapters analyse procurement norms found in the relevant trade agreements.

The GPA, as a point of reference for many RTAs, is analysed first in Chapter 3. Specific elements of the procurement system, such as the methods, deadlines and electronic procurement are also described in order to have a complete picture of the procurement system promoted by the GPA. Provisions regulating the creation and maintenance of procurement review mechanism are under special attention taking into account the focus of the research project. Chapters 4-6 analyse the EAEU Treaty (Chapter 4), the CEPA (Chapter 5) and the EPCA (Chapter 6), following the same logic. In addition to conducting doctrinal analysis of norms related to procurement review mechanisms, each chapter considers geopolitical realities of Armenia and Kazakhstan to reveal the reasons behind the signing (or undertaking to sign) the relevant trade agreements.

In the last substantive chapter (Chapter 7), a comparison is undertaken among the different elements regulating procurement review mechanisms originating from various trade agreements with the aim of detecting instances of "apparent" or "real" conflict of norms. The chapter also concludes on the compliance of the current procurement legislation of Armenia and Kazakhstan with the norms of international trade agreements related to procurement review mechanisms.

Chapter 8 concludes on the (non)existence of conflict of norms and paves the way for future research questions.

As is the case with every research project, this thesis as well has its limitations. The area of public procurement itself is complex regulating different processes and procedures. The author does not exclude the possibility that the development and amendment of different procurement elements (such as methods, e-procurement), are related to the international obligations undertaken by Armenia and Kazakhstan. Nor it is claimed that the situations of conflict of norms or non-compliance with international obligations arise only in relation to review bodies and procedures. It is important to mention, though, that the scope of the current thesis does not allow diving into the details of all elements leaving them to the future research projects. It should also be highlighted that the information reflected in the thesis is up to date as of November 2019.

Chapter 2: Fragmentation of International Trade Law and International Public Procurement Regulation

1. Introduction

In 2006, the UN International Law Commission (ILC) published a Report on *"Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law"* edited and finalised by Marti Koskenniemi.[1] The Report was an attempt to systematise the problem of fragmentation and was widely cited, criticised and agreed upon in academic literature. It gave rise to debates on the theory of fragmentation,[2] conflicts between human rights and other branches of law,[3] conflicts within international trade law,[4] conflicts of international trade law with environmental law.[5] Thus, the fragmentation of international law is a multidimensional topic that can be researched from different perspectives, within and between different branches of law. The fragmentation of public procurement is tightly linked to the fragmentation of international trade law, which in turn occurs as a result of countries signing different RTAs covering the same area of regulation in order to reap the relevant economic and other benefits.

This Chapter addresses the issues of regionalism and fragmentation of international trade law as a theoretical background for answering the main research question of the thesis. Its starting point is the acknowledgement that the fragmentation of international trade law is a reality. Economic, political and legal aspects of the creation of RTAs are discussed together with such a controversial question as whether the RTAs have trade creation or trade diversion effect.[6] The current Chapter is based on extensive literature review, including on the subject of the disadvantages associated with the signature of multiple RTAs and their relation with the WTO in general and the GPA in particular.

Fragmentation can be also seen as a source of conflict of norms. Thus, the current Chapter includes analysis of the existing theory of conflict of norms in order to

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[1]See "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", Report of the Study Group of the International Law Commission, finalised by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006, viewed at: http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf.

[2]See for example Anthony J. Colangelo, "The systems theory of fragmentation and harmonization", (2016) 49 NYU Journal of International Law and Politics.

[3]See for example Anthony E. Cassimatis, "International humanitarian law, international human rights law and fragmentation of international law", (2007) Int. and Comparative Law Quarterly, Vol. 56.

[4]See for example Adrian Johnson and Michael Trebilcock, "Fragmentation in international trade law; insights from the global investment regime", (2013) World Trade Review, Vol. 12:4.

[5]See for example Anja Lindroos and Michael Mehling, "From autonomy to integration? International law, free trade and the environment", (2008) Nordic Journal of International Law 77.

[6]See subsection 2.2.

define the "conflict" and to have an understanding of its different types. This will be the gist of the current research on which the rest of the thesis will be premised.

2. Regionalism vs multilateralism

There is no universal definition of regionalism in the academic literature. Some commentators define it as "a body of ideas, values and concrete objectives that are aimed at creating, maintaining or modifying the provision of security and wealth, peace and development within a region".[7] Others concentrate more on the political component defining regionalism as "a political process marked by cooperation and policy coordination".[8] In the context of trade, multilateralism is widely understood as the trade liberalisation practices undertaken via the WTO,[9] while regionalism is the liberalisation undertaken via regional trade agreements.

RTAs prolilferated extensively especially after the creation of the WTO in 1995. Lynch argues that they resemble the "Holy Roman Empire which was neither holy, nor Roman, nor an empire".[10] Most of the so-called RTAs involve countries from different regions, cover areas beyond tariffs and quotas for example public procurement, investment, IP, and sometimes are agreements only on paper not in practice.[11] Thus, in order to avoid confusion, in this Chapter and elsewhere in the thesis unless stated otherwise "RTA" will be used as an umbrella term to encompass FTAs, CUs and other variations of trade agreements both in bilateral and in multilateral settings.[12]

[7]See Michael Schulz, Fredrik Soderbaum and Joakim Ojendal, "Introduction: A Framework for Understanding Regionalization", in Michael Schulz, Fredrik Soderbaum and Joakim Ojendal (eds), *Regionalization in a Globalizing World: A Comparative Perspective on Forms, Actors and Processes,* (Zed Books 2001), 5.

[8]See Edward D. Mansfield and Etel Solingen, "Regionalism", (2010) Annu. Rev. Polit. Sci. 13, 146.

[9]See Beth V. Yarbrough and Robert M. Yarbrough, "Regionalism and Layered Governance: The Choice of Trade Institutions", (1994) Journal of International Affairs, Vol. 48:1, 95.

[10]See David A. Lynch, "Trade and Globalization: An Introduction to Regional Trade Agreements", (Rowman & Littlefield publishers 2010), 20.

[11]For example, RTAs among the former USSR countries are mostly not implemented in practice. See Michael Roberts and Peter Wehrheim, "Regional Trade Agreements and WTO Accession of CIS countries", (2001) INTERECONOMICS, Vol. 36:6, 319; Viet Do and William Watson "Economic Analysis of Regional Trade Agreements" in Lorand Bartels and Federico Ortino (eds.), *Regional Trade Agreements and the WTO Legal System,* (Oxford University Press 2006, reprinted in 2010), 9.

[12]Usually RTAs are believed to encompass the following arrangements: free trade agreements where the trade barriers are eliminated among the members and each of them is still in control of setting external tariffs; customs union in which case there is a common external tariff rate for the imports from

2.1. Regionalism: general remarks

As was discussed in the Introduction, RTAs are not a new phenomenon in international trade law. Fabricotti considers that during the Cold War, where the Socialist Bloc countries were not participating in multilateral negotiations, universalism[13] tended to prevail over regionalism because the "relevant problems of international security acted as a cement among the GATT Members".[14] It is odd to claim that the international trading system was "universal" as a considerable amount of trade conducted with and within the Socialist bloc was outside the GATT framework. However, given the bipolar system of the world order at that time, it can be concluded that indeed GATT provided a "universal" platform for Western countries to align trade policies. After the end of the Cold War and the demolition of the Berlin Wall, a shift occurred from a bipolar to a multipolar system. The emergence of new economies, especially in Asia, made clear that the world was changing; China, India and others also wanted to have a say in the international economic order and international politics.[15]

The creation of the WTO in 1995 was considered the "triumph of liberalism": finally, an international organisation entrusted with coordination of all matters concerning international trade was created. [16] However, the creation of the WTO also triggered a proliferation of RTAs. Academic literature suggests several explanations for this phenomenon. One of the most interesting explanations focuses on the differentiation of regional groupings in accordance with their purposes — outward or inward-looking. Outward-looking regional grouping tends to act as a single unit in its relations with multilateral organisations, while inward-looking group's main aim is to defend the interests of its members from the interference of such organisations.[17] It is presumed that most of the RTAs are inward-looking, hence the creation of the WTO and further steps towards multilateralisation pushed them to undertake more defensive actions, *inter alia* by deepening economic integration and creating new regional agreements. It is fair to note, though, that RTAs may

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third countries; common markets where free movement of labour is ensured and finally economic union in which case common market is created. See supra note 8, 147.

[13]Universalism is used as a synonym of multilateralism in the current research.

[14]See Alberta Fabricotti, "Universalism and Regionalism in International Trade Law. Is the WTO a truly Universal International Organization?", (2014) Napoli, Editoriale Scientifica (Publ.), Volume I, 564.

[15]As former Director General of the WTO Lamy noted: "The reality is that the end of the cold war caught everyone by surprise. It was the end of a bi-polar world. A new world order was being born". Pascal Lamy's speech was given in 2009 at the University of Bocconi, viewed at: https://www.wto.org/english/news_e/sppl_e/sppl142_e.htm.

[16]See supra note 14, 560.

[17]See supra note 14, 568.

exhibit characteristics of both outward and inward-looking groups. For example, the EU can be seen as both inward and outward-looking regional grouping. International trade is an exclusive competence of the EU (Art. 3 of the TFEU),[18] and the European Commission represents its members at a multinational level, which is a feature of an outward-looking grouping. At the same time in relation to for example, agricultural policy, the EU tries to protect its members' interests,[19] which as discussed above is an attribute of an inward-looking grouping.

Another factor for the RTA proliferation was the shift of the USA policy from multilateralism to regionalism.[20] It was easier for the USA to get trade benefits from trade agreements acting as a "hub" country and pushing its preferred solutions. In such cases, the counterparts were forced to accept the terms and conditions, thus acting as a "spoke" country.[21] Other countries then reacted to this shift by creating their own RTAs as a means of protection.[22] Similarly, initially three and now already five countries became members to the EAEU Treaty [23] marking the emergence of a new block of trading partners covering a large part of the post-Soviet territory.

This new wave of regionalism known as "new regionalism" in academic literature[24] gave rise to processes that have emerged from within the regions themselves. It represents a "heterogeneous, comprehensive, multidimensional phenomenon, which involves state, market and society actors and covers economic, cultural,

[18]See "Towards Open and Fair World-Wide Trade", viewed at: https://europa.eu/european-union/topics/trade_en.

[19]See, for example, Vladimir Kostic, Zoran Simonovic and Aleksandar Kostic, "Advantages and Controversy of Common Agricultural and Cohesion Policy in the EU", (2016)Economics of Agriculture, Vol. 4:63, 1369; Fiona Smith, "Regulating Agriculture in the WTO", (2011) International Journal of Law in Context, Vol. 7:2, 234-236.

[20]See Sungjoon Cho, "Defragmenting World Trade", (2006) Northwest Journal of International Law and Business, Vol. 27:39. After NAFTA the US signed several RTAs with Jordan, Chile, Australia, Morocco, Bahrain.

[21]It is acknowledged that in case of the symmetry of countries, multilateral trade liberalisation is preferred while in case of asymmetry, i.e. "hub and spoke" setting, bilateral approach is often opted for. See Euan MacMillan, "Explaining Rising Regionalism and Failing Multilateralism: Consensus Decision Making and Expanding WTO Membership", (2014) International Economics and Economic Policy, Vol. 11:4, 600.

[22] This is one of the possible reactions, the other one being the desire to join the regional grouping. See Walter Mattli, *The Logic of Regional Integration: Europe and Beyond*, (Cambridge University Press 1999), 14.

[23]Unofficial English translation of the EAEU Treaty can be viewed at: http://www.un.org/en/ga/sixth/70/docs/treaty_on_eeu.pdf.

[24]See Chad Damro "The Political Economy of Regional Trade Agreements" in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System*, (Oxford University Press 2006, reprinted in 2010), 27.

political, security and environmental aspects".[25] Current RTAs indeed cover a variety of regulatory areas suggesting perhaps that deeper integration is pursued and the number of RTAs is not going to decrease in the near future. The more RTAs are signed the more fragmented the international trade law will be unless there is a complete harmonisation of all the areas covered by all the RTAs.

2.2. The reasons for signing RTAs

The question that arises from the above discussion is why do countries sign RTAs thus preferring regionalism to multilateralism? Several reasons can be mentioned: "[m]arginalisation syndrome; security via economic means; new security needs; increase[d] negotiating leverage; lock-in [of] domestic reforms; accommodation [of] domestic constituents; practical [issues]".[26] Each of these reasons deserve further explanation before assessing their application to the cases of Armenia and Kazakhstan.

The "*marginalisation syndrome"* refers to cases where the country is afraid of being left out from economic and political developments in the world and in the region.[27] Damro mentions that especially small and isolated countries are prone to signing RTAs for this reason but this is a reason also to pursue "multilateral trade liberalisation".[28] Such an example can be seen especially in the CIS region,[29] where after Armenia joined the GPA, other countries in the region, e.g. Moldova, Tajikistan, started showing increased interest in joining it.[30]

"Security via economic means" relates to cases where the country signs an RTA to have greater security especially when the region is torn with past or current armed conflict.[31] This rationale can be applied to the case of Armenia when it joined the EAEU. The economic benefit was not the first concern that drove the country

[25]Quoted in Ibid, page 28. New regionalism for other academics is the need to understand that the regions are not just natural units but are the result of human interaction and cooperation with the globalised world. See Fredrik Soderbaum, "The International Political Economy of Regionalism", in Nicola Phillips (ed), *Globalizing International Political Economy*, (Palgrave Macmillan 2005), 234.
[26]See supra note 24, 29-30.
[27]See supra note 24, 30.
[28]See supra note 24, 30.
[29]CIS includes Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyz Republic, Moldova, Russia, Tajikistan, Turkmenistan, Uzbekistan and Ukraine.
[30]Moldova joined on 14th of July 2016, Kyrgyz Republic and Tajikistan are currently at the advanced stage of negotiations. See Parties, Observers and Accessions. Viewed at: https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm
[31]See supra note 24, 30.

towards signing the EAEU Treaty, it was rather the need for security insurance from Russia and other partners in connection with the conflict in Nagorno Karabakh.[32] Some countries, such as the USA, are also believed to "reward [their] security partners" with RTAs.[33]

"New security needs" can be a reason when a country is concerned with such security problems as environmental damage, drug trafficking, terrorism.[34] As an example, Mexico's participation in NAFTA[35] is mentioned, where higher environmental standards in NAFTA have direct impact on Mexico by pushing it towards compliance with the undertaken environmental obligations.[36] Kazakhstan being in a region vulnerable to such security threats has also opted to open up to international cooperation and signed its first trade agreement with the EU already in 1999.[37]

Furthermore, *"increase of negotiating leverage"* is linked to the increase of bargaining power of especially small, developing or least developed countries.[38] These countries consider regionalism as a means of joint participation in global economy.[39] The Asia Pacific Economic Cooperation (APEC) can be seen as an example where, besides creating "regional structures" in the East Asia,[40] the union has increased the leverage of the relevant countries.[41]

Regionalism is also often seen as a mechanism to *"lock-in desired reforms"* by limiting the possibility for future government to rescind them.[42] The need to lock-

[32]See David G. Tarr, "The Eurasian Economic Union of Russia, Belarus, Kazakhstan, Armenia, and the Kyrgyz Republic: Can It Succeed When Its Predecessor Failed?", (2016) Eastern European Economics, Vol 54:1, 17.
[33]See John Ravenhill, *Global Political Economy*, (5th edition Oxford University Press 2017), 146.
[34]See Ibid.
[35]Currently NAFTA is being renegotiated and the new agreement is known as USMCA (United States-Mexico – Canada Agreement). See Joint Statement from United States Trade Representative Robert Lighthizer and Canadian Foreign Affairs Minister Chrystia Freeland, viewed at: https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/september/joint-statement-united-states.
[36]See supra note 24, 32-33.
[37]See Council and Commission Decision of 12 May 1999 on the Conclusion of the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Kazakhstan, of the Other Part, 1999/490/EC, ECSC, Euratom, OJEC L 196/1, 28.7.1999.
[38]See supra note 33, 146-147.
[39]See Shaun Breslin, Richard Higgott and Ben Rosamond, "Regions in Comparative Perspective", in Shaun Breslin, Christopher W. Hughes, Nicola Phillips and Ben Rosamond (eds), *New Regionalism in the Global Political Economy*, (Rutledge 2002), 8.
[40]See Peter Drysdale, "Open Regionalism, APEC and China's International Trade Strategies", in Peter Drysdale, Zhang Yunling and Ligang Song (eds.), *APEC and Liberalisation of Chinese Economy*, (ANU Press 2012), 15.
[41]See supra note 24, 35.
[42]See supra note 24, 36.

in domestic reforms can drive countries towards multilateral solutions as well. For example, it is widely believed that China's accession to the WTO had an effect of "modernising China's legal system and diminishing provincial and local leaders' ability to capriciously and corruptly impose taxes, make regulations and restrict trade within China".[43] Armenia in its turn locked in domestic reforms in the area of public procurement when it joined the GPA. In other words, Armenia's commitments arising from the GPA membership prevent future Armenian governments from engaging in discriminatory practices involving government procurement contracts whose value is above the GPA thresholds.

Moreover, the "*accommodation of domestic constituent interests"* can be a reason for pursuing liberalisation via regional or multinational path as the reciprocity of the trade deal will satisfy the domestic constituents and the politicians will be re-elected as a result.[44] Authorities might be also *pressured* by domestic constituencies to join (or to refrain from joining) this or that trade agreement depending on the area of economy such lobbyists are active in.[45] The Armenian authorities, for instance, were pressured by the society not to increase the utility charges,[46] which was possible only if Armenia cooperates closely with the Russian-driven Eurasian project.[47]

In addition, governments may prefer regionalism to multilateralism because it is easier and seemingly faster to negotiate trade agreements following the former rather than the latter.[48] One can imagine that negotiating with all the members of the WTO is much more difficult and time consuming than negotiating with a limited number of states. This point is elucidated by the impasse of the Doha Round, due to the inability of the WTO members to reach consensus on future of international trade, which is often presented as causally related to the proliferation of RTAs.[49]

Some other reasons for preferring regionalism to multilateralism can be found in academic literature. Thus, RTAs might signal change in domestic politics and might

[43]See supra note 10, 10.
[44]See supra note 24, 37.
[45]In accordance with Gilpin: "Winners support integration and losers oppose it". See Robert Gilpin, *Global Political Economy: Understanding the International Economic Order*, (Princeton University Press 2001), 354.
[46]See "Putin's Armenia Shock: Protests Break Out Against a Russian Ally in the Caucasus", *Wall Street Journal* (Online), New York. 29 June 2015.
[47]See Randall Newnham, "Oil, Carrots and Sticks: Russia's Energy Resources as a Foreign Policy Tool", (2011) Journal of Eurasian Studies 2, 134.
[48]See supra note 24, 38.
[49]See Stephen W. Hartman, "The WTO, the Doha Round Impasse, PTAs and FTAs/RTAs", (2013) International Trade Journal, Vol. 27:5, 413.

pursue "first-mover" objectives to be able to set standards later in a multilateral setting.[50] In addition, due to the smaller number of negotiating countries, the RTAs include new areas of regulation not included in the WTO agreements (e.g. investment, competition) and deeper regulation of the areas already included in the WTO (e.g. IP, services). [51] Whatever is the reason for the recent rise of regionalism, there is no indication of countries shifting preference to multilateralism. *The fragmentation of international trade law is a reality.*

Besides the literature on international political economy explored above, it is necessary to look also at the trade diversion or trade creation effect that RTAs (might) have on the economies of their member states.

2.3. RTAs: Trade diverting or trade creating arrangements?

Whether the proliferation of RTAs has trade diversion or trade creation effect is a question that still does not have a definitive answer in the economic literature. The first academic work on this matter was an analysis from Jacob Viner in 1950, where the author concluded that the creation of an RTA would harm both the member country economy and the overall welfare of the world.[52] In accordance with economic theory, trade diversion occurs because by lowering barriers to trade the inefficient domestic production is replaced by more efficient products from other RTA member states but not with the most efficient and competitive production that one might find in the world.[53] From this perspective, the multilateral liberalisation and the unconditional MFN treatment are more desirable.[54]

An oft-quoted example was NAFTA due to which Canada stopped producing wine, as it was less efficient for it, and started importing a better-quality Californian wine. In this scenario, the NAFTA had a trade creating effect because Canada is no longer producing wine, so the resources might be used elsewhere, and the consumers are better off drinking wine of a higher quality. The same agreement could also have a

[50]See Bernard M. Hoekman and Michel M. Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond*, (3rd edition, Oxford University Press 2009), 479-481.
[51]See Gabrielle Marceau, "News from Geneva on RTAs and WTO-Plus, WTO-More and WTO-Minus", (2009) Am. Soc'y Int'l Law Proc 119, 126-127.
[52]See Jagdish Bhagwati and Arvin Panagariya, "Regionalism versus Multilateralism: The Theory of Preferential Trade Agreements: Historical Evolution and Current Trends", (1996) AEA Papers and Proceedings, Vol 86:2, 82.
[53]See supra note 10, 14.
[54]Moreover, the gains of the RTA can be achieved also through unilateral liberalisation of trade though as discussed above this is not very desirable for politicians. See Jan Pokrivcak, "Economics and Political Economy of Regional Trade Agreements", TradeAG, (2007) Working Paper 07/5, 11.

trade diverting effect because wines from other countries which may be of a better quality than the Californian (for example French wine), would be imported less and would be more expensive as exporters would have to pay tariffs unlike the exporters from the USA.[55]

RTA members though do not have economic reasons to pursue multilateral liberalisation as "they are unwilling to cut tariffs on MFN basis for fear of eroding margin of preference that they have granted to their PTA partners".[56] RTAs are premised upon the idea of granting preferences to the chosen group of countries. If the MFN treatment embodied in the GATT Art. I should be used, then there is no need to conclude RTAs at all.

It is widely believed that RTAs divert trade also with other non-tariff regulations, such as rules of origin.[57] Especially small producers will be worse off as they will not have the capacity to comply with all the rules of origin of different RTAs[58]. Customs officers also spend more time on verifying whether the importing goods are compliant with the rules of origin to apply appropriate tariff or not to apply it at all.[59] With the rise of globalisation, production sites are being spread in different countries and the task of deciding whether goods comply with the rules of origin becomes extremely difficult. These factors slow the turnover of goods across the countries, add costs for the producers and eventually forbid some (small) businesses from exporting. Investors might also shop around for the RTA "where compliance with the trade rules is easiest".[60] RTAs, thus, can be trade diverting not only in relation to tariffs but also raising costs for companies to export, i.e. raising non-tariff barriers.

To quantify the impact of RTAs and conclude whether they are trade creating or trade diverting, economists try to make use of collected empirical data related to the intra-RTA trade and trade with third countries. A prominent analysis was conducted by the World Bank in this respect.[61] The study concludes that the

[55]This example is found in supra note 11, 11-12.
[56]See Petros Mavroidis, "Always look at the bright side of non-delivery: WTO and Preferential Trade Agreements, yesterday and today", (2011) World Trade Review, Vol. 10:3, 381.
[57]See e.g. supra note 20, 65 and Antoni Estevadeordal and Kati Suominen, *Managing the Spaghetti Bowl of Trade Agreements*, (Oxford University Press 2009).
[58]See Antoni Estevadeordal and Kati Suominen, *Managing the Spaghetti Bowl of Trade Agreements*, (Oxford University Press 2009), 8.
[59]See Ibid.
[60]See supra note 58, 9.
[61]See International Bank for Reconstruction and Development/World Bank, (2005) "Global Economic Prospects: Trade, Regionalism and Development", viewed at: http://siteresources.worldbank.org/INTGEP2005/Resources/gep2005.pdf.

average impact of the RTA on overall trade is negative, while its impact on the intra-RTA trade is positive. In a nutshell, it is reasonable that the parties within an RTA tend to trade more among each other considering the beneficial conditions that the RTA creates for trade among its member states. A quite surprising fact though is that some trading groups, e.g. NAFTA, EU, MERCOSUR, also export more than before the creation of the RTA.[62] Thus, it becomes difficult to ascertain whether the effect of an RTA is net trade creating or trade diverting. Overall, it can be claimed that "positive outcomes depend on design and implementation" of the RTA.[63]

After looking at the political and economic dimensions of RTAs, the next question is: how do RTAs relate to the WTO? After all, is it not illegal for the parties to the WTO, which is based on the MFN principle, to give preferences to selected trade partners?

2.4. The legal dimension of RTAs

Art. XXIV of the GATT is the provision used to apply for the MFN exemption in case developed country signs a FTA or a CU with a developing country.[64] In order to understand the idea behind this rather controversial exemption, a brief recourse to the history of negotiations of Art. XXIV is needed.

The main actor in the GATT negotiations was the USA, which in 1946 proposed the "Suggested Charter for an International Trade Organisation".[65] At that time, the USA was a fierce proponent of multilateralism considering it a tool "to end discriminatory practices inherent in imperial and regional preferences, import quotas and currency controls".[66] The USA though had to adjust its multilateral approach by way of allowing exceptions for developing countries. Several credible explanations for this shift can be found in literature. *First of all*, Britain was threatening to leave the table of negotiations and instead of participating to multilateral trade negotiations, to focus on trade with Commonwealth countries.[67]

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[62]See supra note 61, 62.
[63]See supra note 61, 72.
[64]For the full text of Art. XXIV, see https://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_09_e.htm. In case of trade in services Art. V GATS is used, see https://www.wto.org/english/res_e/publications_e/ai17_e/gats_art5_jur.pdf.
[65]See Kerry Chase "Multilateralism compromised: the mysterious origins of GATT Article XXIV", (2006) World Trade Review, Vol. 5:1, 3.
[66]See supra note 65, 9.
[67]See supra note 65, 7.

Second, some authors consider that the USA wanted to have a regional trade alliance in Europe as a counterbalance to the Soviet bloc.[68] *Third*, developing countries, like Syria, Iraq, were pressing for the inclusion of MFN exceptions.[69] *Finally*, the USA itself had already agreed to have a trade agreement with Canada and it was in its own interest to have legal grounds in the GATT to support the future agreement (though the bilateral agreement never materialised, giving way to NAFTA).[70]

These historical events led to the inclusion of Article XXIV into the GATT. In accordance with its paragraph 4, the creation of the FTAs and CUs is "*desirable*".[71] When read in conjunction with the rest of the same Article,[72]FTAs and CUs are seen as an important tool for the facilitation of international trade while it is also acknowledged that they may pose some risk to multilateral trade. In order to qualify as an FTA or a CU complying with Art. XXIV, there are "internal" and "external" requirements to respect, laid down in Articles XXIV:5 and XXIV:8.[73] The internal requirements mandate duties and other restrictive regulations of commerce to be eliminated with respect to *substantially all trade* while external requirements oblige *not to raise barriers* to trade for third countries.

There is a large amount of controversy both in the academic literature and within the members of the WTO as to what is considered "substantially all trade". Should it be understood as a qualitative or quantitative requirement? The proponents of a quantitative approach try to lay down some percentage of trade between the members that have to be liberalised as a result of the creation of the RTA (suggestions include 80%, 85%, 90%).[74] In contrast to the quantitative approach, the qualitative approach evaluates the liberalisation of the sectors of trade and looks whether any major sector is left out.[75] The question was addressed by the Appellate Body in the *Turkey-Textiles* case: "It is clear, though, that "substantially all the trade" is not the same as all the trade, and also that "substantially all the

[68]See supra note 20, 47.
[69]See supra note 65, 25.
[70]See supra note 65, 12.
[71]See supra note 14, 571.
[72]The rest of the article reads as follows: "the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories".
[73]See Sungjoon Cho, "Breaking the Barriers Between Regionalism and Multilateralism: A New Perspective on Trade Regionalism", (2001) Harvard International Law Journal, Vol. 42:2, 436.
[74]See Antoni Estevadeordal and Kati Suominen, *Disciplining Trade Agreements: Toward Multilateralization?*, (Oxford University Press 2009), 6.
[75]See Ibid.

trade" is something considerably more than merely some of the trade".[76] Though the ruling did not provide much clarity, it can be derived that the liberalisation of all the sectors of the trade is not a legal requirement. What is missing in this report is a clear guidance on how much liberalisation of the trade should there be between the RTA members to meet the requirement of "substantially all trade" or at least whether the quantitative or qualitative approach should be preferred.

The Understanding on the Interpretation of Article XXIV might be of help here.[77] In the Preamble of the Understanding, it is unambiguously stated that the "elimination between the constituent territories of duties and other restrictive regulations of commerce extends to all trade, and diminished if any major sector of trade is excluded".[78] The Preamble, thus, suggests a qualitative approach. Questions related to what the "major sector" means and whether the elimination of a big sector like agriculture will still make the RTAs compliant with the requirements of Art. XXIV still exist but at least the Understanding provided the basis for future development of legislation and case law in this regard.

Regarding the external requirement, in the oft-cited *Turkey-Textiles* case Article XXIV:5 was interpreted as implying that "any measures imposed by WTO Members inconsistent with GATT 1994 do not fall within Article XXIV:5 exception unless they are "introduced upon the formation of a customs union" and "only to the extent that the formation of the CU would be prevented if the introduction of the measure were not allowed".[79] After the creation of the CU or in case the measure is not strictly necessary for the formation of the CU, it will not enjoy the exemption of paragraph 5. Besides the material requirements discussed above, procedural requirements of Article XXIV:7 also have immense importance for understanding how multilateralism and regionalism interact and what challenges exist in that area.

In accordance with Art. XXIV:7(a), parties that have decided to enter into CU, FTA or interim agreements leading to either CU or FTA, shall notify other parties on their intention to do so and shall make available any information that will give the opportunity to the latter to *make reports and give recommendations*. There is

[76]See the AB Report on the *Turkey-Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, 22 October 1999.
[77]See Md. Rizwanul Islam and Shawkat Alam, "Preferential Trade Agreements and the Scope of GATT Article XXIV, GATS Article V and the Enabling Clause: An Appraisal of GATT/WTO Jurisprudence", (2009) Netherlands International Trade Review, LVI, 20.
[78]See the Preamble of the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, viewed at: https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art24_jur.pdf
[79]See supra note 77, 9.

nothing in this provision indicating the scope of such reports or recommendations, hence it can be assumed that the other parties might even conclude on the desirability of the creation of the CU or the FTA. The powers given by this Article, though, were never implemented in practice since the creation of the WTO.

In the early years of the existence of GATT, Working Parties were established to assess the compatibility of the notified RTAs with the requirements of the GATT Article XXIV. They were operating on an *ad hoc* basis and, according to some, "served very little function beyond a mere talk shop".[80] During GATT years (1948-1994), 26 Working Parties were convened to analyse the compatibility of FTAs, 15 reports were adopted and another 11 were drafted but not adopted.[81] Regarding the compatibility of CUs, during the same time period nine Working Parties were convened, nine reports were adopted and there was no draft report that was not adopted.[82] From all of the reports adopted during the existence of GATT, only one CU between Czech Republic and Slovakia was proclaimed as consistent with the requirements of Article XXIV.[83] Some RTAs[84] were not fully compliant with the requirements but were allowed under Article XXIV:10, which gives the possibility to the parties to approve with the two-thirds majority the proposals which do not fully comply with the requirements of paragraphs 5 to 9 of Art. XXIV, provided that such proposals lead to the formation of a CU or a FTA. In all other cases, "the GATT CPs failed to conclude that the reviewed RTAs were inconsistent with GATT Article XXIV".[85]

The Uruguay Round tried to remedy the situation and, on 6th of February 1996, the Committee on Regional Trade Agreements (CRTA) composed of the delegates from all WTO members was established. The decisions in the Committee are to be taken by consensus[86] and the fact that no report has been adopted so far speaks for itself.[87] It is submitted that both procedural aspects and some disagreement between the parties on the interpretation of rules, slowed the progress in this regard. [88]

[80]See supra note 20, 83.
[81]See supra note 65, 2.
[82]See supra note 65, 2.
[83]See Jong Bum Kim, "Dual WTO Notifications of RTAs with Non-Reciprocal Trade Liberalization", (2012) Journal of International Economic Law, Vol. 15:2, 657.
[84]FTA between Nicaragua and El Salvador and Participation of Nicaragua in the Central American FTA. See Ibid.
[85]See supra note 83, 658.
[86]See supra note 56, 376.
[87]See supra note 65, 2.
[88]See supra note 20, 83.

In 2006, more than ten years to the existence of the CRTA and after realising that the proposed mechanism did not provide solutions, the parties in Doha round adopted a new mechanism that should have *complemented* the existing procedure.[89] The so-called Transparency Mechanism for Regional Trade Agreements, has in fact *substituted* the previous mechanism and "the multilateral review was narrowed down to mere transparency".[90] The mechanism lays down general deadlines for the notification of the RTAs to the CRTA ("no later than directly following the parties' ratification of the RTA or any party's decision on application of the relevant parts of an agreement, and before the application of preferential treatment between the parties")[91] and a deadline for the parties to consider the notified RTA (not exceeding one year).[92] The WTO Secretariat is currently charged with preparing a factual presentation of the RTA, which cannot be used as a basis for the dispute settlement and cannot create new rights and obligations.[93] Hence, the parties are entrusted with the assessment of whether the notified RTA complies with the requirements of Article XXIV. The Transparency Mechanism refers also to the phase where the RTAs have already been established and there are changes in the implementation or operation of the RTAs. This provision makes it clear that the transparency of the RTAs should be guaranteed at all stages, and not only in the phase of formation as it might have been concluded from the wording of Article XXIV:7(a), which refers only to the contracting party deciding *to enter into* a CU or an FTA.

Whether the Transparency Mechanism creates "mere transparency" without any real results, or whether it is an effective and efficient monitoring and surveillance tool is yet to be seen. The Mechanism currently works in a provisional mode, as "members will review, and if necessary modify it in light of the experience gained from its provisional operation, and replace it by a permanent mechanism adopted as part of the overall results of the Doha Round".[94]

2.5. Relationship between the WTO and the RTAs

[89]See supra note 56, 377.
[90]See supra note 56, 377.
[91]See Decision of the General Counsel on Transparency Mechanism for the Regional Trade Agreements, WT/L/671, dated 14.12.2006, Art. B:3.
[92]See supra note 91, Article C:6.
[93]See supra note 91, Article C:10.
[94]See supra note 91, Art. I:23.

The preceding discussion leads to the conclusion that RTAs are seen as "exceptions" to the WTO regulation of world trade. The norms, especially Art. XXIV seems to imply that hierarchically WTO norms are higher than trade norms envisaged in RTAs. Monitoring mechanisms, and the recent Transparency Mechanism put in place, also operate on a presumption that the WTO norms are the ones against which the provisions of the RTAs are checked. Commentators criticise this approach in particular for the following reasons: *first*, as was already discussed "the legality of the RTA has never been confirmed by either GATT or the WTO";[95] *second*, RTAs are created not so much for economic but for political reasons and the aim of their creation should not be undermined;[96] and *third*, RTAs can help the liberalisation of trade in some specific areas as the decisions can be taken in a more efficient manner.[97]

Other commentators propose different prisms through which it might be possible to look at the WTO-RTA relationship. Thus, Reich suggests looking at the relationship using the principle of subsidiarity.[98] This principle is usually used in federal type of governments and entertains the idea that the issues can sometimes be resolved at a lower level of government (for example sub federal, regional or local) easier and better than at the federal level of government.[99] When applying the principle to the WTO-RTA relations, GATT Article XXIV is "turned on its head, making bilateral arrangements the default and engaging multilateralism only where goals could not be attained on a regional or bilateral basis".[100]

Fabricotti in her turn calls for a "bottom-up interpretation of the RTA's autonomy over WTO law".[101] In her opinion, the proliferation of RTAs is a "tacit performance of an international custom, and not simply a non-compliant behavior".[102] This approach suggests that there is no obligation on states to make provisions of the RTAs compliant with GATT. Customary international law does not forbid or limit the possibilities of states to discriminate among third countries, beyond the provisions

[95]See supra note 73, 451.
[96]See supra note 73, 451.
[97]See supra note 73, 451-452.
[98]See Arie Reich, "Bilateralism versus Multilateralism in International Economic Law: Applying the Principle of Subsidiarity", (2010) University of Toronto Law Journal 60.
[99]See supra note 98, 269.
[100]See supra note 98, 286.
[101]See Alberta Fabricotti, "The WTO and RTAs: a "Bottom-Up" Interpretation of RTAs' Autonomy over WTO Law", in Susie Frankel and Meredith Kolsky Lewis (eds), *International Economic Law and National Autonomy*, (Cambridge University Press 2010).
[102]See supra note 101, 116.

laid down in the Charter of the United Nations.[103] What about the MFN Treatment envisaged in Article I of GATT in accordance to which, "any advantage, favour, privilege or immunity granted to one country shall be accorded immediately and unconditionally to all other Members"? MFN status, as is reported by Cottier and Foltea, "is not considered to be a principle of general public international law", hence states are free to discriminate.[104] This goes against the core principles and the main aim of the WTO, created exactly to eliminate the discriminatory policies in trade and trade related areas.

It is important to recall here that as a matter of international law, international treaties do not have hierarchical order. Only Article 103 of the UN Charter sets out that "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".[105] Other than this, all other treaties have equal force.[106] This means that, strictly speaking, there is no formal obligation for RTAs as international treaties to comply with the requirements of the WTO, as the latter has no higher legal force. The absence of any hierarchy might lead to instances of conflict of norms further discussed in section 4. However, it is first necessary to focus on the exploration of the existence of fragmentation in the area of public procurement regulation.

3. Is there a fragmentation of international public procurement regulation?

Public procurement was initially excluded from the coverage of the WTO Agreements and hence, from the MFN treatment.[107] Marceau and Blank in their prominent paper researching the history of the GPA, marked the path of its development, paying much attention also to the negotiation history as an important factor shedding some light on the initial ambitions and the final results.[108]

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[103]See Thomas Cottier and Marina Foltea, "Constitutional Functions of the WTO and Regional Trade Agreements", in Lorand Bartels and Federico Ortino (eds.), *The Regional Trade Agreements and WTO Legal System,* (Oxford University Press 2006, reprinted in 2010), 43.

[104]See Ibid.

[105]See Charter of the United Nation, viewed at: http://legal.un.org/repertory/art103.shtml.

[106]See supra note 103, 51.

[107]See Joan Hird, "Government Procurement", in Kym Anderson(ed.), *Strengthening the Global Trading System: From GATT to WTO*, (Centre for International Economic Studies, University of Adelaide 1996), 125. Currently, Art. III:8(a) of GATT explicitly excludes purchases for governmental purposes. The text of the GATT can be viewed at: https://www.wto.org/english/docs_e/legal_e/gatt47.pdf.

[108]See Gabrielle Marceau and Annet Blank, "History of Government Procurement Negotiations since 1945", (1996) Public Procurement Law Review 5.

When negotiating the International Trade Organisation (ITO) in late 1940s, the US tabled a proposal "that would still be considered revolutionary".[109] The proposal aimed at bringing the public procurement under the auspices of National Treatment and MFN Treatment. This meant that procurement would be treated just like any other trade related issue that was negotiated and included in the GATT and in other Codes[110] of the time. The USA delegate to the ITO negotiations underlined the importance of public procurement stating that it can cover millions of dollars annually while the countries were still free to discriminate against foreign suppliers.[111] Notwithstanding the push from the USA and bearing in mind the very protectionist approach to the procurement transactions at that time, the parties decided to exclude the procurement provisions from ITO coverage altogether.

More than a decade later, in 1964, the Organisation for Economic Cooperation and Development (OECD) set up a working group the main aim of which was "to ensure the fairest possible government procurement procedures, seeking to limit discrimination against foreign suppliers".[112] After substantive discussions for another decade, the negotiating parties were ready to take up the talks at a new level in Geneva; procurement was thus included in the agenda of the Tokyo round in 1977.[113] After two years, on 2nd of April 1979, the negotiations on government procurement were concluded and the so-called Tokyo Round Code on Government Procurement entered into force in 1981[114] "for the governments that have accepted or acceded to it by that date".[115] The GPA was adopted in 1994[116] and finally, in 2012, the text of the revised agreement was adopted entering into force in 2014.[117] In the current research when discussing the GPA, reference will be made to the revised Agreement from 2012 unless explicitly stated otherwise.

[109]See supra note 108, 77.
[110]Agreements negotiated by the Parties separately from the GATT were labelled "Codes". See Sue Arrowsmith, *Government Procurement in the WTO*, (Kluwer Law International 2003), 27.
[111]As quoted in Bernard Hoekman and Petros Mavroidis (eds), *Law and Policy in Public Purchasing: the WTO Agreement on Government Procurement*, (The University of Michigan Press 1997), 31.
[112]See supra note 108, 89.
[113]See supra note 108, 98.
[114]See Robert D. Anderson and Anna Caroline Muller, "The Revised WTO Agreement on Government Procurement (GPA): Key Design Features and Significance for Global Trade and Development", (2017) 48 Geo J. Int'l L., 956.
[115]See supra note 108, 101.
[116]See supra note 108, 109.
[117]See Revised WTO Agreement on Government Procurement Enters into Force, WTO: 2014 News Items, 7 April 2014, viewed at: https://www.wto.org/english/news_e/news14_e/gpro_07apr14_e.htm.

3.1. The GPA and RTAs: correlations and complications

As is seen from the above, the GPA has become an indispensable part of trade regulation at the WTO level. Unlike most of the Agreements under the umbrella of the WTO, it is not binding for all members of the WTO and does not implement strict National Treatment and MFN rules. Even though the membership is limited, it can still be considered "the GATT of public procurement" in the sense that the Agreement sets out the minimum standards that any national system, wishing to be considered as following international best practice, should comply with. Thus the GPA is the "backbone" of the public procurement regulation at an international level while the RTAs increasingly include procurement provisions and even chapters.[118] This brings us to the question of whether there is a fragmentation of public procurement regulation and it seems that the answer is affirmative, as discussed below.

Currently there is a lack of academic research devoted to the issue of fragmentation of public procurement regulation not least because the GPA is a plurilateral agreement as discussed below and its provisions do not affect most of the WTO members, especially developing countries. However, two prominent articles presenting research conducted by the WTO Secretariat can provide interesting insights on the correlation of the GPA and procurement provisions of the RTAs.

The authors analysed approximately 250 RTAs divided in three groups: RTAs between the GPA parties; RTAs between the GPA parties and non-GPA Parties; and RTAs between non-GPA parties.[119] The results showed that 110 of all the RTAs under scrutiny (around 45%) do not contain procurement provisions. These are the plurilateral agreements or the ones signed between the countries of the Commonwealth of Independent States.[120] 67 agreements (approximately 27%) contain some provisions on government procurement proclaiming general non-discrimination goals but without any specific procedural details. First generation EU bilateral agreements, such as the 1999 Partnership and Cooperation Agreement

[118]See Massimo Geloso-Grosso, "Chapter 6: Government Procurement", in *Regionalism and the multilateral trading system*, (OECD Publications 2003), 98.

[119]See Robert D. Anderson, Anna C. Mueller and Philippe Pelletier, "Regional Trade Agreements and Procurement Rules: Facilitators or Hindrances?", EUI working papers, Robert Schuman Centre for Advanced Studies Global Governance Programme-197, RSCAS 2015/81.

[120]Commonwealth of Independent States (CIS) was created in 1991 after the collapse of the Soviet Union and is comprised of the former Soviet countries, except for Georgia. More about CIS can be viewed at: http://www.cis.minsk.by.

(PCA) with Armenia, [121] are good examples of this type of approach. Some 73 agreements (another 27%) contain detailed provisions on procurement and include coverage commitments. These RTAs are mainly from Latin America, North America[122] as well as second-generation EU bilateral agreements.[123]

As to the content of these 73 RTAs, Anderson et al conclude that the procurement provisions of this category of RTAs "tend to track very closely the provisions of the GPA itself".[124] This phenomenon can be explained by several factors: *first of all*, in many RTAs at least one of the parties is a GPA member.[125] Hence, it is unwilling to sign an agreement contradicting its GPA commitments and is keen to promote GPA-inspired procurement provisions, which will make it easier to comply with the requirements of both treaties. *Second*, it seems that the parties to the RTAs (even the ones between the non-GPA parties) have used the GPA style procurement provisions as a gold standard. These synergies can be considered a positive development as RTAs using the GPA-linked provisions might become the stepping stone to GPA membership; states will already have an understanding of what exactly is required and the national legislation will be harmonised with the requirements of the RTA making it easier in the future to accede to the GPA. For example, Kazakhstan has signed a trade agreement with the EU (EPCA) in 2015 where it undertook a commitment to comply with the requirements related also to the procurement sector.[126] It is evident that these provisions are an almost identical copy of the GPA. As Kazakhstan was granted GPA observer status in 2016 and has undertaken an obligation to join it, compliance with the EPCA will facilitate the compliance with the requirements of the GPA in the future.[127]

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[121]See Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Armenia, of the other part, OJEC, L 239/3, 09.09.1999.

[122]See supra note 119, 7-8.

[123]For example, the recently signed EU-Vietnam FTA contains provisions on coverage. The text of the Agreement can be viewed at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437.

[124]See supra note 119, 9.

[125]See Robert D. Anderson, Anna C. Mueller, Kodjo Osei-Lah, Josefita Pardo de Leon and Philippe Pelletier, "Government Procurement Provisions in Regional Trade Agreements: A Stepping Stone to GPA Accession?", in Sue Arrowsmith and Robert Anderson (eds.) *The WTO Regime on Government Procurement: Challenges and Reforms*, (Cambridge University Press 2011), 655.

[126]See Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part, OJEU L 29/3, 04.02.2016.

[127]In case the legislation will be made compliant with the EPCA requirements by that time. This, however, does not mean that the accession will go smoothly, as coverage negotiations are an important part of the process.

Anderson et al. also conclude that "the co-existence of the GPA with the government procurement provisions of the RTAs seems to involve relatively little in the way of the negative or 'spaghetti bowl' effects".[128] Taking into account the linkages and synergies found among 250 RTAs, it is safe to conclude that indeed, there is little negative effect but there are several issues to consider. *First of all*, the study looked at about 250 RTAs, an impressive number, but it does not include all RTAs notified to the WTO. Mainly, the EAEU Treaty, a major RTA with the ambitions to expand its membership over time, is not analysed.[129] *Second*, the number of RTAs is growing fast and without a proper mechanism in the WTO Secretariat to check their compliance with the WTO requirements, it will be hard to claim that the RTA provisions on procurement are harmonised with the ones of the GPA or at least do not contradict them. *Third*, implementation is a key factor. The RTA provisions should be implemented on the ground in such a way as not to contradict the GPA.

Overall, it can be concluded that "the fragmentation of national, regional and international regimes of procurement regulation is strictly linked with the phenomenon of the "global revolution" of public procurement".[130] The GPA has appeared as the closest existing equivalent to an all-encompassing international agreement on government procurement, while RTAs including procurement-related provisions provide the regional layer. Finally, national legislations incorporating the requirements of both the multinational and regional layers become an interesting mix of different policy and legal requirements.

The aforementioned complex constellation of international public procurement regulation and the ensuing probability of conflict of norms among these various international regulatory regimes require closer attention. The growing membership of the GPA has the potential to increase the likelihood of such conflicts between the various applicable international rules in addition to having a negative impact on the advancement of the GPA negotiation agenda.[131]

3.2. The GPA as a plurilateral agreement and the reasons for its limited membership

[128]See supra note 125, 656.
[129]For detailed discussion of the EAEU Treaty, see Chapter 4.
[130]See Maria Anna Corvaglia, "The Contribution of Public Procurement to Coherence of the Multi-Layered Governance in Implementing Labor Standards", page 3273, viewed at: http://www.ippa.org/IPPC5/Proceedings/Part6/PAPER6-16.pdf.
[131]See supra note 114, 975.

It is important to note at the outset that the nature of the Agreement has some bearing on its membership. As noted earlier, the GPA is one of the so-called Annex 4 Agreements:[132] it is a plurilateral agreement meaning that not all the WTO members are member to it.[133] These types of Agreements are deviations from the single undertaking principle ("nothing is agreed until everything is agreed")[134] adopted at the Uruguay Round. They allow their members to freely discriminate among non-members.[135] Thus, in case of the GPA, the MFN treatment is of a limited use ("conditional MFN"), having regard the bilateral nature of the negotiations between the incumbent and acceding countries.[136]

There are no specific rules related to the area that the plurilateral agreement can regulate, which means that they can refer to an area already regulated under the WTO or to an area excluded from other WTO Agreements (e.g. public procurement).[137] There is also no specific rule on membership and the agreement will set its own accession rules.[138] In case of the GPA, in accordance with its Article XXII:2: "Any *Member of the WTO* may accede to this Agreement *on terms to be agreed between that Member and the Parties*, with such terms stated in a decision of the Committee". The membership of the GPA is thus limited to WTO members only, and there should be negotiations between the members of the GPA and the country wishing to join. Currently, there are 20 parties covering 48 WTO members[139] and nine other WTO members are negotiating terms of accession.[140] In order to expand the membership, the current practice is to include an obligation to join the GPA when the country accedes to the WTO. This was the case for example with Kazakhstan.[141]

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[132]Currently there are only two plurilateral Agreements in Annex 4: the Agreement on Government Procurement and the Agreement on Trade in Civil Aircraft.

[133]See Bernard Hoekman and Michel Kostecki, *The Political Economy of the World Trading System: WTO and Beyond*, (Oxford University Press 2001), 369.

[134]This principle in accordance with some scholars make developing countries to commit beyond their capacities. See, e.g. Michitaka Nakatomi, "Plurilateral Agreements: A Viable Alternative to the World Trade Organization?", (2013) ADBI Working Papers Series, N 439, 3.

[135]See Ibid.

[136]See supra note 133, 369.

[137]See Bernard Hoekman and Petros Mavroidis, "WTO 'a la carte' or 'menu du dour'? Assessing the Case for More Plurilateral Agreements", (2015) The European Journal of International Law, Vol. 26:2, 325.

[138]See supra note 137, 327.

[139]EU with its 28 Member states are counted as one Party. See Parties, Observers and Members, viewed at: https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm.

[140]These countries are Albania, Australia, China, Georgia, Jordan, Kyrgyz Republic, Oman, Russian Federation, Tajikistan and the Northern Republic of Macedonia. See supra note 139.

[141]Report of the Working Party on the Accession of the Republic of Kazakhstan, WT/ACC/KAZ/93, 23 June 2015, para 949.

The membership of the GPA until recently included mainly developed countries. For them, having developing countries on board of the GPA is beneficial as their suppliers will have access to more markets while there is little fear that small developing countries will have enough capacity to compete for the tenders announced for example in the EU or Canada. Increased membership of the GPA on one hand means higher risk of fragmentation entailing higher probability of conflict of norms; on the other hand, if developing countries will have access to other markets through the multilateral avenue, i.e. the GPA, they might refrain from including procurement provisions in their RTAs thus limiting the possibilities of fragmentation.

Developing countries, though, hesitate to join. The reasons can be multiple ranging from the need to comply with the mandatory requirements of the GPA to the fear of losing national markets to foreign suppliers. The acceding country must negotiate with the incumbent countries its terms of accession, i.e. coverage offer – thresholds, list of entities and goods/services/works to be covered by the Agreement, indicating the limits of the market to which other members of the GPA will have access to. The lack of capacity may not allow the developing countries to have a level playing field when negotiating. Incumbent countries may also attempt to "impose a heavier price than what they paid in order to extend admittance to the club so that WTO members seeking to join [the GPA] might find the door closed".[142] This is true also from a political point of view. For instance, when joining the GPA, Ukraine has included entities in the Autonomous Republic of Crimea in its Annex 1 and Annex 2 proposals. In case the Russian Federation will decide to include Crimea in its offer, Ukraine will have the advantage of the "first mover" and can prolong/block the process. Armenia will have the same advantage if Turkey or Azerbaijan would like to join the GPA.[143]

Negotiations also involve considerable amount of costs[144] (e.g. travel costs for the delegations to participate to the meetings in Geneva) which developing countries

[142]See supra note 137, 328.

[143]Armenia has poor relations with both Turkey and Azerbaijan. See further Vicken Cheterian, "The Last Closed Border of the Cold War: Turkey-Armenia", (2017) Journal of Borderland Studies, Vol. 32:1; Gayane Novikova, "The Nagorno Karabakh Conflict Through the Prism of the Image of the Enemy", (2012) Transit. Stud. Rev., Vol. 18:550.

[144]See Robert D. Anderson and Kodjo Osei-Lah, "Forging a more global procurement market: issues concerning accessions to the Agreement on Government Procurement", in Sue Arrowsmith and Robert Anderson (eds), *The WTO Regime on Government Procurement: Challenges and Reforms*, (Cambridge University Press 2011), 79.

with scarce resources are not able to pay.[145] Other costs relate to the reforms necessary to implement the GPA requirements[146] and the preparation of domestic market for the enhanced competition.[147] These costs can be considerable especially for developing countries where procurement legislation is usually not compliant with the GPA requirements. Such difficulties may be also accentuated by the fact that the text of the Agreement reflects the standards and practices of the developed countries. Opening of procurement market to foreign competition is a debatable cost though. On the one hand, the local companies will not gain much from participating in tenders, hence the government revenue will be reduced. On the other hand, the country benefits from procuring better goods/services/works at a comparable price. This is a trade-off.

Other factors might also discourage developing countries from acceding to the GPA. One of such factors is the limited market access due to high thresholds and "positive list" approach.[148] The thresholds are set to mark the procurement value above which the provisions of the Agreement apply. Higher thresholds will mean that developing countries' export possibilities are being limited. It is interesting to recall that developing countries are mostly involved in the production of the primary products, which have lower value.[149] From another perspective, the introduction of thresholds reduces the administrative burden for carrying out procurement procedures of limited interest to foreign competition. EAEU Treaty, for example, does not have any thresholds, meaning that its provisions apply to all procurement procedures of the MS irrespective of the value and importance attached to it. As a result, EAEU members struggle with the implementation of all those provisions in practice. In addition, lower thresholds might discourage developing countries from

[145]In some cases, IFIs and other international organisations might be willing to help the countries to bear negotiation and other costs related to the GPA accession. For example, OECD/Sigma has helped Armenia in 2010 to prepare "Analysis of the Armenian Public Procurement Law and Implementing Decree Vis-à-vis the EC Public Procurement Directives and the Agreement on Government Procurement" and an overview of the "Public Procurement in Armenia". These documents fastened the accession process by clearly describing to other parties the state of play in the procurement area in Armenia. Currently EBRD with its EBRD GPA Technical Cooperation Facility is supporting countries wishing to join the GPA by providing legal and policy support in all stages of accession as well as during the post-accession (implementation) period.

[146]WTO GPA Art. XXII:4 states: "Each Party shall ensure, not later than the date of entry into force of this Agreement for it, the conformity of its laws, regulations and administrative procedures, and the rules, procedures and practices applied by its procuring entities, with the provisions of this Agreement".

[147]See supra note 144, 79.

[148]See Valeria Guimaraes de Lima e Silva, "The Revision of the WTO Agreement on Government Procurement: to what Extent Might it Contribute to the Expansion of Current Membership?", (2008) Public Procurement Law Review, Vol. 17:2, 73.

[149]See IMF, "World Economic Outlook: Spillovers and Cycles in the Global Economy", April 2007, Table 24, 246.

joining as they would make contestable the contracts that national companies can deliver themselves. Hence, thresholds can benefit developing countries having small procurement markets and few procurement procedures above the thresholds.

A further limitation is that the MFN treatment applies only to the covered procurement of the GPA Parties. Strict reciprocity[150] is applied when negotiating opening of markets and it is usual to see in parties' Annexes explicit statements to this effect.[151] For example, the US in its Annex 7 states: "For construction services of the Republic of Korea and suppliers of such services, the threshold for procurement of construction services by the entities included in Annex 2 or 3 is 15,000,000 SDRs".[152] In its turn, the Republic of Korea's thresholds for the sub-central and other entities for the procurement of construction services is 15,000,000 SDRs. In case of developing countries, the principle of strict reciprocity might be harmful as these countries do not have much to offer.[153] Such countries can of course introduce counter-restrictions on the offered coverage but taking into account the lack of level playing field, this will not induce developed countries to open their respective markets.

The costs the countries will bear when joining the GPA will also exist in case of joining an RTA, but in the former case they will get an access to a bigger procurement market, as the number of the GPA parties is not comparable to the number of the parties of any RTA (especially if the RTA is bilateral). Then the question is why the developing countries still prefer to sign RTAs instead of joining the GPA? One possible answer can be that the domestic market might not be ready for the competition from suppliers from all GPA parties, while in case of the RTA the issue might be handled with more ease. Another answer might be that the parties to the RTAs can have "trade-offs across different matters/sectors of the RTAs that would otherwise seem unrelated",[154] while in case of the GPA trade-offs are not allowed as the Agreement is covered by single undertaking principle.

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[150]In accordance with Arrowsmith: "Reciprocity' in international trade means, broadly, that markets are opened in return only for equivalent concessions by trading partners". See supra note 110, 109.

[151]See Robert D. Anderson and Kodjo Osei-Lah, "The coverage negotiations under the Agreement on Government Procurement: context, mandate, process and prospects", in Sue Arrowsmith and Robert Anderson (eds), *The WTO Regime on Government Procurement: Challenges and Reforms*, (Cambridge University Press 2011), 154.

[152]SDR stands for Special Drawing Rights. It is an international reserve asset created by the IMF. See Special Drawing Right (SDR), March 8, 2019, viewed at: .http://www.imf.org/external/np/exr/facts/sdr.htm.

[153]See Vesta Malolitneva, "Ukraine's potential accession to the WTO Government Procurement Agreement: What are the Pros and Cons?", (2014) GSTF Journal of Law and Social Sciences, Vol. 4:1, 59.

[154]See supra note 119, 9.

Overall, developing countries up to 2011 were not particularly eager to join the GPA despite the inclusion of special and differential treatment provisions in the revised Agreement [155] aimed at introducing greater flexibility, which would in turn lead to membership expansion. In particular, Article V named "Developing Countries" is devoted to regulating the special and differential treatment of developing countries. Article V:1 obliges the parties to the agreement to "give special consideration to the development, financial and trade needs of the developing countries", although the rest of the article suggests that any special treatment is subject to negotiations. The problem with this seems to be the unequal bargaining power of the incumbent and acceding countries. Each developing country depends on the decision of the parties to the GPA to take it on board. If it has undertaken a commitment to join the GPA upon joining the WTO, the acceding country might accept even the unfavorable terms of accession just to tick the box of complying with the obligation. In addition, most of the incumbent parties are developed countries, and the practice shows that they have more industrial capacity and better negotiation skills to push for the desired outcome.

From the developed country's perspective though, negotiations are seen as a protective mechanism preventing the "free riding" that might occur if the special and differential treatment is granted automatically. [156] This is because the status of developing economy is not subject to agreed criteria but often is self-proclaimed.[157] This leads to situations where countries with a developed economy (for example, Israel) proclaim themselves as developing to benefit from such exceptions. The fear of the developed countries, though, is not justified, as all the measures allowed by the GPA should be transitional (Art. V:3), which means that they should be "limited in time, non-discriminatory and set out in an Annex".[158] It is implied that after some time the development needs of developing countries will be fulfilled and there will be no need for special measures. In addition, the underlying idea of the WTO is that trade liberalisation is the best way to develop economies and by closing their procurement markets, the developing countries are missing out various opportunities.[159] Hence, developed countries are keen on opening of as much of

[155]See supra note 151, 161.

[156]See supra note 148, 82.

[157]See "Who Are the Developing Countries in the WTO?", viewed at: https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm.

[158]See Anna Caroline Mueller, "Special and Differential treatment and other special measures for developing countries under the Agreement on Government Procurement: the current text and new provisions", in Sue Arrowsmith and Robert Anderson (eds), *The WTO Regime on Government Procurement: Challenges and Reforms*, (Cambridge University Press 2011), 358.

[159]See Andrew D. Mitchell and Tania Voon, "Operationalizing Special and Differential Treatment in the World Trade Organization", (2009) Global Governance 15, 347.

the developing countries' markets as possible. Developing countries though might require more time and gradual opening of markets to prepare their own suppliers for international competition.

From a substantive point of view, the following transitional measures are allowed under the GPA: "price preference programs, offsets, phased-in addition of specific entities or sectors; and a threshold that is higher than its permanent threshold".[160] The chapeau of the same Article V:3 limits the usage of one or several of these measures by two factors: development need and the length of the measure to be negotiated with other parties to the GPA. Another measure allowed for developing countries is the delayed application of any specific measure. Any obligation except for the obligation not to discriminate can be subject to the delay. The length of this measure is explicitly provided in the text, which is up to three years for the developing countries.[161] It is unclear though why the GPA lays down maximum number of years in case of this specific measure while the length of any other measure allowed to developing countries is subject to negotiations; an approach that might reinforce the risk of free riding.

From a procedural point of view, developing countries can make use of the measures provided in the GPA not only when applying for accession (though this is usually the case as the developing countries started actively acceding to GPA) but also after the negotiations are over. Mainly, Art. V:6 provides the opportunity to ask the Committee for an extension of the transitional period or approval of a new transitional measure if some special unforeseen circumstances have occurred. These provisions add another layer of flexibility for developing countries to consider their development needs in the face of rapidly changing global economic realities.

The usage of the mentioned measures though can be described as limited. The membership has indeed increased but at the time of writing only Israel[162] and Moldova had made use of the transitional measures. Israel included Annex 8 introducing offsets,[163] and Moldova was successful in negotiating transitional

[160]See Art.V:3 of the GPA.

[161]See Art.V:5 of the GPA.

[162]Israel joined the GPA still in 1983 as one of the first developing countries. Though currently some doubts are raised as to whether Israel can still be considered a developing country, the reality is that Israel managed to keep the offsets for its procurement, which should be gradually eliminated by 2029. For more about the public procurement regime in Israel, see Arie Reich, "Israel's Public Procurement Regime: International and Comparative Aspects", in Aris Georgopoulos, Bernard Hoekman and Petros Mavroidis (eds.), *The Internationalization of Government Procurement Regime*, (Oxford University Press 2017), 221-263.

[163]Offset in accordance with the GPA Art. I:k means "any condition or undertaking that encourages local development or improves a Party's balance-of-payments accounts, such as the use of domestic content,

measures regarding thresholds.[164] The reasons for the reluctance to make use of the measures might relate to the difficulties of negotiating mutually acceptable measures as well as transitional period.

In sum, it can be concluded that the special and differential treatment introduced by the GPA is well suited to combat the possibility of free riding while allowing some time for developing countries to adjust. Yet, another approach might be just to grant temporary automatic transitional measures to all developing countries without negotiations. Membership might be enhanced greatly creating more problems related to fragmentation, one of which is conflict of norms between different treaties.

4. Fragmentation as a source of conflict of norms

Fragmentation of international trade law and public procurement regulation is an unavoidable result of the increased number of RTAs coexisting with the WTO and the GPA. It might even seem that fragmentation is a neutral phenomenon, unless countries face the problem of conflict of norms. In a fragmented system, conflict may be created by the states themselves to undermine the multilateral treaty they are party to.[165] It might be a result of a clash of values that requires "political decision" instead of a legal discourse;[166] or the negotiators might lack knowledge on different areas of trade thus negotiating regulations not compliant with other obligations of the country. The specific reasons of the conflict of norms are irrelevant for the current discussion as the focus will be on the notion of "conflict" itself.[167] The starting point will be the discussion of the absence of hierarchy of norms in international law. Ultimately, if there are rules describing strict hierarchy of norms like in most national systems, the problem of conflict might not even exist.

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the licensing of technology investment, counter-trade and similar action or requirement". See also supra note 162, 247-248.

[164] The information about countries' Annexes can be found in the e-GPA Portal: https://e-gpa.wto.org/.

[165] See Surabhi Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law*, (Cambridge University Press 2014), 14.

[166] See Jan Klabbers, *Treaty Conflict and the European Union*, (Cambridge University Press 2009), 88.

[167] It is not the aim of this thesis to discuss different ways of solving treaty conflicts. The only issue of concern at this stage is the definition of conflict even though most academics after defining the conflict start suggesting appropriate solutions. See Surabhi Ranganathan, "Between Philosophy and Anxiety? The Early International Law Commission, Treaty Conflict and the Project of International Law", (2013) The British Yearbook of International Law, Vol. 83:1, 87.

4.1. (Lack of) hierarchy of norms in international law

It is widely accepted that there is no formal hierarchy among the norms of international law with two notable exceptions: *jus cogens* and Art. 103 of the UN Charter.[168] *Jus cogens*, also known as peremptory norms, "assert the existence of fundamental norms from which no derogation is permitted".[169] The importance of such norms was acknowledged also in Vienna Convention on the Law of Treaties (VCLT), Art. 53 of which defines *jus cogens* as "a norm accepted and recognised by the international community of States as a whole".[170] Moreover, in case a signed treaty is in conflict with a norm of *jus cogens*, such treaty is void.[171] Thus, the VCLT sets out a clear hierarchy putting the norm of *jus cogens* on top while every other treaty should comply with such norms meaning that there can be no conflict involving *jus cogens*.[172] Without engaging in further debate on which norms constitute *jus cogens* suffice is to note for the purposes of this research, that usually such norms relate to the areas of human rights and humanitarian law representing the values which the "community of States as a whole" commits to protect. Examples can include prohibition of genocide, slavery, piracy, armed aggressions.[173]

As discussed in section 2.4, Article 103 of the UN Charter can be considered a conflict clause giving the Charter a higher legal force in case of conflict. Considering that most countries of the world are members to the UN,[174] it can be stated that the Charter indeed lays down a common rule of hierarchy even though it is a partial one referring to the rank of the UN Charter only. As described by Ghouri, the UN Charter thus becomes a treaty of a "universal character".[175]

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[168]See for example Carmen Pavel, "Normative Conflict in International Law", (2009) 46 San Diego L. Review, 897-901.

[169]See Hilary Charlesworth and Christine Chinkin, "The Gender of *Jus Cogens*", (1993) Human Rights Quarterly, Vol 15:1, 63.

[170]See Vienna Convention on the Law of Treaties (with annex). Concluded in Vienna on 23rd of May 1969. Viewed at: https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf.

[171]See Art. 53 of the VCLT.

[172]See Thomas Kleinlein, "Jus Cogens as the 'Highest Law'? Peremptory Norms and Legal Hierarchies", (2015) Netherlands Yearbook of International Law 46, 11.

[173]The proposed list can be found in Marjorie M. Whiteman, "Jus Cogens in International Law, With a Projected List", (1977) GA. J. Int'l & Comp. L., Vol. 7, 625-626.

[174]List of the UN Member States can be viewed at: http://www.un.org/en/member-states/.

[175]See Ahmad Ali Ghouri, "Is Characterization of Treaties a Solution to Treaty Conflicts?", (2012) 11 Chinese Journal of International Law, 268.

To introduce hierarchy among all the other treaties, some commentators are suggesting categorising them based on the values they are created to protect. Ghouri claims that, when faced with the situation of conflict, a norm "representing a higher value" should be preferred over the norm "representing a lower value".[176] The problem with this categorisation is straightforward: how is the state or the adjudicating body going to decide on the rank of values? Can it be safely claimed that trade has a lower value than protection of environment? Or that maritime laws have higher force than norms regulating investment regimes? Arguably, there are no objective criteria for such categorisation. States enter into treaties to protect some specific values all of which can be considered as having equal importance while referring to different areas of regulation. As Pavel rightly noted: "[b]y subordinating one value to the other in the abstract, we fail to take seriously the proper moral weight of significant human interests that each of the laws in question purports to protect".[177]

The Statute of the International Court of Justice (ICJ), in its Article 38 lays down some of the sources of international law that the Court can use when deciding upon a case.[178] These sources are international conventions (i.e. treaties), international custom, general principles of law and judicial decisions and the works of academics. There is no hierarchy between these sources though some academics tend to believe that the order in which they are enumerated depicts the so-called "informal hierarchy".[179] In accordance to this view, treaties have higher force than custom, and custom has a higher force than the general principles of international law. The last resort in accordance with this view should be judicial decisions and academic writings. Notwithstanding the immense importance of Article 38 for international law in general, it does not contain an exhaustive list of sources for international law and refers only to the law applicable to the cases before the ICJ.[180] Hence, it might be assumed that Article 38 reflects the "logical sequence in which the rules would occur to the judge's mind, rather than to establish a definite hierarchy of sources".[181]

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[176]See Ahmad Ali Ghouri, "Determining Hierarchy Between Conflicting Treaties: Are There Vertical Rules in the Horizontal System?", (2012) Asian Journal of International Law 2, 263.
[177]See supra note 168, 894.
[178]Text of the ICJ Statute can be viewed at: https://www.icj-cij.org/en/statute.
[179]See supra note 1, 47.
[180]See Joost Pauwelyn, *Conflict of Norms in Public International Law*, (Cambridge University Press 2003), 90.
[181]See supra note 180, 95.

Given the absence of the hierarchy of norms, some principles were introduced in international law facilitating the symbiosis of different norms for which there is no formal hierarchy. [182] In this regard a well-known *lex posterior derogate legi priori* postulate is widely discussed and criticised. The rule laid down in the VCLT Article 30 (3)[183] specifies that "[w]hen all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty". This rule applies *only* in case the parties to both earlier and later treaties are identical and builds on the logics that the same parties have chosen to regulate their relations differently, hence the later treaty shall reflect their will more accurately. The presumption might turn out to be wrong if interpretation as well as history of negotiations will prove the parties intent to stick to the provisions of the earlier treaty.[184]

A critical issue in this respect is the date the treaty is considered to be in force. Is it the date when the text was adopted? Or when all parties have ratified it? This question might sound as a purely technical issue, but it creates many problems in practice. For example, the revised GPA entered into force in April 2014 when 2/3 of its parties had deposited their instruments of acceptance but there is one country – Switzerland, for whom the treaty is still not applicable as it has not finished its internal procedures of ratification. Hence, two regimes are still in force – the regimes of the 1994 GPA and 2012 GPA, creating inconveniences for the parties that have already ratified the revised Agreement.

A more challenging question though is the case of treaties between non-identical parties. In this regard Article 30(4) VCLT states: "When the parties to the later treaty do not include all the parties to the earlier one: (a) As between States parties to both treaties the same rule applies as in paragraph 3; (b) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations". An example of this may be the following: Kazakhstan and Armenia both have signed the EAEU Treaty, hence their mutual rights and obligations are governed by that Treaty. Armenia also signed the GPA, hence its rights and obligations towards other

[182]The same principles are seen as mechanisms for resolving treaty conflicts. For further discussion see Anja Lindroos, "Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*", (2005) Nordic Journal of International Law 74, 27.

[183]Article 30 refers to successive treaties relating to the same subject matter. As the scope of this research is limited to the public procurement and analysis will take into account only the procurement chapters of the respective trade agreements, the "same subject matter" requirement seems to be complied with.

[184]See supra note 1, 119.

GPA members are governed by the GPA and Annexes' to it. In their turn, Armenia and Kazakhstan have each signed a trade agreement with the EU. As a result, the EU-Kazakhstan relationship will be governed by the signed bilateral treaty (the EPCA) while the EU-Armenia relationship will be governed by both GPA and the treaty signed with the EU, as both are members to the GPA. When applying *lex posterior* rule as between the EU and Armenia, it might turn out that the EU-Armenia trade agreement shall prevail in case there is a contradiction between the norms of that agreement and the GPA. *Lex posterior* has limited applicability also if we consider that Kazakhstan will join the GPA at a later stage. Which treaty shall govern the relationship between Armenia and Kazakhstan then? Shall it be the EAEU Treaty or the GPA? From the perspective of Armenia, the EAEU Treaty is the later treaty, from the perspective of Kazakhstan, the EAEU Treaty is an earlier treaty. These questions remain unanswered in the academic literature.

Another technique used to apply some type of hierarchy is *the lex specialis derogate lege generali* rule, whereby a more specific rule shall be given priority over a more general rule.[185] In case under scrutiny it is really hard to distinguish the public procurement norms that are of a general nature from those of a specific nature. Can the norms of the EAEU Treaty containing mandatory procurement methods be more specific than the GPA requirements to have methods that comply with the basic principles of transparency and impartiality? Can the GPA norms regulating in detail the creation and operation of a review body be considered more specific than the provision of the EAEU Treaty regulating the same area? The same questions arise when trying to decide on *lex specialis* while looking at the EU respective agreements with Armenia and Kazakhstan. Thus, *lex specialis* just like *lex posteriori* creates problems rather than solves them.

As for the consequences of having conflicting treaties, VCLT Article 30 does not rule on their invalidity, rather "it acknowledges the validity of both treaties and tends to create two different treaty regimes *inter partes*".[186] In this respect, much depends on the definition of the conflict discussed below.

4.2. Definition of conflict of norms

[185]See supra note 1, 47-65.

[186]See W. Czaplinksi and G. Danilenko, "Conflict of Norms in International Law", (1990) Netherlands Yearbook of International Law, Vol. 21, 25.

Norms are usually described as being prescriptive (obligating), permissive or prohibiting.[187] Pauwelyn adds that norms can also be exempting in which case the state has the right not to do something. [188] To illustrate the functions of a norm, it will be useful to look at examples from the international treaties scrutinised in this research. The EAEU Treaty contains many *prescriptive norms* obliging its MS to adapt their procurement legislation to specific and concrete requirements. For example, point 13 of Annex 25 to the EAEU Treaty states that "[p]rocurement legislation of a Member State *shall* provide for the formation and maintenance of a registry of mala fide suppliers". Unlike the EAEU Treaty, the GPA contains more *permissive norms*, for example Article VIII:4 points out that "[w]here there is supporting evidence, a Party, including its procuring entities, *may* exclude a supplier on grounds such as: bankruptcy; false declarations; significant or persistent deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts; final judgments in respect of serious crimes or other serious offences; professional misconduct or acts or omissions that adversely reflect on the commercial integrity of the supplier; or failure to pay taxes". An example of a *prohibitive norm* will be Article 122(2) of the EPCA (and the GPA) stating that "[w]ith respect to any measure regarding covered procurement, a [p]arty, including its procuring entities, *shall not* (a) treat a locally established supplier less favourably than another locally established supplier on the basis of the degree of foreign affiliation or ownership; or (b) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of the other Party". Point 31 of the Annex 25 to the EAEU Treaty can be quoted as an example of an *exempting norm*: "[i]n exceptional cases and as determined in its procurement legislation, a [MS] may unilaterally introduce *exemptions* from such national treatment for a period not exceeding 2 years".[189]

Academic literature in the early days of the discussion of the conflict of norms has defined the term narrowly. According to Jenks: "[a] conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties".[190] This definition points out only the incompatibility of obligations, without paying attention to the rights that the state might not be able to enjoy due to the constraints envisaged in another ratified treaty. Jenks accepts that it is possible for a state to be deprived

[187]See Erich Vranes, *Trade and the Environment*, (Oxford University Press 2009), 12.
[188]See supra note 180, 158-159.
[189]This norm can also be considered a "permissive norm".
[190]See Wilfred Jenks, "The Conflict of Law-Making Treaties", (1953) 30 Brit. Y.B. Int'l L, 426.

of the advantages granted by one of the treaties as making use of it will involve violation of the other treaty.[191] Nevertheless, for him these situations are not amounting to conflict. Marceau is also advocating for the narrow definition claiming that only in case the norms impose "mutually exclusive obligations" there is a situation of conflict.[192] Another prominent academic, Kelsen, while again mentioning only obligations, adds that in order to find a conflict "the observance or application of one norm [should] necessarily or possibly involve the violation of the other".[193] Czaplinski and Danilenko as well think that the conflict is related to cases of incompatibility of obligations.[194]

Unlike this approach, Pauwelyn opts for a broad definition suggesting that "two norms are in a relationship of conflict if one constitutes, has led to, or may lead to, a breach of the other".[195] Note, he does not differentiate between the rights and obligations, but rather states generally "norms". The word "norms" is also used by Sadat-Akhavi who does not make a difference between the norms based on their function.[196] Similarly, Vranes while criticising the narrow approach concentrates on the violation of norms and finds that there is a "conflict between two norms, one of which may be permissive, if in obeying or applying one norm, the other one is necessarily or possibly violated".[197]

These and other authors advocating for a broad definition mostly base their opinion on the fact that the VCLT Article 30 (4) (b) refers to "rights and obligations" thus making clear that obligations do not enjoy priority over rights. Treaties are comprised of negotiated and balanced rights and obligations and to give a priority to only one of them, means to breach the balance and to move away from the will of the treaty-makers. Pauwelyn also states that there should be a distinction between *what* and *how,* i.e. the definition of the conflict and the ways to solve it.[198] Indeed, the numerous tools used to resolve conflicts of norms, e.g. interpretation techniques,[199] compatibility clauses,[200] can be used only when a conflict has been

[191]See Ibid.
[192]See Gabrielle Marceau, "Conflicts of Norms and Conflicts of Jurisdictions: the Relationship between the WTO Agreement and MEAs and Other Treaties", (2011) Journal of World Trade, Vol. 35:6, 1084.
[193]See Hans Kelsen, *General Theory of Norms*, (Oxford University Press 1991), 123.
[194]See supra note 186, 13.
[195]See supra note 180, 176-177.
[196]See Seyed Ali Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties*, (Martinus Nijhoff Publishers 2003), 5.
[197]See Erich Vranes, "The Definition of 'Norm Conflict' in International Law and Legal Theory", (2006) The European Journal of International Law, Vol. 17:2, 415.
[198]See supra note 180, 172-173.
[199]See supra note 192, 1082.
[200]See supra note 186, 13.

identified. In case of a narrow definition, the conflict does not even exist in the first place, hence there is no need to resolve it. Considering the above-mentioned facts, the definition proposed by Pauwelyn is going to be used for the purposes of the current research.

In addition, further substantive research will be built on the differentiation of conflicts that Pauwelyn makes based on the function of norms discussed above.[201] The differentiation is made between:

1. *Conflicting obligations,* in which case two situations are possible: a) two obligations relate to the same "factual circumstances" but are not mutually exclusive and might be complied with; and b) two obligations are mutually exclusive. [202] In the case under sub point a) the conflict might be resolved using interpretative tools.

2. *Conflict between an obligation and a prohibition* where one norm commands to adopt certain conduct and the other norm explicitly prohibits adopting such conduct.[203] In this case there is a conflict, which might require one of the norms to be amended for the country to be able to comply with its international obligations.

3. *Conflict between an obligation and an exemption.* One norm obliges to adopt a conduct while the other norms grant the right to adopt (or not to adopt) the specific conduct.[204] In this case the solution might be to refrain from using the right and to opt for complying with the obligation. Though, as was mentioned above, obligations should not prevail over the rights, this is a very practical way not to contradict any international obligations. Other parties to the agreements are usually concerned only with the question whether the country implements its obligations, and only the implementing country loses the benefits of not making use of the rights granted by the agreements. This is also the way Armenia and Kazakhstan (need to) proceed when drafting a procurement legislation to be compliant with all international treaties signed and ratified.

4. *Conflict between a prohibition and a permission.*[205] Here it will be the same situation as under point 3 above. The solution might be for a state to opt for the prohibitive norm rather than to enforce its rights.

[201] See supra note 180, 180-188.
[202] See supra note 180, 180.
[203] See supra note 180, 184.
[204] See supra note 180, 184.
[205] See supra note 180, 187.

The situations under point 1(b) and 2 are called "necessary conflicts"[206] or "real conflicts"[207] while the conflicts described under points 1(a), 3 and 4 are called "potential conflicts"[208] or "apparent conflicts"[209]. It will become obvious from further Chapters that in cases of Armenia and Kazakhstan there are no "real" or "necessary" conflicts.

5. Conclusion

The rise of regionalism led to the fragmentation of international trade law. The growing number of RTAs threaten to deepen the fragmentation and eventually result in a "real" or a "necessary" conflict of norms, if countries will not consider their commitments. Though there are numerous proposals in academic literature on how to drive regionalism towards multilateralism,[210] changes might be unlikely for a substantive period given the ongoing proliferation of RTAs and their substance.

As discussed above, fragmentation brought out by regionalism exists also in international procurement regulation, although not to the same extent as in international trade law in general. This can be attributed to the limited membership of the GPA. Though the GPA contains favourable terms and conditions for developing countries, due to the limited implementation practices, these provisions did not reach their aim of attracting more members. On the one hand, this is good news, as the fragmentation of public procurement remains limited. On the other hand, the more countries join the GPA, the more open procurement markets become thus enhancing competition and resulting in value for money.

Fragmentation of international public procurement regulation can have practical consequences, such as the possibility of giving rise to conflict of norms. After considering different definitions, the wider definition of the conflict of norms was chosen for the current research project, taking into account that obligations and rights should have equal force as elements of international treaties. The definition

[206]See supra note 180, 180.
[207]See Claude Chase, "Norm Conflict Between WTO Covered Agreements – Real, Apparent or Avoided?", (2012) ICQL, Vol. 61, 791.
[208]See supra note 180, 180.
[209]See supra note 207, 791.
[210]See for example, Jayant Menon, "From Spaghetti Bowl to Jigsaw Puzzle? Fixing the Mess in Regional and Global Trade", (2014) Asia and the Pacific Policy Studies, Vol. 1:3, 476.

of "conflict of norms" as well as the categorisation of conflicts by Pauwelyn is the basis on which the research project is built.

Against this theoretical background, the next Chapter will be devoted to the analysis of the text of the GPA and the in-depth examination of the provisions related to the review bodies and procedures.

Chapter 3: The GPA: general characteristics and domestic review procedures

1. Introduction

The GPA as a plurilateral agreement plays an important role for procurement market liberalisation of the countries party to it and can be seen as the "GATT of public procurement". In order to research the phenomenon of fragmentation of international public procurement regime, the GPA serves as a starting point given its importance for procurement market liberalisation and its role as a "best practice" toolkit.

Even though the analysis will take into account the 1994 GPA, the main focus will be the revised Agreement from 2012. The revisions made the GPA clearer and more user-friendly while addressing some recent developments in public procurement, such as electronic procurement. The parties to the GPA managed to negotiate a text that incorporates provisions on how the procurement systems should work while providing enough flexibility for developing countries to successfully join the Agreement. Thus, they resolved the tension between the need to attract developing economies that are still outside of the GPA[1] and the requirement to decide on the set of rules that will be beneficial for the countries already parties to the Agreement.[2]

The current Chapter, besides analysing the general aim, main features and requirements of the GPA, focuses on the domestic review mechanisms with the aim of highlighting the different options available to the GPA parties. This will be a starting point informing the analysis in Chapter 7 and answering the main research question of whether there are instances of conflict of norms in the existing international obligations of Armenia and Kazakhstan. The Chapter is structured as follows. Section 2 discusses on the general characteristics of the GPA touching upon also the GPA norms on procurement methods and electronic procurement, which have the potential of creating the situations of conflict of norms. Section 3 analyses different elements of the domestic review mechanisms provided in Art. XVIII of the GPA. The Chapter ends with conclusions.

[1]Such economies as India, Brazil, Turkey, and alike.

[2]See Aris Georgopoulos, Bernard Hoekman and Peter Mavroidis "Introduction and Overview", in Aris Georgopoulos, Bernard Hoekman and Petros Mavroidis (eds.), *The Internationalization of Government Procurement Regulation*, (Oxford University Press 2017), 5.

2. General characteristics of the GPA

As mentioned before, the GPA is a plurilateral agreement of the WTO, dealing with the liberalisation of public procurement markets of the countries party to it. Because of strict reciprocity, some procurement transactions as well as PPPs are largely outside of the coverage of the GPA and countries are free to discriminate in such cases by choosing national suppliers even though this might not be the most economically efficient choice (no value for money). In order to understand what exactly the GPA requires from the countries parties to it, this Section will be devoted to the doctrinal analysis of the text of the 2012 GPA with a small comparative recourse to the previous text from 1994.

2.1. Nature, main aims and basic principles

As the GPA was created under the auspices of the WTO, the main aim of the Agreement is trade liberalisation. Quantitative data shows that the GPA parties opened procurement markets worth of 1.7 trillion USD annually, and the revised GPA is estimated to add another 80-100 billion USD annually.[3] Thus, from a trade liberalisation standpoint, the revised GPA indeed has brought (or has the potential of bringing) positive impact. Anderson relates this achievement to several factors, including the "enhancement of the coverage by 400-500 new entities;[4] inclusion of Build-Operate-Transfer type of arrangements; inclusion of telecommunication services by some Members; coverage of the full range of construction services above the respective thresholds; revision of thresholds downwards and cancellation of some exclusions".[5]

The aim of liberalisation was also "engraved" in the preamble of the 1994 text as well as in the preamble of the revised agreement: "Recognising the need for an effective multilateral framework for government procurement, with a view to achieving greater liberalisation and expansion of, and improving the framework for, the conduct of international trade". A point can be made here that, due to the

[3]See Arwel Davies, "The Evolving GPA: Experience and Prospects", in Aris Georgopoulos, Bernard Hoekman and Petros Mavroidis (eds), *The Internationalization of Government Procurement Regulation*, (Oxford University Press 2017), 23.

[4]Armenia can be an example of unilateral expansion of the coverage to the newly created central and sub-central government entities as a result of changes in the government structure. Three central government entities and two municipalities were added to the positive lists under Annex 1 and Annex 2 respectively.

[5]See Robert Anderson, "The Coming into Force of the Revised WTO Agreement on Government Procurement, and related developments", (2014) Public Procurement Law Review 5, 161.

limited membership of the GPA, it is far from creating "multilateral framework", but the core idea - the recognition of the need of procurement multilateralisation and international trade liberalisation, is found in the preamble.

Closely linked with the aim of trade liberalisation is the recognition of the need to encourage the accession to the GPA by the WTO parties that are not yet members to it. As this aim was one of the main issues under scrutiny in Chapter 2,[6] here it will be just mentioned that a special emphasis was put on the necessity of making the Agreement flexible enough to accommodate all the specific circumstances of the (new) parties. Given the growing number and diversity of the GPA membership, this is a viable approach for attracting new members.

The inclusion in the preamble of "domestic welfare rationales […] unrelated to the benefits of international trade" was considered a positive step. [7] Reference is made to two new objectives of the GPA; *first,* the recognition that the "integrity and predictability are linked to the effective and efficient management of public procurement";[8] and *second,* the importance of carrying out procurement procedures in a transparent and impartial manner while avoiding conflict of interest and corrupt practices in accordance with applicable international instruments,[9] e.g. UN Convention Against Corruption (UN CAC).[10] At first sight, these new provisions might indeed concern the procurement systems of individual countries, rather than international trade, but it can be argued that there is an imminent link between the value for money, fight against corruption and international trade. Foreign suppliers will be encouraged to participate in the procurement procedures of the countries whose system is based on the principles of integrity and predictability devoid of corruption. If the country is known to be corrupt, the bidders will be reluctant to spend resources on participating in a procurement procedure for the fear of wasting resources without a chance to be awarded the contract. A valid point to make here is that some foreign companies are adapting to the local corrupt practices so much that they also start "playing with the same rules", e.g. bribing local authorities to win the tender.[11] It can be assumed though that this practice is not widespread

[6] For detailed discussion of the reasons for limited membership, see subsection 3.2. of Chapter 2.
[7] See Arie Reich, "The New Text of the Agreement on Government Procurement: An Analysis and Assessment", (2009) Journal of International Economic Law, Vol. 12:4, 996.
[8] See supra note 7, 997.
[9] See supra note 7, 997.
[10] See United Nations Convention Against Corruption, adopted by the General Assembly Resolution N58/4, dated 31.10.2003. Viewed at: http://unpcdc.org/media/132243/ox.pdf.
[11] See for example Joseph Mann, "IBM to pay 10m USD in SEC bribery case", *Financial Times,* March 18, 2011, viewed at: https://www.ft.com/content/63265324-51ad-11e0-888e-00144feab49a?mhq5j=e1.

among foreign bidders hence they will most likely lose a tender in a country with a corrupt system.

The inclusion of these new aims also alleviates the tension between the concepts of "free trade" of the GPA and the "governments' ability to implement legitimate policies".[12] As the legislation of the countries party to the GPA needs to comply with its requirements, the integrity and the fight against corruption have to be recognised as principles on which the domestic procurement system is based on. These provisions of the preamble are important, as they are the background in the light of which the WTO panels should interpret the provisions of the GPA.[13]

According to Arrowsmith, there are various measures and techniques that parties can use in order to bring their respective legislations in compliance with the new aims of the GPA.[14] For example, a requirement for the evaluation committee members to sign a document about the absence of conflict of interest or transparency requirements related to the publication of contract notices and contract award notices might be seen as integrity and anti-corruption measures. A question follows whether other GPA parties can challenge any such measure as falling short of complying with the GPA requirements. Arrowsmith in this regard notes that any such attempt "would be fraught with extreme practical and political difficulties".[15] Davies also concludes that the WTO panels will likely refrain from ruling on such "sensitive matters" as corruption and conflict of interests.[16]

Even if considering that Art.IV:4(b)-(c) operationalise the provisions of the preamble by requiring the countries to "conduct procurement in a transparent and impartial manner to avoid conflict of interest and prevent corrupt practices", it does not provide any example of specific measures that might be considered as fulfilling this obligation. Hence, parties can choose the means to reach the aim of having corrupt-free procurement procedures. Arrowsmith suggests developing more specific "hard law"[17] provisions in the future revisions of the GPA to implement integrity and anti-corruption principles that can be referred to when the WTO panels are charged with ruling on a specific case. Here, it will be important to recall the

[12]See Sue Arrowsmith, "Reviewing the GPA: The Role and Development of the Plurilateral Agreement After Doha", (2002) Journal of International Economic Law, Vol. 5:4, 767.
[13]See supra note 7, 997.
[14]See Sue Arrowsmith, "The Revised Agreement on Government Procurement: changes to the procedural rules and other transparency provisions", in Sue Arrowsmith and Robert Anderson (eds.), *The WTO Regime on Government Procurement: Challenges and Reform*, (Cambridge University Press 2011), 291.
[15]See Ibid.
[16]See supra note 3, 29.
[17]See supra note 14, 291- 292.

other core principle of the GPA, namely flexibility. The GPA cannot and as an international treaty shall not regulate all the aspects of the procurement process. Rather it is setting the main principles, the so-called legal framework for the national legislation of its parties. In addition, such measures should be country-specific and will depend on the level of corruption in this or that party. However, an indicative list of anti-corruption measures will be beneficial for the parties to elaborate more specific "hard law" measures in their national legislation. Hence, it might be advisable to include several anti-corruption measures in the future text of the GPA as a form of alternatives available to the parties (as is the case, for example, with methods).

The GPA Preamble also makes a direct reference to the UN CAC, which contains more substantive and detailed rules on the anti-corruption issues in public procurement management that might be used by the GPA parties and the adjudicating body.[18] This provision makes clear that the two treaties are connected while acknowledging the importance of the CAC in the international fight against corruption, *inter alia*, in public procurement. Most countries are CAC signatories and some of those are also parties to the GPA.[19] In case of a dispute under the GPA, if both countries are party to CAC, the latter will be used as a legal source to analyse their respective obligations under both treaties taking into account the explicit link in the GPA. Again, whether any case related to the anticorruption measures in procurement can be brought forward is a big unknown due to the political sensitivity of the question and it is still to be seen how (and if) the parties to the GPA will make use of the CAC provisions.

An advancement was also made in recognising in the preamble the importance and usefulness of electronic means when conducting procurement. IT tools not only save resources for both the procuring entities and the suppliers but can also be useful when fighting against corruption as all the steps in the process might be traced.

2.2. Main changes of the GPA: from 1994 to 2012

The GPA preamble sets an ambitious agenda for its parties to create a transparent, non-discriminatory and corrupt-free procurement system. In order to be

[18]See Art. 9 of UN CAC.

[19]The list of Parties and Signatories to the UN CAC can be viewed at: https://www.unodc.org/unodc/en/corruption/ratification-status.html

implemented, the provisions of the preamble are translated into the operational part of the Agreement. The current subsection examines the main changes of the GPA operational provisions related to procurement methods, electronic means including electronic auction, and domestic review mechanisms, with a special emphasis on the latter. The revised GPA, as will be discussed below, introduced more flexibility thus potentially attracting developing countries, such as Kazakhstan, to join the Agreement. Moreover, the flexible nature of the GPA allows the signatory countries to choose the most appropriate option when implementing the requirements of the GPA.

2.2.1. Procurement methods

Unlike the 1994 GPA which prescribed three procurement methods that should be used by parties (open, selective and limited tendering), the revised agreement has a more flexible approach. In accordance with Art. IV:4(a): "A procuring entity shall conduct covered procurement in a transparent and impartial manner that is consistent with this Agreement, using methods *such as* open tendering, selective tendering and limited tendering" (emphasis added).[20] Thus, parties are free to use any other procurement method, as long as they are used in a transparent and impartial manner. GPA flexibility in this case helps a lot, especially taking into account the recent innovative procurement methods introduced by several GPA parties. For example, the EU's 2014/24/EU Classic Sector Directive includes a method, called innovation partnership.[21] It is hard to imagine how this method would have fitted into the strict prescription of the methods of the 1994 GPA.

As noted by Arrowsmith and Reich, the conditions of applying selective tendering also changed making them less prone to abuse.[22] The 1994 GPA defined selective tendering as "those procedures under which … those suppliers invited to do so by the entity may submit a tender"[23] which seems to imply that the procuring entity is free to decide which suppliers shall be invited to submit tenders. Unlike this approach, the revised GPA states explicitly that "only qualified suppliers are invited by the procuring entity to submit a tender", clarifying that the procuring entity must conduct a qualification process and invite arguably all qualified suppliers to submit

[20]See Art. IV:4(a) of the GPA.
[21]See Art. 31 of the European Parliament and the Council Directive 2014/24/EU of 26 February 2014 on public procurement and repealing the Directive 2004/18/EC, OJEU L94/65, 28.03.2014.
[22]See supra note 14, 293. Also, supra note 7, 1009.
[23]See Art. VI:3(b) of the 1994 GPA.

tenders. This rule is restricted only by Art. IX:5[24] allowing the procuring entity to limit the number of qualified suppliers invited to bid in case the powers to do so and criteria for selecting the limited number have been clearly mentioned in the notice. As one of the main purposes of the selective tendering is to save resources when dealing with a large number of bidders, the inclusion of this limitation is understandable. The fact that the limitation should be used in a transparent manner based on criteria known well in advance to participants adds credit to these amendments.

The regulation of open and limited tendering did not change. Under the revised Agreement as well, in case of open tendering all interested suppliers may submit a tender[25] while the usage of limited tendering is strictly limited to an exhaustive list of cases interpreted narrowly.[26] Reich rightly notices that a step forward can be taken requiring publishing a contract notice even in case of limited tendering.[27] Indeed, the usefulness of this norm cannot be overstated. In times of globalisation of procurement markets and the creation of single markets like the EU and the EAEU, procuring entity can hardly have a complete information on the existence and number of suppliers. In addition, the publication of the notice will ensure that the procuring entities are not circumventing applicable public procurement rules, will provide the much-needed transparency and will help combating corruption in public procurement area. With the growing use of IT in procurement, the publication of such notice will not take much time and efforts.

2.2.2. Usage of electronic means in procurement

One of the main objectives of the GPA is the encouragement of the use of electronic means. This is a big step forward considering the speed of development of the technologies.

To begin with, the new text made it clear that the GPA is technologically neutral, meaning that its provisions apply to the paper based, as well as to electronic procurement procedures.[28] Unlike the 1994 GPA that seemed to limit the utilisation

[24]Art. IX:5 of the GPA states: "A procuring entity shall allow all qualified suppliers to participate in a particular procurement, unless the procuring entity states in the notice of intended procurement any limitation on the number of suppliers that will be permitted to tender and the criteria for selecting the limited number of suppliers".
[25]See Art. I:m of the GPA.
[26]See Art. XIII of the GPA.
[27]See supra note 7, 1010.
[28]See Art. II:1 of the GPA.

of technologies to the cases of request for participation when using selective tendering and mentioning only telex, telegram or facsimile,[29] the revised GPA contains a wide definition of "writing" or "in written" making clear that this may include "electronically transmitted and stored information".[30] These provisions open doors not only to e-notices, but also to the submission of bids using electronic means, publishing the e-award notices and concluding e-contracts. Effectively, the entire process can be conducted in an electronic format.

Acknowledging the advantages that the usage of electronic means can bring, it is important to notice that technologies can be challenging as well. Mainly, due to the lack of capacity among users, the rolling out of the system without proper training of both the procuring entities and the suppliers may not bring the desired results, as was the case for example in Armenia.[31] Suppliers and procuring entities will need constant retraining especially if there are several e-platforms used for the conduct of procurement procedures. In addition, instead of opening markets, electronic means might hinder the participation by foreign suppliers when introducing e-signature requirements. The drafters of the GPA being mindful of such negative effects, forbade the usage of "IT systems and software, including those related to authentication and encryption of information, that are not generally available and not interoperable with other generally available IT systems and software".[32] Procuring entities are also required to "maintain mechanisms that ensure the integrity of requests for participation and tenders, including establishment of the time of receipt and the prevention of inappropriate access".[33] As a guarantee that these provisions are followed, the revised Agreement requires to ensure "traceability of any conduct by electronic means".[34] These requirements fit perfectly with the new aims of the GPA, mainly the maintenance of integrity and the fight against corruption.

In fact, as Arrowsmith posits, "there is nothing in the revised Agreement to limit [p]arties' choice of means of communication with their suppliers".[35] Indeed, once the government has taken a policy decision to pass to e-procurement, the supplier side has little to say in this regard. Instead, the policy makers should consider the

[29]See Art. X:4 of the GPA.
[30]See Art. I:g of the GPA.
[31]See Eliza Niewiadomska and Astghik Solomonyan, "Public Procurement in Global and Regional Trade Agreements: Lessons Learned in Armenia", in Aris Georgopoulos, Bernard Hoekman and Petros Mavroidis (eds.), *The Internationalization of Government Procurement Regulation*, (Oxford University Press 2017), 168.
[32]See Art. IV:3(a) of the GPA.
[33]See Art. IV:3(b) of the GPA.
[34]See Art. XVI:3(b) of the GPA.
[35]See supra note 14, 298.

level of general IT usage in the country, quality of the internet and its coverage as well as the supplier market in order to take an informed decision.

The GPA also requires the central government entities listed in the parties' Annexes to publish procurement notices about covered procurement on an electronic media.[36] This not only eases the market opening and enhances foreign suppliers' participation to procurement procedures, but also helps to improve reporting and data collection[37]. Sub-central and other entities listed in Annex 2 and Annex 3 respectively are *encouraged* to publish e-notices to be provided at least "through links in a gateway electronic site".[38]

Acknowledging the reduction of time necessary to submit bids if electronic means are used, the revised Agreement provides for reduced deadlines. If the entity decided to use electronic means covering the whole tendering process, the time period will be 25 days, as opposed to the general deadline of 40 days for open procedure. In any case, if the usage of electronic means is combined with one of the conditions mentioned under Art. XI:4 (for example in case of urgency, or where the procuring entity has published the notice of planned procurement within the period mentioned), the deadline for the submission of bids cannot be less than ten days.[39] Amendments like this will be beneficial especially for countries that already have fully functional e-procurement (e-tendering) systems. It should be mentioned that both Armenia and Kazakhstan use e-procurement systems for almost all procurement procedures and for them, even without the existence of any other condition under Art. XI:4, the shortened deadlines will apply.

The GPA also contains procedures, which are electronic-only, i.e. they cannot be organised on a paper-based manner. This particularly refers to the usage of electronic auctions.

2.2.3. Electronic auction under the revised GPA

With the development of the technologies, the international treaties started to include new procurement methods and techniques, such as dynamic purchasing system under the EU Directives;[40] electronic auction under the EU Directives, the

[36]See Art. VII:1(a) of the GPA.
[37]See supra note 14, 298.
[38]See Art. VII:1(b) of the GPA.
[39]See Art. XI:4 of the GPA.
[40]See the European Parliament and the Council Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014; and the European Parliament and the Council Directive 2014/25/EU of 26 February 2014 on procurement by entities operating in the

GPA and UNCITRAL ML.[41] It is acknowledged that if the e-auction is organised in a manner not allowing identification of the participants and hence limiting the possibilities of collusion, it can in fact enhance transparency of the procurement process and entail better savings.[42] Having said that, the procuring entities need to be careful when designing the auction process. They have to take into consideration the structure of the market as well as the nature of the procured goods/services/works together with the possible value and number of steps, duration and conclusion of auction, rules regarding anonymity and evaluation criteria. The downside of the e-auction, besides the potential of collusion, might be the submission of abnormally low prices (as the participants will get into the "game" and will bid just to win).

The revised GPA regulates e-auctions for the first time. Art. I:f defines e-auction as an "iterative process that involves the use of electronic means for the presentation by suppliers of either new prices, or new values for quantifiable non-price elements of the tender related to the evaluation criteria, or both, resulting in a ranking or re-ranking of tenders".[43] The definition is flexible enough to encompass all the possible scenarios that parties might want to implement in practice: post or pre-qualification, any sequence of procedural steps, stand-alone procedure or as a phase of another procedure, using the price only or other quantifiable elements or both. It also does not prescribe any specific type of goods/services/works that can be suitable for e-auction unlike the EAEU Treaty that has a mandatory list of procurement subjects to be procured via e-auction.

What GPA prescribes, is the amount of information that suppliers need to get in order to have an understanding of the process upfront and their own position (ranking) during the auction.[44] In order for the suppliers to be prepared in advance, Art. VII:2 (f) requires mentioning in the contract notice whether the e-auction will be used.[45] Arrowsmith thinks, that "it would be sufficient here to indicate that an auction *may* be used".[46] It is difficult to agree with this viewpoint, first of all, because the suppliers and the procuring entity will be in a disadvantaged situation if the decision on the usage of the e-auction will be taken later in the process. If

water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L 94, 28.3.2014.

[41]See UNCITRAL Model Law on Public Procurement (2011). Viewed at: http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html.

[42]See supra note 14, 301.

[43]See Art. I:f of the GPA.

[44]See Art. XIV of the GPA.

[45]See Art. VII:2(f) of the GPA.

[46]See supra note 14, 304.

the suppliers know there will be an auction, they will bid higher in the beginning and subsequently lower the price reaching their (possibly) lowest price while in case there is no e-auction involved, the suppliers will have just one "shot", hence they will try to give the best price they can in order to win the contract. The lack of information will induce the bidders to bid cautiously even in case there is no e-auction involved later in the process. Another downside is that if the bidders think they have this one opportunity, they will bid their best price possible, and if there is an e-auction later in the process, it will not be possible for the participants to lower the price and the organisation of the auction will be redundant. Besides, the language of the GPA provision also does not support Arrowsmith's interpretation. The text explicitly uses the word "will" instead of "might", "can" or "may" making it clear that the decision on the possible usage of the e-auction shall be taken in the very beginning of the process. Of course, the above analysis refers only to cases where the e-auction is a phase of the process. In case of a stand-alone procedure, the procuring entity either will have a list or will need to conduct a market research to decide whether an e-auction is an appropriate procedure for that specific market.

Overall, the inclusion of provisions on e-auction in the revised GPA is an important step towards embracing a more technology-based approach to procurement in general. The discussion above suggests that the GPA offers a flexible framework for the national procurement systems of its parties. The amendments related to the review procedures are also not exempted from this flexible approach even though Art. XVIII of the revised Agreement contains many details on the review institutions and procedures.

3. The domestic review procedures under the GPA

Domestic review mechanisms are important means of protecting aggrieved suppliers' rights in the course of procurement procedures. A trustworthy remedies system will enhance the efficiency of the procurement system in general and will contribute to the creation of the level playing field for both the national and foreign suppliers.[47] Competition is also expected to be enhanced in this case. What exactly

[47]The importance of the review mechanisms is underlined also in the UNCITRAL ML 2011 Guide to Enactment. See Chapter VIII, Challenge Procedures, 295-296, viewed at: https://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/Guide-Enactment-Model-Law-Public-Procurement-e.pdf

the GPA envisages for the procurement review system is going to be the focus of the remaining subsections.

3.1. General principles governing the review process

Both the 1994 and the 2012 GPAs based procurement review procedures on the same general principles, namely timeliness, effectiveness, transparency and non-discrimination.[48] What does this mean for the review procedures and processes?

First, the review procedures should be timely in order to provide the aggrieved suppliers with meaningful remedy and keep them interested in bringing complaints. In the context of the GPA, the timeliness can arguably refer to two stages of the procurement process: *first* is the time allowed for the suppliers to bring the complaint and *second,* is the time allowed for the review bodies to make a decision on the case. Regarding the time allocated for the submission of the complaint, the period should be neither too long, nor too short. The suppliers should have enough time to comprise and submit a complaint but the time allowed should not be so long as to hinder the procurement process for an unreasonable period. The GPA obliges the parties to provide at least ten days to the suppliers to prepare and submit a challenge to the review body.[49] The ten-day period shall be calculated "from the time when the basis of the challenge became known or should have become known to the supplier".[50] The Agreement does not answer the question as to whether the procuring entity shall be deprived of the possibility to sign a contract during this period. In the absence of much needed clarity in the GPA, it is logical to consider that the contract should not be signed, otherwise the whole purpose of these ten days is becoming redundant. It is also advisable to have a clear provision introducing standstill period into the further revision of the GPA, which in the face of the built-in amendments clause,[51] seems to be inevitable. Another point to make here is that with the rise of technologies, the moment when the suppliers should have known about the basis of the challenge can be considered the publication of

[48]See Art. XVIII:1 of the GPA and Art. XX:2 of the 1994 GPA.
[49]See Art. XVIII:3 of the GPA.
[50]See Art. XVIII:3 of the GPA.
[51] See Art. XXII:7 of the GPA requiring the parties to start negotiations for amending the GPA "not later than the end of three years from the date of entry into force of the Protocol Amending the Agreement on Government Procurement".

the contract award notice[52] in electronic media or in e-procurement platforms. This assumption makes the calculation of the period easier and provides clarity.

Regarding the timeframe for the delivery of the decision, again a balanced approach should be taken considering the optimal time necessary for the thorough examination of the case and the necessity to continue the procurement process (if it was suspended). Overall, the GPA makes concrete references to the adherence to principle of timeliness in several provisions. For example, Article XVIII:2 of the revised Agreement giving the possibility to consult with the procuring entity, states that the entity shall "accord impartial and *timely consideration* to any complaint".[53] This means that the principle of timeliness has been embodied into operational provisions that can be enforced in case of breach. In this case, if the procuring entity takes too much time for the consultation and signs the contract in the meantime, the supplier can invoke Art. XVIII:1 and Art. XVIII:2.

In deciding what exactly "timely" means, it will be important to take into account the stage of the procurement process where the complaint is brought as well as the "nature of the measure challenged and the remedies sought".[54] Indeed, as Arrowsmith mentions, a complaint to be awarded damages can be resolved in a longer period than a complaint to relaunch the procedure due to the award of the contract in violation of the GPA requirements.[55]

The principle of effectiveness "refers to the utility of challenge procedures in securing the objectives of the GPA by ensuring application of GPA award procedures and other substantive obligations".[56] Arrowsmith considers that the availability of remedies, the independence of the review body, the possibility of claiming damages are constituting elements of effectiveness of the review procedures.[57] Taking this approach will mean that the principle of effectiveness is also embodied in different operational provisions each of which is enforceable. All of these elements together comprise an effective review system that complies with the general principles of the GPA.

Non-discrimination is the main principle of the GPA itself and not only of the review procedures. This principle entails that the state cannot discriminate between

[52]In case the complaint relates to the pre-award stage, the publication of procurement documentation will trigger the ten-day period.
[53]See Art. XVIII:2 of the GPA.
[54]See Sue Arrowsmith, *Government Procurement in the WTO*, (Kluwer Law International 2003), 397.
[55]See Ibid.
[56]See Sue Arrowsmith "The Character and Role of National Challenge Procedures under the Government Procurement Agreement", (2002) Public Procurement Law Review 4, 242.
[57]See supra note 56, 243.

domestic and foreign suppliers *inter alia* in relation to access to review procedures and remedies available. Aggrieved foreign suppliers should be given the same treatment as national suppliers. In essence, this means that national challenge procedures while being much more detailed and demanding than the text of the GPA, shall be applicable for complaints brought by foreign suppliers.[58] A question arises here about the possibility of having a review system only for foreign suppliers and only for the procurement covered by the GPA, thus, excluding domestic suppliers and procurement below the GPA threshold. Generally, the GPA parties are not concerned with procurement that is too small in value to generate international suppliers' interest, so the country is free to regulate its procurement below the threshold, as it deems appropriate. On the other hand, it is highly unlikely that the GPA party will discriminate against its own domestic suppliers depriving them from the right to complain against the violations of the procurement legislation by procuring entities. As Anderson and Arrowsmith conclude: "the supplier review provisions must be interpreted as applying to all suppliers and not merely to foreign suppliers".[59] On the other hand, it is possible to create two bodies that will hear complaints from domestic and foreign suppliers. This option is disadvantageous though. What will be the reason for spending the resources maintaining two forums that will have essentially the same functions? This will also increase the risk of these two bodies reaching different conclusions on similar cases from domestic and foreign suppliers thus creating legal uncertainty. Hence, though the GPA requirements indeed concern foreign suppliers only, it is highly unlikely that the review proceedings will be applicable exclusively to them.

Finally, the GPA requires the review procedures to be transparent which means that the participants (and assumingly public in general) should be kept informed about the launch and the outcome of the review process. Though the GPA does not require the publication of review body decisions, Art. VI:1 has ruled that each Party "shall promptly publish any law, regulation, judicial decision, administrative ruling of general application, standard contract clause mandated by law or regulation and incorporated by reference in notices or tender documentation and procedure regarding covered procurement, and any modifications thereof, in an officially designated electronic or paper medium that is widely disseminated and remains readily accessible to the public".[60] It is evident that if the review forum in a GPA

[58]See supra note 54, 388.
[59]See Robert Anderson and Sue Arrowsmith, "The WTO Regime on Government Procurement: Past, Present and the Future", in Sue Arrowsmith and Robert Anderson (eds.), *The WTO Regime on Government Procurement: Challenge and Reform*, (Cambridge University Press 2011), 33.
[60] See Art. VI:1 of the GPA.

member is judicial, the decisions should be published. It can be assumed that this provision is general enough to encompass also the decisions of administrative review bodies.

It seems that these principles cannot be enforced by themselves without invoking specific operational articles. Arrowsmith in this regard refers to the principle of legal certainty stating that the GPA principles governing the review process are vague and it is very difficult to ascertain their exact content.[61] Indeed, in order to be enforceable these four principles should contain more details and be more precise to allow the adjudicating bodies to base their decisions on them alone. It can be concluded that the principles can be enforceable if they are embodied in specific articles.[62]

One last issue to analyse prior to the discussion of the elements of the review mechanism provided by the GPA, is the question of direct effectiveness. It is acknowledged that the provisions that are justiciable can be applied more effectively in comparison to the provisions that are applied indirectly.[63] The 1994 GPA merely stated that suppliers can challenge the violation of the Agreement without making clear whether the GPA provisions can be relied on directly or should be incorporated in the national legislation.[64] The revised Agreement explicitly mentions that suppliers may challenge either "the breach of the Agreement or, where the supplier does not have the right to challenge directly a breach of the Agreement under domestic law of a Party, a failure to comply with a Party's measures implementing the Agreement".[65] Hence, it depends on the country's national legislation whether the GPA provisions have direct effect or shall be implemented through domestic measures. In both cases, the suppliers are explicitly given the right to challenge the violations of the GPA.

A problem arises when the country does not allow direct applicability of the GPA rules and has failed to adopt national measures implementing the GPA provisions. Reich argues that in such a case, the only viable solution will be the use of the WTO dispute settlement mechanism to hold the non-compliant state responsible for the failure to make its legislation compliant with the GPA mandatory requirements.[66]

[61]See supra note 56, 242.
[62]See supra note 56, 242.
[63]See Dorthe Dahlgaard Dingel, "Direct Effect of the Government Procurement Agreement", (1996) Public Procurement Law Review 6, 245.
[64]See supra note 59, 32. See also, Simon Lester, Bryan Mercurio and Arwel Davies, *World Trade Law: Text, Materials and Commentary*, (3rd edition Hart Publishing 2018), 790.
[65]See Art. XVIII:1 of the GPA.
[66]See supra note 7, 1016-1017.

As described above, the use of this mechanism is very rare due to the political sensitivity. Parties to the GPA are usually reluctant to bring complaints against each other hence only three cases after the creation of the WTO were filed for the panel discussion.[67]

3.2. The tiered system of the review forum

The GPA suggests a facultative tiered system allowing its parties a wide discretion as to the choice of the forum for review depending on their national legal traditions and institutional set-up.

To start with, the GPA "encourages" consultations between the aggrieved suppliers and the procuring entities.[68] Review within the procuring entity is not a mandatory requirement of the GPA. Some commentators pay attention in this regard to the second sentence of the same Art. XVIII:2, which states that the entity "*shall* accord impartial and timely consideration to any such complaint" (emphasis added).[69] The usage of the word "shall" seems to imply that the first stage of the review should be a complaint to the procuring entity. It is hard to agree with such reasoning, as it is clear that the procuring entity has an obligation to give a timely consideration *only if* there is a complaint. This means that the party is free to decide whether it wants to design a challenge system with a compulsory first stage of the review within the procuring entity or just make this step optional. If this first stage is mandatory, procuring entities have an obligation to give due consideration to the complaint.

Compulsory review within the procuring entity can have both a positive and a negative impact on the review system as a whole. As mentioned by Gordon, the procuring entity can be very efficient in resolving the issue, as it possesses all the required information about the procurement process.[70] Also, this is a possibility to solve the problems in a "non-confrontational" manner while preserving good relationship between the suppliers and the procuring entities.[71] Another advantage

[67]The cases are viewed at: https://www.wto.org/english/tratop_e/gproc_e/disput_e.htm.
[68]See Art. XVIII:2 of the GPA.
[69]See Xingling Zhang "Constructing a System of Challenge Procedures to Comply with the Agreement on Government Procurement", in Sue Arrowsmith and Robert Anderson (eds.), *The WTO Regime on Government Procurement: Challenges and Reform*, (Cambridge University Press 2011), 488.
[70]See Daniel Gordon, "Constructing a Bid Protest Process: Choices Every Procurement Challenge System Must Make", (2006) Pub. Cont. L. J. 35, 6.
[71]See Xingling Zhang, "A Supplier Review System as a Part of the Government Procurement System for China", PhD Thesis, (2008) University of Nottingham, 67-68.

might be the possibility to correct minor, technical problems that will leave the supplier satisfied, and there will be no need to waste resources on launching an official review procedure within the external bodies.

The review within the procuring entity might also have disadvantages: *first*, the procuring entity might be biased[72] as it has to review its own decisions, acts or omissions. The chances that it can conduct the review in an absolutely impartial manner are not high. *Second*, the procuring entity has an incentive to prolong the review as much as possible and sign a contract[73] after which receiving a redress for the aggrieved supplier might be harder if not impossible. In order to mitigate this risk, specific deadlines for reaching the decision might be necessary.

Unlike the review within the procuring entity, which is optional, the GPA *requires* its parties to design "at least one impartial administrative or judicial authority that is independent of its procuring entities to receive and review challenges by suppliers".[74] This requirement can be implemented in different ways. For example, the parties might create an impartial body (e.g. council, committee) that will be dedicated only to the review of procurement complaints. Others might entrust this task to already existing impartial bodies (e.g. anticorruption, competition authorities). The most important feature of these type of bodies should be independence as highlighted by the GPA.

The exact meaning of independence requires more deliberation at this stage as the revised Agreement, in contrast to the text of the 1994 GPA, does not contain a requirement that the "independent body must have no interest in the outcome of the procurement" and that its members must be "secure from the external influence during the term of appointment".[75] It may seem that the revised Agreement puts less stringent rules on independence. In essence, this might mean that an executive body, for example the Ministries of Economy or Finance that are usually entrusted with the power to regulate and/or monitor public procurement function in a given country, can be considered an impartial body as they are effectively independent from procuring entities (except for the procurement for their own needs). Would such bodies be considered independent? There are number of reasons to answer in the negative. *First of all,* in case of procurement for their own needs, it is almost impossible to recognise the body as impartial (even if there might be a separate unit created to handle procurement complaints). *Second,* even

[72]See supra note 70, 6.
[73]See supra note 71, 68.
[74]See Art. XVIII:4 of the GPA.
[75]See Art. XX:6 of the 1994 GPA.

if the complaint concerns other procuring entities, such bodies would still be within the executive structure of the government and possibly under the leadership of a single minister. Thus, there is very little incentive to be impartial as the procuring entities can retaliate against these bodies in some other areas of the governance. A solution might be found in the creation of the so-called quasi-governmental bodies that are not under direct supervision of the executive or legislative branches of power, such as an independent board, council or commission. Although the members of such a body will be appointed by some high-ranked officials or by the Parliament, the most important consideration is their level of independence during the term from the body that has appointed them.

Overall, it is very hard to achieve absolute independence. In a nutshell, the body despite of its place within the government structure is financed by the budget and might bear some influence from external bodies. The only possibility to claim absolute independence is when the body is totally self-funded, meaning that in order to be able to sustain itself, there will likely be high complaint fees. In transition economies like Armenia and Kazakhstan, high fees will discourage suppliers, especially SMEs with limited resources, to complain.

The revised GPA does not contain any details on how to ensure the independence of the body as an institution and the independence of its members. No requirement related to the qualification, background and experience of the members of the body is envisaged. Parties have wide discretion to decide on such details of the review body.

In case the complaint was initially reviewed by an entity which is not impartial and independent (e.g. the procuring entity itself or the ministry overseeing procurement transactions), "the party shall ensure that the supplier might appeal the decision of such a body to an impartial administrative or judicial body".[76] When this is also not the case, the review procedures should comply with the requirements of Art. XVIII:6 at least. These requirements refer to the conduct of the process itself and the rights of the participants to be accompanied, heard, represented, to have access to proceedings, to request public proceedings.[77] This means that the GPA requires some level of impartiality to be introduced at some point of the process, be it during the first or the second tier of review.

As the procuring entity may not be inclined to cooperate with the review body, the GPA mandates the former to respond in writing to the challenge (i.e. to lay down

[76]See Art. XVIII:5 of the GPA.
[77]See Art. XVIII:6 of the GPA.

its own position) and reveal all relevant documents.[78] Without these basic steps, the review process is unlikely to result in a timely decision as required by the GPA. Though the GPA does not provide for the exact period within which the review body might reach the decision or recommendation, it lays down the basic safeguard of timeliness. It instructs the national legislator to adopt a reasonable timeframe when deciding the deadlines for the review bodies to reach a conclusion.[79]

As is the case with the review within the procuring entity, the review within the administrative body can also have both advantages and disadvantages. One of the biggest advantages is the "appearance of independence"[80] as opposed to the review within the procuring entity. The suppliers' trust towards the review system might be enhanced which in turn might have an impact on their decision to file a complaint against procuring entities. Another advantage is the professionalisation of the review bodies.[81] If the body is dedicated specifically to hearing procurement complaints, its members will become more and more specialised with every year and the quality of the decisions or recommendations will improve. The focus on procurement might also help the review bodies to complete cases in a timely fashion.[82]

However, administrative review might have disadvantages too. In case the body is designed as a second tier after the review within the procuring entity, time will be of essence. The more tiers, the less possibility to complete the review in a timely fashion and without harming the rights and interests of either the procuring entity or the selected supplier. Another disadvantage, especially for the countries with limited resources like Armenia, is the cost of creating and staffing an independent body dedicated to the hearing of procurement cases only.[83]

Overall, it can be concluded that in case the independent review body is designed as the only mandatory forum for review and in case its procedures are similar to judicial hearings, the advantages outweigh the disadvantages. This might also be the reason why many countries currently choose to set up independent bodies. In addition, most Quad countries[84] during the negotiations to join the GPA insist on the creation of such bodies to ensure that the rights of their own suppliers wishing

[78]See Art. XVIII:6(a) of the GPA.
[79]See Art. XVIII:6(f) of the GPA.
[80]See supra note 70, 6.
[81]See supra note 70, 6-7.
[82]See supra note 71, 79.
[83]See supra note 70, 7.
[84]The term is the shortened version of 'Quadrilateral' referring to the four main negotiating parties in the WTO negotiations-the US, the EU, Canada, and Japan. More information can be viewed at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm.

to participate in the tender procedures in newly acceding countries are well protected.

As was already mentioned, the GPA allows using the judicial bodies as the last or the only instance of review. The text does not clarify whether the judicial bodies should be administrative or civil considering the differences in the legal traditions of individual parties. It is assumed that any judicial review forum will possess the required independence[85] and that the procedure will be conducted in accordance with the principles of fairness and transparency. Hence, no further elaboration or details are given in this regard in the text of the Agreement.

Judicial review might have the advantage of having the greatest degree of independence from procuring entities and even the government itself. The judiciary in democratic countries, by its nature, is supposed to be independent and free from external pressure.[86] Members of the judiciary are usually immune from civil or criminal prosecution for their decisions when those are not a result of bad faith.[87] Courts also have the ability to enforce their decisions[88] which might not be the case with some administrative bodies, especially if they are not entrusted with the power to take binding and enforceable decisions but can merely recommend to take some actions or refrain from them. At the same time, many post-Soviet states, including Armenia and Kazakhstan have weak democracies and the independence of their judiciary is questionable.[89] Where the independence of the judiciary is guaranteed, the judicial review would appear to be the best option. The aggrieved suppliers will have all the benefits of the independent review board while the country will not bear the cost of creating a new body specifically to hear procurement cases.

This is all true but unfortunately, judicial review lacks flexibility in terms of the ability to deliver decisions in a timely fashion. In addition, the judges might not

[85]See Sue Arrowsmith, John Linarelli and Don Wallace Jr, *Regulating Public Procurement: National and International Perspective*, (Kluwer Law International 2000), 769.
[86]See for example Art. 77 of the Constitution of the Republic of Kazakhstan and Art. 162 and 164 of the Constitution of the Republic of Armenia.
[87]See supra note 71, 86.
[88]See supra note 70, 7.
[89]For example, in case of Armenia, the government wanted to conduct a vetting of all the judges in order to eliminate the corrupt practices in the system. The Venice Commission rejected this proposition. See "Armenian Authorities Agree General Vetting of All Judges is 'Neither Necessary Nor Useful' – Venice Commission, *Panorama.am*, 15 July 2019, viewed at: https://www.panorama.am/en/news/2019/07/15/Venice-Commission/2141216. It is acknowledged that corruption exists also in the judicial system of Kazakhstan. See Kairat Balabiyev, Aizhan Kaipbayeva, Saken Mazhinbekov and Saltanat Ibraimova, "Improvement of Legislation and the Judicial System as the Guarantor of Political Stability of the Constitutional State", (2016) Journal of Advanced Research in Law and Economics, Vol. 7:21, 1622.

have the in-depth knowledge of public procurement.[90] A possible solution in this case might be the creation of expedited procedures to be used specifically for resolving procurement disputes. Allocating and training judges to hear procurement cases can also assist in case the country decided to rely on judicial review as the only instance. These possible solutions obviously depend on the legal traditions and the institutional set-up of the judiciary of a particular country as well as on the capacities of members of judiciary and the resources available for their training.

To conclude, the GPA allows a tiered system where there might be two or three levels of review (if further levels of judicial review are not taken into account). The party has the choice of allowing a review within the procuring entity, then the review in a non-independent administrative body (this can be e.g. the regulating and/or controlling body) and finally the supplier can refer to an administrative independent body or judicial authority. Except for the third tier (independent administrative or judicial body), the previous two stages can be either optional or mandatory. The GPA mandates to have at least *one* impartial administrative or judicial body, hence the country can opt not to use the tiered approach but rather appoint *one* body to deal with the procurement complaints. The GPA parties can choose the option better suiting their legal system, procurement market and economic situation.

The creation of the procurement review system does not only include a choice in relation with the number of tiers and types of review (administrative, quasi-judicial, judicial) but relates to such an important issue as standing.

3.3. Who has the right to bring a complaint?

The issue of standing, i.e. who has the right to bring a complaint to the review body, is a central one and the GPA tries to answer it by stating that the right to complain belongs to the "supplier which has or has had an interest in a covered procurement".[91] Unlike the text of the 1994, the revised GPA gives the definition of "supplier" thus trying to clarify the scope of complainants. In accordance with Art. I:t supplier means "a person or a group of persons that provides or could provide goods or services".[92] The definition, though of importance, does not answer the main question raised in academia: can the subcontractors launch a complaint?

[90]See supra note 71, 87.
[91]See Art. XVIII:1 of the GPA.
[92]See Art. I:t of the GPA.

What about trade associations, non-governmental organizations (NGOs), representatives of civil society? [93]

To start with, the definition of supplier refers also to a "group of persons". This can refer to a consortium, when several suppliers come together, create a legal basis for cooperation and participate to the procurement proceedings. In the type of a consortium where the participants form a legal entity (joint venture) and participate with that venture, there is no "group of persons" but the consortium can still bring a complaint. "Group of persons" can also refer to the cases where entities are allowed to rely on the capacities of other entities in order to prove their compliance with the qualification criteria.[94] In this case, it seems that the group of the participants will have the right to file a complaint.

Does this definition imply that the subcontractors also have the right to complain? The answer seems to be negative. "Group of suppliers" can just mean more than one supplier, but there is nothing to indicate that subcontractors are explicitly acknowledged to have a standing. Arrowsmith considers that it is necessary to follow a wider interpretation of the term "supplier" and give the right to bring the complaint to all entities involved in the supply of the product, including the manufacturer, the main contractor and sub-contractors.[95]

It should be recalled here that the GPA puts forward an "interest" test to limit the scope of the complainants. Unlike the term "supplier", the "interest" is not explained anywhere in the revised Agreement. It can be assumed that the supplier already participating in the tender as well as the supplier that intended to participate but could not because of the violations of procurement legislation should have an "interest" in the procurement. This assumption has some limitations though. Arrowsmith asks a relevant question in this regard: what if a supplier that submitted a bid and was disqualified, submits a complaint regarding contract award criteria?[96] Does he or she have a standing? It seems that in this case, the "interest" test is not fulfilled. The disqualified supplier though should have a standing to bring a complaint against the decision to disqualify him.

If potential suppliers would like to complain about restrictive technical specifications or other faults of the procurement documentation, nothing forbids them to do so

[93]See supra note 85, 772.
[94]For example, Art. 63 (1) of the European Parliament and the Council Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJEU L94/65, 28.03.2014 provides such opportunity.
[95]See supra note 56, 243.
[96]See supra note 85, 772.

as the definition of "suppliers" explicitly mentions the persons "that could provide goods or services". What is the standard of proof in this case? Shall the potential supplier simply demonstrate that it operates in the same area of business or that it has the eligibility/qualification to participate? Does he/she have to show that he/she would have won if not for the irregularity? It is considered to be too onerous to require the potential supplier to show any chance of winning the contract.[97] According to Gordon, furthermore, this approach will "require the system to litigate the merits of the protest".[98] Hence, in the absence of guidance from the revised Agreement, it can be assumed that the potential suppliers are allowed to make their own judgement as to whether they would consider themselves as being able to provide the services and whether their interests have been harmed. The review body then needs to resolve the issue on a case-by-case basis taking into account the factual circumstances of each individual procedure.

As the GPA contains the wording "suppliers", it might be assumed that trade associations and the general public are deprived of the right to bring the complaint. It needs to be kept in mind though that the GPA sets the minimum standard leaving its parties the opportunity to enhance the scope of complainants.[99] For example, the party might decide to give standing to the manufacturers of goods/services as they also have the interest in the given procurement. In the end, if the supplier of their goods is not awarded the contract, they are losing a business opportunity, which in some cases can be very substantive.

Trade associations might also be given standing though their "interest" is somehow distantly related to procurement procedure. Zhang argues that if trade associations are given standing, they will provide much desired anonymity to the suppliers who will be reluctant to complain because of fear of retaliation.[100] It is hard to agree with this argument, as it is almost inevitable that during the proceedings the identity of the supplier will be disclosed. In addition, trade associations should be given the right to complain only in case the supplier is their member.[101]

NGOs and the public in general can also be given standing in some countries.[102] For example, an environmental NGO might be interested in monitoring that the

[97]See supra note 56, 245.
[98]See supra note 70, 9.
[99]See supra note 85, 772.
[100]See supra note 71, 102.
[101]See supra note 71, 103.
[102]When discussing the case of Armenia in Chapter 5, it will become obvious that the Public Procurement Law gives standing to *everyone* without restriction, including arguably to NGOs and public in general.

procuring entities are including sustainable procurement elements in tenders if required by the legislation of the country. The interest of the public is also visible: in a nutshell, procurement is an act of spending taxpayers' money, which, if done improperly, can have adverse effect on the welfare of the society.

Zhang considers that the monitoring authority can also have the right *ex officio* to bring a complaint in order to fulfil its duties.[103] Though the interest of the monitoring authority is clear in this case, it can be argued that there are other instruments under its control to reach its aim. The review procedure should be left to be utilised by the private sector that has no other means to enforce procurement provisions.

Overall, while making the choice on the scope of complainants, the country has to bear in mind that the wider the scope, the more it is possible to disrupt the procurement process.[104] If the case is under the jurisdiction of the review body and is filed by a person who has the right to do so, what standard of scrutiny does the GPA impose (if any) and what are the legal effects of the decisions/recommendations made by such a body?

3.4. The standard of scrutiny and the legal effect of the decisions

The text of the 1994 GPA laid down a standard of scrutiny requiring the challenge procedure to provide for "an assessment and a possibility for a decision on the justification of the challenge".[105] This simple sentence in essence required to carry out an assessment on the merits[106] and conclude on whether a breach of the GPA has occurred.[107] The revised Agreement, though, merely states "*where a review body has determined that there has been a breach or a failure*…" without explicitly requiring the review body to actually review the case on the merits and come to a conclusion. Reich considers that this gap might allow some review bodies to refrain from taking decisions on the merits and thus avoid granting corrective measures.[108] Though the departure from the previous language of the text is indeed unfortunate, it is the author's view that this can hardly create any major problem. The revised Agreement requires "determining" whether there has been a breach or failure. In

[103]See supra note 71, 96.
[104]See supra note 71, 102.
[105]See Art. XX:7(b) of the 1994 GPA.
[106]See supra note 54, 396.
[107]See supra note 7, 1017.
[108]See supra note 7, 1017.

order to determine it, the review body shall carry out some scrutiny, review the facts and the legal provisions and conclude on whether the procuring entity has violated any regulation. Thus, it can be assumed that the legal standard of assessment on the merits did not change.

The GPA also does not provide a clear guidance on whether the review body can replace the procuring entity's decision with its own decision, for example re-evaluate the tenders based on the qualification criteria found in the tender documentation. Review bodies, especially the ones that are not created with the sole purpose of hearing procurement complaints and hence are lacking specialised expertise, might not be equipped to substitute the procuring entity's "commercial judgement".[109] They will be required only to conclude on whether the decisions made by the procuring entity comply with the requirements of legal regulations and whether they are reasonable.[110] For example, the body can examine whether "green" contract award criteria have been used in a discriminatory manner and if the answer is positive, order the procuring entity to re-evaluate the tenders or re-launch the procedure.

On the other hand, if the body is a specialised one, countries might choose to give it wide powers to substitute even "commercial judgements".[111] This might not be the best solution, though. The decision to award a contract to a specific supplier based on the eligibility and qualification criteria should always be an exclusive power of the procuring entity as the latter is the one in need of the procurement and it is also the one to carry the financial burden. Review body, even a specialised review forum, should limit itself to deciding on the reasonableness of the procuring entity's decisions and making sure that they are not taken in violation of legislation.

Regarding the legal effect of the decisions adopted by review bodies, the text of the revised Agreement uses the wording "decision or recommendation".[112] It is unclear from the text whether the review body itself can decide what type of measure to adopt or whether the choice is left to the discretion of the implementing party. It might be logical to consider that the review body itself needs to have the flexibility to decide on a case-by-case basis and either take a decision or make a recommendation. In terms of difference, it seems that a "recommendation" is a softer measure not enforceable and not binding for the procuring entity while a decision presupposes a stronger measure, which is enforceable and binding. In

[109]See supra note 54, 396.
[110]See supra note 56, 249.
[111]See supra note 56, 249.
[112]See Art. XVIII:7(f) of the GPA.

terms of effectiveness of the procurement review system, it is obvious that decisions should be preferred over recommendations but given the diversity of the review bodies created under the national legislation of each party, it is understandable why the text considers both options as valid.

3.5. Remedies under the revised GPA

Enforcement mechanisms relying exclusively on private parties (in this case (potential) suppliers) should provide incentives for them to monitor procurement procedures and to complain when they notice discrepancies. If the suppliers do not have trust in the system or they know that their rights will not be restored effectively and in a timely manner, they will refrain from initiating procedures against procuring entities. In the end, why should they risk their relationship with procuring entities and worry about possible retaliation without having the hope to be awarded the contract or at least, if that is not possible, a fair amount of damages? In order to understand the suppliers' options regarding remedies under the GPA, the next subsections will analyse the remedies of interim measures, corrections and compensation.

3.5.1. The remedy of interim measures

One of the most important remedies in the procurement area is the remedy of interim measures in which case the procurement process is suspended until the review body reaches a decision. The granting of interim measure can be an important tool incentivising the aggrieved suppliers to file a complaint for the protection of their rights.

The GPA parties, being mindful of the importance of remedies system in general and interim measures in particular, prescribe that "each [p]arty shall adopt or maintain procedures that provide for rapid interim measures *to preserve the supplier's opportunity to participate in the procurement*. Such interim measures may result in suspension of the procurement process. The procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account when deciding whether such measures should be applied. Just cause for not acting shall be provided in writing" (emphasis

added).[113] Unlike the revised Agreement, the text of the 1994 Agreement required rapid interim measures *"to correct breaches of the Agreement and to preserve commercial opportunities"*.[114] Reich considers that suppliers are thus being deprived of the possibility to ask for the correction of breaches as the text of the 1994 agreement refers to both – breaches of the Agreement and the possibility to preserve commercial opportunity.[115] Arguably though, the correction of breaches can be requested through another type of remedy – the remedy of correction discussed below. In the meantime, the main aim of interim measures is indeed to preserve supplier's chance to participate in a given procurement procedure. Hence, it can be argued that the drafters of the revised Agreement simply polished the text without actually limiting the rights of the suppliers.

The GPA also states that the interim measure *may* result in suspension of the procurement process. This means that the review bodies are not obliged to automatically suspend the process.[116] If a suspension is not granted, the procuring entity can rush into a contract with the selected supplier knowing that the suspension of an already signed contract can be almost impossible as the review bodies are required to balance the others' overriding interests, e.g. interests of the suppliers awarded the contract or the public in general, against the importance of having a fair, transparent and non-discriminatory procedure. Zhang considers that once the contract is signed, the interest of the selected supplier is already an overriding interest (of course, in case he/she is not anyhow involved in the creation or maintenance of irregularity).[117] Overall, it can be claimed that the suspension of the awarded contract, especially of one already being implemented when the review process is ongoing, can be harmful. The financial expenses incurred in this case might well outweigh the possible damages payable to the aggrieved supplier. Thus, after balancing the pros and cons, it might be better to go ahead with the wrongfully awarded contract and award damages to the aggrieved supplier.

In addition, Zhang admits the impracticability of the approach where the review body decides on the suspension of the process on a case-by-case basis. In such case, the early stage of the process will take much time, which is of essence in any procurement dispute.[118] Another point to raise here is the standard of proof: shall the supplier be required to prove that the decision not to suspend will inevitably

[113]See Art. XVIII:7(a) of the GPA.
[114]See Art. XX:7(a) of the 1994 GPA.
[115]See supra note 7, 1017.
[116]See supra note 56, 251. Unlike this approach, UNCITRAL Model Law in Art. 65 and EU Remedies Directive in Art. 2a explicitly provide for a standstill period.
[117]See supra note 71, 132.
[118]See supra note 71, 133.

harm his opportunity to obtain a contract or that his commercial presence will be harmed? Arguably, the opportunity to obtain a contract is always harmed if the process is not suspended, especially in systems where the review process is not rapid enough. Regarding the viability of commercial presence, it will require a heavy burden of proof from the suppliers.[119] Arrowsmith, referring to some national systems, mentions that they require showing a "reasonable, arguable or prima facie case, and a requirement that damages should not be an adequate remedy".[120] As the GPA is merely a legal framework containing the main principles of the review process, it does not impose any specific standard of proof. Most procedural aspects are left for the implementing states to decide upon.[121]

This means, that the GPA parties are not deprived of the possibility to foresee suspension in an automatic or a semi-automatic manner.[122] In case of automatic suspension the complaint itself suspends the process without any decision required by the review body. In case of semi-automatic suspension, the review body may take a decision to go ahead with the process. In this case, the review body may suspend the process for a short period necessary to decide whether the suspension should be retained, or it can be waived. This approach does not provide benefits either to the review system as a whole (as the system still needs to spend resources for taking a decision on the suspension) or the aggrieved supplier (as there is a possibility that the suspension will be waived after the initial short period).

To conclude, when deciding on how the interim measure shall be granted, the overall effectiveness of the review system should be taken into account. If the review body is obliged to make a decision within a reasonable period, the granting of the automatic suspension is justified.[123] On the other hand, if the system does not proceed in a timely and effective manner, automatic suspension will be detrimental for the procuring entity, the selected supplier and the public in general. The system will also be prone to abuse by suppliers acting in bad faith willing to prolong the process without any proper legal ground for that. In such cases, it will be better to grant interim measures after the supplier can show that the complaint is not completely ungrounded. This burden of proof can easily be overcome by any supplier acting in good faith.

[119]See supra note 71, 133.
[120]See supra note 56, 251.
[121]See supra note 56, 252.
[122]See supra note 69, 505.
[123]See supra note 70, 14.

3.5.2. The remedy of correction

After the time, allowed for the review body to examine the case, elapsed the review body shall make a decision about the remedies in case it is proved that the procuring entity has violated applicable legislation or has taken an unreasonable and biased decision. In accordance with the GPA: "each [p]arty shall adopt or maintain procedures that provide for corrective action or compensation for the loss or damages suffered, which may be limited to either the costs for the preparation of the tender or the costs relating to the challenge, or both, in case there has been a breach of the Agreement or a failure to comply with [p]arty's measures to comply with the Agreement".[124] From this paragraph it is unclear what the "corrective action" means. For the aggrieved supplier the best remedy will be to be awarded the contested contract or at least to have the opportunity to participate in the same tender again,[125] hence corrective action is usually understood as the possibility to set aside the unlawful decision of the procuring entity. In this case there is no difference at which stage the procurement process is: any decision can be set aside and any corrective measure can be ordered by the review body. For example, a decision to disqualify a supplier might be set aside and the supplier might be granted a right to participate in the procurement process; the procuring entity might be asked to eliminate discriminatory elements of the technical specifications; the decision to award the contract might be set aside and the procuring entity might be obliged to re-run the process. The GPA does not provide any other detail about this remedy.

The text of the Agreement uses the word "or" when providing the remedies of correction and compensation. It can be argued that the review body shall have the possibility to decide on the appropriate remedy depending on the case under consideration. In case it is impossible to set aside the decision of the procuring entity or when using the "balance of interest" test it becomes obvious that compensation can be a better solution, the review body might order just a compensation. Zhang argues that if the GPA party limits the choice of the review body to compensation only, the review system will not be effective and suppliers will not be motivated enough to file complaints.[126] Indeed, the award of damages can be troublesome and time-consuming, especially when a body other than the review body awards them.

[124]See Art. XVIII:7(b) of the GPA.
[125]See supra note 70, 17.
[126]See supra note 69, 495.

As was the case with the suspension of the concluded contract, the annulment of the contract as a corrective remedy is not explicitly forbidden by the GPA[127] and may depend on the national legislation of the implementing party. It can be argued that the same line of reasoning as was the case with the suspension of the concluded contract should be used also here. This will mean that the review body should take into account the detrimental effect of the annulment of the contract for the public in general and for the interests of the supplier who has signed the contract. If the contract has just been signed and the provision of services is not necessary immediately, the annulment might seem to be a proper remedy. Alternatively, where for example, a school is being constructed and the contactor has already advanced with the construction work, the annulment might harm the public (as children will not be able to have classes in the new school building by the envisaged time) and the contractor (as he already invested resources in construction). In this case, compensation to the aggrieved supplier seems to be a better solution.

The prohibition of annulment of the concluded contract will also depend on other features of the national review system.[128] Where a standstill period is introduced, in which case the procuring entity is forbidden to conclude a contract until the period is over, the annulment of the contract might be considered an inappropriate remedy. In the end, suppliers were given a fair chance to challenge the decision to award a contract and if they did not do so, they would need to bear the consequences. Where there is no standstill introduced, the suppliers might be given more opportunities to claim the annulment of the unlawfully signed contract as "the limitation of the review body's powers at this stage amounts to a significant weakening of their powers and of the incentive for aggrieved bidders to file a complaint".[129]

When deciding on the contract annulment as an appropriate remedy, attention should be paid to the question of whether the winning supplier was somehow involved in the wrongful act or knew about it.[130] It such a case it might be suggested that the annulment will be reasonable as the supplier was awarded the contract as a result of his/her own unlawful conduct (e.g. bribing the procuring officers) or knew about the wrongdoing and decided to keep silent.

[127]See supra note 56, 253.
[128]See supra note 85, 787.
[129]See Arie Reich, *International Public Procurement Law: the Evolution of International Regimes of Public Procurement*, (Kluwer Law International 1999), 337.
[130]See supra note 85, 788.

The consequences of the contract annulment are usually prescribed by national legislation and may include compensation for damages, award of lost profit, or bilateral restitution.

3.5.3. The remedy of compensation (damages)

Art. XVIII:7(b), besides providing for corrective measures, prescribes also the alternative of receiving compensation. The wording of the revised Agreement, unlike the text of Art. XX of the 1994 GPA, makes it clear that the compensation can be for "the loss or damages suffered which may be limited to either the costs for the preparation of the tender or the costs relating to the challenge, *or both*" (emphasis added).[131] It is obvious that the aggrieved suppliers can claim the damages suffered on top of the costs that they have incurred for the preparation of the bid or the complaint. Still, the word "or" leaves some room for manoeuvre for the review bodies to limit the compensation only to the costs of the bid or complaint preparation. This kind of limitation will not encourage the suppliers to complain, as the compensation might be too small in comparison to the efforts of bringing the complaint and the risk of harming the relationship with the procuring entity. In addition, this limitation does not usually have a deterrent[132] or corrective[133] effect. If the contract has not been advertised at all, the suppliers might not be able to receive any compensation as they were deprived of the right to submit a bid.[134] Hence, this provision should be interpreted as not leaving the introduction of this limitation to the discretion of the party implementing the GPA, but allowing the review body itself to decide on a case-by-case basis. Will all suppliers who submitted a bid be entitled to claim compensation for the costs of bid preparation? This question is not answered in the GPA, but it will not be logical to claim so, otherwise every supplier even without a slightest chance to win the contract, might sue for damages thus disrupting the process and eventually causing harm to the budget.

Whether the aggrieved supplier can claim lost profit is another issue related to the extent of the compensation. As the GPA provides for minimum requirements only, it can be claimed that the compensation for loss of profit is possible; there is

[131]See Art. XVIII:7(b) of the GPA.
[132]See supra note 56, 254.
[133]See supra note 71, 141.
[134]See Arwel Davies, "Remedies for Enforcing the WTO Agreement on Government Procurement from the Perspective of the European Community", (1997) World Competition Law and Economic Review, Vol. 20:4, 123.

nothing in the Agreement forbidding it. A supportive argument can also be the use of the word "loss" in the revised GPA, which might point at the possibility of awarding the lost profit to the aggrieved supplier. The recovery of lost profit though might be a difficult task, especially when the standard of proof is stringent. Thus, if it is required to prove that the supplier would have been awarded the contract if not for the violation of the rules, the standard of proof can hardly be overcome.[135] Indeed, especially recently, when the non-price criteria related to sustainable procurement are extensively used in the procurement procedures, as well as with the introduction of innovation partnership procedures that give procuring entities lots of discretion, it will be very difficult for the supplier to prove it might have won if not for the violation of the procurement rules. Reich suggests shifting the burden to the procuring entity to prove that the supplier has had no real chance of winning the contract after the supplier proves that there has been a violation of procurement legislation.[136] It is hard to imagine that this provision will have any positive implication for the aggrieved supplier, as it will be easy for the procuring entity to prove that the latter had "no real chance" of winning the contract except for rare cases where the lowest price is the only criterion and the supplier, complying with the qualification criteria, submitted the lowest price and was not awarded the contract.

Some jurisdictions are using the so-called loss of chance to calculate the percentage of the chance that particular supplier had and to award him appropriate damages for lost profit.[137] This approach seems to be fair but it is too subjective and largely depends on a case under examination and the discretion of the review body. There can be no clear guidelines on how to calculate the percentage of lost chance and this might undermine the trust towards the review body. Zhang considers that there might be a rough estimate or a fixed percentage of the contract amount to be awarded as lost profit.[138] Both options seem acceptable, as the review body will not be in a position to calculate precisely a profit that never materialised.

Damages, besides acting as a compensation to the aggrieved supplier, can also have a punitive effect in case they exceed the amount of loss that the supplier has suffered.[139] These type of damages are called "exemplary damages" and essentially, they can be regarded as fines to the procuring entities for violating the

[135]See supra note 71, 142.
[136]See supra note 129, 338.
[137]See supra note 85, 799.
[138]See supra note 71, 143.
[139]See supra note 85, 803.

procurement rules.[140] The use of fines though can be contested. The fines will be usually paid from the procuring entity's budget, which means that unless the entity has special budget line for paying fines, the money will be paid from the amount allocated for other expenses. The possibility of charging individuals for taking unlawful decisions in the course of procurement process can also be an option but is not usually used. In some cases, for example where the evaluation committee decides to award the contract, it is difficult to attribute the decision to one particular person who will be liable to pay the damage.

To sum up, it can be claimed that the GPA does not provide a specific standard of proof for the recovery of the damages as well as does not specify the extent of damages that might be awarded leaving it to the national legislation of the implementing party. It also does not require the aggrieved supplier to claim damages only after the unlawful decision is set-aside by the review body, again entrusting the national legislation to decide.[141] In any case, foreign suppliers are able to make use of the damages system in place in a given party in accordance with the principle of non-discrimination.[142]

4. Conclusion

The GPA has evolved significantly since its first adoption as a Code in 1979, and the latest version of it demonstrates that the parties are eager to compromise on some aspects in order to attract developing countries into the "club". The revised Agreement can be seen as a set of minimum standards that a country willing to be compliant with international best practice shall incorporate into its national legislation. New provisions, related especially to the electronic procurement, mean that the GPA parties follow recent trends in procurement and are ready to take them on board when negotiating the new amendments to the text.

In order to protect the rights of the aggrieved suppliers and, taking into account the nature of procurement procedures, namely the importance of timing, the GPA obliges its parties to have domestic review mechanisms, i.e. a review and remedies system that can deal with the complaints of foreign suppliers. Considering the diversity of the parties to the GPA, it comes to no surprise that the Agreement in most cases is very flexible allowing several options to choose from. Thus, the party

[140]See supra note 129, 339.
[141]See Dorthe Dahlgaard Dingel, *Public Procurement: A Harmonization of the National Judicial Review of the Application of European Community Law*, (Kluwer Law International 1999), 242.
[142]See supra note 134, 124.

is obliged to have at least one impartial administrative or judicial body but it is free to decide on the matter of a tiered system. It can reserve the right of review to the judicial authorities or to the independent review body only. If the country decides to have a tiered system, it shall ensure that a body, which is not a court, has its decisions subject to judicial review or has procedures that provide for fair trial for the participants.

Suppliers and groups of suppliers have an explicit right to file a complaint. The party might enlarge this scope and allow standing also for trade associations, manufacturers, NGOs and representatives of civil society in general. In order to be able to prepare a complaint, suppliers are given a ten-day period, calculated from the date when they knew or should have known about the basis of the challenge. Parties are obliged to provide for rapid interim measures that can take the form of suspension of the procurement process. The decision on suspension though might not be taken if there are overriding adverse consequences for third parties or public in general. What concerns the measures undertaken in case of breach of the Agreement or of the measure implementing it, the Agreement provides for corrective action or compensation.

It is thus obvious that the GPA has a very flexible system with very few mandatory requirements, which makes it easy for the parties to adapt their national procurement systems. The same cannot be said for the EAEU Treaty, where the countries' discretional power is limited due to the detailed regulation and usage of mainly "command" and "prohibition" norms. The underlying logic of the procurement system proposed in the EAEU Treaty is also different from the GPA and most of other trade agreements, potentially creating a significant "spaghetti bowl" effect. The norms of the EAEU Treaty, and specifically the provisions on the review mechanisms, are analysed next to identify possible conflict of norms.

Chapter 4: The EAEU: A New Reality for the Post-Soviet Area[1]

1. Introduction

The EAEU Treaty was signed in Astana on 29th of May 2014 by Kazakhstan, Belarus and Russia[2] marking an important new stage of integration between these countries. The Treaty entered into force on 1st of January 2015 and Armenia joined on 2nd of January 2015.[3] Kyrgyz Republic in its turn became a member to the EAEU when the Treaty on the Accession of the Kyrgyz Republic to the EAEU came into force on 12th of August 2015.[4] Thus, the EAEU has five full members. Other countries of the post-Soviet space, e.g. Tajikistan, are also considering joining the Union but currently there is no definitive decision to this effect.[5]

The main objectives of the EAEU encompass "creation of proper conditions for sustainable economic development of its Member States (MS); creation of a common market for goods, services, capital and labour within the Union; and comprehensive modernisation, cooperation and competitiveness of national economies within the global economy".[6] These objectives relate to economic cooperation and do not involve deep integration processes in relation to, for example, culture or politics.

The EAEU Treaty also tried to delimit the competences of the Union and of the MS following the example of the Treaty on the Functioning of the European Union (TFEU) which in its Art. 2-6 envisages the exclusive and shared competences of the EU.[7] The EAEU Treaty though, due to some political constrains and the unwillingness of its MS to grant the Union much powers, contains only a vague provision stating that "*the Union shall have competences within the scope and*

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[1]Chapter 4 was used as a basis for the following article: Astghik Solomonyan, "Public Procurement Regulation in the Eurasian Economic Union: A Step Forward or Two Steps Back?", (2019) Public Procurement Law Review 1, 1-15.

[2]See Salibek Mussatayev, Assem Kaidarova and Maigul Mekebaeva, "The Eurasian Union: Realities and Challenges", (2015) Mediterranean Journal of Social Sciences, Vol 6:4, 664.

[3]See "Armenia Joins Russia-Led Eurasian Economic Union", *The Moscow Times*, 2 Jan 2015, viewed at: https://themoscowtimes.com/articles/armenia-joins-russia-led-eurasian-economic-union-42666.

[4]See Eurasian Commission, "Kyrgyzstan Acceded to the Eurasian Economic Union", 8 December 2015, viewed at: http://www.eurasiancommission.org/en/nae/news/Pages/12-08-2015-1.aspx.

[5]See Saodat Olimova, "Tajikistan's Prospect of Joining the Eurasian Economic Union", (2015) Russian Analytical Digest, N 165, 13-16.

[6]See Art. 4 of the EAEU Treaty.

[7]See Consolidated version of the Treaty on the Functioning of the EU, OJ C 326, 26.10.2012. Viewed at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT.

limits determined under this Treaty and international treaties within the Union".[8] This means that Annexes of the Treaty as well as other treaties (to be) signed within the Union are crucial for understanding the Union's competences and the limitations introduced by the MS. In addition, Art. 5(2) refers to the "coordinated" and "agreed" policies;[9] terms that do not add any clarity on what kind of competences the EAEU is vested with. It can be observed that the Union has very limited competences, as there are many waivers introduced in each area regulated by the EAEU Treaty.[10]

Against this context, the current Chapter analyses the procurement norms of the EAEU Treaty imposing certain obligations on Armenia and Kazakhstan. The geopolitical role of the newly created EAEU and the reasons that drove current member states to join it as well as the economic and geopolitical context will be examined as a useful background through which it is appropriate to look at the EAEU Treaty norms. The legal status of the EAEU Treaty and the law of the Union created by the latter will also be analysed. The Chapter will end with conclusions.

2. The EAEU – General remarks on history, economics, geopolitics and legal background

With the collapse of the Union of Soviet Socialist Republics (USSR) in December 1991, the leaders of Russia, Ukraine and Belarus signed an agreement on the creation of the Commonwealth of Independent States (CIS) in an attempt to preserve the economic ties between the former USSR countries, to decide on the rules of succession as well as to build a new regime of cooperation.[11] The history shows that the CIS succeeded only in providing the succession, the so-called "civilised divorce",[12] but it largely failed to preserve the previous economic ties and

[8]See Art. 5(1) of the EAEU Treaty. The draft EAEU Treaty from 2013 contained a better division of competences between the Union and its Member States with the Union having exclusive competences in most areas directly related to trade. See Rilka Dragneva, "The Eurasian Economic Union: Balancing Sovereignty and Integration", in Roman Petrov and Peter van Elsuwege (eds.), *Post-Soviet Constitutions and Challenges of Regional Integration: Adapting to European and Eurasian Integration Projects,* (Routlege 2018), 76-77.

[9]Art. 2 of the EAEU Treaty defines coordinated policy as a policy based on the common approach approved by the institutions of the EAEU, while agreed policy is the policy based on the national legislation harmonised based inter alia on the decisions of the institutions of the EAEU.

[10]See Ergali Bayldinov, "Treaty on the Eurasian Economic Union: A Step Forward, Two Steps Back", (Договор о Евразийском Экономическом Союзе: Шаг Вперед, Два Назад), (2014) Eurasian Law Journal, Vol. 10:77, 25-33.

[11] See Paul Kubicek, "The Commonwealth of Independent States: an Example of Failed Regionalism?", (2009) Review of International Studies 35, 237.

[12] See Azimzhan Khitakhunov, Bulat Mukhamediyev and Richard Pomfret, "Eurasian Economic Union: present and future perspectives", (2017) Econ Change Restruct, Vol 50:1, 60-61.

to create new integration formula in the area.[13] This section will start with examining the reasons of such failure.

2.1. From the Commonwealth of Independent States to the EAEU: History of integration

Following the disintegration of the USSR, three Baltic States refused to participate to the CIS and made clear that they preferred the pathway of European integration.[14] All other countries, although enthusiastic in the beginning, showed little interest in the CIS. For example, the Treaty on FTA of the CIS was signed by and entered into force only for eight members of the CIS.[15] This is because the CIS did not adopt the WTO approach of "single undertaking" in which case members were mandated to sign the Agreements as a package (with notable exception of the GPA, discussed in Chapter 2). The CIS without considering the advantages of such approach and mostly taking into account the political realities of its members at that time opted for the so-called "interested party" principle according to which countries can refrain from signing the agreements they are not interested in.[16] Art. 5 of its Charter explicitly mentions that "the principal legal basis for interstate relations under the framework of the Commonwealth shall be multilateral and bilateral agreements in various spheres of relations of the member states".[17] MS were free to sign various agreements including in the area of economic cooperation, thus creating a "spaghetti bowl" of varying agreements.

The increased number of legislation in the CIS can also be explained with the efforts to transform *de jure* regionalism into *de facto* regionalism.[18] In case of the CIS *de jure* regionalism prevails, as the legislative process is at a satisfactory level,

[13]See Richard Sakwa and Mark Webber, "The Commonwealth of Independent States, 1991-1998: Stagnation and Survival", (1999) Europe-Asia Studies, Vol. 51:3, 379-380.

[14]Baltic States have signed Association Agreements with the EU still in 1995. Viewed at: http://europa.eu/rapid/press-release_PRES-95-173_en.htm.

[15]The text of the CIS FTA as well as the list of the countries that have signed it and for whom it entered into force can be viewed at: http://www.cis.minsk.by/reestr/ru/index.html#reestr/view/text?doc=3183.

[16]See Rilka Dragneva and Joop de Kort, "The Legal Regime for Free Trade in the Commonwealth of Independent States", (2007) ICLQ vol. 56, 243.

[17]See Charter of the Commonwealth of Independent States (Устав Содружества Независимых Государств), viewed at: http://cis.minsk.by/page.php?id=180.

[18]See Michael Roberts and Peter Wehrheim, "Regional Trade Agreements and WTO Accession of CIS Countries", (2001) Intereconomics, Vol 36:6, 316. *De facto* regionalism is not driven by the government but rather by intra-block trade. *De jure* regionalism is described as adoption of loose norms directed at enhancement of cooperation in different areas. See Richard Higgott, "*De Facto* and *De Jure* Regionalism: The Double Discourse of Regionalism in the Asia Pacific", (1997) Global Society: Journal of Interdisciplinary International Relations, Vol. 11:2, 167.

meaning that there are many legal acts being adopted in the scope of the CIS. *De facto* regionalism though is lagging behind due to the lack of support from politicians and business community.[19] As a result, agreements remained on paper most of them without actually being implemented on the ground.

At the same time, countries in the CIS region attempted to form other regional integration projects. To name but a few, in 1994 Kazakhstan, Kyrgyzstan and Uzbekistan created Central Asian Customs Union (Tajikistan joined in 1998); Georgia, Ukraine, Azerbaijan and Moldova created GUAM Organisation for Democracy and Economic Development while being members also to the CIS.[20] None of these efforts resulted in a viable economic union. In addition to multilateral agreements, countries also signed bilateral agreements with each other thus increasing the risk of fragmentation.

The situation appeared to change in 2000s with the creation of the Eurasian Economic Community (EurAsEC) by Belarus, Kazakhstan, Kyrgyz Republic, Russia and Tajikistan.[21] Although in the beginning of its creation the community was not fully functional, it clearly provided a firm basis for moving forward with deeper integration projects. Three countries - Russia, Belarus and Kazakhstan (Troika) having the most intertwined economies and the closest cultural ties, remained as the core of future integration in the post-Soviet area. Thus, these countries made a breakthrough when they launched a CU in 2010 and established a Single Economic Space in 2012.[22]

Even at that time, the creation of the Single Economic Space was not considered a target by itself but merely another step to the creation of the Eurasian Union.[23] Although not a fully-fledged political Union, the EAEU is the next phase of deeper integration. The creation of the EAEU does not mean that the CIS ceases to exist. In fact, only five of the CIS members are member also to the EAEU thus the former will have a larger regional impact if given additional political stimulus. For now, the CIS remains a formal union, tying the majority of post-Soviet states with numerous bilateral and multilateral agreements not implemented in practice.

The CIS has "failed" for several reasons, which can be ascribed to both the policies of its MS and the external factors affecting the region. After the collapse of the

[19]See Ibid.
[20]See supra note 16, 238 – 239.
[21]See supra note 12, 62.
[22]See Evgeny Vinokurov, "Eurasian Economic Union: Current State and Preliminary Results", (2017) Russian Journal of Economics 3, 57.
[23]See Christopher A. Hartwell, "A Eurasian (or a Soviet) Union? Consequences of further economic integration in the Commonwealth of Independent States", (2013) Business Horizons 56, 411.

USSR, Russia opted for bilateral cooperation with the remaining of the countries rather than pursuing multilateral approach.[24] This can be explained by the fact that Russia, having the biggest economy in the post-Soviet area with vast natural resources, could put greater pressure on other countries in case the agreement is bilateral. Russia's reluctance to opt for multilateral approach meant that all the regional integrational projects were doomed to fail from the beginning. Other post-Soviet countries were also not ready to embrace the new integration projects as the memory of the Soviet past was still present and the countries were afraid of limiting their own sovereignty.[25]

Another reason for the limited effect of the CIS is the "geopolitical pluralism"[26] which meant that after the collapse of the USSR the region was open to partners other than Russia, e.g. the EU, China.[27] Newly independent states received the possibility to create trade and other relations with developed economies: a fact that pushed them away from Russia. On the other hand, third countries also used the opportunity of weakened ties among the former USSR states to develop bilateral relationships with them (the EU has established the EaP tool to work with the countries of the post-Soviet region, while China initiated the Shanghai Cooperation Organization).

The economic inter-connection of the states also diminished due to the deteriorating links among them and the lack of diversification of the production and trade patterns.[28] Only the energy sector remained closely linked to Russia as the latter was (and still is) providing gas and oil to its neighbouring countries with subsidised prices.[29] This situation though cannot be beneficial for Russia in the long run. As Shishkov remarked: "It is hard to determine the price that Russia has had to pay, explicitly or implicitly (reduced prices for exports, writing off debts, easy

[24]See supra note 16, 238.
[25]Even with the creation of the EAEU, countries are wary of attempts to limit their sovereignty. For example, President of Kazakhstan Nazarbayev has stated that the country's "political independence is constant, and Kazakhstan will cede sovereignty to no one". See Altair Nurbekov, "Eurasian Economic Integration 'Will Continue', Nazarbayev Says", *The Astana Times*, 2 April 2014, viewed at: https://astanatimes.com/2014/04/eurasian-economic-integration-will-continue-nazarbayev-says/.
[26]The term is taken from Taras Kuzio, "Promoting Geopolitical Pluralism in the CIS: GUUAM and Western Foreign Policy", (2000) Problems of Post-Communism, Vol. 47:3, 25-35.
[27]See supra note 11, 244.
[28]See Elena Khudorenko, Elena Nazarova and Konstantin Cherevik, "Problems of Integration in Post-Soviet Area", (Проблемы Интеграции на Постсоветском Пространстве), (2015) Экономика, N1, 126.
[29]See Ibid.

credit and irrevocable loans), for a decade and a half of fruitless efforts to integrate the post-Soviet economic space".[30]

The political situation in most of the CIS countries did not support the integration efforts in the early years either. Post-independence authoritarian regimes (in Belarus, Kazakhstan, Tajikistan, Russia, Uzbekistan) do not tolerate the sharing of power with supranational organisations,[31] hence the creation of the supranational body to oversight the functioning of the organisation and numerous agreements signed under CIS auspices was out of question. In fact, the Charter of the CIS contains an Article explicitly ruling out the possibility of the creation of the supranational organisation. In accordance to Art. 1: *"…[t]he member states are independent and equal subjects of international law. …. The Commonwealth is not a state and does not hold supranational powers*".[32] This provision reflects the political situation in the MS during early years of the CIS. It can also be concluded that so far little has changed: sharing power with any supranational organisation is not in the plans of the post-Soviet states.

After all of these attempts to integrate the region, the functioning of the EAEU might seem to be doomed from its start. It is too soon to judge whether this is the case as the EAEU is qualitatively different from all the other projects in the area developed since the collapse of the USSR. The geopolitical and economic peculiarities of the EAEU come to prove this.

2.1. The economics of the EAEU

The EAEU is an international organisation of regional economic integration and has an international legal identity.[33] As the EU,[34] it operates on the principles of free movement of goods, services, capital and labour within its borders (single market)[35] while having common external tariff for all its members. The set external tariffs are equal to the Russian tariffs and are higher than the ones in Kazakhstan, Armenia and Kyrgyz Republic which means that these countries have to adjust

[30]See Iu. Shishkov, "The Commonwealth of Independent States: A decade and a Half of Futile Efforts", (2007) Problems of Economic Transition, Vol. 50:7, 18.
[31]See supra note 30, 14.
[32]See Art. 1 of the Charter of CIS.
[33]See Art. 1(2) of the EAEU Treaty.
[34]See Art. 26(2) of the TFEU.
[35]See Art. 1(1) of the EAEU Treaty.

(increase) their external tariffs.[36] To this end, these countries have applied and were granted a grace period over which they need to bring their external tariff in compliance with the EAEU customs tariffs. Armenia has received 800 exemptions with the deadline of compliance 2022,[37] while Kazakhstan was able to receive 3500 exemptions until 2024.[38] As some members to the EAEU are also members to the WTO, other WTO members have the right to ask for compensation, as a result of the departure from earlier obligations, which low-income members of the EAEU might not be able to pay.[39]

From the perspective of trade, the trade patterns of the EAEU MS played an important role in the stagnation of economic growth. Kazakhstan and Russia both produce mainly raw materials (fuels and mining products) constituting the biggest portion of their export.[40] This essentially means that Russia's and Kazakhstan's economies are not complementary but are more competitive as each of them will try to export more fuel and mining products to third countries than the other. Other EAEU members have differing trade patterns with Belarus and Kyrgyz Republic having a better-developed manufacturing sector and Armenia being mostly an agricultural country.[41] This might mean that in the long-run these countries might be in a better position to export to Russia and Kazakhstan but so far the level of intra-block trade remains low. In accordance with the data provided by the Eurasian Economic Commission, the intra-block trade in 2015 was 15,8% of the overall trade, while the percentage rose to 16,4% in 2016, then to 16,9% in 2017 and fell back to 15,7% in 2018.[42]

[36]See David Tarr, "The Eurasian Economic Union of Russia, Belarus, Kazakhstan, Armenia and the Kyrgyz republic: Can It Succeed Where Its Predecessor Failed?", (2016) Eastern European Economics 54, 4.
[37]See Rilka Dragneva, Laure Delcour and Laurynas Jonavicius, "Assessing Legal and Political Compatibility between the European Union Engagement Strategies and Membership of the Eurasian Economic Union", (2017) EU-STRAT Working Paper Series, N07, 14.
[38]See Rilka Dragneva and Kataryna Wolczuk, "The Eurasian Economic Union: Deals, Rules and the Exercise of Power", (2017) Chatham House Research Paper, 22.
[39]See WTO Dispute Settlement Understanding (DSU), Art. 22 (2). The text of the DSU can be viewed at: https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm.
[40]The data for Russian Federation on the exact percentage of fuels and mineral products in each of these countries' export can be viewed at: http://stat.wto.org/CountryProfiles/RU_E.htm and for Kazakhstan at: http://stat.wto.org/CountryProfiles/KZ_E.htm.
[41]Trade profile of Belarus can be viewed at: http://stat.wto.org/CountryProfiles/BY_E.htm , the profile of Kyrgyz Republic can be viewed at: http://stat.wto.org/CountryProfiles/KG_E.htm and the profile of Armenia can be viewed at: http://stat.wto.org/CountryProfiles/AM_E.htm.
[42]See Boris Kheyfets, "Eurasian Economic Union: Time for Modernisation", (Евразийский Экономический Союз – Время для Модернизации), (2019) Outlines of Global Transformations: Politics, Economics and Law, Vol. 12:2, (Контуры Глобальных Трансформаций: Политика, Экономика, Право), 32.

The trade among the countries is also affected by the sanctions imposed by the EU on the biggest economy of the EAEU, namely Russia.[43] The sanctions were introduced as a result of crisis around Crimea and Eastern Ukraine and were followed by imposition of counter-sanctions by Russia in 2014.[44] They did not only restrict the trade between Russia and the EU but also adversely affected the relationship among the members of the EAEU itself. Belarus and Kazakhstan (members of the CU at that time) refused to impose sanctions on the EU as the latter is one of their biggest and most important trading partners.[45] At the same time, these countries started referring to the generally economic nature of the EAEU thus sending a strong signal that they are not ready for a deeper political union.[46] The imposition of sanctions gave rise to trade wars especially between Belarus and Russia[47] as geographical location of the former allowed it to become a bridge between Russia and the EU. The sanctioned products were being imported through Belarus under the pretext of being transited to Kazakhstan only to be sold in Russia.[48] This created tension in the relations with Russia, which as a response banned these products claiming that they did not comply with the required standards of safety[49] and started building borders in Bryansk, Smolensk and Pskov regions.[50] Belarus in its turn threatened to leave the EAEU[51] but has not undertaken any legal steps in that direction so far.

From the perspective of trade with third countries, high external tariffs are not beneficial at all, but they are aimed at revitalising the trade within the EAEU itself, as the closest and the cheapest partners will be those within the Union. This

[43]See Sean P. Roberts and Arkady Moshes, "The Eurasian Economic Union: a Case of Reproductive Integration?", (2016) Post-Soviet Affairs, Vol. 32:6, 545.
[44]See Richard Sakwa, "How Eurasian Elites Envisage the Role of the EEU in Global Perspective", (2016) European Politics and Society, Vol. 17:sup1, 13.
[45]See Ibid.
[46]See Nicu Propescu, "Eurasian Union: the Real, the Imaginary and the Likely", (2014) Chaillot Paper N132, 22.
[47]See Rihor Astapenia, "Belarus Reinstates Customs Control on the Border with Russia: the End of the Eurasian Union?", *Belarus Digest*, 11 December 2014, viewed at: https://belarusdigest.com/story/belarus-reinstates-customs-control-on-the-border-with-russia-the-end-of-the-eurasian-union/.
[48]See supra note 36, 10.
[49]See supra note 36, 10.
[50]See Lyubov Kulyabko, "Playing "the war": stiffening of the borders relates to the strange politics of Belarus", (Поиграть в "войнушку": Ужесточение границы связано со странной политикой Белорусии), *Moskovskiy Komsomolets*, 1 February 2017, viewed at: http://www.mk.ru/politics/2017/02/01/poigrat-v-voynushku-uzhestochenie-granicy-svyazano-so-strannoy-politikoy-belorussii.html.
[51]See Ostap Zhukov, "Media Source: Belarus is preparing to leave the EAEU, CSTO and the United State", (СМИ: Белоруссия готовится выйти из ЕврАзЭс, ОДКБ и Союзного государства), *Moskovskiy Komsomolets*, 2 February 2017, viewed at: http://www.mk.ru/politics/2017/02/02/smi-belorussiya-gotovitsya-vyyti-iz-evrazes-odkb-i-soyuznogo-gosudarstva.html.

assumption though is not backed up by empirical evidence discussed above. Trade with third countries also decreased from 2015 to 2016 with the exports declining by 17,5% and imports declining by 2%.[52] The numbers show that the economic trends of the EAEU membership are negative, as the trade turnover within the EAEU and in relation to trade with third countries is not increased.[53] Moreover, Russia still provides subsidised gas to other member in the EAEU while losing money and it is not clear for how long it can sustain this practice of keeping other members interested in the Union.[54] Thus, the EAEU can be seen as a stumbling block not a stepping stone for international trade since the trade diversion is evident.[55]

Another important factor for the economy of the EAEU is the migration from low-income countries to Russia and to some extent to Kazakhstan.[56] For example out of 1 million Kyrgyz migrants working abroad 92% found job in Russia and 8% in Kazakhstan.[57] The economy of Armenia, though not to the same extent, also depends on the transfers from the migrants mainly working in Russia.[58] The flow of migrants to Russia presumably will continue as the country will need human resources due to the decrease of its population (in 2050 the population of Russia will be 1.2% of the world population).[59] This said, it is important to mention that the population of the EAEU as a whole is not expected to rise,[60] meaning that the economy will suffer from the shortage of human resources and ageing of population with the increased pressure to include new MS and/or to liberalise its market further. This interdependence may explain why the countries decided to join the EAEU, why the EAEU strives to include new members and why Russia encourages free movement of people within the Union.

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[52]See Eurasian Economic Bank Centre for Economic Studies, "Eurasian Economic Integration 2017", Report 43, 42.

[53]EAEU member states have different levels of trade integration with Armenia and Kazakhstan having a medium level, Belarus and Kyrgyz Republic – high level and Russia – a low level of integration. See Iryna Gurova, Iryna Platonova and Mariya Maksakova, "The Level of Trade Integration in the Eurasian Economic Union", (2018) Studies on Russian Economic Development, Vol.29:4, 452.

[54]It is calculated that for example in case of Armenia, Russia is losing 82 USD per 1000 m³. See A. Knobel, "The Eurasian Economic Union", (2017) Problems of Economic Transition, Vol. 59:5, 339.

[55]See supra note 12, 66-67.

[56]Freedom of movement is also an important element of single market.

[57]See Diana Kudaibergenova, "Eurasian Economic Union Integration in Kazakhstan and Kyrgyzstan", (2016) European Politics and Society, Vol. 17:S1, 105.

[58]The transfers though tend to decrease. Thus, if in 2015 transfers from Russia constituted 1 billion 8 million USD, in 2016 the figure was 896 million USD only. See "Reverse comparison of money transfers from Russia to Armenia and from Armenia to US" (Դրամական փոխանցումների հակադարձ համեմատականությունը Ռուսաստանից Հայաստան և Հայաստանից ԱՄՆ), *Azg Daily Newspaper*, 19 April 2017, viewed at: http://www.azg.am/AM/2017041410.

[59]See Vasil Sakaev, "The Political Demography of the Eurasian Economic Union", (2016) Journal of Economics and Economic Education Research, Vol. 17, special issue 2, 170.

[60]See supra note 59, 174.

To conclude, it is clear that the economy of the EAEU suffers from different internal and external factors such as the geopolitical realities of the Union.

2.2. Geopolitical dynamics in the EAEU

The EAEU is largely seen to be the project of Vladimir Putin, the Russian President,[61] although the idea of the Eurasian Union was first mentioned in 1994 when then President of Kazakhstan Nursultan Nazarbayev gave a speech in Moscow State University.[62] In accordance to Nazarbayev's plan, there should have been three phases towards the creation of the Union starting with the economic cooperation, then passing to cooperation in humanitarian area and finally, coordinating security and defence policies.[63] It is paradoxical to note that currently Kazakhstan along with Belarus place an emphasis on the exclusively economic nature of the union, even though Nazarbayev's initial plan was to have a fully functioning Union in other areas of cooperation as well.

New impetus for the creation of the Union came from Putin who in his article in *Izvestiya* on 4th of October 2011 explicitly mentioned that the new project was not going to restore the Soviet Union but was "a close integration based on new values and economic and political foundation".[64] Notwithstanding this explicit departure from the possibility of recreation of the USSR, the countries in the region fear that this is exactly what will happen in the long-run. Russia was long considered a hegemon power in the area and after a short period of decline in 1990s,[65] it seems to be able to act as the main trailer of the Eurasian integration. This is proved by the fact that for example the EAEU Treaty Chapter on public procurement is based on the Russian primary legislation and thus is heavily influenced by the Russian policy and regulation.

The creation of the EAEU is also explained by such schools of thought as neo-Eurasianism and neo-imperialism. Classical Eurasianism appeared in the beginning of the 20th century and conceptualised Russia as a civilisation of its own kind distinct

[61]See Paul Pryce, "Putin's Third Term: The Triumph of Eurasianism?", (2013) Romanian Journal of European Affairs, Vol. 13:1, 25.
[62]See supra note 46, 21.
[63]See Tugce Varol Sevim, "Eurasian Union: A Utopia, A Dream or A Coming Reality?", (2013) Eurasian Journal of Business and Economics, Vol. 6:12, 52.
[64]See "Putin Calls for Eurasian Union of Ex-Soviet Countries", *BBC*, 4 October 2011, viewed at: http://www.bbc.co.uk/news/world-europe-15172519.
[65]See Sherman Garnett, "Russia's Illusionary Ambitions", (1997) Foreign Affairs, New York, Vol. 76:2, 62.

from the Europe or "Atlantic civilisation".[66] Neo-Eurasianism instead "rejects not only "Western" overtures for partnership with Russia but also the notion that Western liberal values could have any place in Russian society".[67] The creation of the so-called Eurasian identity based on the shared Soviet past of the countries, can thus be regarded as a soft tool for deepening the integration. Common Russian language spoken in the territory of the most Soviet Republics, similar bureaucratic structure, victory over fascism unite the nations in that region. These factors are also significant in terms of doing business within the EAEU. At the same time, some other features of Soviet legacy relevant to most post-Soviet states such as corruption, monopolisation and authoritarian political systems might hinder the cooperation.[68]

In accordance with the neo-imperialist approach, Russia's main aim is to rule Eurasia while tightening connections with other states using economic ties rather than military force.[69] As explained by Brzezinski: "A power that dominated Eurasia would exercise decisive influence over two of the world's three most economically productive regions, Western Europe and East Asia".[70] The geographical advantage is obvious: the EAEU can act as a bridge connecting European and Asian civilisations providing a route for the transfer of goods and human capital from one part to another.[71] The benefits from acting as a bridge can be substantial but in order to gain them, the market should be open to regional partners, while this is not the case in the EAEU.

2.3. Armenia and Kazakhstan: rationale for the EAEU accession

Russia has multiple reasons to pursue Eurasian integration, such as the neo-imperialistic ambitions to claim the leadership role in the EAEU[72] and the opportunity to use natural and human resources of other EAEU member states given the economic situation created due to the sanctions. For the purposes of the current thesis though it is more important to consider the reasons pushing Armenia and Kazakhstan to join the EAEU. As a general observation, it can be mentioned

[66]See supra note 61, 30.
[67]See supra note 61, 30.
[68]See Ksenia Kirkham, "The Formation of the Eurasian Economic Union: How Successful is the Russian Regional Hegemony?", (2016) Journal of Eurasian Studies 7, 123.
[69]See supra note 63, 48.
[70]See Zbigniew Brzezinski, "A Geostrategy for Eurasia", (1997) Foreign Affairs, New York, Vol. 76:5, 50.
[71]See Cristopher A. Hartwell, "Improving Competitiveness in the Member States of the Eurasian Economic Union: a Blueprint of the Next Decade", (2016) Post-Communist Economies, Vol. 28:1, 56.
[72]See Aleksandr Bykov, "Eurasian Integration, Its Prospects and Possibilities", (2016) Problems of Economic Transition, Vol. 58:4, 299.

that for these countries Russia is seen as "an important but also unavoidable partner".[73]

2.3.1. Kazakhstan

As mentioned earlier, Kazakhstan was the first country to raise the idea of Eurasian Union and is one of the founding members of the EAEU. It viewed Russia as a better partner than the other alternative in the region – China, as there are fears that a country with rich natural resources, huge territory and only 17 million people will not be in a position to resist China's "economic, political and demographic ambitions".[74] Another factor for joining was economic: Kazakhstan considered that the modernisation of its economy and overall economic prosperity depends on its access to the Russian transit routes.[75] Notwithstanding this possibility, since Kazakhstan joined the EAEU, it had lost in economic terms.[76]

The deterioration of the economic situation rendered a slight change of the country's current political course; Kazakhstan distances itself from Russia. Besides the economic factor, some commentators relate this change also to the fear of aggressive Russian politics veiled by the urge to "protect the rights of Russian minorities" in some post-Soviet countries as was the case in Crimea and Eastern Ukraine.[77] Kazakhstan itself is a home to many Russians constituting about 23.7% of the total population according to the census from 2009.[78] The departure from closer political ties with Russia is also marked by the intention of Kazakhstan to pass to Latin alphabet by 2025.[79] It is clear that this is an attempt to limit the Russian influence in the country together with the usage of the Russian language.

It is thus not surprising that in his article outlining the principles of the EAEU ex-President of Kazakhstan Nursultan Nazarbayev stressed out that without denying the cultural and civilisational factors, integration should be based on economic

[73]See supra note 43, 554.
[74]See Mukhit Assanbayev, "Central Asia: Under Pressure from Russia and Its Integration Projects", (2015) The Polish Quarterly of International Affairs 2, 134.
[75]See supra note 43, 554.
[76]See Nargis Kassenova, "Kazakhstan and Eurasian Economic Integration: Quick Start, Mixed Results and Uncertain Future", in Rilka Dragneva and Kataryna Wolczuk (eds.), *Eurasian Economic Integration: Law, Policy and Politics*, (Edward Elgar 2013), 150-154.
[77]See supra note 46, 31.
[78]See Askar Jumageldinov, "Cultural Identification and Interethnic Relationships in Kazakhstan", (2014) Procedia – Social and Behavioural Sciences 114, 783.
[79]See Aktan Rysaliev, "Kazakhstan: President Calls for Switch to Latin Alphabet by 2025", *Eurasianet*, 12 April 2017, viewed at: http://www.eurasianet.org/node/83206.

cooperation.[80] In his view: "[e]conomic interests and not abstract geopolitical ideas and slogans are the main engines of integration processes".[81] (Partial) loss of sovereignty in case of the creation of the Eurasian Union is unacceptable for Kazakh government. They too, as most of the post-Soviet countries are reluctant to give up on the acquired national sovereignty. National elites also do not want to share their political and economic power, which will be inevitable in case of moving towards the creation of supranational bodies.

Notwithstanding the economic downturn as well as the opposition to deeper integration in the EAEU, Kazakhstan remains one of the most important MS of the EAEU. It is still widely believed in Kazakhstan that the EAEU will deliver economic growth thus supporting political stability and preventing civil disobedience.[82] Unlike Kazakhstan, Armenia joined the EAEU considering factors such as defence, energy and migration.

2.3.2. Armenia

Armenia joined the EAEU on the 2nd of January 2015 after the then President Serzh Sargsyan announced on 3 September 2013 that Armenia would not sign the Deep and Comprehensive Free Trade Agreement (DCFTA) with the EU but instead would join the Russian-led CU.[83] This U-turn came as a surprise to many analysts, academics and practitioners as the Armenian politicians always stressed that there was no plan to join the EAEU. Particularly, the former Prime Minister of Armenia, Tigran Sargsyan (currently the head of the Board of the EAEU Commission) indicated that: "[t]here is no example in international practice where a country, not having common borders, became a party to the Customs Union. The reason of the Customs Union is to have exchange of goods without customs clearance. In our case this is impossible as we need to pass through the territory of a neighbouring country and pass customs clearance twice".[84] Commentators in their turn did not see Armenia as a potential member to the EAEU, explicitly pointing at Ukraine and

[80]See Nursultan Nazarbaev, "Eurasian Union: From Idea to the History of the Future", *Izvestiya,* 25 October 2011, viewed at: https://iz.ru/news/504908.
[81]See Ibid.
[82]See Zhenis Kembayev, "The Constitutional Order of Kazakhstan and its Adaptability to the Eurasian Economic Union", in Roman Petrov and Peter Van Elsuwege (eds.), *Post-Soviet Constitutions and Challenges of Regional Integration: Adapting to European and Eurasian Integration Projects*, (Routledge 2018), 225.
[83]See Andrew Gardner, "Armenia Chooses Russia over EU", *European Voice*, 3 September 2013, viewed at: http://www.politico.eu/article/armenia-chooses-russia-over-eu/.
[84]See Yelena Chernenko, "The Customs Union makes no sense for us", (Таможенный Союз не имеет для нас смысла), *Kommersant*, 4 April 2012, viewed at: https://www.kommersant.ru/doc/1907602.

Kyrgyz Republic as next in line for the membership.[85] The population of Armenia was also predominantly against the idea of joining the CU and later the EAEU. Only about 46% of Armenians have positive attitude towards this integration (for comparison, in Kyrgyz Republic the percentage is much higher – 81%).[86] Notwithstanding this opposition, people did not take to streets as was the case of Maidan in Ukraine and there was no major political opposition to joining the EAEU. The Constitutional Court of Armenia rapidly confirmed the compatibility of the EAEU Treaty with fundamentals of Armenian Constitution and other international obligations of the country. [87]

The reasons for the U-turn by the Armenian Government are numerous and relate mainly to the defence needs, primarily over the dispute with Azerbaijan involving the territory of Nagorno-Karabakh. Russia as a strategic partner, sells arms to Armenia (as well as to Azerbaijan) and having access to the Russian military equipment is crucial for the Armenian national security.[88] Armenia is also a member of the CIS Treaty on Collective Security Art. 2 of which states that in case there is a threat to one of the MS all the other MS shall consult and coordinate their positions in order to eliminate the threat.[89] Though legally the Treaty on Collective Security and the EAEU Treaty are not connected,[90] meaning that refusal to join the latter would not negate Armenia's rights and obligations under the former, in practice Russia made clear that it would support Azerbaijan in its fight for Nagorno-Karabakh in case Armenia refused to join the EAEU.[91] Although the security of Nagorno-Karabakh was the decisive factor when Armenia joined the EAEU, the territory itself remained outside of the CU.[92] Kazakhstan, in particular, was concerned about its future relationship with Turkey and Azerbaijan[93] and was

[85]See Alexander Libman and Evgeny Vinokurov, "Eurasian Economic Union: Why Now? Will it Work? Is It Enough?", (2012) 13 The Whitehead Journal of Diplomacy and International Relations, 36.
[86]See supra note 22, 67.
[87]See Narine Ghazaryan and Laure Delcour, "From EU Integration Process to the Eurasian Economic Union: The Case of Armenia", in Roman Petrov and Peter Van Elsuwege (eds.), *Post-Soviet Constitutions and Challenges of Regional Integration: Adapting to European and Eurasian Integration Projects*, (Routlege 2018), 167.
[88]See Alexander Nicoll and Jessica Delaney, "Moscow Plays Both Sides on Nagorno-Karabakh", (2010) Strategic Comments, Vol. 16:5, 1.
[89]See Treaty on Collective Security (Договор о Коллективной Безопасности), viewed at: http://www.odkb.gov.ru/start/index_aengl.htm.
[90]Kembayev considers that the EAEU is the economic element of the so-called 'Eurasian alliance' while the Treaty on Collective Security is its military element. See Zhenis Kembayev, "Regional Integration in Eurasia: The Legal and Political Framework", (2016) Review of Central and East European Law 41, 177.
[91]See Vladimir Socor, "Putin Courting Azerbaijan While Deep-Freezing the Karabakh Conflict", *Eurasia Daily Monitor*, Vol. 10:151, 14 August 2013, viewed at: https://jamestown.org/program/putin-courting-azerbaijan-while-deep-freezing-the-karabakh-conflict/.
[92]See supra note 46, 23.
[93]See supra note 43, 553.

against the inclusion of the territory into the CU as "legally Nagorno-Karabakh is a secessionist part of Azerbaijan".[94] Ultimately, when joining the EAEU Armenia signed a memorandum accepting that Nagorno-Karabakh will not be part of Armenia.[95] Unlike Crimea that after annexation is considered to be part of Russia and hence part of the EAEU, Nagorno Karabakh was formally excluded from the EAEU.

Armenia also depends much on the supply of Russian gas with subsidised prices since around 80% of Armenia's energy sector is controlled by Russia.[96] In the summer of 2015, Yerevan, the capital of Armenia, witnessed one of the biggest protests against the announced 17% rise of the cost of electricity.[97] The protest was not merely about the electricity price hike but rather about "the Russian domination of the local economy and the corruption and cronyism that are hallmarks of the Kremlin business model".[98] As a result of pressure from the protesters, then President Sargsyan announced that a special audit will be organised to check the Electric Networks of Armenia owned by Russia, and the government would subsidise the increase of the price until the audit is over.[99] In the meantime, Russia also had to offer concessions to Armenia in order to back Sargsyan's power in the country. Thus, it was announced that Russia would provide a concessionary loan of 200 million USD to Armenia in order to buy arms and armaments made in Russia.[100] Russia also had to drop the price of gas for Armenia to 165 USD cubic meters.[101]

Notwithstanding these concessions, Armenian society is still dissatisfied with the Russian influence and military presence in Armenia.[102] The tensions between Russia and Armenia, though, tend to be solved in a rather peaceful manner without

[94]See supra note 36, 17.
[95]See Armen Grigoryan, "Armenia's Membership in the Eurasian Economic Union: An Economic Challenge and Possible Consequences for Regional Security", (2015) The Polish Quarterly of International Affairs, Vol. 24:4, 12-13.
[96]See Syuzanna Vasilyan, "Swinging on a Pendulum: Armenia in the Eurasian Economic Union and with the European Union", (2017) Problems of Post-Communism, Vol. 64: 1, 36.
[97]See Rayhan Demytrie, "Armenia Energy Protests: Electric Atmosphere in Yerevan", *BBC News*, 26 June 2015, viewed at: http://www.bbc.co.uk/news/world-europe-33286397.
[98]See "Putin's Armenia Shock; Protests Break Out Against a Russian Ally in the Caucasus", *Wall Street Journal* (Online), New York, 29 June 2015, viewed at: https://www.wsj.com/articles/putins-armenia-shock-1435600879.
[99]See "Armenia Politics: State Offers Concessions to "Electric Yerevan"", *EIU ViewsWire*, New York, 03 July 2015, viewed at: http://search.eiu.com/default.aspx?sText=Electric%20Yerevan.
[100]See Ibid.
[101]See supra note 96, 37.
[102]Currently the public support for the EAEU is low in Armenia. Thus, in 2015 the support decreased from 64% to 56% and in 2016 went as low as 46%. See Eurasian Development Bank Centre for Economic Studies, "Eurasian Economic Union", 2017, 51.

reaching the point, where force is used. This can be explained by the fact that Armenia depends on Russia to a larger extent than for example Georgia, Ukraine or Moldova. In addition, Russia itself has taken a more cautious approach with Armenia after several examples of countries rebelling against its politics. This is proved by the stance Russia took during the Velvet Revolution in Armenia in April-May 2018 directed against the ruling government, economic decline and corruption.[103] Even though Russia backed the ruling elites, it decided to refrain from direct actions taking into account that the protests were largely peaceful and did not have external political pretext. The new Prime Minister of Armenia, Nikol Pashinyan in his turn confirmed the importance of Russian-Armenian alliance even though as an opposition leader he was critical of the previous government's pro-Russian policies.[104]

When deciding to join the EAEU, Armenia was also keen to secure working rights of Armenian migrant seasonal workers mainly in Russia, as the country still relies heavily on the remittances received from its citizens working abroad.[105] These factors acted as important ground for Armenia to take a decision to join the EAEU instead of signing a DCFTA with the EU.

While it is clear why Armenia viewed the EAEU membership as inevitable, what compelled the other countries to seek (secure) Armenia's accession? It seems that without a common border with any other EAEU MS, the economic impact of Armenia joining the Union is minimal for all. Demographically Armenia is a "European type" country with aging population and low birth rate.[106] It is mainly an agrarian country with some reserves of copper and mineral water and produces mainly food and textile (no gas or oil).[107] It can be concluded that the reason for including Armenia in the EAEU is rather geopolitical and benefits especially Russia. The country occupies an important geographical location linking Asia, Europe and Middle East and it is the only EAEU MS with a common border with Iran.[108] Some academics even see the inclusion of Armenia as a substitute to Ukraine[109] though it is hard to

[103]See Rayhan Demytrie, "Why Armenia 'Velvet Revolution' Won Without a Bullet Fired", *BBC*, 1 May 2018, viewed at: https://www.bbc.co.uk/news/world-europe-43948181.
[104]See Aram Terzyan, "The Anatomy of Russia's Grip on Armenia: Bound to Persist?", (2018) CES Working Papers, Vol. X:2, 234-235.
[105]See supra note 36, 16.
[106]See supra note 59, 171.
[107]See supra note 2, 666.
[108]The EAEU signed an interim agreement leading to a formation of an FTA with Iran in May 2018. See Eurasian Economic Commission, "Interim Agreement is Signed between the EAEU and Iran Enabling Formation of Free Trade Area", 17 May 2017, viewed at: http://www.eurasiancommission.org/en/nae/news/Pages/17-05-2018-1.aspx.
[109]See supra note 2, 666.

agree with this view taking into account that the role of Ukraine in the economy and policy of the EAEU would have been incomparable to the one of Armenia. Ultimately, Armenia is a full member of the EAEU as of 2nd of January 2015 and should abide by its legal order.

2.4. Institutions and legal order

Vladimir Putin in his prominent article in *Izvestia* mentioned that the Eurasian Union should be built on the experience of the EU and other regional coalitions.[110] The link to the EU is not accidental: as one of the most successful regional projects that has achieved deep integration among its MS, the EU indeed can serve as an example of regional cooperation. The link to the EU can point to the fact that even though the EAEU is an economic union, it aims at becoming a political union, as was the case with the EU. It needs to be recalled that the EU is a project of more than 60 years with its own distinct history of integration and it will be naïve to consider that by replicating some of its institutions and some elements of its legal order, it is possible to achieve the same level of integration for the EAEU in a short period of time.

Nevertheless, looking at the institutional structure of the EAEU it is evident that it is borrowed from the EU to a certain extent. Thus, the EAEU has a Supreme Eurasian Economic Council ("the Supreme Council"); a Eurasian Intergovernmental Council ("the Intergovernmental Council"); a Eurasian Economic Commission ("the Commission") and a Court of the Eurasian Economic Union ("the Court").[111] The Eurasian Development Bank and the Eurasian Stabilisation and Development Fund provide budget loans to the governments and act as "regional IFIs".[112]

The *Supreme Council* is comprised of the heads of the states and is recognised as the supreme body of the Union.[113] The Council considers the main issues of the Union's activities, "defines the strategy, directions and prospects of the integration development and makes decisions aimed at implementing the objectives of the Union".[114] It is entrusted with the powers to "consider, on the proposal of a MS, any issues relating to the cancellation or amendment of decisions adopted by the

[110]See supra note 64.
[111]See Art. 8 of the EAEU Treaty.
[112]See supra note 22, 57-58.
[113]See Art. 10 of the EAEU Treaty.
[114]See Art. 12(1) of the EAEU Treaty.

Intergovernmental Council or the Commission".[115] The Council is, thus, a highly political body deciding on matters of strategic importance for the whole Union. The decisions of the Council are adopted by consensus. This can point at the intergovernmental rather than supranational nature of the Council as in case of independent, supranational bodies, the decisions are usually adopted by the majority thus binding even the states that do not consent.[116]

The *Intergovernmental Council* is comprised of the heads of the governments and meets at least twice per year. It is authorised to ensure *inter alia* the "implementation of the EAEU Treaty, international treaties within the Union and the decisions of the Supreme Council, to issue instructions to the Commission and to consider any issues relating to the cancellation or amendment of a decision issued by the Commission, or, in case no agreement is reached, to refer them to the Supreme Council".[117] The body is political, and all its decisions are adopted by consensus. Again, as was the case with the Council, this body cannot be considered as supranational as the MS not satisfied with the decision may easily veto its adoption.

The *Commission* is considered the only permanent body, which has some elements of a supranational institute. The Commission itself is comprised of two bodies – the Council and the Board.[118] Decisions of the Council are adopted by consensus while the decisions of the Board are adopted by the qualified majority or consensus (in case the issue is listed as "sensitive" by the Supreme Council).[119] Although the adoption of the decisions of the Board by qualified majority is a sign of having a body independent from MS, in reality a mechanism is put in place not to allow decisions to be adopted without the consent of all MS. The mechanism is called "Belarusian elevator" and refers to the cases where the decisions taken at a lower level can be challenged at a higher level and be taken to the Supreme Council as a last resort.[120] As was already mentioned, at the Supreme Council level the decisions are taken by consensus in which case the country who raised the issue, has the possibility to block the adoption of the decision it does not agree with. The vetoes can be overcome by political means, "side payments or bilateral diplomacy, quite

[115]See Art. 12(2)(8) of the EAEU Treaty.
[116]See Rilka Dragneva, "The Eurasian Economic Union: Balancing Sovereignty and Integration", (2016) Institute of European Law, Working Papers, Paper 10, 4.
[117]See Art. 16 of the EAEU Treaty.
[118]See Art. 18 of the EAEU Treaty.
[119]See Art. 18 of the EAEU Treaty.
[120]See Maksim Karliuk, "The Eurasian Economic Union: an EU-Like Legal Order in the Post-Soviet Space?", Basic Research Program, Working Papers, Series: Law, WP BRP 53/Law/2015, 10.

like coercive diplomacy as well, to induce cooperation".[121] These type of arrangements undermine one of the main principles of the Eurasian regional cooperation - the principle of sovereign equality of the states (preamble of the EAEU Treaty). Given that the countries member to the EAEU are not equal in economic, development and other terms, it can be assumed that bigger economies will act as "hub" countries putting pressure on small underdeveloped economies to accept decisions that are not beneficial for their needs.

The powers of the Commission to monitor the implementation of the EAEU Treaty and other legal acts are limited as it only acknowledges the violation of legislation by MS and recommends remedying the situation.[122] This is in sharp contrast with the provision enacted during the CU granting the Commission the power to apply to the Court in case a MS fails to implement its obligations.[123] An example of the weakness of the Commission can be the fact that it is not able to tackle anti-competitive behaviour within the Union, namely, monopolies, although it signalled the existence of the problem several times.[124] The only step that the Commission could undertake in this regard was the suggestion to create working groups "to further study the problem".[125] Thus, the EAEU MS are not ready to concede their sovereignty even partially to create a strong supranational body which will take decisions independently and whose decisions will be binding even for the states that do not consent. Even though the Head of the Board of the Commission Tigran Sargsyan considers that the body is ready to undertake more powers, such amendments to the EAEU Treaty seem unrealistic in the short term.[126]

The EAEU misses one of the most important institutions that the EU has created: namely, the democratically elected Parliament. The EAEU thus has no legislative branch based on representation. This might be explained by the fact that the EAEU members are not ready to share the power with representatives directly elected by the people. It is true especially bearing in mind that those are mainly authoritarian states having Presidents that rule for almost twenty years. Another reason can be

[121]See supra note 46, 11.
[122]See point 43(4) of Annex 1 to the EAEU Treaty.
[123]See Vladislav Kamyshevskiy, "The Treaty on Eurasian Economic Union: Identified Gaps and Normative Ways for Their Elimination" (Договор о Евразийском Экономическом Союзе: Выявленные Пробелы и Способы их Нормативного Устранения), (2016) Eurasian Advocacy, Vol. 5:24, 142.
[124]See supra note 43, 549.
[125]See supra note 43, 549.
[126]See Igor Zubkov, "Head of the Board of the Commmission Tigran Sargsyan Expects the Eurasian Economic Commission to Sign Free Trade Agreements with Five Countries This Year" (Евразийская Экономическая Коммиссия в Этом Году Подпишет Соглашения о Зонах Свободной Торговли с Пятью Странами, Рассчитывает Председатель Коллегии ЕЭК Тигран Саркисян), *Rossiyskaya Gazeta*, 29 January 2018, viewed at: https://rg.ru/2018/01/29/rossiia-poluchit-novye-instrumenty-protiv-kontrabandy.html.

that the EAEU is still in its early stages of development and it may create a Parliament in the future.

The judicial power in the EAEU belongs to the *Court of the Union.* This is a permanent body the main aim of which is to ensure "uniform application of the Union law".[127] In order to achieve this goal, the Court is entrusted with the competence to decide on the "compliance of an international treaty within the Union with the EAEU Treaty, on observance of the Union Law by another MS, on challenges against the acts (omissions of the Commission)", etc.[128] Companies and the MS have the right to refer to the Court while natural persons are not listed as eligible to file a complaint.[129] The Court cannot "alter and/or override the effective rules of the Union law and the legislation of the MS, or […] create new ones".[130] This fact effectively limits the precedential powers of the Court leaving it with the ability to decide only on the compliance/non-compliance of the MS with their obligations under the Union Law and on the legality of acts and omissions of the Commission.

The Court, although is entitled to interpret the provisions of the Union law, can do so by providing only an advisory opinion, and MS are not deprived of the right to joint interpretation of international treaties.[131] This solution raised a legitimate question on whether there is a need to entrust the Court with such powers at all. Besides, what will happen in case the Court and the MS interpret norms differently?[132] The text of the EAEU Treaty leads to the conclusion that the joint interpretation by MS will prevail in which case indeed, the advisory opinion of the Court is redundant. The Court is also deprived of the possibility of preliminary ruling, hence the achievement of its main aim (insurance of the uniform application of the Union Law) seems to be under threat. Some commentators state that the possibility for providing preliminary rulings is not lost.[133] They refer to point 49 of Annex 2, which requests the MS to provide list of bodies or organisations entitled to apply to the Court. This interpretation is definitely possible in case the national courts are listed as bodies authorised to apply to the Court but currently this is not

[127]See Annex 2, point 1 of the EAEU Treaty.
[128]See Annex 2, point 39 of the EAEU Treaty.
[129]See Annex 2, point 39 of the EAEU Treaty.
[130]See Annex 2, point 102 of the EAEU Treaty.
[131]See Annex 2, point 47 of the EAEU Treaty.
[132]See supra note 10, 25-33.
[133]See Ekaterina Diyachenko and Kirill Entin, "The Court of the Eurasian Economic Union: Challenges and Perspectives", (2017) Russian Law Journal, Vol. V:2, 62.

the case.[134] The MS want to have the possibility to jointly agree on the interpretation of the Treaty norms most suitable for them. This position can be attributed to the fact that the predecessor of the Union Court, the Court of the EurAsec in the *Yuzhny Kuzbass* case ruled that its judgements are binding *erga omnes*. [135] This judicial activism was not what the MS envisaged, thus when the EAEU Treaty was being drafted they decided to create a new Court instead of reforming the Court of EurAsec.[136] Kembayev concludes that the Court in the current situation should cooperate closely with the Commission in order to support the development of the Eurasian legislation, rather than taking the activist path as the EurAsec court did.[137]

The notion of the "Union law", mentioned above, is not defined in the Treaty. The latter, however, provides the list of legal acts comprising the Union law. In accordance with the EAEU Treaty , "the law of the Union consists of the EAEU Treaty itself, international treaties within the EAEU; international treaties of the EAEU with a third party; decisions and dispositions of the Supreme Eurasian Economic Council, the Eurasian Intergovernmental Council, and the Eurasian Economic Commission adopted within the powers provided for by the EAEU Treaty and international treaties within the EAEU".[138] Before the creation of the EAEU, there was a cluster of different legal acts created by the CU, the EurAsec, and the Single Economic Space that were not systemised and did not constitute an integrated system.[139] The EAEU Treaty codified numerous legal acts, created a strict hierarchy thus providing for a system of law proclaiming the EAEU Treaty to be the main document with which all other legal acts of the Union shall comply with.[140]

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[134]Member States mainly indicate Ministries of Justice, except for Kazakhstan that has indicated also General Prosecutor Office, Ministry of Foreign Affairs, Ministry of Investments and Development, Ministry of National Economy. See Ibid.

[135]See Decision of the Court of the EurAsec from 8th of April 2013 "On the Clarification of the Decision of the Court of the Eurasian Economic Community dated 05.09.2012 which declared point 1 of the Decision of the Customs Union Commission dated 17.08.2010 N 335 as not compliant with the international treaties effective in the scope of the Customs Union and the Single Economic Space", the text of the decision can be viewed at: http://www.consultant.ru/document/cons_doc_LAW_144867/.

[136]See supra note 133, 54.

[137]See Zhenis Kembaev, "Legal Comparative Analysis of the Functioning of the Court of the Eurasian Economic Union" (Сравнительно-Правовой Анализ Функционирования Суда Евразийского Экономического Союза), (2016) Scriptorium Justicia, Vol. 2:18, 44.

[138]See Art. 6(1) of the EAEU Treaty.

[139]See Olga Mesheryakova, "Eurasian Integration Process and the Problems of the Creation of Effective Institutional Mechanism", (Евразийский интеграционный процесс и проблемы создания эффективного институционального механизма), (2014) Legal Initiative 2, viewed at: https://elibrary.ru/item.asp?id=21744170.

[140]See Art. 6(3) of the EAEU Treaty.

It would be reasonable to imply that the EAEU Treaty lays down also the principles governing its relationship with the norms of the WTO but this is not the case. There is only a vague reference to the WTO in the preamble stating that the regulations, rules and principles of the WTO are taken into account.[141] The wording is not precise enough to conclude that the norms of the EAEU Treaty should not contradict the provisions of the WTO Agreements, hence the risk of contradiction, including in the area of public procurement, exists.

In this regard, it should be mentioned that the EAEU Treaty was submitted to the WTO Committee on Regional Trade Agreements referring *inter alia* to Art. XXIV. The Ukrainian delegation asked a question about the relevance of the WTO Agreements in relation to Article 6 of the EAEU Treaty, which states that "in case of the conflict between the international obligations within the EAEU system and the EAEU Treaty, the latter takes precedence".[142] This provision might be considered a conflict clause establishing a hierarchy of the EAEU Treaty over the WTO Agreements. A careful reading of the Article though, seems to suggest that it rather refers to the international treaties concluded between the MS of the EAEU or between the MS and a third country. In addition, the EAEU MS, while responding to the Ukrainian delegation, emphasised that the WTO obligations are considered before concluding other international treaties.[143]

The EAEU Treaty covers many areas of economic cooperation, including but not limited to customs regulations, public and municipal procurement, trade in services, subsidies.[144] The Treaty though is silent about the direct applicability of these norms in the domestic legislation of the MS. Only Annex 1 point 13 makes explicit reference to the direct applicability of the decisions of the Commission.[145] Other than this, the Court of the Union in a recent case has concluded that the general rules on competition have direct applicability.[146] The Court also made clear that the

[141]See preamble of the EAEU Treaty.
[142]See Discussion of the Treaty on the Eurasian Economic Union (Goods and Services) in the WTO, WT/REG358/3, 7 November 2018, 18.
[143]See Ibid.
[144]See Anatoliy Spitsyn and Galiya Kulubekova, "Eurasian Economic Union and Prospects of Development of Transnational Corporations in the Frame of the Globalization", (2016) Economy of the Region (Ekonomika regiona), Vol.12:3, 697.
[145]In accordance with Point 13 of Annex 1 of the EAEU Treaty: "The Commission shall, within its powers, adopt decisions with regulatory and binding effect for the Member States, organisational and administrative dispositions and non-binding recommendations. Decisions of the Commission shall form part of the Union law and shall be directly applicable on the territories of the Member States".
[146]See Case №СЕ-2-1/1-17-БК, *On the Interpretation of the EAEU Treaty*, advisory conclusion. Viewed at: http://courteurasian.org/database. The Russian language does not differentiate between the notions of "direct applicability" and "direct effect" thus some commentators refer to "direct applicability" when analysing this case (see Benedikt Harzl and Aiste Mickonyte, "Armenia Caught Between (In-)Compatible Legal Orders: Paths of Competitive and Cumulative Integration", viewed at:

EAEU has competences in cross-border competition markets but MS have some freedom to regulate relations pertaining to competition in their internal markets. In doing so, the MS should harmonise their legislations in this area so that there is no difference in implementation.[147] This decision can be seen as an attempt by the Court to impose some supranational elements, as it makes clear that the MS have transferred competences in the sphere of competition in the cross-border markets to supranational body, i.e. to the Commission.[148]

It can be deduced from the case above that in the absence of thresholds in the EAEU for the application of the rules on procurement, the regulation of all procurement transactions of the MS are under the competence of the EAEU and the Treaty rules on procurement are directly applicable. Article 88 together with Chapter 25 of the EAEU Treaty regulate the conduct of procurement procedures in the territories of the MS in a detailed manner.

3. Regulation of public procurement in the EAEU: comparative analysis with the GPA

As is the case with almost all modern trade agreements,[149] the EAEU Treaty contains a Chapter regulating public procurement in its MS. The public (municipal) procurement is regulated in a detailed manner in Annex 25 while Art. 88 of the EAEU Treaty sets the general aims and principles of the public procurement regulation. Both sources should be read in conjunction in order to understand the procurement system promoted by the Treaty. The following section examines the EAEU procurement Chapter prior to its comparison with the GPA to identify the options available to Kazakhstan and Armenia.

3.1. Principles of public procurement in the EAEU

The principles of the procurement regulation are set out in Article 88 of the EAEU Treaty itself. In accordance to it, MS have to include the principles in their national

https://www.researchgate.net/publication/335182764_Armenia_Caught_Between_In-Compatible_Legal_Orders_Paths_of_Competitive_and_Cumulative_Integration) while the others refer to "direct effect" (see Ekaterina Dyachenko and Kirill Entin, "The Court of the EAEU on the Protection of Competition: Relation between the National and Supranational Legislation", (Суд ЕАЭС о защите конкуренции. Соотношение национального и наднационального права), (2017) Competition and Law 4. The author of the current thesis considers that the court referred to the "direct applicability".

[147] See supra note 146, point 2, part IV.

[148] See supra note 146, point 10, para. 1, part IV.

[149] See for example NAFTA Chapter Ten, Republic of Korea - USA FTA Chapter 17.

legislations. The principles cover a large range of issues, such as "regulation of relations in the sphere of procurement using the national legislation on procurement and international treaties which the MS is party to; the optimal and most efficient expenditure of funds used for procurement; providing the MS with a "national regime"; prohibition on provision of a more favourable treatment in the sphere of procurement to third countries as compared to the MS;[150] ensuring disclosure and transparency of procurement; mutual recognition of e-signatures; ensuring availability of competent regulatory and supervisory authorities of the MS in the sphere of procurement (both functions may be exercised by a single authority); determining liability for violation of the procurement legislation of the MS; and development of competition, as well as the fight against corruption and other abuses in the sphere of procurement".[151]

As can be observed, the EAEU Treaty contains principles that are suitable for an international treaty (e.g. non-discrimination, national regime treatment) and the principles that are most suitable for the national systems of procurement (e.g. ensuring the existence of regulatory authorities, determining liability for the violation of procurement legislation). The first principle states that the relations pertaining to procurement should be regulated through the national legislation of the MS and international agreements. It can be deduced that both national legislation provisions and the requirements of different international treaties should be taken into consideration. Most probably, the country will be asked to transpose mandatory provisions of the international agreements[152] into their national law so that there is no contradiction between those two. This particular provision can be seen as an intention to accommodate different norms deriving from international commitments of MS with the aim of avoiding conflicts amongst them.

Another principle deserving further attention is the mutual recognition of the e-signatures issued in another MS. This requirement, though of importance, creates technical and legal problems for the MS. Armenia, for example, has to introduce the e-signature into its electronic procurement system while previously it identified the suppliers based on their username and password. This was possible as the documents were available to anyone without the necessity to sign into the system, the bids were not required to be signed and the contracts were uploaded into the system instead of being signed online. Thus, the system was much more open for

[150]This means the Most Favoured Nation treatment is also included as a principle in the EAEU even though it is not called so.
[151]See Art. 88 of the EAEU Treaty.
[152]In case of Armenia and Kazakhstan these will be the EAEU Treaty, the respective trade agreements with the EU and the GPA.

any potential supplier from any country. With the introduction of the e-signatures, the system will become more secure and much more closed as the e-signature will be required for the participation to tender procedures, even though it is still envisaged to give access to procurement documentation to everyone without the need to register. A question then arises whether the mutual acceptance of signatures can be extended to all suppliers irrespective of country of residence or only to the suppliers from the EAEU? In case of the latter, this might be considered a violation of the non-discrimination and equal treatment obligations under the GPA.[153]

All other principles are either self-explanatory (optimal and efficient use of funds, transparency of procurement, availability of competent regulatory and supervisory authorities, liability for the violation of procurement rules, fight against corruption) or are explained elsewhere in the Treaty (the definition of national treatment is given in Annex 25). These principles are embodied in different operational provisions of Annex 25, which should be reflected in the national legislations of the MS.

Overall, it can be concluded that both the GPA and the EAEU Treaty are based on largely the same principles. What matters is how these principles are reflected in other, operational provisions of the treaties and how they are implemented in practice.

3.2. Thresholds

The EAEU Treaty does not contain any provision on the thresholds, which effectively means that the detailed provisions of the Treaty do apply to all procurement transactions of the MS independent of their value. This approach can be considered strange as, the aim of the regulation of procurement at international level is the opening of national markets to foreign competition - thresholds are used to signal the contracts foreign suppliers might be interested in. In case of the EAEU Treaty though, the idea is not to differentiate between the local and the EAEU suppliers independent of the contract value. Taking into account the linked economies (especially of Russia and Belarus), it is understandable that the companies of these MS might have interest even in the low value procurement procedures. In general,

[153]See Eliza Niewiadomska and Astghik Solomonyan, "Public Procurement in Global and Regional Trade Agreements: Lessons Learned in Armenia", in Aris Georgopoulos, Bernard Hoekman and Petros Mavroidis (eds.), *The Internationalization of Government Procurement Regulation*, (Oxford University Press 2017), 183-184.

this approach creates better harmonisation and better possibilities for the penetration into the markets of other MS but it also gives rise to an administrative burden, which small procuring entities in countries having decentralised systems will struggle to carry.[154]

The absence of threshold does not create any problems regarding compliance with the GPA rules; in fact, it even makes the compliance easier as the GPA requirements affect only high value procurement above specific negotiated thresholds carried out by procuring entities listed in country's Annexes.

3.3. Procurement procedures

Unlike the GPA, that does not mandate procurement procedures but just specifies some of them as a suggestion to its parties, the EAEU Treaty opted for a different approach. It contains an exhaustive list of procurement procedures some of which are mandatory for the MS. Thus, the EAEU Treaty refers to the following procurement methods:

- "an open tender, which, among other things, may provide for two-stage procedures and pre-qualification of bidders ("the tender");
- request for pricing (request for quotations);
- request for proposals (if provided for by the procurement legislation of the Member State);
- open electronic auction ("the auction");
- commodity trading (if provided for by the procurement legislation of the Member State);
- procurement from a single source or a single supplier (executor, contractor)".[155]

Only the request for proposals and commodity trading are not mandatory for the MS. It also seems that novel arrangements like dynamic purchasing systems or innovation procurement have no place in the system of the EAEU Treaty, as the list is exhaustive. This is unfortunate as, *first of all*, MS cannot choose the procedures best suiting the needs of their markets but have to accommodate all of the described mandatory procedures. *Second,* in case there are new procurement methods used in the systems of the more developed countries (e.g. EU, USA), and

[154]See supra note 153, 179.
[155]See point 4, Annex 25 of the EAEU Treaty.

the MS would like to make use of them, they have to initiate a process of amending the EAEU Treaty. This is not an easy task and will take years of negotiations.

Single source procurement deserves a more detailed elaboration as the abuse of this method affects cross-border trade and undermines the aim of international treaties. As was mentioned, the GPA contains an exhaustive list of cases where single sourcing can be considered legitimate. Such cases should be interpreted narrowly not allowing parties to the Agreement to give frivolous interpretation and thus implicitly enlarge the list. In stark contrast to this approach, the EAEU Treaty contains a list of 63 items that are permitted to be procured using single sourcing. Under each such "ground" there are different procurement subjects described in a general manner. For example, the following services can be procured via single sourcing: "services related to business trips of employees, trips of students and post-graduate students to participate in creative contests (contests, competitions, festivals, games), exhibitions, open-airs, conferences, forums, workshops, internships, educational practical workshops, including their delivery to the venue of these events and back, rent of accommodations, transportation services, meals, as well as goods, works and services related to hospitality expenditures".[156] As can be seen, procurement of unrelated services are clustered under one provision proving that the list is much larger than 63 items. Another problem is the opaque nature of certain provisions. For example, the "acquisition of goods, works and services required for the implementation of monetary activities, as well as activities to manage the national fund of the MS and pension assets" may be procured via single sourcing.[157] It is unclear what services, goods and works can be envisaged under this provision and the MS are able to abuse it.

Fortunately, the states are not obliged to incorporate all these provisions into their national legislation. Moreover, MS may reduce the list of goods, works and services in its procurement legislation.[158] This provision is a solution for countries member to the GPA and the EAEU Treaty, as they can limit the list of procurement subjects to be compliant with the GPA, at least for the procurement above the GPA threshold. This might raise the question of inequality when comparing to the states, which are members *only* to the EAEU Treaty, as the latter can make use of all 63 cases of single sourcing thus effectively eliminating competition from other MS.[159]

[156]See point 23, Annex 3 to Annex 25 of the EAEU Treaty.
[157]See point 46, Annex 3 to Annex 25 of the EAEU Treaty.
[158]See point 10, Annex 25 of the EAEU Treaty.
[159]See supra note 153, 182.

Though from the technical point of view, countries member to both the GPA and the EAEU Treaty can comply with the requirements of both Treaties related to procurement methods, they in fact have to make a choice. It can be claimed that there is a situation of conflict of norms as the states are giving up their right granted by the GPA to choose whatever procurement method they deem appropriate to comply with the obligations of the EAEU Treaty. Such countries also give up their right to have a larger list of single sourcing opportunities to comply with the GPA.

Another crucial element of procurement is the electronic procurement solutions provided in the GPA and the EAEU Treaty, hence it is worth exploring them to conclude on their compatibility.

3.4. Electronic procurement and electronic auctions

Both the GPA and the EAEU Treaty pay a lot of attention to the usage of IT in public procurement. The EAEU Treaty follows the approach of the GPA when obliging its members to provide for a "single point of access for the procurement related information".[160] In addition, it requires its MS to organise the open tender and the electronic auction in an electronic format and encourages doing the same for other procurement procedures.[161] For the electronic auction, it is redundant to mention the obligation that it has to be organised in an electronic format as there is no other way the MS can conduct procurement via e-auctions. Other than that, these provisions seem to be in line with the recent trends in public procurement and are in correspondence with the principles of the GPA.

The electronic auction procedure deserves some more elaboration at this stage as a potential source of conflict of norms. Unlike the relevant EU rules,[162] the electronic auction is considered a stand-alone procedure in the EAEU Treaty. The text of the Treaty refers to Annex 4 containing list of goods, services and works to be procured using e-auction. This list, unlike the list for the single source procurement, cannot be reduced but can be enlarged.[163] It shall be noted that Armenia decided to make use of this possibility and approved a list containing more than 300 procurement

[160]See para 2, point 2, Annex 25 to the EAEU Treaty. Also, supra note 153, 182.
[161]See point 4, Annex 2 to the EAEU Treaty.
[162]See Art. 35 of the European Parliament and the Council Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJEU L94/65, 28.03.2014. Text of the Directive can be viewed at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN.
[163]See point 8, Annex 25 of the EAEU Treaty.

subjects.[164] On the one hand, this is a positive step as the procedure is organised with shortened deadlines of fifteen or seven days depending on the national thresholds.[165] As the listed subjects are the ones purchased frequently (standardised items), the large list saves administrative resources of procuring entities. On the other hand, with the usage of e-signature, the GPA parties will be practically deprived of participation to the procurement in a big portion of the procurement market[166] as a result of the absence of thresholds for the usage of e-auction the only condition being the inclusion of the subject in the list mentioned above.

In the area of e-auction, conflict of norms can be noticed. Countries are limiting their right to decide whether they want to use or not to use electronic auction and what works/services/goods shall be procured via e-auction, in order to comply with more stringent rules of the EAEU Treaty. It can be concluded that although in practice MS can be compliant with all their international obligations, in many instances they are effectively deprived of rights due to the need to comply with all the undertaken obligations. These instances amount to the conflict of norms as described in Chapter 2.

3.5. Review institutions and review procedures

The GPA, as discussed, puts an emphasis on the review procedures of its parties and makes sure that each of them has at least one impartial administrative or judicial authority to receive and resolve complaints from aggrieved suppliers. The EAEU Treaty instead takes a different approach. It does not contain detailed regulation of the review process and does not require impartiality of the review body. The text of the EAEU Treaty Annex 25 contains only one provision incorporated under the heading "Ensuring Rights and Legitimate Interests of the Persons Participating in Procurement". It is essential to underline that the first point under that heading does not refer to the protection of the rights and interests of the (potential) bidders but instead mandates the MS to take measures to prevent, detect and stop violations of its procurement legislation.[167] This suggests that for the drafters of the EAEU Treaty the detection and punishment of violations of the

[164]See Decision of the Government of Armenia N 534-N "On Approving the Regulation on e-Auction and the List of Goods, Works and Services to be Procured via e-Auction", dated 18 May 2017.
[165]See point 8(3), Annex 1 to Annex 25 of the EAEU Treaty.
[166]Unless there is a mutual recognition of e-signatures with the GPA parties as well.
[167]See point 35, Annex 25 to the EAEU Treaty.

procurement legislation is much more important than the protection of aggrieved suppliers' rights.

This conclusion is substantiated also by the first sentence of point 37 of Annex 25 to the EAEU Treaty which states: "In order to ensure the legitimate rights and interests of persons in the sphere of procurement, as well as to exercise control over compliance with the procurement legislation of the Member State...". The raison d'être of this provision thus seems to be twofold: *first,* ensuring the rights and interests of persons in the sphere of procurement; and *second,* establishing control over the compliance with the procurement legislation. Even though the protection of the rights is stated first, the rest of the articles proves that the main aim of this provision is to provide for control and monitoring function in each MS. The article sounds as follows: "In order to ensure the legitimate rights and interests of persons in the sphere of procurement, as well as to exercise control over compliance with the procurement legislation of the MS, each of the MS, in accordance with its legislation, shall ensure the availability of authorised regulatory and/or controlling authorities in the sphere of procurement. In this case, these functions may be performed by a single authority having the following powers:

1) control in the sphere of procurement (including through inspections);

2) examination of claims and applications against decisions and actions (omission) of procuring entities, procurement organisers, operators of electronic trading platforms (e-platforms), operators of web portals, commodity exchanges, commissions and other persons in procurement, violating the procurement legislation of the MS. In this case, the decisions and actions (omission) of customers, procurement organisers, operators of electronic trading platforms (e-platforms), operators of web portals, commodity exchanges, commissions and other persons in procurement adopted (committed) before the deadline for the submission of applications for participation in the procurement may be appealed against not only by any potential supplier, but also by any other person in accordance with the procurement legislation of the MS;

3) prevention and detection of violations of the procurement legislation of the MS, as well as taking measures to remedy the said violations (including by issuing a binding order to remedy such violations and bringing perpetrators to liability for such violations);

4) establishing and maintaining the registry of mala fide suppliers".[168]

[168]See point 37, Annex 25 to the EAEU Treaty.

It should be noted that the EAEU Treaty does not differentiate between the functions of control (monitoring) and the function of review. The text above suggests that the regulatory and/or controlling authorities (which are usually Ministries of Finance or Public Procurement Agencies of MS) are entrusted with the powers to carry out inspections, detect violations of procurement norms and take binding decisions on remedies, to handle the complaints from aggrieved (potential) suppliers as well as to establish and maintain the so-called "black list" of suppliers. Mixing these functions might carry potential conflict of interest, as the same people will be entrusted with inspecting the procurement procedures of procuring entities and with handling the complaints against them. There is also no reference to the impartiality of the body taking care of the complaints. The EAEU Treaty does not mention the complaint to the procuring entity as a phase of a review process but also does not explicitly forbid it. The only body specifically mentioned in the EAEU Treaty entrusted with the review function is the controlling/monitoring body. If the regulating authority hears a complaint against its own decisions as a procuring entity, the problem of conflict of interest will be acute.

The EAEU Treaty does not contain any reference to the complaints to judicial bodies and it is assumed that this will depend on the Constitution of each MS. For example, the Constitution of Armenia in its Art. 61 provides that each person has the right to effective judicial protection of his/her rights and freedoms.[169] This provision fills in the gap found in the EAEU Treaty. The same refers to the Constitution of Kazakhstan containing a similar provision in its Article 13.[170]

Regarding the standing, it seems that in case the filed complaint relates to the procurement documentation, the list of people having the right to complain is much wider. The EAEU Treaty gives the right to complain not only to the potential suppliers, but also to "other people in accordance with the procurement legislation of the MS". This can be interpreted as giving right to subcontractors, NGOs and even public in general to complain if the MS decides so. It can be also deduced that after the award of the contract only the suppliers who have submitted the bid have the right to complain.

The EAEU Treaty contains no other provision on the procedure or processes of the review. The Treaty does not regulate the possibility of interim measures or the provision of specific time period for filing the complaints though point 2 (9) of Annex

[169]The text of the Constitution of the Republic of Armenia, can be viewed at: http://www.arlis.am/DocumentView.aspx?docID=102510.
[170]See text of the Constitution of the Republic of Kazakhstan, can be viewed at: http://www.akorda.kz/en/official_documents/constitution.

1 to Annex 25 of the EAEU Treaty states that "the contracts should be signed not earlier than ten calendar or working days and not later than 30 calendar days since the adoption of the decision on the selection of the successful bidder or invalidation of the tender in cases specified by the procurement legislation of the MS". These ten days thus refer to the "standstill period" during which the procuring entities should refrain from concluding the contract. The problem with this point is that the date is counted from the day the decision is adopted and not from the day when it was published and when the aggrieved suppliers should reasonably be informed about the decision of the procuring entity. In order to comply with Art. XVIII:3 of the GPA, thus, the countries have to adopt and publish the decision on the same day to respect the period of at least ten days envisaged under the GPA.

It is assumed that the scope of jurisdiction of review bodies under the EAEU Treaty covers all procurement transactions due to the absence of thresholds. However, there is an exception for the procurement containing state secrecy.[171] The questions of standard of scrutiny, the legal effect of the decisions of bodies handling the complaints and most importantly the remedies are not dealt with in the EAEU Treaty[172] suggesting that these important questions are left to the discretion of MS. This also means that the states member to both the GPA and the EAEU Treaty can easily opt for the solutions provided in the GPA due to the lack of regulation in the EAEU Treaty.

To sum up, the procurement system promoted by the EAEU Treaty is based on a different logic than the one supported by the GPA. Several instances of conflict of norms related to procurement review mechanisms are identified and will be discussed in detail in Chapter 7. These instances of conflict of norms are only "apparent conflicts" allowing the states to comply with all their international obligations. None of them amounts to "real conflict".

4. Conclusion

The EAEU is the most recent regional integration project built on the past futile efforts of some of the post-Soviet countries to preserve the economic, cultural, political and other ties between themselves after the collapse of the USSR. It is

[171]See point 2 of Article 88 of the EAEU Treaty.
[172]There is a possibility to interpret one of the EAEU Treaty provisions as related to remedies. More on this see Chapter 7.

evident already now that the EAEU is qualitatively different from the past integration projects of the post-Soviet region.

Though the main aim of the Union is an economic one, the gains in economic terms are not tangible for the MS. The imposition of common external tariffs at a higher rate than the ones countries had before joining the EAEU has implications for trade with third countries. In addition, the international sanctions imposed on Russia create major problems in both trade and political agenda of the Union. From the announcements of heads of the EAEU MSs, it also becomes clear that they are reluctant to limit their sovereign powers in favour of supranational institutions.

Notwithstanding the political and economic challenges currently faced by the Union, legally it has a founding Treaty, which lays down strict hierarchy of legal acts while attempting to create EAEU *aquis*. The EAEU Treaty regulates many areas of economic activities in the MS and sets out provisions that should be complied with.

One of these areas is public procurement. Unlike the GPA and other international trade agreements, the EAEU Treaty does not contain any thresholds, which means that all procurement transactions should be compliant with the detailed mandatory rules of the Treaty. It should be also noted that some areas are regulated in a much more detailed manner than the others. For example, the Treaty lays down all the steps of open procedure and the electronic auction with mandatory deadlines while paying little attention to the review procedures leaving its regulation to the discretion of MSs. The GPA in its turn puts strong emphasis on the domestic review procedures and contains relatively few mandatory provisions regulating other phases of procurement process. This is beneficial for the countries, parties to both treaties as they can opt for mandatory provisions of each treaty without violating the other one. From the conflict of norms perspective, based on a wide definition of "conflict of norms" discussed earlier, it is evident that there is a situation of conflict. The states have to discard various rights in order to comply with all international obligations. In practice though, as the states do not violate any obligation, other states member to the GPA or the EAEU Treaty will not raise the question of non-compliance. Rather the implementing state bears the consequences of not being able to make use of the rights provided by international treaties.

As the countries included in the research project concluded trade agreements also with the EU, the next Chapters will be devoted to the analysis of those agreements. The European Neighbourhood Policy (ENP) as a tool for the EU cooperation with Armenia will be the starting point.

Chapter 5: EU relations with Armenia and the CEPA

1. Introduction

The current Chapter is set to explore the EU relations with Armenia and the recent trade agreement signed between them (the CEPA) with a special emphasis on its public procurement norms and review procedures. The EU, while committed to multilateralism, namely trade negotiations via the WTO, is gradually "upgrading" its bilateral contacts[1] as proved by the recent bilateral agreements signed *inter alia* with Armenia, Kazakhstan, Japan, Canada.[2] Having said that, it is important to note that the EU is not giving up the multilateral or regional dimensions of its foreign policy but is trying to strike a balance with bilateralism.[3] As discussed further, in relation to countries under examination, the EU still utilises both multilateral and bilateral tracks of cooperation.

In academic literature, the EU is seen, on the one hand, as a normative power based on some specific values[4] and, on the other hand, as a global market and trade power.[5] As a *normative power,* the EU actively diffuses its norms outside its borders making use of mainly bilateral arrangements with third countries, including the neighbouring countries. It aims to create a neighbourhood based on the same values as itself, which is believed to facilitate cooperation.[6] As a *trade power*, harmonised sanitary and phytosanitary standards, elimination of non-tariff barriers to trade clearly enhance the trade turnover potential between the EU and the third

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[1]See Thomas Renard, "Partnerships for Effective Multilateralism? Assessing the Compatibility between EU Bilateralism, (Inter-)regionalism and Multilateralism", (2016) Cambridge Review of International Affairs, Vol. 29:1, 23-24. Importance of bilateral trade liberalisation has been underlined also in the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 4 October 2006, "Global Europe: Competing in the World", COM(2006) 567 (final), viewed at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:r11022&from=EN.

[2]The list of EU trade agreements can be viewed at: http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#_in-place.

[3]See supra note 1, 32.

[4]See e.g. Helene Sjursen, "The EU as a "Normative" Power: How It Can Be?", (2006) Journal of European Public Policy, Vol. 13:2, 236; Henrik Larsen, "The EU as a normative Power and the Research on External Perceptions: The Missing Link", (2014) JCMS, Vol.52:4; Ian Manners, " Normative Power Europe: A Contradiction in Terms?", (2002) JCMS, Vol. 40:2.

[5]See Chad Damro, "Market power Europe", (2012) Journal of European Public Policy, Vol. 19:5, 696.

[6]See Art. 8 of the TEU.

countries, making the EU an inevitable and important player in the trade policy of its counterparts.[7]

In order to understand the nature and dynamics of the EU relations with Armenia underlying the conclusion of CEPA, as well as to explore public procurement norms related to review procedures, the current chapter will first analyse the EU policies of the ENP[8] and the Eastern Partnership (EaP) as the main framework of cooperation with Armenia. Later the uneasy development of the EU-Armenia relations will be the center of attention. CEPA as a new legal ground for cooperation will be scrutinised next with a specific emphasis on procurement review mechanism, which in its turn will inform the analysis of Chapter 7. The Chapter will end with conclusions.

2. The ENP and the EaP: general characteristics

The ENP was launched by the EU in 2003 when the Communication on *"Wider Europe –Neighbourhood: A new Framework for Relations with our Eastern and Southern Neighbours"* was adopted.[9] One of the main factors for such a push was the expected EU enlargement from 2004, which brought the EU closer to the post-Soviet states geographically[10] and made it a "legitimate and welcomed" actor in the region.[11] In 2009, the ENP has gone through the "policy regionalisation" when two blocks of countries, namely the EaP and the Union of Mediterranean (UfM) were created.[12] The EaP includes six countries – *Armenia*, Azerbaijan, Belarus, Georgia,

[7]See Sophie Meunier and Kalypso Nicolaidis, "The European Union as a Conflicted Trade Power", (2006) Journal of European Public Policy, Vol. 13:6, 911.

[8]The following countries were included in the ENP Strategy: Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Palestine, Syria, Tunisia and Ukraine. See Pieter Jan Kuijper, Jan Wouters, Frank Hoffmeister, Geert De Braer and Thomas Ramopoulos, *The Law of EU External Relations: Cases, Materials, and Commentary on the EU as an International Legal Actor*, (2nd edition Oxford University Press 2015), 555.

[9]See Communication from the Commission to the Council and the European Parliament "Wider Europe –Neighbourhood: A new Framework for Relations with our Eastern and Southern Neighbours", Brussels, 11.3.2003, COM(2003)104(final), viewed at: http://eeas.europa.eu/archives/docs/enp/pdf/pdf/com03_104_en.pdf.

[10]See Marek Debrowski, "EU Cooperation with Non-Member Neighbouring Countries: The Principle of Variable Geometry", (2014) CASE Network Reports, N 119, 34.

[11]See Hiski Haukkala, "From Zero-Sum to Win-Win? The Russian Challenge to the EU's Eastern Neighbourhood Policies", (2009) European Policy Analysis, Issue 12, 1.

[12]See Elena Korosteleva, "Eastern Partnership: Bringing the Political Back", (2017) East European Politics, Vol. 33:3, 322.

Moldova and Ukraine[13] with the main aim "to create the necessary conditions to accelerate political association and further economic integration between the EU and interested partner countries".[14] The understanding of the underlying reasons for the introduction of the ENP and the EaP and the way they have evolved bringing countries in transition closer to the EU is important as a background that will inform further analysis of the CEPA in general and its procurement chapter in particular.

2.1. The ENP: The starting point of closer cooperation with the neighbouring countries

When establishing the ENP, Romano Prodi, then the President of the EU Commission, highlighted that the aim of the EU was the creation of a "ring of friends from Morocco to Russia and Black Sea" that would share "everything with the Union but the institutions".[15] This statement was reiterated in *Wider Europe* Communication where the main aim of the EU for creating the ENP is described as "develop[ing] a zone of prosperity and a friendly neighbourhood – 'a ring of friends' – with whom the EU enjoys close, peaceful and co-operative relations".[16] The ENP was not created to substitute the already existing relations between the EU and the respective countries.[17] Rather, this was the EU's response to the future enlargement prospect: by creating the ENP as a so-called "enlargement-lite" tool, the message was sent to the neighbouring countries that the EU was prepared to cooperate but without the membership offer.[18]

In order to achieve the ENP aims, the ENP Strategy Paper suggested drafting Action Plans setting up the priority areas of cooperation of mutual interest.[19] The Strategy

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[13]See Hrant Kostanyan and Jan Orbie, "The EEAS' Discretionary Power within the Eastern Partnership: in Search of the Highest Possible Denominator", (2013) Southeast European and Black Sea Studies, Vol. 13:1, 50.

[14]See Council of the European Union, "Joint Declaration of the Prague Eastern Partnership Summit", Brussels, 8435/09 (Presse 78), 7 May 2009, 6; viewed at: https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/107589.pdf.

[15]See Romano Prodi, "A Wider Europe – A Proximity Policy as the Key to Stability", Speech/02/619, Brussels, 5-6 December 2002, viewed at: http://europa.eu/rapid/press-release_SPEECH-02-619_en.htm.

[16]See supra note 9, 4.

[17]See Karen E.Smith, "The outsiders: the European Neighbourhood Policy", (2005) International Affairs, Vol. 81:4, 759.

[18]See Michael Emerson, "Just Good Friends? The European Union's Multiple Neighbourhood Policies", (2011) The International Spectator, Vol. 46:4, 48.

[19]See Communication from the Commission, European Neighbourhood Policy, Strategy Paper, Brussels 12.5.2004, COM(2004) 373 final, viewed at:

Paper emphasised the importance of having a differentiated approach to each country taking into account "needs, capacities, as well as common interests".[20] This can be considered the correct approach, especially taking into account that the countries included in the ENP differ much regarding their geography, development pace and the EU aspirations. The approach of differentiation was not very evident at the start of the ENP, while over time the EU indeed started having a tailor-made approach to countries in its neighbourhood owing *inter alia* to the creation of the EAEU in the post-Soviet area as discussed below.

The joint ownership is another underlying principle for the cooperation with the ENP countries, acknowledging that the priority areas to be included in the Action Plans should be mutually agreed upon.[21] Ghazaryan mentions that joint ownership does not "sit well" with the principle of positive conditionality largely used as a "carrot" for the ENP countries to fulfil the reforms envisaged in their respective Action Plans.[22] In accordance to her, "joint ownership is only possible within the limits of the requirements imposed through unequal conditionality".[23] Indeed, in practice the ENP countries being at a receiving end of the EU financial support, having less developed economies and hence, weaker bargaining power, are not in a position to owe the ENP process on an equal footing with the EU. The process becomes a one-sided road where the EU "imposes" the reforms it wants to see in its neighbourhood while suggesting the enhanced political, economic and other relations.[24] The reason for such an EU-centred approached could be also the fact that the ENP countries usually lack required domestic legislation "that could counter unilateral policy export".[25]

Action Plans themselves were criticised for the striking imbalance of the obligations and benefits for the ENP countries not providing the "real incentive for reform".[26] In addition, the reforms envisaged in the ENP Action Plans and the EU responses to the lack of progress in that regard are not "strong enough to force long-ruling

http://www.europarl.europa.eu/meetdocs/2004_2009/documents/com/com_com(2004)0373_/com_com(2004)0373_en.pdf.

[20]See Ibid.

[21]See supra note 19.

[22]See Narine Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU: A Legal Analysis*, (Hart Publishing 2014), 82.

[23]See Ibid.

[24]See Edzard Wesselink and Ron Boschma, "European Neighbourhood Policy: History, Structure, and Implemented Policy Measures", (2017) Tijdschrift voor economische en sociale geografie, Vol. 1008:1, 8.

[25]See Sandra Lavenex, "A Governance Perspective on the European Neighbourhood Policy: Integration Beyond Conditionality?", (2008) Journal of European Public Policy, Vol. 16:6, 951.

[26]See supra note 17, 764.

political elites into the tracks of progressive democratic reforms".[27] Smith adds that the benefits are not directly linked to the aims and priorities of the Action Plans; it is usually unclear whether the EU or the other party should undertake the action; and there is no clear benchmarking and timelines included.[28] From another perspective, the vagueness of the Action Plans sometimes is seen as a possibility "to propose actions as part of the process of concretising the measure".[29] Unlike this positive view, Cremona sees Action Plans as non-binding "long lists of actions" based on the priorities that the EU promotes and which are used to monitor the progress of the third country.[30] This is in contrast with the announced joint ownership of the ENP as the EU is setting priorities mostly unilaterally and is promoting its own values and norms.

2.2. The revision of the ENP

Due to the mentioned shortcomings, the ENP failed short of delivering tangible results. Its principles of "more for more"[31] and ex post/ex ante conditionality[32] did not deliver obvious results mainly because the EU values (democracy, rule of law, respect for human rights) did not always coincide with its interests (e.g. stability in the neighbourhood) and often the priority was given to the interests.[33] An example can be the inclusion into the ENP and continuous collaboration with several autocratic states notwithstanding the numerous claims about human rights violations. As was noted: "Such a stance undermines the EU's image as a normative

[27]See Steven Blockmans and Adam Lazowski, "The European Union and Its Neighbours: Questioning Identity and Relationships", in Steven Blockmans and Adam Alzowski (eds.), *The European Union and Its Neighbours: A Legal Appraisal of the EU's Policies of Stabilisation, Partnership and Integration*, (T.M.C. Asser Press 2006), 15.

[28]See supra note 17, 764-765.

[29]See Analysis of European Neighbourhood Policy (ENP Action Plans for South Caucasus: Armenia, Azerbaijan and Georgia), viewed at: http://pdc.ceu.hu/archive/00003063/01/Analyses_of_European_Neghbourhood_Policy.pdf.

[30]See Marise Cremona, "The European Neighbourhood Policy: More than a Partnership?", in Marise Cremona (ed.), *Developments in EU External Relations Law,* (Oxford University Press 2008), 275-277.

[31]The "more for more" principle means, "the EU will develop stronger partnerships with those neighbours that make more progress towards democratic reform". See European Neighbourhood policy (ENP) – Fact Sheet, Brussels 19 March 2013, viewed at: http://europa.eu/rapid/press-release_MEMO-13-236_en.htm.

[32]More about ex-post and ex-ante conditionality, see supra note 30, 283-285.

[33]See Hrant Kostanyan (ed.), *Assessing European Neighbourhood Policy: Perspective from the Literature*, (2017) CEPS, (Rowman and Littlefield International, London), 9.

power, both domestically and internationally, and hinders its capability to effectively employ conditionality in the neighbourhood".[34]

In order to provide better results and to reflect the new geopolitical realities in the targeted regions, the ENP Strategy was amended in 2015.[35] It was stressed that the "more for more" principle was successful in delivering democratic reforms, promotion of rule of law, and other EU values but this was possible only in case there was a political will.[36] In other cases, the principle did not serve the purpose. The EU thus needed to "explore more effective ways to make its case for fundamental reforms with partners, including through engagement with civil, economic and social actors".[37] This is a welcomed approach, bearing in mind that the EU worked with the governments most of the time providing direct financial support to the budget of the state. The private actors, including active NGOs and civil society, had limited role, hence in the new strategy it was advised to "support the societies more than governments".[38] By refocusing on the private sector when the politicians are not willing to support the reforms, the EU thus tries the bottom-up approach, i.e. empowering the reform recipients to push for more actions.

In addition, the EU restated priorities for the ENP, the most important one being stabilisation.[39] For the EU, the stable neighbourhood means tackling challenges not only in the traditional security area but also preventing poverty, fighting corruption, creating job markets especially for the youth.[40] Unfortunately, having stabilisation as a priority, the EU ties its own hands when facing non-democratic regimes as democratisation usually entails some form of destabilisation, which, depending on the country, might be long, or short-term and this is exactly what the EU is trying to avoid.[41]

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[34]See Ibid.

[35]See Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Review of the European Neighbourhood Policy", Brussels, JOIN(2015) 50 final, 18.11.2015, viewed at: http://eeas.europa.eu/archives/docs/enp/documents/2015/151118_joint-communication_review-of-the-enp_en.pdf.

[36]See supra note 35, 5.

[37]See supra note 35, 5.

[38]See Alina Inayeh and Joerg Forbrig, "Introduction to Reviewing The European Neighbourhood Policy: Eastern Perspectives", (2015) Europe Policy Paper 4, 3.

[39]See Richard Youngs, *Europe's Eastern Crisis: The Geopolitics of Asymmetry*, (Cambridge University Press 2017), 82.

[40]See supra note 35, 3-4.

[41]See Tanja Borzel and Vera van Hullen, "One Voice, One Message, but Conflicting Goals: Cohesiveness and Consistency in the European Neighbourhood Policy", (2014) Journal of European Public Policy, Vol. 21:7, 1042.

As was already mentioned, the ENP includes a large geographical area covering countries very different in economic, political, social and cultural terms. In order to better tackle the regional problems and even before the review of the ENP Strategy, it was clear that a focus on the regions is necessary taking into account the inherent differences as well as "distinct framework of cooperation"[42] with the countries included in the ENP.

2.3. The EaP and Association Agreements

Within the scope of the ENP it was decided to direct the policy into two streams – the EaP and the UfM.[43] Poland in particular was interested in creating the Eastern European dimension of the ENP, which it helped to shape in 2009.[44] The reason for this activism might be explained by the fact that Poland itself being under Communist rule (though not in the Soviet Union) had historical affinity with post-Soviet countries that were not able to join the EU. From a more pragmatic point of view, Poland attempted to create an easy access to the markets where its products would be more competitive.[45] The efforts of Poland and some other EU states were successful in 2009 when the creation of the EaP was announced during the summit in Prague.[46]

Prague Summit Joint Declaration was considered "very poor, if not empty, with regard to the new initiatives".[47] Commentators mention that the EaP added another layer of the EU policy that in fact did not differ much from the ENP, the major difference being the regional aspect of the policy.[48] The Prague Declaration emphasised the mode of working with the EaP countries adding the multilateral track to pursue deeper cooperation with them.[49] In terms of multilateral cooperation, the countries were invited to participate to "target oriented sessions"

[42]See supra note 22, 84.
[43]See supra note 24, 14-15.
[44]See Ivanna Machitidze, "The "Eastern Partnership" Project: Does Poland's Voice Still Matter?", (2016) CES Working Papers, Vol. VIII:3, 378.
[45]See supra note 44, 385-386.
[46]See Ioanna Sandu and Gabriela Dragan, "Political Options and Economic Prospects Within the Eastern Partnership", (2016) CES Working Papers, Vol. VIII:2, 291.
[47]See Dimitry Kochenov, "New Developments in the European Neighbourhood Policy: Ignoring the Problems", (2011) Comparative European Politics, Vol.9:4-5, 588.
[48]See supra note 47, 582.
[49]See supra note 14.

and "open and free discussions".[50] The multilateral track unlike the bilateral one has no legal basis and "results merely from the political processes".[51]

The bilateral track usually takes the form of agreements that the EU signs with each of the EaP participant countries individually. These are mostly Association Agreements (AA)[52] encompassing political, justice and other agendas together with DCFTAs covering the economic relations.[53] In fact, the DCFTA covers much more than just trade liberalisation between the EU and a third country as it contains provisions about gradual harmonisation of the country's legislation on public procurement, IP and other trade-related areas with the EU *acquis*.[54]

An AA/DCFTA was negotiated with Moldova, Armenia, Georgia and Ukraine and the countries were ready to sign the agreements in Vilnius in November of 2013.[55] The agreements were supposed to enhance and deepen the cooperation of those countries with the EU, which Russia took as a challenge to its own power over the post-Soviet area. Some Russian commentators went as far as proclaiming that the EU and particularly the EaP are aimed at "absorbing the European post-Soviet states, using tools such as association with the EU and the signing of free trade agreements".[56] As a response, Russia put forward and accelerated the entering into force of its own regional project – the EAEU.[57] This meant that two competitive regional projects with economic guise but evident political objectives emerged both aimed at maintaining the countries under the EU's or Russia's sphere of influence.

It was to be expected that Russia and the EU would collide as they both claimed important geostrategic role in the region.[58] Signing the AA/DCFTA as they were in original forms and participating to the EAEU, was impossible for individual countries taking into account the differences in external tariffs and other trade-related

[50]Four thematic platforms for the multilateral track were the Democracy, good governance and stability; Economic integration and convergence with EU sectoral policies; Energy security; and Contacts between people. See supra note 14, para 11.
[51]See supra note 13, 50.
[52]See supra note 46, 292.
[53]See supra note 14, para 4.
[54]See Petra Lustigova, "The Place and Status of the Eastern Partnership Policy in the European External Relations Law", in Nadezda Siskova (ed.), *From Eastern Partnership to the Association: A Legal and Political Analysis,* (Cambridge Scholars Publishing 2014), 15.
[55]See Peter Havlik, "Vilnius Eastern Partnership Summit: Milestone in EU-Russia Relations – Not Just For Ukraine", (2014) Danube: Law and Economics Review, Vol. 5:1, 22.
[56]See Aleksandr Bykov, "Eurasian Integration, Its Prospects and Possibilities", (2016) Problems of Economic Transition, Vol.58:4, 287.
[57]See Amanda Paul, "The EU in the South Caucasus and the Impact of the Russia-Ukraine War", (2015) The International Spectator, Vol. 50:3, 38.
[58]See David Cadier, "Eastern Partnership vs Eurasian Union? The EU-Russia Competition in the Shared Neighbourhood and the Ukraine Crisis", (2014) Global Policy, Vol. 5:Supplement 1, 81.

regulations.[59] This meant that the countries were forced to choose between two regional actors, either Moscow or Brussels, and depending on their political, defence, energy and other considerations, they made their choices. The EU in this regard is largely blamed for failing to take into consideration Russia's interests in the region[60] and afterwards being incapable of protecting countries from military intervention. As Youngs describes the EU's involvement in the region, "it was intrusive enough to provoke Russia, but not robust enough to deal with the consequences".[61] Hence, the EU is advised to make note of Russia's interests in the region and to work towards minimisation of conflicts.[62] Some other commentators, on the other hand, think that the annexation of Crimea and the ongoing conflict in East of Ukraine pose a threat to the EU security and the EU has to "hold its ground and wait for better times".[63]

From the point of view of the EU relations with the EaP countries, in the absence of the membership prospect, the most tangible asset beyond trade liberalisation offered by the EU is the visa liberalisation. In order to sign Visa Liberalisation Agreements, EaP countries are required to comply with relevant conditions,[64] which some of them struggle to implement and hence, the promised visa liberalisation is still pending for Armenia, Azerbaijan and Belarus.

Another problem of the EaP is the lack of security dimension. In a region with many regional conflicts, only economic and political motives will not incentivise countries to move towards the EU. The problem of Nagorno-Karabakh is especially acute as it is between two states both of which the EU wants to have relations with (unlike Georgian case with Ossetia and Abkhazia or Moldovan case with Transnistria).[65] The EU participation to the conflict resolution in Nagorno-Karabakh has been close

[59]See supra note 58, 82.
[60]See Kamala Valiyeva, "The EU's Eastern Partnership: Normative or Geopolitical Power Projection?", (2016) Eastern Journal of European Studies, Vol.7:2, 23.
[61]See supra note 39, 11.
[62]See Oleksiy Kandyuk, "Foreign Policy of European Union: Eurasian Agenda", (2016) CES Working Papers, Vol. VIII:3, 352.
[63]See Ian Bond, *The EU, the Eurasian Economic Union and One Belt, One Road: Can They Work Together?*, (Centre for European Reform2017), 8.
[64]Visa liberalisation agreements are concluded if four pillars are effectively implemented: legal migration, irregular migration, migration and development, international protection. It is envisaged that Armenia will sign the VLAP with EU and will have a visa-free travel regime by 2020. See Joint Staff Working Document, "Eastern Partnership – 20 Deliverables for 2020; Focusing on Key Priorities and Tangible Results", SWD(2017) 300 final, Brussels, 9.6.2017, viewed at: https://eeas.europa.eu/sites/eeas/files/swd_2017_300_f1_joint_staff_working_paper_en_v5_p1_940530.pdf.
[65]See supra note 57, 38.

to none. France is involved in the OSCE Minsk Group,[66] a special representative for the South Caucasus and crisis in Georgia has been appointed[67] and a civil society initiative called European Partnership for the Peaceful Settlement of the Conflict over Nagorno-Karabakh was established.[68] Other than that, no major involvement could be observed from the EU. Moreover, the EU was playing a double game when it included in the Action Plan with Armenia the principle of self-determination, at the same time stressing out the principle of territorial integrity in the Action Plan with Azerbaijan.[69] As was described in Chapter 4 and due to inactivity and to some extent the double game of the EU, Armenia had to accept Russia's "suggestion" to enter the EAEU for security reasons, as there was no alternative provided by the EU. This example shows that without involvement in the security-related issues, the EU's success in the region will be limited.

The crisis in Ukraine and the decision of Armenia to join the EAEU made the EU to change the underlying strategy of the EaP.[70] It was acknowledged that there is a real need to differentiate among the countries that eventually signed the AA/DCFTA with the EU (Moldova, Georgia and Ukraine), countries that took a neutral position (Azerbaijan) and countries that joined the EAEU (Armenia and Belarus).[71] At the same time, the EU continued the dialogue with the countries that rejected signing the AA/DCFTA and were exploring new modes of cooperation. This case-by-case approach was a positive strategy demonstrating the EU's interest in keeping ties with the Eastern partners and maintaining the EaP without a common approach in bilateral relations. In this vein, a new agreement, the CEPA,[72] was negotiated and signed with Armenia on 24th of November 2017, which was also said to be testing

[66]OSCE Minsk Group chaired by France, Russia and the US aims at finding peaceful resolution of the Nagorno-Karabakh conflict. More about the activities of the group can be viewed at: http://www.osce.org/mg.

[67]For more information about the role of the EUSR in the South Caucasus, see EU Special Representatives, 25 November 2019, viewed at: https://eeas.europa.eu/headquarters/headquarters-homepage_en/3606/EU%20Special%20Representatives.

[68]More information on the EPNK can be viewed at: http://www.epnk.org/.

[69]See Narine Ghazaryan, "'Good Neighbourliness' and Conflict Resolution in Nagorno Karabakh: A Rhetoric or Part of the Legal Method of the European Neighbourhood Policy", in Dmitry Kochenov and Elena Basheska (eds.), *Good Neighbourliness in the European Legal Context: Studies in EU External Relations,* Volume 9, (Brill Nijhoff 2015), 14.

[70]Still in 2011 Amy Verdun and Gabriela E.Chira warned that "the EU needs a new strategy vis-à-vis the eastern neighbouring Ukraine, Moldova, Georgia, Armenia and Belarus so that those states do not fall again under the influence of Russia". See Amy Verdun and Gabriela E. Chira, "The Eastern Partnership: The Burial Ground of Enlargement Hopes?", (2011) Comparative European Politics Vol.9:4-5, 460.

[71]The so-called "3-1-2" approach. See Maria Sarakutsa and Maryna Rabinovych, "The Future of the Eastern Partnership: "Building a Shared European Home", (2016) CES Working Papers, Vol. VIII:4, 727.

[72]See Anahit Shirinyan, "What Armenia's New Agreement with the EU Means?", *EUobserver*, 24 November 2017, viewed at: https://euobserver.com/opinion/140017.

the limits of Russia's acceptance of the EAEU MS foreign policy decisions.[73] The legal bases for the CEPA are various provisions of the TEU and TFEU[74] but Art. 8 TEU and Art. 217 TFEU are not listed.[75] This means that the CEPA is not an association agreement. Even so, it has a clear aim of enhancing the economic and other relations between the EU and Armenia.

3. EU relations with Armenia

After its independence in 1991,[76] Armenia started developing its own foreign policy bearing in mind its peculiar geographic location, geopolitical realities and the economic difficulties that the newly created state was facing especially during the first years of its independent existence. To overcome all the hurdles, the country decided to be active in "current international developments and [promote] intensive multilateral, multi-layer and bilateral policy".[77] The harmonious development of the relations with the EU was one of the cornerstones of this multifaceted foreign policy.

3.1. The EU and Armenia: evolution of relations

The EU-Armenia official ties materialised in the PCA entered into force in 1999.[78] The PCA regulated such areas as trade in goods, investment, legislative and economic cooperation, public procurement. This was the first legal document signed between the EU and Armenia. Similar PCAs were signed at the time with

[73]See Leila Alieva, Laure Delcour and Hrant Kostanyan, "EU Relations with Armenia and Azerbaijan", Directorate-General for External Policies, Policy department (October 2017), 7-8.
[74]As legal grounds for CEPA the following provisions were mentioned: Art. 37 TEU, Art. 207 TFEU, Art. 209 TFEU read in conjunction with Art. 21 (6) (a) TFEU and 2nd subparagraph of Art. 218(8) TFEU. See Joint Proposal for a Council Decision on the Signing, on Behalf of the European Union, and Provisional Application of the Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the One Part, and the Republic of Armenia, of the Other Part, Brussels, 25.9.2017, JOIN(2017)36 final, 2017/0236 (NLE).
[75]Art. 8 TEU foresees the development of special relations with neighbouring countries with the aim of creating prosperity in the area. Art. 217 TFEU is the main legal basis for AA/DCFTAs.
[76]See Petros Malakyan, "Leadership Models in Armenia: Historical and Contemporary Perspectives", (2013) SAGE Open, Vol.3:2, 4.
[77]See National Security Strategy of the Republic of Armenia, viewed at: https://www.mfa.am/filemanager/Statics/Doctrineeng.pdf.
[78]See Partnership and Cooperation between the European Communities and their Member States, of the one part, and the Republic of Armenia, of the other part, OJEC L239/3, dated 9.9.1999, viewed at: https://eeas.europa.eu/sites/eeas/files/eu-armenia_partnership_and_cooperation_agreement_en.pdf.

almost all post-Soviet countries that later on were covered by the ENP and EaP.[79] Belarus was an exception as the ratification was suspended due to the democratic challenges of the country.[80] The PCA with Armenia contained two articles on public procurement, namely Article 43 (encouraging approximation of the legislation of Armenia *inter alia* on procurement with the one of the EU) and Article 48 (calling for cooperation in development of conditions for open and competitive tenders for the purchase of goods and services).[81]

After the creation of the ENP and especially the EaP it was an imperative for the countries in the region (including Armenia) to update the legal basis for their future relations with the EU in order to reflect the deepening of ties that was achieved during more than ten years' of cooperation. As mentioned in subsection 2.4, the EU suggested a new legal basis for its relations with the EaP countries, namely the AA/DCFTA.

The European officials underlined that Armenia, unlike Ukraine and Georgia, was an easy country to negotiate with.[82] This might be explained by the fact that Armenia did not pursue EU membership from the very beginning and was benefiting from what the EU had to offer (e.g. technical and direct budget support).[83] In fact, some commentators wondered why Armenia was so interested in approximating its own legislation with that of the EU taking into account that it was always more inclined towards Russia unlike other EaP states.[84] Delcour and Wolczuk conclude that the EU itself, as well as domestic and regional developments affected Armenia's decision to approximate its legislation with the EU *acquis*.[85] *First*, the relations with the EU are considered an indivisible part of Armenia's foreign policy of "complementarity" envisaged in the National Security Strategy.[86] For a landlocked, small country like Armenia the economy of which was largely harmed by the collapse of the USSR, the cooperation with all possible leading actors in the region is desirable. In addition, closed borders with Azerbaijan and Turkey limit the

[79]See Partnership and Cooperation Agreements: Russia, Eastern Europe, the Southern Caucasus and Central Asia, viewed at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:r17002&from=EN.

[80]See Sabine Fischer, "Executive Summary" in Sabine Fischer (ed.), *Back From the Cold? The EU and Belarus in 2009*, (2009) Chaillot Paper N119, 6.

[81]These provisions will be analysed in detail in Chapter 7.

[82]See Laure Delcoure, and Kataryna Wolczuk, "The EU's Unexpected "Ideal Neighbour"? The Perplexing Case of Armenia's Europeanisation", (2015) Journal of European Integration, Vol. 37:4, 497.

[83]See supra note 70, 456.

[84]See supra note 82.

[85]See supra note 82, 504.

[86]See National Strategy of the Republic of Armenia, viewed at: https://www.mfa.am/filemanager/Statics/Doctrineeng.pdf.

economic development of the country,[87] leaving it with no choice but trying to liaise with as many "friendly" actors as possible. *Second*, changes were an internal imperative taking into account the disturbances that took place in 2008 after the Presidential elections as well as the social conditions of the majority of population.[88] The reforms became a necessity especially when 2008 global crisis caused a recession of 5.9% in Armenia.[89] *Third*, by adopting the EU legislation in some sectors, the political elites were retaining their positions, as the EU was not demanding anything that could threaten their positions (at least in the beginning).[90]

On the other hand, it is important to mention that opening the borders to a huge market like the EU would inevitably weaken the position of Armenian oligarchs holding monopolies over specific products in the country. The decision of joining the EAEU instead of signing the AA/DCFTA with the EU was beneficial for them.[91] Taking into account that many of these oligarchs were elected into the Parliament it is understandable why there was no particular opposition to the ratification of the EAEU Treaty.[92] In fact, the majority of the parliamentarians interviewed by Gasparyan stressed that Armenia should make the most out of joining the EAEU and some even brought the example of Ukraine as a case that Armenia managed to avoid by timely opting out from signing the AA/DCFTA.[93] Moreover, in terms of economic advantage, the DCFTA promised a medium to long-term results while requiring some painful reforms that might not necessarily be popular within the population.[94]

Even though politicians were not principally against joining the EAEU, the announcement by the President on 3 September 2013 came as a surprise for them

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[87]See Lev Freinkman, Evgeny Polyakov and Carolina Revenco, "Armenia's Trade Performance in 1995-2002 and the Effect of Closed Borders: A Cross-Country Perspective", (2003) MPRA Paper N 10065, 2.

[88]See supra note 82, 498-499.

[89]See Part 1 - Armenia: Poverty Profile in 2008-2015, viewed at: http://www.armstat.am/file/article/poverty_2016_eng_2.pdf.

[90]See supra note 82, 501.

[91]See Hans-Jurgen Zahorka and Ofelya Sargsyan, "The Eurasian Customs Union: an Alternative to the EU's Association Agreement?", (2014) European View 13, 94.

[92]Armenia has ratified the Treaty on the Eurasian Economic Union on 4th of December 2014 with 103 votes in favour, seven votes against and one abstention. See "Armenian Parliament Ratifies Eurasian Economic Union Treaty", *Radio Free Europe*, 04 December 2014, viewed at: https://www.rferl.org/a/armenians-ratifies-eurasian-economic-union-treaty/26725089.html.

[93]See Abraham Gasparyan, "Armenian Leadership (Political and Party Elite) Stance on State's Foreign Policy Orientation", in Piotr Bajor and Kamila Scholl-Mazurek (eds.), *Eastern Chessboard: Geopolitical Determinants and Challenges in Eastern Europe and the South Caucasus,* (KSIEGARNIA AKADEMICKA 2015), 225-226.

[94]See Moritz Esken, "Post-Vilnius Armenia – Still Sitting on the Fence?", in Piotr Bajor and Kamila Scholl-Mazurek (eds.), *Eastern Chessboard: Geopolitical Determinants and Challenges in Eastern Europe and the South Caucasus,* (KSIEGARNIA AKADEMICKA 2015), 205.

as well as for the society as a whole. That might be the reason why there were no big rallies against this decision unlike the riots against the hike of public transportation fares, electricity prices and the incorporation of pension system in the country.[95] There has been no prior public debate about the possibility of joining the EAEU as opposed to signing the AA/DCFTA, hence the civil society could not mobilise fast.[96] Another reason is that the society knew very little about the agreement and the EU in general. As the empirical research shows, in 2009, around 60% of the Armenian population was unaware of the EU and the absolute majority even considered that Armenia is a member to it.[97] Only few years into the ENP, the EU started promoting the programs it finances providing short infographics. The EU Delegation to Armenia started publishing news items about all the meetings of the EU Delegation representatives with the Armenian authorities together with organised workshops and expert missions. This informs the society about the EU funded activities in Armenia and can enhance the trust, which decreased from 63% in 2012 to 45% in 2014.[98]

The government itself changed its perception of the EU from seeing it as a normative power that could bring peace to the region to perceiving it as a pragmatic actor driven by its energy needs.[99] This is particularly true taking into account that the EU MS are considered the biggest foreign investors in Azerbaijan.[100] This was a sign for Armenia that the EU cannot be a reliable partner to provide for security needs and even though Russia sells arms and armaments also to Azerbaijan,[101] the Russian military base in Armenia seems to provide some security guarantees. During the four-day war between Armenia and Azerbaijan in April 2016, the EU High Representative Federica Mogherini condemned the escalation of the conflict[102]

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[95]See Chiara Loda, "The European Union as a Normative Power: the Case of Armenia", (2017) East European Politics, Vol.33:2, 275.

[96]See supra note 95, 276.

[97]Numbers are quoted in Narek S.Galstyan, "How to Deal with Armenia's Geopolitical Trilemma? Examining Public Opinion", in Piotr Bajor and Kamila Scholl-Mazurek (eds.), *Eastern Chessboard: Geopolitical Determinants and Challenges in Eastern Europe and the South Caucasus,* (KSIEGARNIA AKADEMICKA 2015), 215.

[98]See supra note 97, 214.

[99]See Aram Terzyan, "The Evolution of the European Union's Conception in the Foreign Policy Discourse of Armenia: Implications for U-Turn and the Path Beyond the Association Agreement", (2016) Eastern Journal of European Studies, Vol.7:2, 170.

[100]See Azerbaijan and the EU, 11.05.2016, viewed at: https://eeas.europa.eu/headquarters/headQuarters-homepage/916/azerbaijan-and-eu_en.

[101]See Joseph Larsen, "Russia's Double Dealing in Armenia and Azerbaijan", *International Policy Digest*, 07 Dec 2016, viewed at: https://intpolicydigest.org/2016/12/07/russia-s-double-dealing-armenia-azerbaijan/.

[102]See Statement by High Representative/Vice President Federica Mogherini on the Escalation in the Nagorno-Karabakh Conflict, Brussels, 02 April 2016, viewed at:

but in fact, the ceasefire was again mediated by Russia.[103] This came to prove that Russia with its hard power could be a better ally in terms of security needs than the EU.

3.2. The EU and Armenia: restoring the broken ties

After choosing to join the EAEU, Armenia shifted from the policy of "complementarity" to that of "supplementarity": the relations with other parties are developed as long and as much as they do not contradict the obligations undertaken against the EAEU.[104] The switch of the sides itself did not shock the EU as much as the thought that this scenario might be repeated in case of other countries.[105] Even though the fear was there, the EU did not undertake any actions in order to counterbalance Russia's coercive diplomacy. This approach was erroneous at the time when Ukraine, Moldova and Georgia were experiencing the same pressure to drop the signing of the trade agreement with the EU. Some EU officials later recognised that the failure to act when Armenia was being pressured by Russia might have allowed the crisis in Ukraine to evolve.[106]

Notwithstanding the pragmatic reaction from the EU, the U-turn brought "a period of strategic pause" in the EU-Armenia relations.[107] Both parties had to reflect on the situation and were trying to overcome the tension. Armenian officials considered that the EU is detached from the Armenian political realities but they still hoped for a new agreement to be concluded.[108] Armenian Foreign Affairs Minister even announced that the country was ready to sign the AA without the DCFTA but the EU rejected this possibility.[109] The EU's stance was understandable as the DCFTA was the core of the AA without which the EU-Armenia agreement

https://eeas.europa.eu/headquarters/headquarters-homepage/2921/statement-high-representativevice-president-federica-mogherini-escalation-nagorno-karabakh_en.

[103]See Jack Farchy, "Russia Senses Opportunity in Nagorno-Karabakh", *Financial Times,* 19 April 2016, viewed at: https://www.ft.com/content/3d485610-0572-11e6-9b51-0fb5e65703ce.

[104]See Suzanna Vasilyan, "Swinging on a Pendulum: Armenia in the Eurasian Economic Union and with the European Union", (2017) Problems of Post-Communism, Vol. 64:1, 33.

[105]See Nicu Propescu, "Behind- and Beyond – Armenia's Choice", (2013) European Union Institute for Security Studies, Issue Alert 35, 1.

[106]See Armen Grigoryan, "Armenia's Membership in the Eurasian Economic Union: An Economic Challenge and Possible Consequences for Regional Security", (2015) Polish Quarterly of International Affairs N4, 25.

[107]See Laure Delcoure, Hrant Kostanyan, Bruno Vandecasteele and Peter Van Elsuwege, "The Implications of Eurasian Integration of the EU's Relations with the Countries in the Post-Soviet Space", (2015) Studia Diplomatica, LXVIII-1, 19.

[108]See supra note 39, 61.

[109]Quoted in supra note 99, 173.

might be just a shell without a real content.[110] There were also some announcements at an official level that the EU would not have bilateral negotiations with Armenia but would need to negotiate with the EAEU.[111]

After some period of coolness, the EU eventually proposed to move forward with a new agreement, which took into account the EAEU commitments.[112] During the Riga Summit in 2015, the President of Armenia welcomed the tailor-made approach to every country in the EaP region and declared that Armenia was ready to move forward with drafting new legal basis for the future EU-Armenia relations considering other international commitments of the country.[113] The so-called "scoping exercise" was started in order to understand the current commitments of Armenia and to adapt the future agreement to them.[114] It soon became clear that most of the trade related chapters (including on public procurement) should be abandoned or amended as the EAEU largely concerned the trade area while other chapters, related *inter alia* to justice, freedom, security, could remain unchanged.[115] During the negotiations, Armenia asked for a special provision to be included in the future agreement that would allow it not to implement some of the commitments in case there are new obligations under the EAEU.[116] This suggestion was clearly rejected by the EU. If accepted, this would render the new agreement practically not implementable and would make the EAEU Treaty automatically superior.[117] The EU and Armenia were finally able to overcome all the political and technical constraints and the negotiations were concluded in February 2017.[118]

The fact that both the EU and Armenia were ready to move forward can be explained by different motives. For Armenia, the EU is an important (though not

[110]See Anahit Shirinyan and Stefan Ralchev, "U-Turns and Ways Forward: Armenia, the EU and Russia Beyond Vilnius", (2013) Policy Brief, Institute for Regional and International Studies, 8.
[111]See "Armenia does not negotiate new trade agreement with the EU, said the Deputy Minister of Economy" (Армения не ведет новых торговых переговоров с ЕС, сказал замминистр экономики), *Banks Am,* 30 January 2014, viewed at: http://www.banks.am/ru/news/newsfeed/9133/.
[112]See Hrant Kostanyan, "The Rocky Road to an EU-Armenia Agreement: From U-Turn to Detour", (2015) CEPS Commentary, 2.
[113]See Statement by the President of the Republic of Armenia Serzh Sargsyan at the fourth Eastern Partnership Summit, 22.05.2015, viewed at: http://www.president.am/en/statements-and-messages/item/2015/05/22/President-Serzh-Sargsyan-Eastern-Partnership-Latvia-Speech/.
[114]See supra note 107, 19.
[115]See supra note 112, 2.
[116]See supra note 39, 197.
[117]See Hrant Kostanyan and Richard Giragosyan, "EU-Armenian Relations: Seizing the Second Chance", CEPS Commentary, 31 October 2016.
[118]See EU-Armenia Relations, 27.02.2017, viewed at: https://eeas.europa.eu/headquarters/headquarters-homepage_en/4080/EU-Armenia%20relations.

the biggest) trade partner and investor.[119] Moreover, Armenia wants to benefit from the visa requirement waiver that was granted to Moldova, Ukraine and Georgia. Of course, this does not mean that Armenia will dramatically change its pro-Russian policy course, but a more balanced approach will be adopted. Some commentators believe that the so-called "Velvet Revolution" in Armenia directed mainly against the corruption, nepotism and social injustice, might restore the foreign policy of "complementarity".[120] For instance, the current Prime Minister Nikol Pashinyan participated in North Atlantic Treaty organization (NATO) summit in Brussels shortly after becoming a Prime Minister while continuing to highlight the importance of good relations with Russia.[121]

For the EU the main benefit might be the counterbalancing of the Russian policy in the region. Furthermore, the stability in Armenia means stability near the borders of the EU, one of the central objectives of the ENP.[122] After the warming of the relations with Iran, Armenia can also act as a gateway for the EU to access the country's rich energy resources.

In sum, the newly concluded agreement – the CEPA, is a good example of balancing the EU and the EAEU policies on the ground, which will allow other countries in the region and in Central Asia to intensify their relations with the EU. Moreover, for the EU the CEPA is an embodiment of the greater "differentiation" found in the 2015 revised ENP.[123] The main characteristics of the CEPA and provisions regulating public procurement in general and procurement review mechanisms in particular will be the focus of the next section.

4. The regulation of public procurement in the CEPA

The second-generation agreement[124] of the EU with Armenia is qualitatively different from the PCA that was governing the relations of the parties before.[125] The CEPA (and, as will be seen in Chapter 6, the EPCA) pays attention to the areas

[119]The statistical data on the socio-economic condition of Armenia in 2018 including the external trade can be viewed at: http://www.armstat.am/am/?nid=81&id=2014.

[120]See Alexander Markarov and Vahe Davtyan, "Post-Velvet Revolution Armenia's Foreign Policy Challenges", (2018) Demokratizatsiya: The Journal of Post-Soviet Democratization 26:4, 532-533.

[121]See supra note 120, 533.

[122]See supra note 14, para 2.

[123]See Hrant Kostanyan and Richard Giragosyan, "EU-Armenia Relations: Charting a Fresh Course", (2017) CEPS Research Report, N 2017:14.

[124]See Artem Patalakh, "Kazakhstan's EU policies: a Critical Review of Underlying Motives and Enabling Factors", (2018) Asian Journal of German and European Studies, Vol. 3:4, 1.

[125]The same is true for the EPCA with Kazakhstan.

the EU is most interested in: the protection of human rights, good governance and trade-related issues. It is indeed a comprehensive agreement in that it regulates different areas starting from the cooperation in the field of foreign and security policy and ranging across trade and different trade-related topics, including but not limited to electronic commerce, financial services and public procurement. In general, the CEPA is set to create more jobs and more business opportunities, as well as to enhance the fairness of rules and strengthen the democracy.[126]

The preamble of the CEPA recognises that Armenia is committed to gradually approximate its legislation with the relevant EU *acquis*. [127] Unlike the PCA, the CEPA lays down specific rules on the monitoring of approximation of the Armenian legislation, including "on-spot missions".[128] Khvorostiankina considers that the norms provide only the basis and Armenia can even "go beyond the formal requirements of CEPA".[129]

In addition to the CEPA, the EU and Armenia also adopted Partnership Priorities with the aim of "facilitating the implementation of the cooperation between the partners".[130] This is a soft law document replacing the ENP Actions Plan[131] and laying down the main areas of cooperation. Interestingly, public procurement is included within the context of fight against corruption as a major area susceptible to corrupt practices. Procurement is also seen as a means to achieve the goal of sustainable governance.[132] Other than this, the Roadmap for the implementation of the CEPA was drafted and acknowledged during the meeting of the EU – Armenia Partnership Committee as a "good starting point" for the approximation of the

[126]See EaP, the Comprehensive and Enhanced Partnership Agreement between the EU and Armenia, Bruxelles, 24.11.2017, viewed at: https://eeas.europa.eu/headquarters/headquarters-homepage/36140/comprehensive-enhanced-partnership-agreement-between-european-union-armenia-cepa_en.

[127]Detailed analysis of what approximation means and how it is different from harmonisation and convergence is presented by Aaron Matta, "Differentiating the methods of *acquis* export: The case of the Eastern Neighbourhood and Russia" in Peter Van Elsuwege and Roman Petrov (eds.), *Legislation Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union: Towards a Common Regulatory Space?,* (Routledge 2014).

[128]See Article 372 (3) of the CEPA.

[129]See Anna Khvorostiankina, "Europeanisation Through EU External Agreements and the Issue of 'Constitutional Identity': The Case of the EU-Armenia CEPA", (2018) Kyiv-Mohyla Law and Politics Journal 4, 44.

[130]See Partnership Priorities between the European Union and Armenia, viewed at: https://eeas.europa.eu/sites/eeas/files/eu-armenia_partnership_priorities_0.pdf.

[131]The procurement norms provided for the in the ENP Action Plans are discussed in Chapter 7.

[132]See supra note 130, section II:1 and II:3.

legislation of Armenia.[133] The Roadmap is not published yet, hence the inclusion of provisions on public procurement cannot be asserted.

4.1. General comments

As both the EU and Armenia are members to the GPA, Art. 269 of the CEPA confirms that parties reaffirm their commitments under the 2012 GPA. The CEPA goes beyond the GPA rules and can be classified as a "GPA plus" agreement.[134] The "plus" elements of the CEPA will be discussed further in the current subsection.

The rights and obligations conferred by the GPA, including the Appendix I (coverage) are made part of the CEPA and are subject to bilateral dispute settlement. This effectively means that the parties have another forum for the GPA related dispute settlement. Art. XX of the GPA in its turn explicitly grants parties the right to have a recourse to the provisions of the Dispute Settlement Understanding. It is not clear from the language of the text whether the parties have the choice to refer either to the WTO Dispute Settlement Body (DSB) or to the bilateral dispute settlement under the CEPA or it is mandatory to refer to the CEPA dispute settlement mechanism. Without explicit provisions to this end, it can be assumed that the parties have a choice to decide which forum they want to refer to.

Art. 270 (1) is another CEPA provision linking it to the GPA. In accordance to it, Articles I to IV, VI to XV, XVI.1 to XVI.3, XVII and XVIII of the GPA[135] shall apply *mutatis mutandis* to the procurement covered in Annex XI to CEPA (concessions). Thus, the CEPA extends the substantive part of the GPA provisions to the concession contracts.[136] Annex XI can be amended by following the same procedure as is laid down in Art. XIX of the GPA for the modification of the coverage. The only difference is that the notification in this case should be submitted directly to the other party and not to the GPA Committee and in case of disputes, parties again

[133]See Joint Press Release: European Union-Armenia Partnership Committee, Yerevan, 27th of November 2018, viewed at: https://eeas.europa.eu/delegations/armenia/54509/joint-press-release-european-union-armenia-partnership-committee_en.

[134]See subsection 2.6 of Chapter 2.

[135]The text of the mentioned articles can be viewed at: https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm.

[136]Concession contracts are long-term arrangements of a public-private partnership in which case the "concessionaires undertake the design, building, financing and operation of the relevant facility and their main source of revenue are the tolls that they can charge to users for the whole length of the concession". See Laure Athias and Stephane Saussier, "Are Public Private Partnerships that Rigid? And Why? Evidence From Price Provisions in French Toll Road Concession Contracts", (2018) Transportation Research Part A 111, 174.

should refer to Chapter 13 of the CEPA instead of following the arbitration rules laid down in Art. XIX of the GPA.

As the GPA is the basis for the CEPA chapter on procurement, the latter only provides for additional scope (inclusion of the concession contracts) and additional disciplines. Additional disciplines added in the CEPA refer to electronic procurement, non-discrimination of established companies and most importantly, the review procedures. Those additional disciplines apply to the procurement covered by Parties Annex I to the GPA as well as to concession contracts.[137]

As mentioned earlier, the importance of electronic tools in conducting procurement procedures was highlighted and emphasised in both the GPA and the EAEU Treaty. The CEPA also mentions single point of access, which shall be created to grant (potential) tenderers unhindered direct access to the procurement notices.[138] Moreover, this information should be available free of charge. If the party wishes, it can publish the notices also in a widely disseminated paper medium. These provisions are important for ensuring the transparency and availability of the information necessary for local and foreign suppliers to decide on participation in procurement procedures.

As the main principle ensuring the cross-border trade is non-discrimination, the CEPA assures that the suppliers of each party having a commercial presence by establishing, acquiring or maintaining a legal entity are granted national treatment. The requirement covers not only GPA Appendix I entities of each Party but also all other entities conducting procurement.[139] Thus, the scope of the CEPA non-discrimination requirement is much wider than that of the GPA. Notwithstanding this, the exceptions of the GPA envisaged under Art. III are applicable.[140]

This provision also sheds an important light on the question of the scope of the CEPA. It can be submitted that most of the CEPA provisions cover the entities, goods, works, services included in each party's Appendix I to the GPA (with notable exception of the non-discrimination principle and concession contracts, which are extra). Having said that, it is also presumed that the thresholds laid down in Appendix I are also applicable in case of the CEPA.

[137]See CEPA Art. 217.
[138]See CEPA Art. 271(1).
[139]See CEPA Art. 271 (10).
[140]See CEPA Art. 271 (10).

The rest of the relevant provisions are devoted to the review procedures.[141] As is the case with other elements, here too there is an explicit reference to Art. XVIII of the GPA regulating domestic challenge procedures. On top of the requirements of the GPA, that both the EU and Armenia need to comply with, the CEPA contains additional requirements related to the review body and the process itself. In doing so, it relies on the Directives 89/665/EEC and 92/13/EEC as amended by the Directive 2007/66/EC (Remedies Directives).[142] There is no differentiation between the remedies in the classical and the utilities sector, which means that all the additional regulations apply to the covered entities equally. This does not mean that the Directives are automatically copied into the CEPA in their entirety. It is evident that some form of adaptation took place adjusting the remedies provisions to the legal environment of Armenia. Notwithstanding this, legal interpretation of the provisions of the Remedies Directives and the CJEU case-law are going to be discussed further below as a good source of inspiration for the Armenian authorities when approximating the national legislation and for the arbitration panels when adjudicating.

4.1.2. Requirements for the institutional set-up of the procurement review body under the CEPA

Regarding the institutional set-up of the review body, the CEPA mentions that the members of the independent body shall not be representatives of any procuring entity. This provision is absent from the Remedies Directives and is included specifically to eradicate the previous practice in Armenia where the representatives of the review board were *inter alia* employees of different procuring entities. This provision strengthens the prohibition of conflict of interest and highlights the importance of the independence of the review body.

It is submitted that independence should refer to both the body itself and the members of such a body[143] and it seems that one cannot exist without the other. Regarding the independence of the body, the commentators mention that it should

[141]See CEPA Art. 271 (2-9).

[142]See Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989), as amended by the European Parliament and the Council Directive 2007/66/EC of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJEU L 335/31, 20.12.2007).

[143]See OECD/Sigma Brief 25, "Establishing Public Procurement Review Bodies", September 2016, 7-10, viewed at: http://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-25-200117.pdf.

be independent from the parties to the procurement procedure and functionally independent from the government.[144] The members of the review body should also be independent, i.e. their appointment and dismissal terms should be described in the law and reserved for an official holding a post which itself is considered to be independent.[145] The CEPA provisions on independence of the review body and its members are the reflection of the above-mentioned ideas. The members of such an independent body "should be appointed and leave office under the same condition as members of judiciary; at least the President of such an independent body should have the same legal and professional qualifications as members of judiciary and the procedure should be such in which both sides are heard, and the decisions are legally binding".[146] In addition, in case the body is not judicial in character, the written reasons for its decision should always be given and the decisions or measures should be subject to judicial review or a review by another independent body, which is a court or tribunal. The provisions described above relate to the insurance that in case the body is *not* independent there are enough procedural rules in place allowing for a review by a judicial or an independent administrative body.

The Remedies Directives explicitly allows having two separate bodies one of which will be entrusted with the award of damages.[147] Even though this norm is not reflected in the CEPA, this is exactly how Armenian authorities proceeded as will be discussed below.

On a separate note, the CEPA explicitly mentions that the parties should ensure the effective enforcement of the review board decisions. Without proper enforcement mechanisms, even the most independent body cannot effectively eliminate the illegal practices in the public procurement area. How exactly should the "effective enforcement" take place is not described in the CEPA and is thus left to the discretion of each party to decide.

4.1.3. Standstill period

[144]See supra note 143, 7.
[145]See supra note 143, 9.
[146]See CEPA Art. 271 (5).
[147]See Art. 2(2) of the Remedies Directives.

The provisions related to the standstill period[148] were introduced into the EU procurement system by the amendments to the Remedies Directives in 2007.[149] As the empirical data shows, standstill is considered "the most effective" remedy.[150] Before the introduction of the standstill rules, the procuring entities would rush to conclude a contract thus making the correction of infringement almost impossible.[151] The amendments to the Directives introducing standstill period are based on the case law of the CJEU, namely *Alcatel*[152] and *Commission vs Republic of Austria*.[153]

In *Alcatel,* the Court ruled that "the Member States are required to ensure that the contracting authority's decision prior to the conclusion of the contract […] is in all cases open to review in a procedure whereby an applicant may have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once the contract has been concluded, of obtaining an award of damages".[154] The Court, though, did not rule on the specific period required to elapse between the award of the contract and its actual signature. In *Commission vs Republic of Austria,* the Court emphasised that the tenderers should be informed about the award decision "so that a genuine possibility to bring an action is available to them".[155] The Court also required that "a reasonable period must elapse between the time when the award decision is communicated to unsuccessful tenderers and the conclusion of the contract in order, in particular, to allow an application to be made for interim measures prior to the conclusion of the contract".[156] Again, the "reasonable time" was not defined in the decision, and the MS were free to introduce that time limit which resulted in differing periods not enhancing legal certainty and not supporting

[148]Standstill period is explained in Chapter 2.
[149]See Report from the Commission to the European Parliament and the Council on the Effectiveness of Directive 89/665/EEC and Directive 92/13/EEC, as Modified by Directive 2007/66/EC, Concerning Review Procedures in the Area of Public Procurement, Brussels, 24.1.2017, COM(2017) 28 final, 8.
[150]See Summary of the Results of the Open Public Consultation from 24/07/2015-20/07/2007, viewed at: https://ec.europa.eu/docsroom/documents/20982/.
[151]See Jane Golding and Paul Henty, "The New Remedies Directives of the EC: Standstill and Ineffectiveness", (2008) Public Procurement Law Review 3, 146.
[152]See Case C-81/98 Alcatel Austria v Bundesministerium für Wissenschaft und Verkehr, [1999] ECR I-07671.
[153]See Case C-212/02 Commission vs Republic of Austria, ECLI:EU:C:2004:386.
[154]See supra note 152.
[155]See supra note 153, para 21.
[156]See supra note 153, para 23.

cross-border procurement.[157] Thus, the Remedies Directives laid down the minimum period that all the MS should comply with.[158]

Similar provision is introduced in the CEPA.[159] In accordance with it, the standstill period should be "at least ten calendar days from the day following the date on which the contract award decision is sent to the tenderers concerned in case fax or electronic communication means are used; or at least 15 calendar days from the day following the date on which the contract award decision is sent to the tenderers concerned in case other means of communication are used; or again ten days from the day following the date of the receipt of contract award decision".[160] Parties are also allowed to publish the award decision in an electronic media and thus trigger the standstill period. Since the contract award decisions are already being published online in Armenia and in the majority of the EU MS, in most cases the standstill period will be ten calendar days from the day following the date on which the contract award decision is published online.

The observance of the standstill period for the CEPA covered procurement can be waved in case there has been only one tenderer and he/she is awarded the contract. This means that there is no other tenderer whose rights might be harmed. Furthermore, in case the contract is based on framework agreements or on dynamic purchasing systems, the standstill period can be skipped. Since framework agreements and the dynamic purchasing systems are not used in Armenia (and cannot be used unless this specific procurement tools are incorporated in the EAEU Treaty), this provision is included so that the EU MS can have this derogation. The derogation relating to the cases where it is legally not required to publish a contract notice in the Official Journal of the EU (OJEU) (mainly the cases of single sourcing), is not reflected in the CEPA.

The absence of this derogation might mean that even in cases of single sourcing, the procuring entities are obliged to publish a contract award notice and to observe a standstill period. This is a step forward as usually in case of single sourcing the potential suppliers are not aware of the contracting possibility and are deprived of the right to challenge the decisions of the procuring entity (most specifically, the decision to conduct a single source procurement). By inducing procuring entities to publish the contract award notice, the CEPA enhances the transparency and

[157]See Paul Henty, "Is Standstill a Step Forward? The Proposed Revision to the EC Remedies Directive", (2006) Public Procurement Law Review 5, 256.
[158]See Art. 2a(2) of the Remedies Directive.
[159]See Art. 271(6)(a) of the CEPA.
[160]See CEPA Art 271 (6).

fairness of the procurement procedures in the meantime supporting the competition for each procurement transaction. On the other hand, this derogation might be missing simply because Armenian procuring entities are not obliged to publish notices in the OJEU.

The CEPA also does not contain any provision on the minimum deadlines allowed for the suppliers to bring claims related to the ineffectiveness of the contract or the damages.[161] This means, that Armenia is free to introduce or to refrain from the introduction of such deadlines. It should be highlighted also that in accordance to the CJEU in case the claim refers to damages, the introduction of the six months period, though allowed in case of the ineffectiveness of the contracts, will go against the underlying principle of effectiveness of the remedies systems promoted by the Directives.[162] Hence, even if Armenian authorities would like to introduce deadlines for bringing the claims in relation to the damages, they might need to follow the CJEU ruling.

4.1.4. Interim measures

Art. 271(2)(a) of the CEPA reiterates Art.2(1) of the Remedies Directives and provides for interim measures which can take the form of a suspension of the public procurement procedure as a whole or of the implementation of any decision of the procuring entity. In accordance with Art.2(4) of the Remedies Directives, the review procedures do not have automatic suspension effect with regard to the procedure they relate to with two notable exceptions: "a) in case it is mandatory to refer to the [procuring entities] as a first tier of review; b) unless the independent body reaches a decision on either interim measure or the review (at least for the period of standstill)".[163] The CEPA contains almost identical provisions referring only to the automatic suspension requirement allowing the independent body to reach a conclusion on either interim measure or the review.

The review body might consider all the interests involved (including the public interest) and might decide not to grant interim measures. The Directives are silent about any specific criteria that might be taken into account when deciding on

[161]The EU MS can introduce a deadline for bringing the claims regarding contract ineffectiveness, which in any case shall not be more than six months from the date following the day the contract is concluded (Art. 2f of the Remedies Directives).
[162]See Case C-166/14 *MedEval — Qualitäts-, Leistungs- und Struktur-Evaluierung im Gesundheitswesen GmbH*, ECLI:EU:C:2015:779, paras 42-44.
[163]See Art. 2(3) and 2(4) of the Remedies Directives.

whether the interim measures shall be granted.[164] This means that the review bodies have the discretion to decide on a case-by-case basis taking into account the pros and cons of suspending the process in each case. Unlike the Directives, the CEPA does not mention anything about the possibility of weighting the interests involved and coming to a decision as to whether an interim measure should be granted or not. This might lead to a conclusion that an interim measure shall always be granted when requested in case the procurement is covered by the CEPA. This conclusion though is at unease with the practice of the EU MS usually applying the balance of interest test, in which case the complainant has to show that "he is likely to suffer serious and possibly irreparable harm if interim measures are not granted".[165] In addition, it is not forbidden for the review bodies in the EU to take into account the aggrieved supplier's chances of success when deciding whether or not to grant interim measures.[166] In this light, it will be correct to assume that still a certain balance of interest test will be required even though the CEPA is silent about such possibility.

4.1.5. Set-aside

Besides the power to decide on interim measures, the review body under the CEPA should have the ability to set aside the unlawful decisions. The agreement does not define the "decisions" but as submitted, it covers the "decision to include or exclude particular tenderer, or to award or not award contracts to particular tenderer".[167] The remedy of "set aside" is the one sought most frequently.[168] This is of no surprise, as the tenderers would rather be awarded the contract than be entitled to damages. In *Stadt Halle*, the Court of Justice ruled that only the "acts constituting a mere preliminary study of the market or which are of a purely preparatory nature" cannot be challenged in review procedures.[169] This means that all the other decisions, independent of the stage of the procedure, should be

[164]See Steen Treumer, "Enforcement of the EU Public Procurement Rules: The State of Law and Current Issues", in Steen Treumer and Francois Lichere (eds.), *Enforcement of the EU Public Procurement Rules*, (DJØF Publishing 2011), 30.
[165]See Christopher Bovis, "Judicial Activism and Public Procurement", in Christopher Bovis (ed.), *Research Handbook on EU Public Procurement Law*, (Edward Elgar 2016), 335.
[166]See Sue Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and the UK*, Vol. 2, (Sweet and Maxwell 2018), 991.
[167]See Peter Trepte, *Public Procurement in the EU: A Practitioner's Guide*, (2nd edition Oxford University Press 2007), 545.
[168]See supra note 149, 5.
[169]See Case C-26/03 Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall-und-Energieverwertungsanlage TREA Leuna, ECLI:EU:C:2005:5, para. 35.

reviewable. Moreover, referring to the opinion of the Advocate General, the Court stated: "[t]he contracting authority's decision not to initiate an award procedure may be regarded as the counterpart of its decision to terminate such a procedure",[170] a decision, which understandably should be amenable to review.

It is important to note that Art. 271(2)(b) of the CEPA refers to the "removal of discriminatory technical, economic or financial specifications in *the publication of intended or planned procurement*, the contract documents or any other document relating to the contract award procedure" (emphasis added). The inclusion of the notices of planned or intended procurement is something new, not found in Remedies Directives. It might point to the fact that the information included in the annual procurement plans and amendments to them are considered "decisions" as well. According to Arrowsmith, in case the remedy of set-aside is granted, the simple removal of the discriminatory technical specifications and continuation of the procedure will not be lawful, and the procuring entity have to be required to rerun the process with the new or amended technical specifications allowing the suppliers to participate on equal terms.[171]

4.1.6. Damages

The review body should also be able to award damages to the persons harmed by the infringement. There is no other provision regarding damages either in the Remedies Directives or in the CEPA. This means that the amount of the damages and the standard of proof of being harmed is left entirely for the national legislation to decide upon. It is submitted though that in case the tenderer has submitted a bid, it will be easier for him to claim damages at least for the cost of preparing the tender.[172] What if the tenderer could not submit a bid because the notice was not published though the law required the publication? In this case, it would be very difficult to prove that in the absence of the illegal actions of the procuring entity, the tenderer would have been awarded the contract. The aggrieved potential supplier cannot even recover the expenses for preparing the bid, as he/she never submitted one.

Another possibility to recover loss is to use the "loss of chance" when calculating the chance of a specific tenderer to win the contract and be awarded damages

[170]See *Ibid.*
[171]See supra note 166, 1007.
[172]See Christopher Bovis, *EU Public Procurement Law*, (2nd edition ELGAR EUROPEAN LAW 2012), 196.

accordingly.[173] This can mean that almost all (potential) tenderers had some degree of chance to win and can claim damages. In this case, the procuring entity is in a position where it is required to pay damages to a large amount of (potential) tenderers. As almost all procuring entities are budget organisations, it is highly unlikely and/or undesirable to make them pay to a large pool of tenderers.

Another question is whether the lost profit can be recovered. The Civil Code of Armenia seems to include the lost profit in the definition of damages given in Art.17(2):[174] "[d]amages are the expenses that a person has to make in order to recover his violated rights, loss or damage of his property (real damage), profit not received which he could have received if the rights were not violated (lost profit), as well as non-material damage". Thus, lost profit is explicitly mentioned as a type of damage that the complainant can claim. In addition, Art. 18 of the Civil Code states that in case the damage has been caused by the acts (omissions) of state and local self-government bodies or their officials, either the Republic of Armenia or the municipality is responsible to cover the damage. This article can be applicable to the cases of procurement and can serve as a basis for damages claims against the procuring entities at central and sub-central level.

4.1.7. Ineffectiveness

The last remedy provided by the CEPA is the remedy of ineffectiveness. Illegal direct award has been rightly considered one of the most serious violations of the public procurement law.[175] In addition, before the introduction of the standstill period, the procuring entities were rushing to conclude a contract thus leaving the aggrieved tenderers with one remedy: claim for damages. The amended Remedies Directives introduced a new remedy of ineffectiveness, which can be invoked in three cases: "where there has been an illegal direct award; where the standstill period has not been observed or the process has not been suspended in case of a complaint to a [procuring entity] or a body of first instance; and where the value of the contract under a framework agreement or a dynamic purchasing system is above the thresholds and the procuring entity has invoked the derogations of the

[173]See supra note 167, 560.

[174]See Civil Code of the Republic of Armenia, viewed at: http://www.arlis.am/DocumentView.aspx?DocID=119471.

[175]See Hans-Joachim Priess and Pascal Friton, "Designing Effective Challenge Procedures: The EU's Experience with Remedies", in Sue Arrowsmith and Robert Anderson (eds.), *The WTO Regime on Government Procurement: Challenge and Reform*, (Cambridge University Press 2012), 522.

standstill period".[176] The violation of the standstill or suspension rules should be combined with the violation of a substantive provision of the EU Procurement Directives.[177] Besides that, in order to grant the remedy of ineffectiveness, the possibility of the violation to "affect the chances of the tenderer applying for review" should also be considered.[178]

As opposed to the Remedies Directives, the CEPA contains only one ground for ineffectiveness, namely the award of a contract without prior contract notice. Moreover, the agreement makes clear that the contract can be rendered ineffective either by the review body or by judiciary. This is because in accordance with Art. 303 (1) of the Civil Code of Armenia, "[a] transaction is invalid on the bases established by the present Code by virtue of its declaration as such by a court (disputable transaction) or independent of such declaration (a void transaction)". This means that *only the court* has the right in Armenia to declare the transaction (including the procurement contract) as void and to apply the consequences provided for in the CEPA. These consequences include either the retroactive cancellation of all contractual obligations or the cancellation of the obligations not yet performed ("prospective ineffectiveness").[179]

In case of declaring the contract ineffective, the parties are required to provide for alternative penalties. The CEPA does not define such penalties, but Art. 2e(2) of the Remedies Directives states that as a general rule alternative penalties should be "effective, proportionate and dissuasive". It sets the exclusive list of such penalties: fines or shortening of the duration of the contract. Even though the CEPA does not explicitly mention these penalties, it can be assumed that these are the ones the EU will use in case of partial cancellation of the contracts. The prospective ineffectiveness itself means the contract cannot be continued to be performed and hence the fines are in fact the only alternative penalty to be used against the procuring entities.[180]

As asserted by Arrowsmith, in case the contract is rendered ineffective the supplier who was awarded the contract and who was acting in good faith, might be entitled to damages in the form of the lost profit.[181] The position towards such suppliers is not clear under the Remedies Directives but such an interpretation seems logical

[176]See Art. 2d of the Remedies Directives.
[177]See supra note 166, 1022.
[178]See Art. 2d(1)(b) of the Remedies Directives.
[179]The term is used by Arrowsmith, see supra note 166.
[180]See supra note 166, 1036.
[181]See supra note 166, 1024.

as the supplier in good faith bears losses in terms of the time, resources and expectations of profit from that contract. From the perspective of the Armenian Civil Code, it seems that nothing precludes the adoption of such interpretation even though the CEPA is silent on the issue.

In case there are overriding reasons relating to a general interest, the review or the judicial body may decide not to declare the contract ineffective even though it was awarded unlawfully.[182] The concept of "general interest" is unknown to Armenian legislation. The only concept used in Armenian legislation is the "public overriding interest" which relates to the appropriation of property for public needs.[183] Hence, the term should have been defined in the CEPA or there should have been a separate provision describing the "general interest". The Remedies Directives clarify that the economic interests would be considered as an overriding reason only if "in exceptional circumstances the ineffectiveness would lead to disproportionate consequences".[184] Moreover, "economic consequences linked to the contract", such as the costs related to the change of supplier or the re-running of the procurement procedure, cannot be accepted as "overriding reasons".[185] In the absence of these provisions in the CEPA, the Armenian courts are free to define "general interest". It is yet to be seen whether in such cases the Remedies Directives will be utilised as a point of reference for interpretation.[186]

5. Conclusion

Besides the enlargement agenda, the EU has various cooperation modes in order to accommodate the diverging needs of countries in the close and far neighbourhood. Depending on some internal and external factors (e.g. reaction of Russia, economic crisis) the attitude of the EU and subsequently the EU tools have changed. The ENP created in 2003 provides the general basis for cooperation while it was later understood that a regional focus is necessary. Thus, six post-Soviet

[182]See Art. 271:9 of the CEPA.

[183]See the Law of the Republic of Armenia N HO-185-N, dated 27.11.2006 on the "Alienation of Property for the Needs of State and the Society".

[184]See Art. 2d (3)(2) of the Remedies Directives.

[185]See Art. 2d (3)(3) of the Remedies Directives.

[186]Especially the Armenian Constitutional Court started referring to the case law of the ECJ and to the Commission recommendations when substantiating some of its decisions. More on this see Narine Ghazaryan and Anna Hakobyan, "Legislative Approximation and Application of EU Law in Armenia", in Peter van Elsuwege and Roman Petrov (eds.), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union: Towards a Common Regulatory Space?*, (Routledge 2014), 207-209.

countries were included in the EaP, which provided for a more targeted cooperation and dialogue between the EU and the partner countries.

The bilateral track of the cooperation has proven to be more far-reaching and fast forward as it accounts for the differences, needs and wishes of separate countries. Under the auspices of the EaP, the EU recently signed the CEPA with Armenia, which is considered a victory of the EU and Armenian diplomacy after Armenia refused to sign the AA/DCFTA in 2013. The new agreement takes into account the commitments of Armenia towards the EAEU. The CEPA also contains a chapter on public procurement which can be labelled as "GPA plus". In terms of the review mechanisms, the CEPA goes beyond the requirements of the GPA basing the "plus" elements on the Remedies Directives. Analysis of the procurement chapter showed that the CEPA emphasises the independence of the review body and its members. In addition, it contains norms on standstill and specific remedies adapted to fit in the legal realities of both the EU and Armenia. The examined norms will be used in Chapter 7 helping to answer the question of whether there is any conflict of norms among the procurement provisions of international treaties signed by Armenia.

Besides its immediate neighbourhood, the EU established links also with the resource-rich Central Asian countries. The EPCA signed with Kazakhstan is the first second-generation agreement between the EU and a Central Asian country. The EU relations with Kazakhstan, the EPCA and specifically its procurement chapter will be analysed next.

Chapter 6: EU relations with Kazakhstan and the EPCA

1. Introduction

The EU relations with Kazakhstan are not developed to the same extent as the EU relations with Armenia. This might be explained by the geographical distance and by the fact that the Central Asian countries never wished to join the EU unlike some of the EaP countries. Nevertheless, the EU was interested in establishing and maintaining good relations especially with Kazakhstan, considering the latter's vast natural resources. The EPCA, taking the EU-Kazakhstan relationship to a new level, was signed in December 2015 and contained a chapter, *inter alia*, on procurement. Analysing the procurement norms of the EPCA, it becomes clear that besides diffusing its own norms, the EU is acting as a "transmitter of rules that have been elaborated in other international fora".[1] As will be discussed further, in Kazakhstan the EU is diffusing GPA rules and norms. The slight differences of the GPA and EPCA procurement norms will be discussed further below. It can be also concluded that in comparison to Armenia, Kazakhstan has one trade agreement less to comply with. Whether this changes the state of play will be discussed in Chapter 7.

In order to examine the EU relations with Kazakhstan, in particular the enhanced trade agreement, the current chapter is structured as follows. The EU relations with Kazakhstan and specifically the recent activation of ties, leading to the signature of the EPCA, will be discussed first. The subsequent discussion will evolve mainly around the EPCA with special emphasis on its public procurement chapter in accordance with the focus of the thesis. The chapter will end with conclusions.

2. EU relations with Kazakhstan

EU relations with Kazakhstan have developed gradually since 1992 when, after the collapse of the Soviet Union, Kazakhstan established diplomatic relations with Brussels.[2] The EU started paying more attention to the region especially after the 9/11 events putting an emphasis on security and energy related issues.[3]

[1]See Sangeeta Khorana and Maria Garcia, "Procurement Liberalisation. Diffusion in EU Agreements: Signalling Stewardship?", (2014) Journal of World Trade, Vol. 48:3, 482.

[2]See Kuralay Baizakov and Gulnaz Yergeshkyzy, "Kazakhstan and the European Union: Cooperation in Regional Security", (2013) Procedia-Social and Behavioural Sciences 81, 558.

[3]See Rustem Kurmanguzin, "Kazakhstan and EU: From Cooperation Strategy to the new Enhanced Partnership Agreement", (Казахстан и ЕС: От Стратегии Сотрудничества к Новому Соглашению о Продвинутом Партнерстве), (2016) Comparative Politics (Сравнительная Политика), Vol. 1:22, 108.

Kazakhstan in its turn realised that cooperation with the EU MS and the EU institutions is essential for acquiring weight in the world political arena.[4] In a very short period the EU became Kazakhstan's biggest trade partner, further enhancing areas of cooperation. [5]

2.1. Bilateral track of relations

Even before the activation of relations after the 2001 September 11th events, the EU was present in the Central Asian region. Thus, still in 1995 it signed a bilateral PCA with Kazakhstan, which became effective after its ratification in 1999.[6] The PCA comprised of three main parts – political dialogue, trade and cooperation, where the trade relations received special attention. As is the case with Armenia, the PCA with Kazakhstan contained identical provisions on the approximation of procurement legislation (Art. 43) and cooperation to "develop conditions for open and competitive award of contracts" (Art. 47).[7] In the absence of clear benchmarking and timelines for the approximation, these provisions remained largely unimplemented. The EU itself at that time was more interested in the countries of its immediate neighbourhood, hence Kazakhstan was not considered a priority. Even more, some commentators were thinking of Caucasus and Central Asia as a single and remote area with which the EU has limited ties.[8]

The PCA highlighted the importance of cooperation in the energy sector having in mind the special interest of the EU in this sphere[9] and based on the fact that already in 1995 Kazakhstan ratified the EU Energy Charter Treaty.[10] The latter was considered beneficial because of the clause on non-discriminative treatment of

[4]See supra note 2, 558.
[5]About 40% of Kazakhstan's external trade is with the EU. See Countries and Regions: Kazakhstan, viewed at: http://ec.europa.eu/trade/policy/countries-and-regions/countries/kazakhstan/index_en.htm.
[6]See supra note 2, 559.
[7]See The European Union and the Republic of Kazakhstan: Partnership and Cooperation Agreement, viewed at: https://eeas.europa.eu/sites/eeas/files/pca_kazakhstan_en_0.pdf.
[8]See S. Neil MacFarlane, "The Caucasus and Central Asia: Towards a Non-Strategy", in Roland Dannreuther (ed.), *European Union Foreign and Security Policy: Towards a Neighbourhood Strategy*, (Routledge 2004), 132.
[9]See Zhenis Kembayev, "Legal Bases of Partnership Between the Republic of Kazakhstan and the European Union", (Правовые основы партнерства между Республикой Казахстан и Европейским Союзом), (2013) Jurist N7, 47.
[10]The list of Energy Treaty Signatories can be viewed at: https://energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/signatories-contracting-parties/.

resources in energy markets originating from Kazakhstan.[11] While deepening the relations specifically in the energy sphere, the EU and Kazakhstan signed a Memorandum of Understanding on the Cooperation in the Energy Area in 2006 "outlining two road maps for cooperation on enhancing energy security and industrial cooperation".[12] Transport was another sector where the EU-Kazakhstan relationship developed in a fast pace. The EU needed new routes to bring the resources from the Central Asian markets to the EU,[13] whereas Kazakhstan benefited from exports and from gaining access to new infrastructure. Thus, the cooperation in the energy and transport sectors between the EU and Kazakhstan was (and is) seamless.

Notwithstanding the geographical distance and obvious differences related to values, the trade between the EU and Kazakhstan is also flourishing. In accordance to statistical data, in 2018 the EU exported goods worth of 5.8 billion euros and imported goods for 20.8 billion euros.[14] The main products of import for the EU are gas and oil while Kazakhstan is mainly importing machinery and chemical products.[15] The majority of foreign direct investment in Kazakhstan also comes from the EU.[16] The data comes to prove that "the EU-Asia relationship is mainly about trade and investment".[17] This is in sharp contrast with the situation in early 2000s when companies other than the Russian ones, were not willing to invest in Central Asia.[18] Kazakhstan's accession to the WTO in 2015,[19] (after applying for a membership in 1996),[20] as well as the signature of the EPCA with the EU is expected

[11]See Luca Anceschi, "The Tyranny of Pragmatism: EU-Kazakhstani Relations", (2014) Europe-Asia Studies, Vol. 66:1, 7.

[12]See "Kazakhstan and the EU set the framework for their Energy Relations with the Signature of a Memorandum of Understanding", IP/06/1679, Brussels, 4 November 2006, viewed at: http://europa.eu/rapid/press-release_IP-06-1679_en.htm.

[13]See Nargis Kassenova, "The New EU Strategy Towards Central Asia: A View from the Region", (2008) CEPS Policy Briefs, N 148, 4.

[14]See Trade Policy for Kazakhstan, viewed at: http://ec.europa.eu/trade/policy/countries-and-regions/countries/kazakhstan/index_en.htm.

[15]See European Union, Trade in Goods with Kazakhstan. The data can be viewed at: http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113406.pdf.

[16]See Fact Sheet: EU-Kazakhstan Relations, Brussels 21 December 2015, viewed at: https://eeas.europa.eu/sites/eeas/files/eu_kazakhstan_factsheet_0.pdf.

[17]See Marie Julie Chenard and O.Arne Westad, "The EU's Engagement with Asia", (2014) Global Policy Volume 5:Supplement 1, 86.

[18]See Oxana Dolzhikova, "Kazakhstan's Response to Regional Economic, Political and Security Challenges", (2008) Himalayan and Central Asian Studies, Vol. 12:3-4, 52.

[19]See Kazakhstan joins the WTO as 162nd member, viewed at: https://www.wto.org/english/news_e/news15_e/acc_kaz_30nov15_e.htm.

[20]See Richard Pomfret, "Trade Policies in Central Asia after EU Enlargement and before Russian WTO Accession: Regionalism and Integration into the World Economy", (2005) Economic Systems 29, 38.

to support the establishment of better links benefitting trade turnover between the EU and Kazakhstan.

Regarding other aspects of cooperation, it is admitted that Kazakhstan sees the EU as a driving force for sustainable development[21] and modernisation of its financial sector.[22] The intensification of relations also led to the interest from Kazakh media towards the EU. As was shown by empirical research, the EU is mainly depicted as an economic force that was able to create a single market and is an active player in the world economy.[23] On the other hand, the commentators admit that "the Union's framing is one-sided and dominated by the Kazakh elite's discourse".[24]

2.2. Multilateral track of cooperation

Besides the bilateral relations, the EU engaged with the Central Asian countries on a multilateral level as well. Unlike Armenia, Kazakhstan was not included in the ENP even though it lobbied for it.[25] Some suggested that the decision on non-inclusion was taken because Kazakhstan has a poor record of democracy.[26] This can be disputed on the ground that Belarus, Azerbaijan, Morocco were also not front-runners of democratic values and protection of human rights but were still included in the ENP.[27] It is fair to note though, that the geographical location of the countries played an enormous role when deciding on the range of countries to be included in the ENP. Kazakhstan due to the lack of geographical proximity was considered rather a "neighbour of the neighbour".[28]

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[21]See Sabina Chukayeva and Bakhytzhan Akzharov, "Kazakhstan: Sustainable Development in Transition and Connection to the EU's Assistance", (2016) Romanian Journal of European Affairs, Vol. 16:2, 63-66.
[22]See Jaroslaw Marczak and Natalya Uvarova, "The Kazakhstan-European Union Partnership: Modernization of the Republic's Financial System", (2016) DANUBE: Law and Economics Review, Vol. 7:4, 235.
[23]See Bakyt Ospanova, Houman Sadri and Raushan Yelmurzayeva, "Assessing EU perception in Kazakhstan's mass media", (2017) Journal of Eurasian Studies 8, 80.
[24]See supra note 23, 81.
[25]See Bhavna Dave, "The EU and Kazakhstan: Balancing Economic Cooperation and Aiding Democratic reforms in the Central Asian Region", (2007) CEPS Policy Briefs N127, 4.
[26]See supra note 11, 8.
[27]For the full list of the ENP members, see European Neighbourhood Policy, 21/12/2016, viewed at: https://eeas.europa.eu/headquarters/headquarters-homepage/330/european-neighbourhood-policy-enp_en.
[28]See Agnieszka Konopelko, "Eurasian Economic Union: a Challenge for EU Policy Towards Kazakhstan", (2018) Asia Eur J, Vol. 16:1, 14.

In 2007, with the push of the German Presidency,[29] the EU adopted *"The EU and Central Asia: Strategy for a New Partnership"*.[30] A big impetus for the development of the EU relations with all Central Asian countries and especially resource-rich Kazakhstan was given by the adoption of the strategy. The EU made clear that its strategic interests in the region lie within the security and energy dimensions. In this regard, the EU stressed that the developments in Central Asia (strategic, political, economic and trans-regional) are directly affecting the EU.[31] The security of this quite volatile region is indeed important for the EU. Central Asian countries bordering with Afghanistan (Tajikistan, Uzbekistan and Turkmenistan) are possible routes for human and drug trafficking and illegal migration.[32] In addition, the rise of Taliban and other extremist groups attracted the attention to the need of cooperation with the region.[33] Moreover, with the EU enlargement in 2004 and the creation of the ENP, the EU became closer to the Central Asian states.[34] As was already mentioned, the EU wanted to create a "ring of friends" along its borders and the stability of the Central Asian region was (and is) an important factor for ensuring the security of the EU.

At a multilateral level as well, the cooperation in the energy sector was a strategic goal for the EU.[35] The aim of the EU at the time of the adoption of the strategy was the construction of the Nabucco pipeline, which was thought to reduce the EU's energy dependence on Russia's supply of gas.[36] Kazakhstan, with an access to the Caspian Sea, also considered joining Nabucco as it could be beneficial for its economy.[37] In addition, several EU MS had clear interest in the gas and oil sector

[29]See Neil J. Melvin, "The European Union's Strategic Role in Central Asia" in *Engaging Central Asia: The European Union's New Strategy in the Heart of Eurasia* (ed. Neil J. Melvin), (2008) Centre for European policy Studies, 138.

[30]The text of the Council of the European Union Decision N 10113/07, dated 31st of May 2007, "The EU and Central Asia: Strategy for a New Partnership", viewed at: https://eeas.europa.eu/sites/eeas/files/st_10113_2007_init_en.pdf. Some commentators think that there is a need to update the Strategy as after its adoption both the Europe and the Central Asian region have changed. See Rustem Kurmanguzhin, "Why the EU's New Strategy for Central Asia is Needed", (2012) Lithuanian Foreign policy Review, Vol. 27, 137.

[31]See supra note 30, 4.

[32]See Fabienne Bossuyt, "Between National and European Foreign Policy: the Role of Latvia and Romania in the EU's Policy towards Central Asia", (2017) Southeast European and Black Sea Studies, Vol. 17:3, 449.

[33]See Richard Weitz, "Kazakhstan and the New International Politics of Eurasia", (2008) Central Asia-Caucasus Institute and Silk Road Studies Program, 42.

[34]See supra note 30, 4.

[35]See supra note 30, 5.

[36]See Katharina Hoffmann, "The EU in Central Asia: Successful Good Governance Promotion?", (2010) Third World Quarterly, Vol. 31:1, 100.

[37]See "Pipelines: Kazakhstan favours joining Nabucco", *Interfax,* Central and Caucasus Business Weekly, Moscow, May 25, 2010.

as they invest in the region through big companies like Shell and British Gas.[38] As will be discussed below, the existence of commercial interest does not sit well with the promotion of the EU values in the region.

The increasing interest in Central Asian countries allowed the EU to adopt an updated strategy in 2019 named "The EU and Central Asia: New Opportunities for a Stronger Partnership".[39] The new strategy restated the EU's interest in creating a "more resilient, prosperous and closely interconnected economic and political space" in the region where the EPCAs will be the legal bases for cooperation.[40] The Council, in its endorsement of the Strategy, highlighted that the aim is to affirm a "non-exclusive partnership",[41] most probably referring to the reality that two out of five Central Asian countries joined the EAEU and the rest bear strong Russian influence. As a strong player in international trade arena, the EU also offered its assistance to the countries that are still not members to the WTO and the GPA. For Kazakhstan, this will mean technical and political support when negotiating its GPA accession terms. Overall, the New Strategy is thought to be "a light-weight attempt at influencing economic and political processes in the region" as the EU accepts its inability to compete with Russian hard power in the region.[42]

Even though the Strategies mentioned above refer to all five Central Asian countries, the EU tries to differentiate them based on the "differing needs of every country"[43] using the principle of differentiation found also in the ENP Strategy Paper.[44] In this respect, Kazakhstan is truly a leading country in the region considering the depth of relations with the EU; it is still the only Central Asian country that signed the EPCA in 2015. The official sources attribute this success to the effective foreign policy of the Nazarbayev regime.[45] In addition, among the five Central Asian countries Kazakhstan is championing in economic reforms and investing in people.[46] This drives the EU towards acknowledging Kazakhstan as its

[38]See Gordon Crawford, "EU Human Rights and Democracy Promotion in Central-Asia: From Lofty Principles to Lowly Self-Interest",(2008) Perspectives on European Politics and Society, Vol. 9:2, 187.
[39]See Joint Communication to the European Parliament and the Council. "The EU and Central Asia: New Opportunities for a Stronger Partnership", JOIN(2019) 9 final, 15.5.2019, Brussels.
[40]See supra note 39, 1.
[41]See Council Conclusions on the New Strategy on Central Asia, COEST 139, 10221/19, 17 June 2019 (OR.en), Brussels.
[42]See Mridvika Sahajpal and Steven Blockmans, "The New EU Strategy on Central Asia: Collateral Benefit?", 21 June 2019, viewed at: https://www.ceps.eu/the-new-eu-strategy-on-central-asia/.
[43]See supra note 30, 6.
[44]See supra note 19.
[45]See supra note 11, 11.
[46]See Bhavna Dave, "The EU and Kazakhstan: Is the Pursuit of Energy and Security Cooperation Compatible with Promotion of Human Rights and Democratic Reforms?", in Neil J. Melvin (ed.),

closest ally in the region. While this approach is understandable, some commentators think that Kazakhstan should be compared to the "members of the "New Europe" and not simply be seen as "better" than other countries in Central Asia".[47]

Even though the protection of human rights, rule of law, good governance and democratisation are included in both the old and the new strategies, it is submitted that the EU is not pursuing its stated goal of "ensuring promotion and protection of human rights" vigorously enough as it opts more for the energy and trade benefits.[48] Notwithstanding the fact that Kazakhstan is included in the Freedom House Index from 2018 as a "Not Free" country[49] and is ranked 124 out of 180 countries in the Corruption Perception Index from 2018[50], the EU does not rush to put more pressure on the country to start reforms for the protection of human rights and other democratic values. Autocratic regimes in Central Asian countries (including in Kazakhstan) are stable and have little dependence on the relations with the EU;[51] a fact that by itself limits the EU abilities to affect the transposition of norms on good governance and rule of law. Moreover, Kazakhstan is presented to international counterparts as a "prosperous and stable country",[52] even though such stability is a result of the autocracy. The economic development of Kazakhstan is also claimed to be related to the stability of politics while democracy praised by the West is said to entail destabilisation.[53]

2.3. Relations with the EU in a wider geopolitical setting

Besides economic and trade ties, the EU is important for Kazakhstan from geopolitical perspective as well. The relations with the EU is part of the official multi-vector foreign policy of Kazakhstan used to "imply a balanced if not neutral approach using which Kazakhstan can maximise its autonomy of action and

Engaging Central Asia: the European Union's New Strategy in the Heart of Eurasia, (Centre for European Policy Studies 2008), 46.

[47]See Ibid.

[48]See supra note 11, 14-16.

[49]The Freedom House Index can be viewed at: https://freedomhouse.org/report/freedom-world/freedom-world-2018.

[50]The Corruption Perception Index from 2018 can be viewed at: https://www.transparency.org/cpi2018.

[51]See supra note 36, 101.

[52]See supra note 25, 1.

[53]See supra note 25, 5.

bargaining power".[54] The signature of the EPCA with the EU while also being a founding member of the EAEU proves the multi-dimensional character of the foreign policy in Kazakhstan. The country also tries to use its geographic location and to connect Europe with Central Asia and the whole South Asian region.[55] Indeed, Kazakhstan has close relations not only with the EU but most prominently with Russia, which is the leading player in the Central Asian region and the most important strategic partner for Kazakhstan due to its reliance on hard power.[56]

Out of all major players in Central Asia such as Russia, India, and China, only the EU has a human rights promotion agenda for the cooperation with the region.[57] This is one of the reasons driving Kazakhstan (and other Central Asian countries) towards Russia rather than the EU. The autocratic regimes have a challenge of sustaining themselves and external pressure of democratisation is an additional and unnecessary problem.[58] Cultural proximity due to the common Soviet past, absence of the language barriers with Russia as well as the fear of China's soft expansionist power might also explain the choice of Russia as the closest regional partner for Kazakhstan. On the other hand, as noted by some commentators, the EU cannot be the "classical great power in the region" so it must use the tools it masters the best – supporting the reforms and continuing the promotion of the EU values.[59]

To sum up, the EU activated its relations with Kazakhstan only recently even though the PCA entered into force still in 1999. In the search for new energy sources the EU turned its face towards Central Asia where Kazakhstan appeared as the economically most developed and the most reliable partner for the EU. Notwithstanding the recent warm-up of relations, and the claims by some commentators that Kazakhstan belongs to Europe,[60] the EU and Kazakhstan have a long way to go before reaching the level of "strategic partnership".[61] It is yet to be seen what the recently signed EPCA will entail for both parties. The next section

[54]See Neil Collins and Kristina Bekenova, "Fuelling the New Great Game: Kazakhstan, Energy Policy and the EU", (2017) Asia Eur J 15, 9.
[55]See Luca Anceschi, "Regime-Building, Identity-Making and Foreign Policy: Neo-Euriasianist Rhetoric in Post-Soviet Kazakhstan", (2014) Nationalities Papers, Vol. 42:5, 735.
[56]See supra note 28, 2.
[57]See Neil Melvin, "The European Union's Strategic Role in Central Asia", (2007) CEPS Policy Briefs, N128, 3.
[58]See Steven Levitsky and Lucan Way, "International Linkage and Democratisation", (2005) Journal of Democracy, Vol. 16:3, 20-21.
[59]See Neil Melvin, "The EU Needs a New Value-Based Realism for its Central Asia Strategy", (2012) EUCAM Policy Brief N28, 5.
[60]See Svante E. Cornell and Johan Engvall, "Kazakhstan in Europe: Why Not?", Central Asia-Caucasus Institute Silk Road Studies Program (October 2017).
[61]See supra note 9, page 49.

will concentrate on the legal bases of the EPCA and its general characteristics before analysing the specific public procurement chapter.

3. The EPCA: legal aspects and political importance

As is the case with Armenia, the second-generation agreement[62] of the EU with Kazakhstan differs from the PCA of 1999. Unlike the PCA, which mandates the parties to grant each other MFN treatment while containing "standard commitments" in the area of human rights,[63] the EPCA is more specific paying attention to the areas of most interest for the parties. These are, as could be expected, the areas of energy and transportation. The CEPA in comparison to the EPCA contains more references to human rights and good governance alongside trade-related chapters. This might be explained also by the different negotiating positions that Armenia and Kazakhstan had. The CEPA for Armenia was the second chance to normalise relations after 2013, hence the country was not in a strong negotiating position since the beginning. Kazakhstan being a big and resource-rich country had more bargaining power and could potentially refuse to sign the EPCA in case more extensive human rights closes were included. The EPCA, like the CEPA, is comprehensive in covering different trade and trade-related areas, including public procurement described in detail below.

As was the case with the CEPA, the EPCA is also not an association agreement: Art. 217 TFEU is not mentioned as its legal basis. It does not mention Article 8 TEU as a legal basis either, which diminishes the importance of that provision. Much in line with the CEPA, the EPCA refers to Articles 37 and 31(1) of the TEU and Articles 91, 100(2), 207 and 209 of the TFEU. In addition, a reference is made to Articles 91 and 100(2) TFEU from the Title on Transport making clear the importance of this sector for both the EU and Kazakhstan.

From the political viewpoint, the new agreement underlines future political and economic dialogue between the EU and Kazakhstan while specifying closer cooperation within 29 sectors (including education, environment, public procurement, transportation).[64] The previous Head of the EU Delegation to Kazakhstan, Traian Hristea mentioned that the EPCA is about "strengthening

[62]See Artem Patalakh, "Kazakhstan's EU policies: a Critical Review of Underlying Motives and Enabling Factors", (2018) Asian Journal of German and European Studies, Vol. 3:4, 1.
[63]See Tika Tsertsvadze and Vera Axyonova, "Trading Values with Kazakhstan", (2013) EUCAM Policy Brief N32, 2.
[64]See supra note 28, 12.

regulatory cooperation and eliminating non-tariff barriers, improving intellectual property rights protection, improving trade in services and establishment, public procurement and implementing an organic trade facilitation strategy, and working further on improving the overall investment climate".[65] Public procurement is thus one of the most important areas of cooperation between the EU and Kazakhstan. In addition, Kazakhstan expects to start visa waiver negotiations soon after the conclusion of the EPCA enabling more people-to-people contacts.[66] The rule of law, further democratisation as well as the protection of human rights are explicitly mentioned in the preamble of the EPCA but as Kembayev rightly highlights the cooperation of the EU with Kazakhstan in this regard "is not harmonious".[67] The ex-President of Kazakhstan Nazarbayev in one of his articles highlighted the importance of trade, energy, education, security for the cooperation with the EU without mentioning human rights, judicial reforms or alike.[68]

Even though the EPCA is enhanced in its nature, it is still far from the DCFTA.[69] Just as Armenia could not sign the DCFTA with the EU after opting for the EAEU, Kazakhstan also had limited margin of maneuver. In stark contrast with the CEPA, the EPCA does not impose approximation with the EU *acquis* but states rather vaguely that "the Parties shall promote mutual understanding and convergence[70] of their legislation and regulatory framework, in order to further strengthen mutually beneficial links and sustainable development".[71] Looking at different sections of the EPCA it becomes obvious that though there is no general provision on approximation, several sections contain a requirement to harmonise, approximate or converge practices in specific areas of cooperation.[72] This said, it can be concluded that the general rule embodied in the preamble is "convergence"

[65]See "Welcoming Remarks of the EU Ambassador Traian Hristea at the Second EPCA Workshop on EU-Kazakhstan Trade and Business Cooperation", 29/06/2017, viewed at: https://eeas.europa.eu/headquarters/headquarters-homepage/29023/welcoming-remarks-eu-ambassador-traian-hristea-second-epca-workshop-eu-kazakhstan-trade-and_en.

[66]See "Kazakhstan-EU Agreement Stipulates Enhancement of Cooperation in 15 Additional Areas", 6 May 2016, *Interfax*: Russia and CIS Business & Investment Weekly; Moscow.

[67]See Zhenis Kembayev, "Partnership between the European union and the Republic of Kazakhstan: Problems and Perspectives", (2016) European Foreign Affairs Review 21:2, 194.

[68]See Nursultan Nazarbayev, "The Next Chapter in Kazakhstan-EU Relations: Bolstering Development and Trade Through a New Partnership Agreement", *Wall Street Journal Europe*, 08 October 2014.

[69]See supra note 67, 199.

[70]Convergence for the purposes of the current research is defined as "the decreasing distance of national regulatory practices and governance arrangements towards the EU's regulatory model applied in the single market". See Julia Langbein, "Organizing Regulatory Convergence Outside of the EU: Setting Policy Specific Conditionality and Building Domestic Capacities", Working Paper, KFG The Transformative Power of Europe N33 (December 2011), 5.

[71]See EPCA, Preamble, para 24.

[72]For example, Art.25 (2)(a) and Art. 50 (2) require harmonisation, Art. 220 (d) mentions approximation while Art. 228 and Art. 244 relate to convergence.

while there are specific areas where the parties will go as far as harmonisation. The Chapter on public procurement contains no requirement on approximation or harmonisation meaning that the parties should strive for convergence of their legislations.[73] Without the explicit requirement to approximate/harmonise the public procurement legislation with the norms of the EPCA, Kazakhstan has very few incentives to do so. This might also mean that the rules laid down in public procurement Chapter will only regulate procurement covered by the EPCA.

Recent Constitutional amendments in Kazakhstan require promulgation of national legislation laying down "the procedure and conditions of operation of international agreements in the territory of the Republic of Kazakhstan to which Kazakhstan is a party".[74] The EPCA was promulgated by the Kazakh authorities with a Law containing a single article which itself referred back to the EPCA.[75] This creates the same effect as if the EPCA was directly applicable. In addition, in accordance with Art. 22 of the Law of the Republic of Kazakhstan "On International Treaties of the Republic of Kazakhstan", the central government entity responsible for specific area of regulation, should submit to the Government suggestions on the amendments to the national legislation together with the suggestion on ratification of an international treaty.[76] Such document was not drafted for the EPCA,[77] thus it is impossible to judge how much the national legislation will change after the EPCA procurement chapter enters into force.

4. Public procurement under the EPCA

Kazakhstan is not a member to the GPA yet, hence the EU could not directly refer to mutual rights and obligations undertaken in its scope. In this case, the EU chose to almost completely copy the text of the GPA into the EPCA. As opposed to the CEPA, the EPCA does not contain provisions borrowed from the EU Remedies Directives. This shows that the EU is taking a cascaded approach depending on the depth of relations with each country under discussion. Armenia already being a member to the GPA, was eager to undertake GPA+ commitments while in case of

[73] In practice, this entails convergence of the public procurement rules of Kazakhstan with the ones of the EU.

[74] See Art. 4 (3) of the Constitution of the Republic of Kazakhstan.

[75] See the Law of the Republic of Kazakhstan N475-V ZRK, "On the Ratification of the Enhanced Partnership and Cooperation Agreement between the Republic of Kazakhstan on one side, and the European Union and its Member States on another side", dated 25 March 2016.

[76] See the Law of the Republic of Kazakhstan N54 "On International Treaties of the Republic of Kazakhstan", dated 30 May 2005.

[77] As ascertained by relevant authorities during an unofficial conversation.

Kazakhstan the starting point was the GPA itself. As the GPA was discussed in detail in Chapter 3 (including the provisions on review mechanisms), only the diverging elements related mainly to e-auction, deadlines and coverage are analysed in the current section.

4.1. Procurement regime under the EPCA

As mentioned earlier, the EU made extensive use of the GPA when drafting the procurement chapter of the EPCA with Kazakhstan. Understandably, the provisions related to the GPA as a plurilateral agreement either do not exist or are replaced by a wording applicable to a bilateral treaty. For example, the EPCA lacks the definitions of "committee" and "country" as indeed the GPA Committee has no role in the EU-Kazakhstan trade relations (there is a Cooperation Committee instead) and as the treaty is bilateral, there is no need to define what is to be understood under "country". Special and differential treatment envisaged under the GPA Article V is also understandably not reflected in the EPCA.

4.1.2. Electronic means and e-auction

The EPCA (as the GPA and the EAEU Treaty) puts a special emphasis on the usage of electronic means in public procurement. All the requirements of the GPA in this regard apply. Moreover, unlike the GPA, which only encourages the sub-central and other entities to publish their notices through a single point of access, the EPCA mandates all covered procuring entities to do so.[78] Currently, the EU has set a deadline for all its MS to pass to e-procurement[79] while all procurement in Kazakhstan is already conducted by using electronic means, hence this provision just reflects the reality on the ground.

Closely related to the e-procurement is the regulation of the e-auction. As discussed in Chapter 4, the EAEU Treaty is treating the e-auction as a stand-alone procurement method. This peculiarity is reflected in the EPCA where alongside the

[78]See Article 124 (1) of the EPCA.

[79]EU has a cascaded deadline for the introduction of e-procurement in different stages of the procurement procedure. Thus, tender notices should be published electronically by April 2016. Central Purchasing Bodies have a higher standard – they need to pass to electronic communication including bid submission by April 2017. October 2018 is the deadline for all contracting authorities to conduct e-procurement for all types of procedures. Viewed at: http://ec.europa.eu/growth/single-market/public-procurement/e-procurement_en.

open, selective and limited tendering, the e-auction is mentioned as a method the parties can opt for. Another option is to have an e-auction as a stage of another method, such as the open method. In this case, the EPCA is following the approach on the e-auction found in the EU Classical Sector Directive.[80] Art. 131(2) of the EPCA states that "in open, limited or negotiated procedures, a procuring entity may decide that the award of a contract shall be preceded by an electronic auction when the contract specifications can be established with precision". This means that the procuring entities have two options for using electronic auction: *first*, e-auction as a stand-alone method (an approach which Kazakhstan is employing due to its commitments under the EAEU Treaty) and, *second*, e-auction as a stage of another procurement method (the EU's approach). The requirement of having full initial evaluation of tenders before proceeding with the auction itself also sits very well with both parties to the EPCA; for the EU the auction is the last stage of the procedure, and Kazakhstan has pre-qualification procedure before passing to the auction. The rest of the article regulates such issues as the information to be included in the contract notice; contract award criteria, closing of the auction. Thus, the EPCA regulates the e-auction in a more rigorous manner than the GPA. It seems, Kazakhstan tried to harmonise its obligations stemming from different trade agreements by including some elements from the EAEU Treaty into the EPCA. This, as will be discussed in Chapter 7, helps Kazakhstan to avoid possible conflict of norms.

4.1.3. Deadlines

Another important point relates to the deadlines for the submission of tenders. The EPCA follows the GPA in what concerns the general deadlines but it has shortened deadlines in case all the conditions for the shortening are present (seven days instead of ten).[81] This might be related to the fact that the EAEU Treaty allows the parties to have seven calendar days' deadline for the e-auction procedures below national thresholds. If the EPCA would have followed the GPA deadline of at least ten days, it might have contradicted the commitments under the EAEU Treaty for this specific procurement method. To avoid conflict of norms involving the EAEU Treaty and the EPCA, one of the solutions for Kazakhstan might be to set up a seven days' deadline for e-auction procedures below the EPCA threshold. Another

[80]See the European Parliament and the Council Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJEU L 94/65, 28.3.2014.
[81]See Article 128 (8) of the EPCA.

possibility is just to refrain from using the shortened deadline provided by the EAEU Treaty. The same shortened seven days' deadline applies also to the cases described under 128(8),[82] which is again less than the ten-day period envisaged by the GPA. In addition, the EPCA allows procuring entities to shorten the deadline for the submission of tenders when utilising e-procurement by seven days for each case mentioned in the EPCA, while the GPA allows the shortening by five days.[83]

4.1.4. Coverage

Besides the textual analysis of the procurement chapter of the EPCA, it is necessary to look also at its Annex III in order to understand the scope and the coverage. It is based on the structure of Appendix I to the GPA though is very limited in scope in comparison with the coverage parties usually suggest under the GPA. There are limited number of covered procuring entities involving central and sub-central entities and no procuring entity is included under the subheading "other entity". Central and sub-central entities when conducting procurement related to the energy, transport, water and postal services are exempted from the application of the EPCA.[84] The list of covered goods and services is also limited while the construction works are mostly covered. The thresholds are higher than can be usually observed under the GPA. For goods and services procured by central and sub-central government entities, the thresholds are 300,000 SDR and 400,000 SDR respectively, while procurement of construction works is covered above the seven million SDR threshold.

Unlike the GPA, the EPCA does not exclude the contracts related to "security interests (arms, ammunition or war materials), or procurement indispensable for national security or for national defence purposes".[85] This might appear strange at the first glance as usually defence procurement is excluded even from national legislation or a separate softer regime is created for it. The examination of Annex III of the EPCA (equivalent of Appendix I of the GPA) demonstrates that from the

[82]Article 128 (8) of the EPCA reads as follows: "Where a procuring entity covered under Part 3 of Annex III has selected all or a limited number of qualified suppliers, the time period for tendering may be fixed by mutual agreement between the procuring entity and the selected suppliers. In the absence of agreement, the period shall not be less than seven days".

[83]The procuring entity can shorten the deadline by seven days for each of the following cases: "(a) the notice of intended procurement is published by electronic means; (b) all the tender documentation is made available by electronic means from the date of the publication of the notice of intended procurement; and (c) the entity accepts tenders by electronic means" (Art. 128(5) of the EPCA).

[84]See Annex III, Part 7 (2) of the EPCA.

[85]See Article III:1 of the GPA.

side of the EU, the coverage of defence and security procurement is limited to the goods that are non-sensitive and non-warlike materials, meaning that the procurement of arms and ammunitions is effectively excluded from the coverage. In addition, ministries of defence are also excluded from the list of covered central entities, which supports the presumption that defence procurement is largely excluded from the coverage. From Kazakhstan's side no such exception is envisaged, though such procurement is excluded from the coverage of the national legislation. Another exclusion deserving attention is the set-aside of contracts from Kazakhstan's side for the small or minority-owned business or a business that employs people with special needs. It is explicitly admitted that set-aside in this case can mean any type of preference, be it an exclusive right to supply goods or provide services or the price preference.[86] The existence of this provision explains the absence of the prohibition of offsets in the EPCA as these type of set asides might be regarded as offsets.

The coverage is, hence, very limited with a few contracting opportunities open to international procurement. This leads to the conclusion that the main purpose for the EU is the diffusion of the GPA rules into Kazakhstan's national legislation even before the country accedes to the plurilateral agreement. This will help Kazakhstan when negotiating the GPA as the parties can concentrate on market opening (enlarging the list of covered entities, goods, services, and lowering the thresholds) rather than debating the harmonisation of national legislation with the norms of the GPA. Furthermore, Kazakhstan will also have less to do, when joining the Agreement as it is already acquainted with the normative requirements. It is unfortunate, though, that the EPCA procurement chapter is set to enter into force in five years after the Title on Trade and Business enters into force. For the procurement of goods and construction services envisaged under the Parts 4 and 6 respectively, the chapter enters into force after eight years of the date the Title enters into force. The European Parliament in its non-legislative resolution of 12th of December 2017, highlighted that the 2/3 of the EPCA entered into force in May 2016. It also drew attention to the fact that public procurement is an important area of trade, hence, after the transition period of five and eight years, the procurement market of Kazakhstan is expected to be more liberalised for the EU suppliers.[87]

[86] See Annex III, Part 7(2) of the EPCA.

[87] See European Parliament, EU-Kazakhstan Enhanced Partnership and Cooperation Agreement (Resolution),

It can be concluded that Kazakhstan is gradually opening its procurement market to international competition. Even though the coverage of the EPCA is very limited, the fact that its procurement chapter is based on the GPA speaks about the possibility of smooth accession to the latter once the country decides to start the negotiations. From the EU's perspective, even though the new procurement market is not completely open for the EU suppliers, the injection of international best practice into the national legislation of Kazakhstan is a good starting point.

5. Conclusion

The EU relations with Kazakhstan were not intense until recently due to the geographical distance and the lack of interest from the EU towards Central Asia in general. The recent document on "*The EU and Central Asia: new opportunities for a stronger partnership"* can be considered a new chapter in the EU-Kazakhstan relations. Security, drug trafficking, protection of human rights as well as energy related issues are on the agenda for the closer cooperation with Kazakhstan (and other Central Asian countries). The EU also explicitly referred to the GPA suggesting its assistance in joining the Agreement.

The new strategy refers to the EPCAs as a legal basis for future cooperation with Central Asia. So far, Kazakhstan is the only Central Asian country that signed the EPCA in 2015. This second-generation agreement is qualitatively different from the 1999 PCA. The EPCA regulates cooperation in 29 areas of interest reflecting the enhanced trade relations between the EU and Kazakhstan. The agreement is directed at the deepening of the existing trade and other related areas of cooperation with the EU. Human rights clauses, considered essential, are also included though the main impetus of the EPCA is on the cooperation in the energy and transport sectors. As is the case with most of the recent RTAs, the EPCA also contains a detailed procurement chapter, which is an almost identical copy of the GPA with a differing coverage and some differences related mainly to the deadlines and usage of e-auction. Notwithstanding the limited coverage, the fact that the EPCA is promoting procurement best practices found in the GPA, can be considered the first step towards the possible quick accession to the GPA and opening of Kazakhstani procurement market to foreign competition. It should be also noted that Kazakhstan negotiated the EPCA bearing in mind its already existing

P8_TA-PROV(2017)0485, 12 December 2017, Strasbourg. Viewed at: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2017-0485&language=EN.

commitments under the EAEU Treaty. Thus, it managed to include some elements of e-auction as a stand-alone procedure into the EPCA making its compliance with both treaties easier.

The next Chapter reveals the instances of "apparent" or "real" conflict of norms among the provisions on procurement review mechanisms found in different international treaties. It also concludes on whether Armenia and Kazakhstan managed to avoid tensions when drafting national legislation.

Chapter 7: Procurement Legislation of Armenia and Kazakhstan: to what extent is compliance with all international obligations ensured?

1. Introduction

Armenia and Kazakhstan had different reasons for signing or undertaking to sign the relevant international agreements as discussed in Chapters 5 and 6. The geopolitical situation, defence imperatives, and energy-related issues played significant role in the decisions made by these countries. Notwithstanding these factors, the result is the same: Armenia and Kazakhstan are members to several international agreements containing procurement chapters. The provisions of the EAEU Treaty apply equally to both countries. It is yet to be seen what coverage Kazakhstan can negotiate when joining the GPA, but the provisions of the Agreement will apply just the same as they apply to all other GPA parties. In addition, the EPCA, being an almost identical copy of the GPA, puts Kazakhstan in a position where it must comply with the GPA norms even before acceding to the Agreement itself. The CEPA with Armenia is a GPA+ agreement as both the EU and Armenia are members to the GPA.[1]

As analysed below, the requirements of the mentioned treaties suggest that even though there are several cases of "apparent conflict", there is no "real" conflict that will hinder the relevant countries' compliance with all the mandatory requirements related to the review bodies and procedures. In any case, deliberate and very careful choices should be made when drafting the national legislation. Besides international obligations stemming from different treaties, the countries need to consider also the situation on the ground, the market conditions and the level of competition, which makes the task of drafting the national legislation even more complicated.

To have a proper understanding of the choices the countries under examination have in the context of the internalisation of international obligations, the current Chapter will examine the history of the development of public procurement legislation in Armenia and Kazakhstan with a specific emphasis on the legislation in force at the time of writing. The main focus will be on the regulation of review bodies and procedures taking into account the complexity of institutional

[1]For more discussion on the CEPA see Chapter 5.

amendments, administrative burden and the importance of the capacity of the procurement review bodies.

The Chapter contains three sections. The first section compares the provisions of the international treaties under examination in relation to the procurement review mechanisms and concludes on the (non-)existence of "real conflicts". The second section provides the analysis of the procurement system of Armenia within the context of negotiating and signing the discussed international trade agreements containing procurement provisions. Its subsections follow a chronological order starting with the first Law "On Procurement". The same approach is taken for the third section devoted to the public procurement system of Kazakhstan. Each country-specific section will end with the comparative analysis of the compliance of current national legislation with the mandatory requirements of international treaties demonstrating the difficulties of simultaneous compliance with several trade agreements containing public procurement provisions.

2. Conflict of norms: real, apparent or none

The current section engages in a *horizontal examination* of the procurement chapters of the international trade agreements that the countries under investigation need to comply with (Table 1). The next sections engage in a *vertical examination* of compliance of the Armenian and Kazakh current procurement legislation with the commitments stemming from the procurement chapters of these international agreements.

2.1. Comparison of provisions of international trade agreements signed by Armenia and Kazakhstan in terms of procurement review mechanisms

Table 1

	Principles/Aims	**Standstill Period**	**Forum**	**Requirements for the review body that is not a court**	**Standing**	**Remedies**
GPA	Timeliness, effectiveness, transparency, non-discrimination.	No, but ten days to prepare the complaint.	Review within the procuring entity (optional); at least one	Yes. Related mainly to procedural fairness and access to justice.	Supplier who has or has had interest.	Interim measures, correction, compensation.

			administrative or judicial authority (mandatory); non independent body + judicial review.			
EAEU Treaty	Protection of rights and interests of persons in the area of public procurement, control over the compliance with the procurement legislation, national regime.	Ten days since the adoption of the award decision.	Tiered system (only controlling/ monitoring bodies are mentioned).	No.	Before the deadline for bid submission, anyone in accordance with national legislation; after the deadline - only the potential suppliers.	None.
CEPA	Timeliness, effectiveness, transparency, non-discrimination.	Yes. At least ten calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers.	Review within the procuring entity (optional); at least one administrative or judicial authority (mandatory); non independent body + judicial review.	Yes. Mainly related to procedural fairness and independence of the body and its members.	Supplier who has or has had interest.	Interim measures, set-aside, damages, ineffectiveness of the contract.
EPCA	Timeliness, effectiveness, transparency, non-discrimination.	No but ten days to prepare the complaint.	Review within the procuring entity (optional); at least one	Yes. Related mainly to procedural fairness and access to justice.	Supplier who has or has had interest.	Interim measures, correction, compensation.

			administrative or judicial authority (mandatory); non independent body + judicial review.			

The principles governing review procedures under the CEPA and the EPCA are identical to the ones under the GPA, including timeliness, effectiveness, transparency and non-discrimination. The aim of the GPA review procedures is the provision of a fair forum, which will review the complaints in an impartial, transparent and timely manner providing the aggrieved parties with appropriate remedies. The protection of the tenderers' rights is the ultimate goal of the procurement review procedures envisaged by the GPA (the CEPA, the EPCA).

Unlike this supplier-centered approach, the EAEU Treaty has a different stance and the main emphasis is on the monitoring and control over the procurement procedures. The EAEU Treaty, acknowledging the role of the suppliers in the review process initiation, still mixes the review procedure with other types of compliance enhancing mechanisms such as monitoring and control. As a result, the independence of the review body and its members, the due process, the remedies are largely left out from the scope of the regulation. MS have the option to decide on such important matters individually.

The EAEU Treaty contains norms on the standstill period even though the period is not called as such. The contract, in accordance with the Treaty, cannot be signed earlier than ten working days and later than 30 calendar days. Moreover, the ten-day period counts from the day the decision is adopted. With regards to the GPA, it should be noted that the Agreement does not contain provisions on standstill period. It just allows the suppliers at least ten days for the preparation and submission of the complaint from the day when the basis of the challenge have become known or reasonably should have become known to the supplier. The CEPA is the most straightforward of all the discussed treaties as it makes use of the EU Remedies Directives when regulating the standstill. Thus, there is no case of "real" conflict involving the introduction of the standstill period but there is a case of "apparent conflict". The countries have to follow the strict approach of the EAEU Treaty and publish the contract award notice on the same day the decision is

adopted in order to comply with the ten-day requirement of the GPA (the CEPA, the EPCA).

Further, the review system itself can be either tiered or just be composed of one instance. In case of the GPA (the CEPA, the EPCA), the possibilities to construct a review system are varied allowing the signatories to these agreements to choose the best suitable approach. Thus, the GPA in its Art. XVIII provides several options to the parties. It *encourages* the consultations between the procuring entities and the suppliers and *obliges* every party to have at least one impartial administrative or judicial body to handle the complaints. In case the body is not impartial, there should be a possibility to appeal the decisions of such a body to an impartial administrative body or to a court. In case the review body is not a court, it shall have procedures that provide for fair and transparent resolution of the dispute. Except for the review by an independent administrative or judicial body, the other two tiers can be either optional or mandatory.

The EAEU Treaty entrusted the review of the complaints to the monitoring and/or controlling bodies, such as the Ministries of Finance or Public Procurement Agencies. These bodies are usually not impartial and deal with the procurement review as part of their wider obligations. There is no explicit mentioning of the possibility to launch a complaint procedure within the procuring entity or judicial body. The examination of constitutional systems of the countries under consideration clarified that judicial protection is a constitutional right[2] and cannot be revoked as discussed in Chapter 4. Thus, the following configurations exist under the EAEU Treaty: the complaint can be launched either to the monitoring/complaining body then to the judicial review; or to the procuring entity, then to the controlling/monitoring body and finally to the judicial authorities.

As a result, the countries member to all the treaties discussed have the following limited option only: the complaint to the procuring entity and(or) non-impartial body, then judicial review. This is a clear case of "apparent" conflict of norms where the countries are deprived of the possibility to choose freely from the wide range of options provided by individual treaties, as they need to comply simultaneously with the requirements of all the treaties.

The next element of the review process requiring attention is the question of standing. In accordance with the GPA (the CEPA, the EPCA) the supplier who has or has had an interest might apply for the review. As discussed in Chapter 3, this

[2]See Art. 61 of the Constitution of Armenia and Art. 13 of the Constitution of Kazakhstan.

provision leaves parties to the GPA a wide scope of standing ranging from the suppliers who have submitted tenders to possibly the members of the public and the NGOs. The EAEU Treaty has a similar approach regarding the standing: the decisions, actions and omissions of the procuring entities before the deadline for the submission of bids can be appealed by any person in accordance with the legislation of the MS.[3] This leads to two separate conclusions: *first*, the EAEU MS are free to decide the scope of persons that have standing, limiting it to potential suppliers who have or have had interest only or giving a possibility to public in general to appeal any pre-contractual decision. *Second*, after the contract award notice, i.e. during the standstill period, only potential suppliers can submit a complaint. The Treaty defines "potential supplier" as any legal or natural person (including individual entrepreneur), without mentioning the need to have an interest in a given proceeding. This creates confusion when looking back at point 37(2) of Annex 25 to the EAEU Treaty, which differentiates between the potential suppliers and "any other person". In the absence of official interpretation of the EAEU Treaty provisions on the standing, it is difficult to say whether this is a deliberate regulation or an omission of the drafters. In any case, it seems that both the GPA (the CEPA, the EPCA) and the EAEU Treaty have a similar approach to the issue of standing. "Real" or "apparent" conflict is not observed in this case.

In case of remedies, there is also no conflict whatsoever given the fact that the EPCA follows the GPA when regulating the remedies, and the CEPA adds only the remedy of ineffectiveness of the contract following the EU Remedies Directives approach. The EAEU Treaty does not contain provisions on the remedies. The only provision that might somehow relate to the remedies is point 37(3) of Annex 25 that confers to the monitoring and controlling body the power to prevent and detect violations of procurement legislation and to take measures for the elimination of such violations. As the function of review and the function of prevention and elimination of violations are to be carried out by the same monitoring/controlling body, it can be stated that this is a provision on remedies even though it is very vague and does not reflect on what are the exact remedies. Overall, there is no case of "real" or "apparent" conflict of norms in the area of remedies either.

The understanding of the instances of possible conflict of norms, the so-called *horizontal dimension*, is an important first step leading towards the analysis of the second - *vertical dimension* as described above. The historical development of

[3]See Point 37(2) of Annex 25 to the EAEU Treaty.

Armenia's national legislation and the impact of international commitments on it is discussed next.

3. Contextual analysis of the development of public procurement legislation in Armenia

Armenia is a small landlocked country with the population of around three million people as of 2017[4] having metallurgy and manufacturing (production of foodstuff, beverages, tobacco) as the main sectors of production.[5] It is thus, not surprising that the imports are exceeding the exports of goods and services.[6] From the public procurement perspective, it means the state buys mainly foreign goods and services. The procurement market of the country is small with the estimated total amount of 245.639,8 million AMD[7] (approximately 4,227,879,518 euros). During 2017, 25 767 procedures were announced in total, 15 629 of which were for the procurement of goods.[8] In order to regulate the procurement market, relevant legislation was enacted since 2000.

3.1. 2000 Law

The first Law of the Republic of Armenia "On Procurement" was adopted in 2000.[9] Previously, the 1998 Civil Code regulated the so-called public contracts without detailing the process and procedures for the award. One essential provision though was introduced already in the Code: the usage of a tender for the selection of the

[4]The data is obtained from the official website of the Statistical Committee of the Republic of Armenia, viewed at: http://armstatbank.am/pxweb/hy/ArmStatBank/ArmStatBank__2%20Population%20and%20social%20processes__28%20Population/PS-pp-7-2017.px/table/tableViewLayout2/?rxid=002cc9e9-1bc8-4ae6-aaa3-40c0e377450a.

[5]See Socio-Economic Conditions of Armenia in January-June 2018: Production, Services, viewed at: http://armstat.am/file/article/sv_06_18a_121.pdf.

[6]In 2015 the exports of goods and services were 29,7% of the GDP, while the imports were 41,9% of the GDP. In 2016 the difference was reduced with exports amounting to 33,1% of the GDP and imports - 42,7%. The data is from the World Bank and can be viewed at: http://databank.worldbank.org/data/reports.aspx?source=2&country=ARM.

[7]See Public Procurement Annual Review 2017, viewed at: http://gnumner.am/hy/page/2017_tvakani_hashvetvutyunner/. It is important to note though that not all contracting entities have submitted reports as per their annual procurement transactions.

[8]See Ibid.

[9]See Law N HO-62 "On Public Procurement", dated 05th of June 2000, viewed at: http://www.arlis.am/DocumentView.aspx?DocID=729.

suppliers to the state.[10] Other provisions regulated the signature of the contract for the supply without further details on the processes, the principles or the methods.

At this time, the international obligation of Armenia stemmed only from the PCA, which did not contain any specific requirement related to procurement. As discussed in Chapter 5, only two articles of the PCA referred to public procurement, namely Article 43 (encouraging approximation of the legislation of Armenia *inter alia* on procurement with the one of the EU) and Article 48 (calling for cooperation in development of conditions for open and competitive tenders for the purchase of goods and services). Thus, the authorities were free to decide on the norms appropriate for the Armenian market specificities. It is also clear that when drafting the first Law on procurement, extensive use was made of the 1994 UNCITRAL Model Law, especially in relation with the review procedures and bodies.

The 2000 Law was a positive start for a country lacking such legislation altogether. *First of all*, the Law established the principle of non-discrimination in the procurement, stating that any person independent of the country of residence has the right to participate in procurement procedures.[11] This was a logical decision taking into account that Armenia is mainly an importing country with low levels of production, the necessary goods/services/works being procured from elsewhere. Hence, the introduction of preferential treatment for local producers or goods originated in Armenia would have been of no use. This provision can be considered a cornerstone of the Armenian public procurement system, as it remained intact in subsequent legislative revisions.

Limitations to the right of a foreign national to participate in procurement in Armenia existed only when the government would have decided that the participation might threaten the national security of the country.[12] Considering the hostile relations with two of its four neighbours, it can be concluded that the suppliers from those countries (Turkey and Azerbaijan) would not be able to participate. No such decision is adopted as of today.

Importantly, the 2000 Law contained articles on the review procedures providing for a tiered system.[13] The supplier had the right to launch a complaint to the procuring entity, the Authorised Body (the Ministry of Finance) and the court.[14] The

[10]See Art. 542 (2) of the Civil Code of the Republic of Armenia.
[11]See Art. 8 (3) of the 2000 Law.
[12]See Art. 8 (2) of the 2000 Law.
[13]See Art. 46 of the 2000 Law.
[14]Art. 45(2) stated: "Each person has the right to a) appeal against the decisions of the contracting authority to the contracting authority in accordance to Art. 46 of the current Law; b) appeal against the decisions of the contracting authority to the Authorised Body in accordance to Art. 47 of the current

Law did not clarify though whether it is compulsory for the supplier to pass all the instances of the review before reaching the judicial review as the final stage. It might seem that the suppliers could choose where to file a complaint first – to the procuring entity or to the Authorised Body. On the other hand, Art. 47 stated that the suppliers whose complaints were not reviewed by procuring entity, who were unhappy about the decision or in case the decision was taken in breach of a deadline, could apply to the Authorised Body. Art. 50 in its turn envisaged that the decisions taken by the procuring entitities and/or the Authorised Body could be appealed to court. Reading these articles in conjunction makes clear that the supplier had to seek the review from the procuring entity first and only afterwards it would have the right to refer to the Authorised Body or the court. When opting for the judicial review, the supplier could skip the stage of the review by the Authorised Body and refer directly to the court.

In case of a tiered system, the question of the deadlines for launching the complaint as well as of suspension of the procedure becomes an acute one as the long procedure might disrupt the procurement process altogether. The 2000 Law in this regard envisaged specific deadlines for the launch of the complaint to the procuring entity (five days after the contract award notice)[15] and to the Authorised Body (within 15 days in case the complaint is launched after the contract award notice)[16] while there was no deadline for the application to the court. In case of the complaint to the Authorised Body, it can be assumed that the 15-day term included also the first tier review with the procuring entity. The first and second tier review bodies were also requested to provide decision within a short period - five working days.[17] Again, there was no such deadline for the court decision (which is understandable considering the independence of the judicial authorities and internal procedures for the allocation of cases within the courts).

The procurement process could be suspended by the Authorised Body in case of the review in the first and second tiers for up to seven working days if the supplier justified that it would bear damages otherwise.[18] This meant that during the review by the procuring entity, the supplier had to apply simultaneously to the Authorised Body asking for the suspension. Burden of proof of damages, in case the suspension was not granted, was on the supplier. The suspension period, if granted, might be

Law; c) appeal to the court against the decisions of the contracting authority and/or the Authorised Body in accordance to Art. 50 of the current Law". (Translation is provided by the author).

[15]See Art. 46 (1) of the 2000 Law.

[16]See Art. 47 (1) of the 2000 Law.

[17]See Article 46 (3) and Art. 47 (4) of the 2000 Law.

[18]See Art. 49 (1) of the 2000 Law.

prolonged until the process of review was over but it could not be more than 15 working days.[19] This is an important provision limiting the possibility of suspending the process for a period long enough to damage the procurement process. The procuring entity also had some leverage here as it could ask to continue the procurement process without suspension if this followed from the defence and national security needs.[20]

The above analysis shows that the Armenian authorities drafted provisions in such a way that the aggrieved suppliers had at least five working days to appeal the decision of the procuring entity to the Authorised Body. Furthermore, the deadlines to submit a complaint and the period of suspension of the process were also harmonised, thus, allowing the suppliers to go through all the tiers without a concern for missing the deadline to appeal the supposedly illegal decisions.

The standing was limited to the persons that were harmed or might be harmed as a result of the actions of the procuring entity and/or the Authorised Body.[21] Unfortunately, no specific case could be found in order to assess how wide the standing was interpreted at that time but it can be assumed that the suppliers had to show the actual or potential harm of their interests, the problems related to which were discussed in Chapter 3. As will be seen, the subsequent revisions of the Law allowed everyone to complain opening the floor also for the non-government organisations and public in general.

The decisions of the procuring entity related to the choice of the procedure and the ones based on the mandatory legislative requirements, were not reviewable.[22] The decision on the choice of procedure is a crucial one especially if it relates to the usage of single sourcing, hence the restriction to review such decisions can be claimed to be ungrounded.

As regards the remedies, they differed depending on the tier of review. The first tier could take a decision to reject the complaint or to sustain it (partially or wholly).[23] The Authorised Body, instead, acting as a body reviewing the decisions of the procuring entity had the powers to i) forbid the procuring entity to take some decisions, conduct some actions or use specific procedures; ii) oblige the procuring entity to take specific decisions, conduct some actions and specific procedures; iii) partially or wholly cancel the decisions of the procuring entity or adopt a decision

[19]See Art. 49 (2) of the 2000 Law.
[20]See Art. 49 (3) of the 2000 Law.
[21]See Art. 45 (1) of the 2000 Law.
[22]See Art. 45 (1) of the 2000 Law.
[23]See Art. 46 (3) of the 2000 Law.

substituting that of the procuring entity, except for the decision to cancel the contract award or the termination of the contract; iv) oblige the procuring entity to repay the costs related to the participation in the procurement procedures; v) cancel the procurement procedure altogether.[24] The procuring entity was also responsible for covering damages suffered as a result of its wrongful actions. It is obvious that the Authorised Body had vast powers and essentially could have a say about any aspect of the procurement process, including substituting the decisions of the procuring entity with its own and issuing instructions on the usage of procedures it deemed appropriate.

Thus, a robust system of review with complex rules covering the forum of the review, deadlines as well as remedies was introduced in Armenia, the only international obligation regarding procurement being the PCA from 1999, which, as discussed, did not contain specific obligations in this area. As a first attempt to establish a review system, the 2000 Law can be considered a very good start. The new Law "On Procurement" in 2004 also contained provisions on procurement review mechanisms. [25]

3.2. 2004 Law

The 2004 Law amended the system of the review of procurement complaints. As was the case with the 2000 Law, the tiered system remained in place. Unlike the previous Law though, the first mandatory tier, i.e. the review by the procuring entity, was not mentioned even though it was not explicitly prohibited to refer to the procuring entity. Hence, the Authorised Body was acknowledged as the first instance to launch a complaint to. A new unit dealing specifically with the procurement complaints was created to assist the Authorised Body in reaching a decision within a period of ten to twenty working days after the receipt of the complaint.[26] The scope of the complainants was not changed and the persons harmed or risking being harmed could apply.[27] The scope of the Authorised Body decisions was limited in comparison to the 2000 Law. The remedies at that time included: i) forbidding the procuring entity or the evaluation committee to take specific actions or decisions; ii) obliging procuring entity or the evaluation

[24]See Art. 47 (3) of the 2000 Law.
[25]See Law N HO-160-N "On Procurement", dated 06th of December 2004, viewed at: http://www.arlis.am/DocumentView.aspx?DocID=40700.
[26]See Art. 53 of the 2004 Law.
[27]See Art. 52 of the 2004 Law.

committee to take appropriate decisions except for the decision to terminate the contract; iii) revising the adopted decision; and iv) cancelling the procurement procedure altogether.[28]

The power to "revise" the adopted decisions raises some questions. The power to forbid or oblige the procuring entity to take specific actions (decisions) is already envisaged. What does the power to "revise the adopted decision" refer to? Can it refer to the cases of substituting the decisions of the procuring entity with its own decisions? If this was the case, this would be mentioned clearly as in 2000 Law. It seems that "revision", rather, refers to the cases where the decision is not substituted but some amendments are incorporated. Furthermore, this might also be the result of the partial utilisation of the 1994 UNCITRAL ML allowing the body carrying out the administrative review to "revise an unlawful decision by the procuring entity or substitute its own decision for such a decision, other than any decision bringing the procurement contract into force".[29]

The suppliers did not have to apply for the suspension any longer and the Authorised Body had the right to suspend the process until the case was resolved.[30] As with the 2000 Law, in case the procuring entity applied in writing for the continuation of the process due to the defence and national security reasons, the process might not be suspended.[31] The procuring entity should also pay damages to the suppliers, but the decision should be taken by the court, as this was not included in the powers of the Authorised Body. The judicial review remained another forum and could be used instead or after the review by the Authorised Body.

In this period, in order to implement the legal obligations set out in the PCA, including the ones related to the public procurement, the Government approved a Partnership and Cooperation Agreement National Implementation Program.[32] In the area of public procurement, the Armenian legislation was to be approximated with the respective EU Directives.[33] Unfortunately, there was no clear benchmark

[28]See Art. 53 of the 2004 Law.

[29]See UNCITRAL Model Law (1993), Art. 44 (3) (e), viewed at: http://www.uncitral.org/pdf/english/texts/procurem/proc93/proc93.pdf.

[30] See Art. 55 (1) of the 2004 Law.

[31] See Art. 55 (2) of the 2004 Law.

[32]See An Excerpt from the Session of the Government of Armenia, "31. On Approval of the National Program 2006-2009 for the Implementation of the Partnership and Cooperation Agreement between the Republic of Armenia and the European Communities and its Member States Directed at the Integration with the European Union", N11, dated 23 March 2006.

[33]Reference is made to the Council Directive 89/665/EEC of 21 December 1989; Council Directive. 92/13/EEC of 25 February 1992; Council Directive 92/50/EEC of 18 June 1992; Council Directive 93/36/EEC of 14 June 1993; Council Directive 93/37/EEC of 14 June 1993. See supra note 32, 114-115.

of the exact provisions of the EU Procurement Directives, which Armenia should approximate its legislation with. This might have meant that the Armenian legislation was expected to be compliant with every provision of the EU legislation on public procurement thus having the same burden as the candidate countries (maximalist interpretation of the commitment). Such interpretation would have been unlikely given the fact that the PCA did not require approximation: Armenia was only to "endeavor" to make the legislation "gradually compatible" with that of the EU. On the other hand, the absence of a clear set of provisions that the Armenian legislation should comply with created a gap allowing Armenian authorities to choose the norms they were willing to implement in national legislation.

In the meantime, given the lack of capacity in the Armenian Ministry of Finance and the Ministry of Economy, the EU suggested technical assistance in the form of capacity-building sessions.[34] As a result, the new Law "On Procurement" was adopted in 2010, which was also the basis for the accession to the GPA. It can be concluded that the PCA, at that time the only binding international agreement of Armenia with reference to public procurement, had a prominent role in the future accession to the GPA even though the PCA itself did not elaborate much on the procurement procedures and processes.

To sum up, the 2004 Law rather simplified the review processes with the creation of a two-tiered system instead of three. Rules were clarified with the Authorised Body acting as the main body reviewing the complaints against the actions/decisions of the procuring entity or the evaluation committees. In addition, the new Law was a good starting point for the launch of the e-procurement reform, which was taken further with the adoption of the specific strategy.

3.3. Strategy for the installation of the electronic procurement system and the ENP Action Plan

In 2006, the Government of Armenia undertook to reform the public procurement system, which was thought to be ready for the electronic procurement. The Strategy for the Installation of the Electronic Procurement System was approved by binding Government Decision N137-N dated 26 January 2006.[35] It provided a

[34]See supra note 32 pages 114 and 116.

[35]See The Strategy for the Installation of the Electronic Procurement System was approved by the Government Decision N137-N dated 26 January 2006, viewed at: http://www.arlis.am/DocumentView.aspx?DocID=14388. This is a legally binding document.

comprehensive, all-encompassing approach towards reforming the whole procurement system including but not limited to de-centralisation of the procurement function, joining the GPA as well as the implementation of the electronic procurement in the territory of the country. The future ENP Action Plan discussed below also referred to this document thus making it an important stepping-stone towards the compliance with the requirements of the EU *acquis*.

From the perspective of international obligations during this period, the EU-Armenia Action Plan should be mentioned.[36] The Plan largely drew on the legal requirements from the PCA in many areas, as it did not have legally binding effect being a soft law tool setting up the priorities for the bilateral relations of Armenia with the EU within the scope of the ENP.[37] It explained and prioritised the actions necessary to comply with the legal requirements of the PCA and contained eight priority areas ranging from the rule of law, respect for human rights, and improvement of investment climate to the enhanced cooperation in the area of regional cooperation. More detailed provisions laid down specific actions to be undertaken mainly by the Armenian government. Regarding public procurement, the following actions were specified:

✓ "Ensure implementation of (public) Procurement Law;

✓ Ensure compliance of the procurement system with the EU procurement legislation and principles, in particular transparency, information provision, access to legal recourse, awareness and training among [procuring entities] and business community as well as limited use of exceptions;

✓ Review existing procedures and improve the administrative capacity of the State Procurement Agency;

✓ Ensure implementation of the "Strategy for Introduction of an Electronic Procurement System in Armenia";

✓ Accede to the WTO Agreement on Government Procurement".[38]

These obligations laid the basis for having a transparent and competitive procurement market with the legislation compliant with international best practice. Armenia's progress in the Action Plan implementation was monitored by the EU institutions with the last review taking place in 2015, assessing the progress of

[36]See EU-Armenia Action Plan, viewed at: https://eeas.europa.eu/sites/eeas/files/armenia_enp_ap_final_en.pdf.
[37]More on the ENP see Chapter 4.
[38]See supra note 36.

Armenia in 2014, and considering the political change as a result of the EAEU accession.[39] Overall, the latest progress report stressed that Armenia made little progress in implementing the Action Plan. Unlike this generally negative view, "significant improvements" of the procurement area were acknowledged, especially related to the capacity building sessions, the usage of framework agreements and the random monitoring of procurement transactions.[40] It is true that in compliance with the ENP Action Plan, Armenia acceded to the GPA in 2011 and drafted the secondary legislation implementing the PPL but it cannot be claimed that there was a "significant improvement" of the procurement area. Unfortunately, the EU while assessing the progress, did not analyse the situation on the ground in Armenia sufficiently. This can be deduced for example from the fact that the usage of framework agreements was mentioned as a sign of improvement of the system while in reality the scheme did not provide for any benefits.[41] Unlike this positive assessment by the EU, the Open Society Foundation, after analysing the implementation progress of the ENP Action Plan, voiced several shortcomings and irregularities in the procurement area, such as the limited usage of e-procurement, procurement from specific companies and corrupt practices.[42]

Ultimately, the main international actor in terms of setting the agenda for public procurement reforms in this period was the EU, which eliminated the possibility of any tension at a legislative or practical level. The adopted strategies and action plans were in line with the undertaken obligations with the caveat that some of them were not appropriately implemented in practice. The EU also supported Armenia's accession to the GPA, as mentioned in the 2006 Strategy discussed above.

The next step in the development and reform of the public procurement system of Armenia was the adoption of the Strategy on Procurement System Reforms in 2009, which brought Armenia a step closer to having a GPA-compliant legislation.

[39]See Joint Staff Working Document, "Implementation of the European Neighbourhood Policy in Armenia; Progress in 2014 and recommendations for actions", Brussels, SWD(2015) 63 final, 25.3.2015.
[40]See supra note 39, 12.
[41]The framework agreements were not closed framework agreements as in the EU. Armenian authorities opted for the so-called "open framework agreements" which essentially were just lists of suppliers. This decision was taken out of fear of procurement market closure, which might have increased the risk of corruption. See Eliza Niewiadomska and Astghik Solomonyan, "Public Procurement in Global and Regional Trade Agreements: Lessons Learned in Armenia", in Aris Georgopoulos, Bernard Hoekman and Petros Mavroidis (eds.), *The Internationalization of Government Procurement Regulation*, (Oxford University Press 2017), 169.
[42]See Open Society Foundation-Armenia, "Monitoring Report on Implementation of ENP in Armenia in 2015-2017", October 2017, 9-10.

3.4. Strategy on procurement system reforms

The Strategy on Procurement System Reforms was adopted by the Government of Armenia as an Annex to a Protocol Decree after failing to implement the targets laid down in the earlier 2006 Strategy and taking into account the need to accede to the GPA as was prescribed in the ENP Action Plan.[43] Thus, Armenia was preparing to undertake additional international obligations after becoming a party to the GPA.

Overall, the 2009 Strategy was much more detailed and included clear tasks related to procurement planning, financing, contract management stages. Based on the Strategy, a timeline was approved by the decision of the Prime Minister containing specific targets, actions required to reach them as well as deadlines and anticipated results. [44] The accession to the GPA was one of such targets the deadline for which was set as December 2010. This deadline was missed by several months, as Armenia joined the GPA in September 2011. Notwithstanding this, the fact that the target was included in a normative act provided some validity and necessary political support for the speedy accession.

The gist of the legislative and institutional amendments suggested by the Strategy was mainly the compliance with the ENP Action Plan and the GPA requirements especially considering the push to access the GPA in a short period after the adoption of the 2009 Strategy. Importantly, the function of review should have been separated from the Authorised Body and a separate body should have been created. This requirement was satisfied with the adoption of 2010 Law considered next. Unfortunately, some provisions as well as the implementation on the ground proved that the newly established Procurement Review Board (PRB) was short of compliance with internationally recognised standards of independence and impartiality.

3.5. 2010 Law

One of the requirements for the accession to the GPA is the compliance with the text of the Agreement, including the requirement to have at least one independent review body. The timing of Armenian accession coincided with the amendments to the GPA itself together with the DCFTA negotiations with the EU and as will be seen

[43]This is a binding legal document. It is in file with the author.

[44]See Decision of the Prime Minister of the Republic of Armenia N862-A, dated 12 October 2009 "On the Adoption of Timeline for the Measures Derived from the Procurement System Reform Strategy", viewed at: http://www.arlis.am/DocumentView.aspx?DocID=54231.

below, the Armenian authorities largely considered the new draft of the Agreement as a basis for the accession to the GPA.[45] The 2010 Law "On Procurement" [46] had many similarities with the 2004 EU Directives,[47] as the EU experts assisted the Armenian authorities in drafting the legislation.[48] The DCFTA negotiations were also commenced and it was logical to draft a legislation that could be compliant with all future (planned) international obligations. The 2010 Law was considered compliant with the GPA by its parties, and the country was given the green light to accede to it.

The principle of non-discrimination, the cornerstone of the Armenian public procurement legislation since its inception, was maintained also because it is one of the most important principles under the GPA. This ensured smooth negotiations resulting in accession in approximately two years.[49] The Armenian case of accession is still considered a textbook one referring to the speedy and unhindered process in a very limited period, which in its turn is the result of the work carried out to make the legislation compliant with the requirements of the GPA. Armenia was interested in joining as quickly as possible more for political rather than trade reasons as is proved by the data related to the Armenian procurement market mentioned above.

From the institutional point of view, the 2010 Law created the Procurement Support Center (PSC) with the powers related to the maintenance of the e-procurement platform and provision of capacity building activities. It also acted as a secretariat for the newly created "independent" PRB causing some problems as discussed below. The tiered system of review was maintained with the first tier being the PRB and the second being the judicial review. Even though, as with the previous Law, the procuring entities were not mentioned as an instance for the review, nothing prohibited the aggrieved suppliers to resort to them first. The PRB was designed as an "independent and unbiased" body that was composed of representatives of

[45]Even though the GPA gives several options as to the institutional set-up and procedures of the review bodies, the Parties usually ask the acceding country to create an independent review institution. The EU also pays attention to the level of independence of the review body when negotiating.

[46]See Law N HO-206-N "On Procurement", dated 22 December 2010.

[47]See the European Parliament and the Council Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJEU L 134/114; the European Parliament and the Council Directive 2004/17/EC of 31 March 2004 on coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJEU L 134/1.

[48]As was mentioned in the Strategy from 2009, the OECD/Sigma project, principally financed by the EU, was largely involved in the development of the new approaches included in the PPL from 2011. More about Sigma's work in Armenia see: http://sigmaweb.org/countries/armenia-sigma.htm.

[49]See "Armenia to Accede to the WTO Government Procurement Agreement", WTO: 2010 News Items, viewed at: https://www.wto.org/english/news_e/news10_e/gpro_07dec10_e.htm.

procuring entities and NGOs.[50] The list of PRB members was unbalanced in terms of the engagement: out of 72 participants, only three were representatives of the NGOs, the rest being representatives of procuring entities.[51] The cases were heard with the panel of three members randomly chosen from the list.[52] Despite this measure, the possibility of the conflict of interest was acute. As civil servants, the members of the PRB were not paid for additional work they were asked to do and could not be called "independent" and "unbiased" when discussing cases. Considering this, the 2010 Law laid down several norms to ensure the independence, albeit somewhat insufficiently. For example, the PRB members were appointed for five years with the possibility of prolongation for another five years.[53] The head of the panel should have been a qualified lawyer with relevant experience and the PRB members could be dismissed only in cases specifically envisaged in the Law.[54] The members had to sign a document on the absence of conflict of interest regarding the cases under review.[55] These were all provisions ensuring independence but in reality, being representatives of procuring entities without high remuneration, the independence of the PRB members was not ensured.

The scope of the potential complainants was enlarged in 2010 Law and included practically anyone, which means that the standing was wider than that provided by the GPA and the EU Remedies Directive.[56] NGOs, civil society, as well as potential suppliers were considered eligible to launch a complaint. It might be expected that this enlargement of the scope entailed an influx of complaints, but this did not happen as seen in Table 2 below. The reason might be the lack of trust in the system and the potential conflict of interest with the PSC as the Secretariat for the PRB. PSC was acting both as a body advising the procuring entities and the suppliers and providing the necessary support to the PRB. Thus, it was possible that the PSC dealt with the complaint, stemming from its advice to the procuring entities or the suppliers. The PSC also drafted the decisions, while the members of the PRB simply signed them. Cases were registered when the PRB members did not even attend the premises of the PSC to sign the already drafted decisions.[57]

[50]See Art. 46 of the 2010 Law.
[51]See Hasmik Yengoyan, "Non-Judicial Resolution of Public Procurement Disputes", Collection of Conference Materials of the Staff of the YSU Faculty of Law, (Yerevan State University Publishing 2017).
[52]See Art. 47 of the 2010 Law.
[53]See Art.46:4 of the 2010 Law.
[54]See Art. 46:5 and Art. 47 of the 2010 Law.
[55]See Art. 47:3 of the 2010 Law.
[56]See Art. 45 of the 2010 Law.
[57]The cases were reported while the author was working at the premises of the Ministry of Finance of the Republic of Armenia.

Regarding the remedies, the PRB was given 20 days to reach one of the following decisions: take interim measures (the suspension of the procedure), cancel specific decisions or actions of the procuring entity and cancel the already concluded contract (in case the contract was concluded without the publication of the contract notice or with the violation of the standstill period or the suspension of the procurement process ordered by the PRB).[58] In case the overriding public interest was involved, the contract could be kept in place, but its implementation period would be shortened or fines would be imposed on the procuring entities.[59] The 2010 Law granted the PRB the power to announce the entire process legal or illegal, which could be the basis for claiming the damages in court. There was no automatic suspension of the procurement process but unless a decision on the interim measures was taken based on the application of the supplier, the procuring entity had no right to conclude a contract.[60] It was also envisaged that the PRB could take a decision on the suspension of the process in case this was necessary to prevent the possible damage until the final decision on the complaint was reached.[61] The standstill period of ten calendar days was ensured for the procurement of over one million AMD (about 2000 EUR) while below that threshold the period was limited to five calendar days.[62] Thus, Armenia complied with the requirement of the GPA on provision of at least ten calendar days to the suppliers for the preparation and the launch of the complaint as the GPA norms apply to procurement above the threshold mentioned in Appendix I of Armenia.

To sum up, the comparably well-designed body was not efficient in reality due to the lack of trust from the suppliers and implementation flaws proven *inter alia* by the low number of complaints launched during the work of the PRB. Thus, the mere inclusion of the mandatory requirements of the international treaties into the national legislation is not enough to ensure proper implementation in practice.

After the accession of Armenia to the EAEU Treaty, there was a need to amend the Law once again. The current 2016 Law of the Republic of Armenia "On Procurement" will be the main center of discussion of the following subsection as it was drafted to be compliant with both the GPA and the EAEU Treaty. Later the Armenian authorities negotiated the CEPA with the EU in such terms that would not contradict any of the country's previous obligations.

[58]See Art. 48 of the 2010 Law. This remedy is similar to the remedy of ineffectiveness found in Art. 2(d) of the Remedies Directive.
[59]See Art. 48 of the 2010 Law.
[60]See Art. 49 of the 2010 Law.
[61]See Art. 49 of the 2010 Law.
[62]See Art. 9 of the 2010 Law.

3.6. 2016 Law

The new version of the Law of the Republic of Armenia "On Procurement" was adopted in 2016, with effect from 2017.[63] The previous Law has undergone substantive amendments especially in relation with procurement review mechanism.

The PRB was substantially amended both from procedural and institutional point of view with additional amendments in March 2018. The new body was again recognised as being independent and unbiased when hearing the cases and was composed of up to three members.[64] The members reached a decision on each case solely while acting on behalf of the PRB.[65] The collegiality of the adoption of the decision was, thus, eliminated trusting one person with the review of the case. Moreover, the member of the review body was remunerated from the state budget through the Ministry of Finance, which also organised the "working conditions" of the PRB by providing *inter alia* the office space.[66] All the above mentioned undermined the independence of the PRB.[67] On the other hand, the Law still contained provisions on the appointment and dismissal of the members, which provided some guarantees of independence of the PRB.[68] Thus, the members were appointed by the President of Armenia upon the presentation of the Prime Minister. The dismissal could take place only in cases referred in Art. 48(7), e.g. in case of the inability to continue working for more than three months in a row (except for the cases of maternity leave), if the citizenship was renounced, if the person was announced dead or missing by the court. Important was also the provision forbidding the member to review the case if there was a conflict of interest involved.

The Law envisaged the price for launching the complaint, which remained the same as in the previous secondary legislation: 30 thousand AMD (approximately 60 EUR).[69] The fee is not as high as to restrain the suppliers from filing a complaint and is an additional source of income for the state budget. It might even stop frivolous complaints in case such problem arises in Armenia. For now, the statistical

[63]See the Law N HO-21-N, "On Procurement", dated 16th of December 2016.
[64]See Art. 48 of the 2016 Law.
[65]See Art. 49 of the 2016 Law.
[66]See Art. 47 of the 2016 Law.
[67]See OECD/Sigma Brief 25, "Establishing Procurement Review Bodies", July 2013, viewed at: https://www.oecd-ilibrary.org/docserver/5js4vmn47gzr-en.pdf?expires=1536936473&id=id&accname=guest&checksum=0A81978FB45C0937343669BDDBEAEC0E
[68]See Art. 48 of the 2016 Law.
[69]See Art. 50 of the 2016 Law.

data shows an increase in the number of complaints with every year but there is no evidence of the influx of frivolous complaints.[70]

Table 2

Number	**Out of the received complaints**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**[71]	**2018**
1	Sustained	15	17	19	21	24	58	42 (+24 sustained partially)	45 (+22 sustained partially)
2	Rejected	5	11	20	24	27	62	35	44
3	Left without examination	6	10	10	2	3	8	15 (+ 1 suspended)	21
4	Finished (restricted procedure*)				1				1
Overall		**26**	**38**	**49**	**48**	**54**	**128**	**117**	**132**[72]

**This complaint was examined by the Ministry of Finance due to the specificity of the procedure.*

It is obvious from the data that the number of complaints doubled in 2016. As the new Law was not in force yet, the increase in the numbers might be attributed to the general enhancement of the knowledge about the procurement procedures and the PRB. The small decrease in the number in 2017 can be related to the amendments in the institutional structure of the PRB and the new rules.

Regarding the remedies, the PRB was entitled to i) forbid the procuring entity and the evaluation committee to take specific actions or decisions; ii) oblige to take specific decisions, including the decision to cancel the procurement, except for the termination of the contract and iii) amend the adopted decisions.[73] Moreover, the

[70]Annual procurement reports can be obtained from the official procurement website of Armenia, viewed at: www.gnumner.am (in Armenian only).
[71]The period is from 24th of April to 31st of December 2016, as the new Law entered into force on 24th of April 2017.
[72]Even though the official report from 2018 mentions receiving in total 132 complaints, the sum of all the decisions shows 133 complaints.
[73]See Art. 50 of the 2016 Law.

PRB was also entitled to monitor the implementation of its decisions. The suspension of the procedure was made automatic, meaning that once the complaint was received the procurement procedure was suspended until the PRB reached a decision and *published it*. The exception could be made in case of the need for the protection of the public or defence and national security interests. If the procuring entity justified the harm to the mentioned interests, the PRB could take a decision to continue the procurement process.[74] As can be seen, the burden of proof was reversed and the procuring entities had to prove why they think the suspension of the process would harm the public or defence and national security interests.

The PRB was obliged to take a decision within 20 calendar days while this deadline could be extended once for up to ten calendar days with the substantiated decision of the PRB.[75] The PRB was entitled to hear the cases related to the pre-contractual disputes while the disputes related to the contractual stage should be addressed to the court.

3.6.1. Recent amendments from 2018

Even though the Law entered into force in 2017, it was amended in March 2018 due to Constitutional amendments of 2015, which made Armenia a Parliamentary state.[76] In accordance to Art. 122 of the newly amended Constitution, autonomous bodies can be created for the implementation of the basic human rights as well as the protection of the constitutionally envisaged public interest of fundamental importance.[77] The Parliament is entitled to create such bodies with the majority of the total votes. This provision was the basis for the Ministry of Finance to suggest amending the Law with regards to the review body. It should be mentioned though that these amendments were unnecessary as the functions of the PRB could be considered as protecting the fundamental rights of the aggrieved suppliers in which case the Parliament would be asked to create an autonomous body for hearing the procurement complaints.

Nevertheless, the amendments entered into force and the notion of the PRB was amended; currently the Law refers to the "persons reviewing the procurement

[74]See Art. 51 of the 2016 Law.
[75]See Art. 50 of the 2016 Law.
[76]See "Constitutional Amendments Approved in Armenia's Referendum", *Armenian Weekly,* 7 December 2015, viewed at: https://armenianweekly.com/2015/12/07/constitutional-amendments-approved/.
[77]See the amendments to the Constitution of the Republic of Armenia from 6th of December 2015. The text can be viewed at: https://www.president.am/en/constitution/.

complaints".[78] Thus, the "body" as such is eliminated, and the aggrieved suppliers are practically deprived of the right to appeal to the court. [79] As is evident from the recent cases submitted to the court, the complaints are returned to the complainants. In case ԵԴ/*16173/02/18 Europa LLC against the person reviewing procurement complaints/Emil Sargsyan,* the complainant mentioned Mr. Emil Sargsyan[80] as a respondent, while also noting that the copy was submitted to the Ministry of Finance. In addition, the complainant sent the complaint to the address of the Ministry of Finance where the offices of the persons reviewing the complaints were located. The court remarked that it was unclear in what capacity was the Ministry involved as it was not the respondent. Furthermore, the court stated that the documents should be submitted to the registered or current address of the respondent if he is an individual (which is the case here in accordance to the court).[81] This case is a clear example of the problems created by the amendments to the Law. The PRB as such ceased to exist being substituted by individuals. As a result, the suppliers cannot implement their constitutional right to judicial protection.

The provisions on the remuneration are also eliminated. It is unclear how the persons reviewing the procurement complaints will be paid and what will be the basis for the calculation of their salaries. The new draft also does not provide the maximum number of people to be appointed for the review of the complaints and does not specify the requirements for the appointment. Unlike the current version of the Law, the previous draft of the Law provided that individuals precluded from taking public offices by the decision of the court, who are announced as having no or limited capacity as well as people convicted for a crime (unless the conviction is removed or expired) could not be appointed as members of the PRB.[82] The previous version of the Law also limited the possibility of the PRB member to hold another position or undertake other paid job except for scientific, creative and pedagogic job.[83] This provision was eliminated as well. The cases of dismissal of the people

[78]See Art. 47 of the 2016 Law as amended in 2018.

[79]See Hasmik Yengoyan, "Several Challenges Related to the Legal Status of the Review Body under the Law "On Procurement" as of 16 December 2016", Collection of Conference Materials of the Staff of the YSU Faculty of Law, (Yerevan State University Publishing 2018).

[80]Mr Emil Sagsyan was one of the persons appointed to review the procurement complaints.

[81]See also case ԵԴ/14692/02/18, "Vaga-Farm" LLP vs Person Reviewing Procurement M. Ananyan, dated 24.07.2018; or case ԵԴ/13953/02/18, "Vandist" LLP vs Procurement Review Board (third party the Ministry of Finance). All the cases are accessible through Datalex (in Armenian only): www.datalex.am.

[82]See Art. 48 of the 2016 Law.

[83]See Art. 48 of the 2016 Law.

reviewing the procurement complaints are also not envisaged in the new provisions on the review.

In addition, it is unclear how the review should be carried out as there is no provision stating that the complaint must be reviewed by individual members of the PRB. This might mean that there is a possibility of having a committee review, which will enhance the transparency and objectivity of the procedure. Unfortunately, at the time of completing the current research, two people are appointed as "persons reviewing procurement complaints" who take the decisions solely.[84] The recent Decision of the Minister of Finance "On regulating activities of a person reviewing procurement complaints"[85] raises several questions about the relationship of such persons with the Ministry of Finance. In accordance to points 3 and 12 of the mentioned decision, the complaint is submitted through the Secretariat of the Ministry of Finance and its copy together with the copy of the documents received from procuring entities should be directed *inter alia* to the procurement policy unit of the Ministry of Finance and to the State Supervision Authority. Thus, the independence of the persons reviewing procurement complaints is jeopardised by the possibility of intervention from other bodies.

Last but not least, regarding remedies, the person reviewing the complaint currently has no power to amend the decision adopted by the procuring entities. This is a clear limitation in comparison to the previous version of the Law and does not add any value.
All the other elements of the review, such as the deadline to reach a decision and provisions on conflict of interest, remained unchanged.

It is obvious that even though the person reviewing the procurement complaints should be independent when reaching the decisions in accordance to the Law, the current set-up of the review process does not contain elements essential to ensure an unbiased review. The discussed institutional set-up is not warranted by the international obligations of the country and is not a forced solution due to the parallel implementation of different trade agreements. Rather, this is a policy choice justified by the Constitutional reform, which, as discussed below, makes Armenia non-compliant with its international obligations. Moreover, the EU and Canada raised the issue of the non-compliance of the Armenian review body with the GPA during the latest Trade Policy Review of Armenia within the scope of its

[84]This information was conveyed by the Ministry of Finance in an informal conversation with the author.
[85]See the Decision of the Minister of Finance of the Republic of Armenia N600-N "On regulating activities of a person reviewing procurement complaints", dated 06 December 2018.

commitments under the WTO.[86] Some steps to remedy the non-compliance are expected from Armenia and the latest discussions on this matter largely relate to the possibility of entrusting the review to judicial authorities while creating a special streamlined procedure for hearing procurement claims only.[87] No official document contains such amendments to the Law so far.

In order to make the discussed shortcomings of the current legislation explicit, a point by point comparison of the current provisions of the Law with the international obligations related to the review bodies and procedures will be completed below (*vertical comparison*) with the aim of visualising the extent of non-compliance with the undertaken international obligations.

3.7. Compliance with international obligations

It should be noted that the "conflict of norms" situation (either real or apparent) does not arise in case of vertical comparison as in accordance with Art. 5 of the Constitution of the Republic of Armenia, in case of non-compliance between the norms of international treaties ratified by the Republic of Armenia and national legislation, the provisions of the international treaties apply. The same relates also to the situation of Kazakhstan. This also means that Armenian authorities need to amend the 2016 Law in order to comply with their existing obligations. Below is the comparative table of Armenia's international obligations regarding procurement review procedures and bodies and the most recent Law "On Procurement".

	The EAEU Treaty	**The GPA**	**The CEPA**	**2016 Law**
Principles of review	Protection of rights and interests of persons in the area of public procurement, control over the compliance with the procurement legislation, national regime.	Timeliness, effectiveness, transparency, non-discrimination.	Timeliness, effectiveness, transparency, non-discrimination.	Equal treatment.

[86]See Trade Policy Review of Armenia: Minutes of the Meeting, WT/TPR/M/379/Add.1, dated 8 February 2019.
[87]Unofficial information gathered from the author's visit to the premises of the Ministry of Finance of the Republic of Armenia in August 2019.

Forum	Tiered system (only controlling/monitoring bodies are mentioned).	Review within the procuring entity (optional); at least one administrative or judicial authority (mandatory); non independent body + judicial review.	Review within the procuring entity (optional); at least one administrative or judicial authority (mandatory); non independent body + judicial review.	Persons reviewing procurement complaints (proclaimed as body).
Standing	Before the deadline for bid submission, anyone in accordance with national legislation; after the deadline only the potential suppliers.	Supplier who has or has had interest.	Supplier who has or has had interest.	Any person.
Standstill period	Ten days since the adoption of the award decision.	No but ten days to prepare the complaint.	Yes. At least ten calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers.	In case of open tender and e-auction the standstill period is ten calendar days, for other procedures it is five days.
Standard of scrutiny and legal effect	None.	None.	None.	No substitution of the decisions of procuring entities.
Deadline to reach a decision	None.	Reach a decision in a timely fashion.	Reach a decision in a timely fashion.	20 calendar days; can be extended once for ten calendar days.

Remedies	None.	Interim measures, correction, compensation.	Interim measure, set-aside, damages, ineffectiveness of the contract.	Restrict to take some actions and decisions; oblige to take appropriate decisions, including on the cancellation of the procedure (except for invalidation of the contract); take a decision on the inclusion of the supplier in the blacklist and monitor the implementation of the decisions of the review body. Damages awarded by the courts.

The principles of timeliness, effectiveness and transparency are not directly mentioned in the Armenian legislation, but the overall system seems to comply with these principles. There are clear deadlines for the launch of the complaint (ten or five calendar days depending on the method) and twenty (maximum thirty) calendar days for reaching a decision and this is compliant with the principle of timeliness. The principle of effectiveness is fulfilled by the existence of review procedures, detailed description of the procedure and the availability of remedies. The transparency is ensured with the publication of the submitted complaints and the decisions of the review board.

The same level of compliance was not achieved in relation with the forum for the dispute settlement. As examined in Chapter 3, the GPA (the CEPA) has a very flexible approach allowing different institutional settings for the review body but paying much attention to its independence. As discussed, the review process in Armenia is carried out by an "independent body" which in reality is comprised of two people within the system of the Ministry of Finance. The choice of the forum is non-compliant with the requirements of the EAEU Treaty either. First, it is unclear how the appointed two persons can be considered "a body" even though they are listed as such in the Law "On State Governance Bodies" Art. 6 of which states that the bodies, subordinated to the Ministries, act within the scope of the area of activities reserved for the Ministry and ensure implementation of different

directions of such activities. [88] Essentially, these two individuals are under the control of the Ministry. The list of subordinated bodies (e.g. Penitentiary Service, Migration Service) and their status indicate that the "persons reviewing procurement complaints" cannot be considered as independent and unbiased even though this is declared in the Law. This type of "body" is also neither the regulatory nor the controlling body, hence in most likelihood it is not compliant with the requirements of the EAEU Treaty.

Even though the so-called "body" is "not independent", its decisions are subject to appeal to the court. It might seem that this possibility makes the legislation compliant with the GPA (the CEPA) as the judicial authorities are acknowledged to have the required independence. It was discussed in subsection 2.6 that the right of judicial protection is now hindered with the elimination of the PRB as a body and this makes the solution proposed in the 2018 amendments non-compliant with the requirements of the GPA.

Regarding the standing, the Armenian legislation has interpreted the "interest" test in a wide sense, where the taxpayers are also considered to have an interest. The 2016 Law prescribes that any person can complain before the conclusion of the contract. The scope is much larger than it is envisaged in the EAEU Treaty, which states that after the deadline for the submission of the bids, only potential suppliers can complain. Nevertheless, when looking at the definition of the "potential supplier" in the EAEU Treaty (any natural or legal person), it becomes clear, that there is no contradiction. As is mentioned in sub-section 2.1, there is a confusion as to the definition of "potential supplier", but no further interpretation or guidance could be found in this regard.

In addition, it might appear that the standstill period of five days for methods of procurement other than the open tender and auction contradicts the EAEU Treaty, but this is not the case. The Treaty requires a standstill of ten calendar or working days only in case of the open tender and e-auction while there is no such period prescribed in case of the request for price quotation and single sourcing. Hence, there is no ground to voice non-compliance. GPA affects procurement above the threshold and as in the Armenian legislation the usage of the price quotation is below the GPA threshold,[89] there is no contradiction with the GPA as well.

[88] See Law N HO-260-N dated 23rd of March 2018.

[89] See Art. 22(2) of the 2016 Law. The GPA thresholds for Armenia can be viewed at: https://e-gpa.wto.org/en/Agreement/Latest.

After the amendments from March 2018, the 2016 Law does not contain any reference to the background and qualification of the members of the review body. This is one of the mandatory elements of the CEPA, which requires the members of the review body to "be appointed and to leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal".[90] Moreover, "at least the President of such an independent body [should have] the same legal and professional qualifications as members of the judiciary".[91] This is a clear case of non-compliance. These elements are included to ensure the independence of the review body members which is an important part of ensuring the independence of the board overall, and Armenian legislation does not contain such provisions.

Further, the remedies of the Armenian legislation are compliant with the GPA, the EAEU Treaty and the CEPA. The aggrieved suppliers are entitled to damages (compensation), the unlawful decisions can be set-aside (corrective measures) and the interim measure of suspension is automatic. In addition, it is noteworthy to stress again that the review body in Armenia deals only with the pre-contractual complaints, the contractual disputes are within the remits of the court.

Ultimately, the Armenian 2016 Law and its recent amendments are not fully compliant with all international trade agreements containing mandatory requirements in relation with procurement review mechanisms. Even though this non-compliance stems largely from the Constitutional amendments and their strict interpretation, Armenia still needs to find a solution to respect all of its international obligations related to compliance with undertaken obligations. The next section will investigate the case of Kazakhstan by following the same approach.

4. Contextual analysis of the development of public procurement legislation in Kazakhstan

Kazakhstan is the ninth biggest country in the world with the population of only 17 million inhabitants.[92] Located in Central Asia, its economy is mainly based on mining and extraction of gas, oil and coal.[93] In accordance to the data from the OECD, the economy of the country was boosted since 2000 with a substantive GDP

[90]See Art. 271 (5) (c) of the CEPA.
[91]See Art. 271 (5) (d) of the CEPA.
[92]See Temirbulat Djalankuzov, Mikhail Rubinstejn, Beibut Sulejmenov, Zhuldyz Oshakbaeva, and Warren Busscher, "Kazakhstan", (2004) Journal of Soil and Water Conservation Vol 59:2, 34A-35A.
[93]See Nurlan Nurseiit and Ken Charman, "Selection of the Optimal Way of Development for the Oil Dependent Economy of Kazakhstan", 2018 Eurasian Journal of Economics and Finance, Vol. 6(1), 28.

increase of 2,8-fold by 2014.[94] The country has an ambition to become one of the 30 most developed countries in the world by 2050 as declared by ex-President Nazarbayev in his Communication to the People of Kazakhstan in 2012.[95] As can be seen, the economy of Kazakhstan is more robust and developed than that of Armenia and this is reflected in the procurement market. In accordance with the data submitted to the author by Kazakh authorities, on average annual value of public procurement is 3-3,2 trillion tenge (about 7,5 billion EUR).[96] It is important to note that a considerable portion of the market is not covered by procurement rules. These are procurement transactions of the quasi-public sector, such as national holding "Sovereign Welfare Fund "Samruk-Kazyna" JSC.[97] Such state-owned enterprises have their own procurement rules and as the main emphasis of the current research is on public procurement, the procurement rules of national holdings and other state-owned enterprises are not considered. The next subsection, thus, concentrates on the development of the public procurement system of Kazakhstan with a specific emphasis on the review bodies and procedures.

4.1. The early regulation of public procurement in the 1990s

The Kazakhstani public procurement system was founded by two separate Government Decrees regulating the procurement of goods, services and works for public and municipal needs.[98] The decrees are simple without envisaging specifics of procedures and other details essential for the provision of transparent and competitive tenders. Nevertheless, they set out some standards of transparency

[94]See Multi-Dimensional review of Kazakhstan: Volume 2. In-Depth Analysis and Recommendations, (2017) OECD Development Pathways, 22.

[95]See Communication from President of the Republic of Kazakhstan –Leader of the Nation N.A. Nazarbayev to the People, "Strategy "Kazakhstan – 2050", New Political Course of a Succeeded State", *Industrial Karaganda* (Индустриальная Караганда), 15 December 2012.

[96]1 EUR=404 tenge, as per rate of the Central Bank of Kazakhstan as of 09 August 2018. The data is submitted by the authorities in Kazakhstan and are in file with the author.

[97]Legislation governing the procurement transactions of Samruk Kazyna can be viewed at: https://sk.kz/purchases/?temp=full&id=456&iblock=89.

[98]Decision of the Government of the Republic of Kazakhstan N 586 as of 13 May 1996 "On Public Procurement of Goods (Works, Services)" and Decision of the Government of the Republic of Kazakhstan N 925 as of 24 July 1009 "On the Adoption of Model Provisions on the Organisation of Public Procurement of Goods (Works, Services) for the Satisfaction of the Needs of the Regions"; Texts of the Decrees can be viewed at: https://tengrinews.kz/zakon/pravitelstvo_respubliki_kazahstan_premer_ministr_rk/hozyaystvennaya_deyatelnost/id-P960000925_/ and https://tengrinews.kz/zakon/pravitelstvo_respubliki_kazahstan_premer_ministr_rk/hozyaystvennaya_deyatelnost/id-P960000586_/.

mainly by requiring publishing procurement notices in media and giving the details about the process of procurement.[99] The tenders were mainly open and were cancelled in case less than three suppliers submitted bids.[100]

Preference for local suppliers was envisaged even at the early stages of the development of the procurement system. Thus, Art. 14 stated that local suppliers had preferences over the foreign suppliers in case the price difference was not more than 20%. Unlike Armenia, Kazakhstan opted to close its procurement market for foreign suppliers thus trying to support the development of local businesses. Provisions allowing preferences were maintained in all subsequent legal acts as will be seen below.

The 1996 Decisions contained no detail on the review process except for a small provision stating that the disputes between the suppliers and the procuring entities should be resolved in accordance with the legislation in force. Whether the Ministry of Economy or Finance or the courts were entrusted with the review was not clear. No clarification was provided on the remedies, deadlines for launching the complaint, suspension, standstill period and other elements essential for regulating the review procedure.

The Decision regulating municipal (regional) procurement was almost the identical copy of the one for procurement from state budget with the difference that it was a model document and the akims (heads) of the regions and of the city of Almaty (the capital at that time) were *recommended* to draft regulations for the procurement of goods (works, services) from the local budgets in accordance with the model provisions.

These two Decisions were replaced by a Law that entered into force in 1998 and regulated both public and municipal procurement in a more detailed manner.

4.2. 1997 Law

The first Law of the Republic of Kazakhstan "On Public Procurement" was adopted on 16th of July 1997.[101] Even though it still had gaps in the area of review procedures, it was a much-enhanced version of the Government Decisions analysed above.

[99]See Art. 13 of the 1996 Decision.
[100]See Art. 11 of the 1996 Decision.
[101]See the Law of the Republic of Kazakhstan "On Public Procurement" N 163-I dated 16 July 1997.

The review procedures, though regulated better, raised several questions about the fora, remedies and suspension. Art. 26 stated that all potential suppliers had the right to launch a complaint against the actions and decision of the organiser of the tender or the procuring entity. The Law defined "potential supplier" as the person who submitted a bid with the aim of signing a contract with the procuring entity.

The Law also clearly set out an exhaustive list of decisions that are not subject to review.[102] The list was extensive and included: choice of the method of procurement; choice of contract award criteria; limitation of the scope of suppliers by mentioning that only local suppliers are eligible to bid; and decision of the organiser of the tender to reject all bids. None of the exclusions from the review can be considered legit as they all represent essential elements of the procurement process capable of limiting the possibilities of other suppliers to participate in the procurement procedure.

Nothing more was mentioned in relation with review procedures, except for the statement that the review should be carried out in accordance with the legislation of the Republic of Kazakhstan. On the other hand, Art. 28 contained another provision on the dispute settlement, which ruled that the disputes arising between the procuring entity and the supplier during the process of signing or the implementation of the procurement contract were to be resolved in accordance with the legislation of the Republic of Kazakhstan. Thus, it becomes clear that Art. 26 referred to the pre-contractual disputes but still the difference between these two instances of dispute settlement was not elaborated as they were both resolved "in accordance with the legislation of the Republic of Kazakhstan", a statement which did not provide much clarity on the forum of the review.

At this time Kazakhstan had no international obligations in relation to public procurement, hence the country was free to design a system as it wished. The inclusion of the provisions on the support of local suppliers proved that the country had no external pressure to open its procurement market for foreign participants.[103]

4.3. 2002 Law

The Kazakhstani procurement system was substantially changed with the adoption of the new Law "On Public Procurement".[104] Not only the state bodies like ministries

[102]See Art. 26 of the 1997 Law.
[103]See Art. 25-1 of the1997 Law.
[104]See the Law of the Republic of Kazakhstan "On Public Procurement" N 321, dated 16 May 2002.

and municipalities but also enterprises with 50% or more of shares belonging to the state were covered by the 2002 Law.[105] This is in contrast with the current regulation where the national holdings and state organisations have their specific procurement legislation and are not covered by the Law "On Public Procurement".

The review process also benefited from the amendments to the 2002 Law as finally it became clear that the complaint should be launched to the Authorised Body. There was only one decision not subject to review and that was the choice of procedure.[106] It was also clearly established that the Authorised Body was responsible for the pre-contractual disputes. In case the contract was signed with the violation of legislation, the Authorised Body had to refer to court with the claim to recognise the contract void. Furthermore, the Authorised Body was entitled to amend or cancel the decision of the tender organiser, procuring entity and the tender committees; review cases on administrative violations; issue mandatory instructions.[107] It could also suspend the procurement process for the period of the review but for not more than thirty days. To reach a decision, the Authorised Body was allowed to make use of the services of experts and specialists from other state bodies. The mandatory instructions of the Authorised Body could be appealed in accordance with legislation of the Republic of Kazakhstan (it can be assumed, to the court).[108]

In addition, the 2002 Law set out deadlines for the suppliers to launch a complaint: five calendar days since the publication of the tender results in media.[109] At the same time, Art. 23 ruled that the winner of the tender had to sign the contract within five working days after the receipt of the draft contract or should refuse to sign within the same period. The period for signing the contract should not exceed 30 calendar days since the decision on the winner is taken. As there was no standstill period explicitly mentioned, the five-day period given to the suppliers was largely redundant.

4.4. 2007 Law

[105]See Art. 1 of the 2002 Law.
[106]See Art. 29 of the 2002 Law.
[107]See Art. 9 of the 2002 Law.
[108]See Art. 5(10) of the 2002 Law.
[109]See Art. 17(10) of the 2002 Law.

The 2007 Law[110] was adopted as another step to comprehensively regulate the area. As discussed below, further amendments to the Law were introduced with the main aim of transitioning to electronic procurement. It should be mentioned that the provisions related to IT usage were very progressive for the time they were adopted.

2007 Law as the regulations before it, contained local preferences and one of its main principles was the "support of local producers".[111] Other types of preferences, such as support for SMEs, for organisations of disabled persons and prisons, were also included. Some preferences were in the form of set-aside, while the others provided for price preferences. For illustration, the procuring entities were obliged to set-aside 15% of the volume of specific goods, works and services for SMEs, and must provide 15% price preference to the prisons when procuring specific items.[112] These preferences were restricted with the introduction of the "national regime" in 2014 as means of compliance with the requirements of the EAEU Treaty. In accordance to the principle, the foreign suppliers and goods should be given the same treatment as national suppliers and goods as far as this is envisaged by the international treaties ratified by Kazakhstan. Considering the date when the national regime was introduced, it can be safely assumed that it covered the countries member to the EAEU at that time (Russia and Belarus). The national regime remained as one of the core principles also of the 2015 Law.

Not much was amended in the new Law in relation to the review procedures. The only provision specifically devoted to the review was Art. 45. Accordingly, a potential supplier could complain against the actions (inactions), and decisions of the procuring entity, organiser of procurement (specialised unit of the procuring entity), single organiser of procurement procedures (centralised purchasing body), commission, experts and single operator in the area of public procurement (Centre of Electronic Commerce). As can be seen, the scope was enlarged as new institutions and decision-makers appeared in the arena of procurement. Moreover, the inactions of the above-mentioned bodies and individuals (i.e. the fact that they were legally obliged to take some actions within some period and failed to do so) could also be complained against. The Authorised Body had the right to ask and receive information and materials from the participants of procurement procedure as well as to invite experts and consultants.[113]

[110]See the Law "On Public Procurement" N 303-III, dated 21 July 2007.
[111]See Art. 3 of the 2007 Law.
[112]See Art. 44-1 of the 2007 Law.
[113]See Art. 14(21) of the 2007 Law.

The complaint could be launched in case the rights and legal interests of the potential suppliers were violated.[114] It can be said that this test provided some certainty, as the Law clearly set out the rights of the potential suppliers. In case the latter is unlawfully hindered from exercising his/her rights or the procuring entity or any of the above-mentioned bodies (individuals) violated them, the potential supplier had the right to refer to the "bodies of public control". It might seem that the Authorised Body was not entrusted with the review any longer rather controlling/monitoring bodies were in charge. Art. 14, however, suggested that the regulatory, review and control functions were all entrusted to the Authorised Body. Moreover, the Authorised Body could issue mandatory instructions to cancel the decisions taken in violation of the legislation before the conclusion of the contract.[115] Thus, the review described was pre-contractual only. It is assumed that the post-contractual disputes were to be resolved in the court. In addition, the court was the forum to complain against the decisions of the Authorised Body. Hence, the two-tier system was prescribed in the Law even though the potential suppliers were not hindered from applying to the procuring entity as well. It needs to be born in mind, though, that with the absence of the standstill period, the potential suppliers would simply loose time with every additional instance of complain.

The fact that there was no standstill period provided is deduced from Art. 37, according to which the contract must be signed by the procuring entity within five working days after signing the contract award notice. There is no provision on the suspension of the process for the launch of the complaint and the procuring entity could potentially sign the contract the next day of receiving the contract award notice. There is a chance that the contract is signed by both parties within two-three days after the announcement of the results in which case the aggrieved suppliers are left with only one choice and that is to refer to the court. As discussed in Chapter 3, the contracts are usually declared void in very few circumstances, and the unsuccessful suppliers are left with the possibility to claim damages only, which are not satisfactory for most of the suppliers as their main aim is to be awarded the disputed contract.

The control function is clearly entangled with the review as Art. 15 prescribed that the control activities were carried out in case the potential supplier launched a written complaint. This could mean that with every complaint received, a control was being organised though it is unclear whether the scope of the review was only

[114]See Art. 45 of the 2007 Law.
[115]See Art. 14(6-1) of the 2007 Law.

the specific procurement procedure or all procurement transactions of that procuring entity for a specific period.

Regarding the remedies, the Authorised Body had the right to give the object of the control mandatory instructions for the elimination of violations detected during the control activities; refer to court in order to invalidate the contract entered into force that was signed with the violations of the procurement legislation; and to suspend the payments to the accounts of the object of control opened in the central Authorised body for the budget execution.[116] Once again, these provisions clearly demonstrated the link between the control and review functions as the Authorised Body took a decision on remedies not after the review but after the control activities.

Overall, the 2007 Law can be said to provide more clarity concerning the review procedures. Notwithstanding this, it fell short of requiring an independent and unbiased review. It also did not ensure the delineation of the review and control functions as both were entrusted to the Ministry of Finance. In essence, the 2007 Law was yet another step in the development of a more comprehensive regulation of public procurement in general and review procedures in particular.

4.5. 2015 Law

The 2015 Law[117] is a streamlined version of the 2007 Law. The main amendments related to the introduction of electronic procurement in all phases of procurement for all procedures. In addition, the provisions on review bodies and procedures were also enhanced, and, for the first time, the standstill period and the suspension of the procedure for the period of the review were introduced.

The national regime remains the same in 2015 Law as a reflection of the core element of the EAEU Treaty. The only addition is that Kazakhstan can have a waiver from the national regime treatment for not more than two years.[118] No other detail on the provision of national regime is envisaged in the primary legislation. As was with the 2007 Law, the principle of preferences for local producers remains as long as this does not contradict the international treaties ratified by Kazakhstan.[119]

[116]See Art. 15(4) of the 2007 Law.
[117]See the Law of the Republic of Kazakhstan "On Public Procurement" N 434-V, dated 4th of December 2015.
[118]See Art. 14 of the 2015 Law.
[119]See Art. 4 of the 2015 Law.

The Authorised Body in accordance with the 2015 Law is tasked with monitoring as well as control and review functions. As with the 2007 Law, the review function was seen as part of the control. Thus, Art. 47 envisages that the complaint shall be examined within the scope of the cameral control in accordance with the legislation of the Republic of Kazakhstan on financial audit and control. The review itself is not seen as a separate function of the Authorised Body allowing the protection of the aggrieved suppliers' violated rights. The same logic was underlying the review function of the EAEU Treaty as discussed in Chapter 4.

Notwithstanding the fact, that 2015 Law also does not separate the function of review, many provisions are updated allowing the suppliers to have a more transparent review procedure. Thus, in accordance with Art. 47 the aggrieved suppliers have the right to challenge the decisions, actions and inactions of the procuring entity, organiser of the procedure, single organiser of procurement procedures, commissions, experts and single operator in the area of procurement within five working days from the day the contract award notice is published.[120] During this period, the process is suspended. This is the first time that the Kazakhstani legislation introduced the standstill period. Moreover, the contract cannot be signed during the process of review.[121]

Some limitations are introduced in terms of standing as the suppliers do not have the right to complain against the flaws in the procurement documentation if they didn't provide comments when they had the chance during the preliminary discussion procedure. In accordance to this procedure, the procuring entities are obliged to publish procurement documents (except for the ones containing state secret) and give the potential suppliers five working days to present their concerns and suggestions.[122] In case the comments are taken into account, the procuring entity amends the documents accordingly. When rejecting the suggestion, the procuring entity must give justification. The decision of the procuring entity is subject to review.[123] The available data demonstrates the efficiency of this procedure as out of 19,000 cases of preliminary discussions in 2017, documents of 11,000 procedures were amended after receiving comments from the potential

[120]This period is considered by the civil society to be very short for the preparation and launching of the complaint. See "OECD Government Integrity Scan of Kazakhstan: Preventing Corruption for a Competitive Economy", (2017) OECD Public Governance Reviews, 143.
[121]See Art. 43 of the 2015 Law.
[122]See Art.22 of the 2015 Law.
[123]See Art. 22 of the 2015 Law.

suppliers.[124] This is an element of transparency in which case the suppliers are acting as a watchdog against the inclusion of restrictive requirements. In fact, the discussion of the documents is open not only to suppliers, but to public in general as it is unclear how at this stage the procuring entity can decide who is the potential supplier.

In addition, the complaint submitted by a supplier who did not bid or participate in the preliminary discussion, does not suspend the process of signing the contract.[125] This provision unnecessarily limits the scope of complainants depriving some bidders of the possibility to effectively protect their rights. From another point of view, it can be fair to note that this provision gives the aggrieved suppliers the chance to complain at early stages. If they do not take the chance, the risk is theirs. As will be discussed below, the Authorised Body receives many complaints and limitation of the scope of the complainants after the award might be one of the measures of Kazakh authorities aimed at spreading the complaints evenly throughout the different phases of the procurement process.

Regarding the remedies, the Authorised Body can decide to set aside the decision violating the legislation on public procurement; to cancel the procurement procedure or to reject the complaint.[126] No other remedies, such as damages or substitution of the decision of the procuring entity, is envisaged in the Law. It is unclear what the procuring entities are exactly entitled to do after the cancellation: shall they start a new procedure from the scratch or just change the results of the procurement procedure? In case the whole procedure is cancelled, additional time and resources are spent while in case the Authorised Body is entitled to oblige the procuring entity to take decision different from the one being challenged, the procedure might not need to be repeated from the beginning.

The decision of the Authorised Body can be appealed to the court meaning that the court is designed as a second-tier review body.[127] Even though the launch of the complaint to the procuring entity is not explicitly mentioned, there is nothing in the Law forbidding referring also to the procuring entity. The only problem is that the five-day period of standstill most probably will be lost. Hence, the legislation pushes the suppliers to refer to the Authorised Body as a first instance of review, which in

[124]See "On the Project of Law on the Issues related to Public Procurement and Procurement of Quasi-Public Sector", Ministry of Finance of the Republic of Kazakhstan, Astana, January. 2018, in file with the author.
[125]See Art. 47 of the 2015 Law.
[126]See Art. 47 and Art. 16(6) of the 2015 Law.
[127]See Art. 47 of the 2015 Law.

accordance to the latest amendments to the Law is mandatory.[128] The tiered system is comparable to the Armenian system with the difference that in Kazakhstan the Ministry of Finance is explicitly mentioned as a body in charge of the review, while in Armenia the "persons reviewing the procurement complaints" are within the structure of the Ministry of Finance. The problems related to this type of arrangements are discussed in sub-section 2.6.

To conclude, the procurement review system in Kazakhstan is still in the process of being developed. Nevertheless, positive dynamics can be noticed in this regard in the new 2015 Law, which specified in much more detail the review mechanism, the responsible bodies and the process. These developments led to the increase of the number of complaints: in 2015 the Authorised Body received 2265 complaints, while in 2016 the number was 8359.[129] The first semester of 2017 saw an influx of the complaints: 9354 were submitted.[130] Moreover, the percentage of the sustained complaints raised from 40% to 60%.[131] All of these can be attributed to the fact that the suppliers trust the system of the review in Kazakhstan. Another view is that the aggrieved suppliers deliberately submit a complaint in order to suspend the process of the procurement.[132] Looking at the rate of the sustained complaints, it can be claimed that frivolous complaints are not a real problem for Kazakhstan. In any case, an introduction of a small fee for the complaint can be a solution against the influx of ungrounded complaints.

4.6. Compliance with international obligations

As discussed in previous chapters, Kazakhstan currently has international obligations related to public procurement stemming from the EAEU Treaty and the EPCA. Even though the country is currently an observer to the GPA and is not obliged to comply with the text of the Agreement, the EPCA is an almost identical copy of the GPA as discussed in Chapter 5. This means that Kazakhstan while complying with the EPCA will indirectly comply also with the GPA. In addition, when negotiating the EPCA, Kazakhstan was mindful of its obligations under the EAEU Treaty and introduced several articles on e-auction making it easier to comply with

[128]See Art. 47 of the 2015 Law.
[129]See Problems and Solutions in the Area of Public Procurement, submitted by the Ministry of Finance of the Republic of Kazakhstan, in file with the author.
[130]See Ibid.
[131]See supra note 129.
[132]This view has been expressed during the informal conversation with the officials of the Ministry of Finance of the Republic of Kazakhstan.

the requirements of both treaties. The comparative Table 3 below scrutinises the elements of the review procedure found in the EAEU Treaty and the EPCA with the aim to conclude on the compliance of Kazakhstan with its international obligations.

Table 3

	The EAEU Treaty	**The EPCA**	**2015 Law**
Principles of review	Protection of rights and interests of persons in the area of public procurement, control over the compliance with the procurement legislation, national regime.	Timeliness, effectiveness, transparency, non-discrimination.	National regime (partial non-discrimination).
Forum	Tiered system (only controlling/monitoring bodies are mentioned).	Review within the procuring entity (optional); at least one administrative or judicial authority (mandatory); non independent body + judicial review.	Authorised Body as a first tier and the court as a second tier.
Standing	Before the deadline for bid submission, anyone in accordance with national legislation; after the deadline - only the potential suppliers.	Supplier who has or has had interest.	The review is pre-contractual only, the potential suppliers whose rights have been violated have the right to complain. The suppliers that did not complain against the violations found in procurement documentation during preliminary discussion stage cannot do so after the award.
Standstill period	Ten days since the adoption of the award decision.	No but ten days to prepare the complaint.	Five days since the publication of the award decision.
Standard of scrutiny and legal effect	None.	None.	No substitution of the decision by the review body.

Deadline to reach a decision	None.	Reach a decision in a timely fashion.	None.
Remedies	None.	Interim measures, correction, compensation.	Set aside the decision violating the legislation on public procurement; cancel the procurement procedure or reject the complaint.

The table above clearly shows that the legislation of the Republic of Kazakhstan is mostly compliant with the requirements of the EAEU Treaty. As discussed in Chapter 4, the Treaty itself does not contain details of review, which makes it easier for the MS to comply with the very few mandatory requirements. Standing in case of Kazakhstan is limited to potential suppliers only, but as the complaint is to be launched after the publication of the contract award notice, there is no contradiction with the EAEU Treaty. Even though the potential suppliers are not given the right to complain before the deadline for submission, the procedure of the preliminary discussion of procurement documents substitutes the lack of the right to complain.

The problem with the standstill period is evident. As mentioned in Chapter 4, the EAEU Treaty states that the contract cannot be signed earlier than ten calendar or working days since the adoption of the decision on the selection of the successful supplier. In case of Kazakhstan, the draft of the contract is sent to the supplier within five working day since the end of the period for the launching the complaint (or five days since the award decision in case of price quotation), which should be signed by the supplier within three working days of receiving the draft via the web-portal. This technically means that the contract can be signed as early as within a day after the end of the period for complaints. This clearly contradicts the EAEU Treaty. Even though the EPCA does not contain a provision on the standstill, it still requires giving the suppliers not less than ten calendar days for the preparation and submission of the claim. This period is more than is currently required by the legislation of Kazakhstan (five working days). Thus, there is a clear case of non-compliance with both the EAEU Treaty and the EPCA in relation with standstill period.

The principles of timeliness, effectiveness and transparency found in the EPCA are not explicitly mentioned in the Law, but it can be submitted that the review system complies with them. The system is effective in carrying out the function of review, which can be proved by the increase of the number of the complaints. Regarding the transparency, the procurement website allows access to complaints online as

well as lists the decision taken with regards to a particular complaint. Moreover, an online analytical tool shows the number, status and grounds for the complaints (e.g. illegal access to procurement procedures, ungrounded requirements, illegal rejection of the bid) and the subject of the procurement (goods, services, works).[133]

Regarding the institution of review, Kazakhstan opted for the solution, where the function is undertaken by a non-independent body decision of which can then be appealed to the court. This complies with the requirements of the EPCA and the EAEU Treaty.

Regarding the remedies, the interim measure is provided by the Kazakh legislation. It can also be claimed that the ability of the Authorised Body to set aside the decision violating the legislation on public procurement or to cancel the procurement procedure are corrective actions. There is no mentioning of compensation (damages) in the Kazakhstani legislation, while the review bodies should have the possibility to award damages as discussed in Chapter 3. In this case, thus, a partial non-compliance is evident.

To sum up, the history of development of public procurement legislation of Kazakhstan shows that it was less affected by international norms on procurement. Up until recently, the specific local preferences were in place making it hard for foreign suppliers to participate in procurement procedures of the country. The situation changes gradually with Kazakhstan becoming more open to international cooperation *inter alia* in the area of public procurement. This is evident from the signature of the EPCA with the EU and the fact of obtaining an observer status to the GPA. Unlike Armenia, Kazakhstan has more resources and a better negotiating position thus it could inject several provisions from the EAEU Treaty into the EPCA providing for better linkages between these two international treaties mandatory norms of which should be reflected in its national legislation.

5. Conclusion

The current Chapter was set to explore how the countries under examination complied or attempted to comply with their international obligations throughout the evolvement of their national legislation on procurement review mechanisms. The Armenian public procurement system has developed since the adoption of the first Law "On procurement" in 2000. Subsequent laws and regulations were directed

[133]See Register of Complaints, viewed at: https://www.goszakup.gov.kz/ru/registry/complaint.

inter alia at compliance with Armenia's international obligations. As the analysis of the procurement legislation shows, the process of the review and the forum were amended several times. Unfortunately, the most recent 2016 Law (as amended in 2018) has the worst solution of all in relation specifically to the forum of review.

Regarding the compliance with international obligations, Armenia falls short in respect of several requirements of international trade agreements. Neither an independent body, nor a regulatory or controlling body carries out the procurement review. A hybrid solution of appointing two persons and treating them as a "body" entrusted with powers to review procurement complaints, cannot provide the expected results of having an unbiased review of procurement procedures. Such non-compliance is a result of poor internal policy choices rather than the impossibility to comply with parallel obligations stemming from various international agreements. While having the option of creating a non-independent body with the judicial review as a second tier, the country chose an option, which makes it non-compliant with the undertaken international obligations.

Kazakhstan has also undergone a process of amendments of the procurement system. It has a more robust procurement system than Armenia. In terms of review procedures, the process is not very well developed yet, but the 2015 Law is a positive step in comparison to the 2007 Law. The country has a review system harmonised better with the EAEU Treaty than the EPCA. Legislative changes especially related to the remedies and the standstill period will be required to ensure full compliance with both treaties. Even though Kazakhstan does not have an independent administrative body, the system of a two-tiered review (non-independent body and an appeal to the court) is compliant with both the EAEU Treaty and the EPCA.

Finally, notwithstanding the differences in the economic development, the role in negotiating the examined trade agreements and the geopolitical realities, both Armenia and Kazakhstan must amend their legislation to comply with the requirements of the international treaties they are party to. For Kazakhstan, not many amendments are necessary to respect the mandatory obligations of the EPCA and the EAEU Treaty. Armenia, on the other hand, must reform the procurement review mechanism in its entirety and rethink the institutional structure. Despite the cases of "apparent conflict" related to several instances of procurement review found in treaties under examination, both Armenia and Kazakhstan are not deprived of the possibility to find a middle ground to comply with international obligations, even though it might require more efforts than if only one trade

agreement containing procurement chapter was at stake. The compliance thus largely depends on the internal political will.

Chapter 8: Concluding chapter: Key findings, recommendations and future research

Regionalism is taking over multilateralism in the area of international trade even though the creation of the WTO was considered a triumph of multilateralism: special set of norms should have governed the majority of trade relations of the WTO parties. Surprisingly, the creation of the WTO gave rise to more RTAs than before. Though the international trade law was never perfectly harmonised as the RTAs predate the multilateral trade relations, the signature of more than 400 RTAs parallel to the WTO agreements further deepened the fragmentation in this area. Reasons of fragmentation of international trade law include *inter alia* the ease of negotiating with limited number of countries and the wish of some countries to deepen their trade relations by granting each other further preferences and regulating more areas related to trade while the WTO operates largely on the basis of the MFN principle, while it has only limited application in case of the GPA.[1]

Besides pure economic reasons, states choose to sign RTAs for the fear of being marginalised, to ensure security through economic means, to satisfy new security needs, to lock-in domestic reforms and to satisfy domestic constituents. Armenia and Kazakhstan also have their own non-economic reasons for signing several RTAs thus enhancing not only their trade relations but also satisfying wider security, including defence and energy needs arising from a complex geopolitical situation in South Caucasus and Central Asia. Independent of the reasons for signing different RTAs, one thing is clear: fragmentation of international trade law is a reality and countries will not rely on the multilateral path of trading only.

Hence, it is important to understand the relation of RTAs with the WTO agreements. Should the RTAs be compliant with the WTO commitments? Which takes precedence in case of conflict between the norms of the RTAs and WTO agreements? While there is no consensus on this matter in public international law, the Charter of the UN is considered to take precedence in case conflict arises between the obligations under the Charter and any other international treaty (Art. 103 of the UN Charter). Another set of norms that take precedence over other norms, are the so-called *jus cogens* norms related mainly to the areas of human rights and humanitarian law. There is currently no recognised *jus cogens* norm

[1] Another important principle of the WTO is the National Treatment found in all three main agreements (GATT, GATS and TRIPS). See "Principles of the Trading System", viewed at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm.

regulating the area of international trade. All the other attempts to rank treaties or norms within did not succeed. Therefore, it would be correct to claim that other than the UN Charter, all treaties are equal. This means that the provisions of the WTO agreements and of the RTAs have equal force and the RTAs do not have to comply with the provisions of the WTO agreements. This argument is usually contested by referring to the GATT Art. XXIV, *arguably* laying down the provisions for making RTAs compliant with the WTO terms. It should be highlighted though that no report was issued by the WTO to this end so far. Some commentators claim that the reasons are political rather than the belief that RTA norms are completely harmonised with the WTO agreements. The recent Transparency Mechanism enacted by the WTO limits the role of the WTO Secretariat in the process of assessment of the RTAs and leaves the decision to be taken by the parties themselves. It is hard to see how or whether this arrangement will result in a thorough analysis of RTA norms. The existence of both GATT Art. XXIV and the enacted Transparency Mechanism might lead to a conclusion that indeed the WTO parties will expect the RTAs to comply with the WTO norms but again, no such formal hierarchy can be observed from public international law perspective. As a result, a conflict of norms becomes highly probable due to the WTO and RTAs covering mainly the same areas of trade with the RTAs frequently going beyond the WTO agreements.

Public procurement is also not immune from the processes of fragmentation of international trade law. It is important to bear in mind that the GPA is a plurilateral agreement open for all WTO members to join (unlike other multilateral agreements of the WTO). As of November 2019, it has 48 members. The limited scope of membership on one hand casts some doubts on its importance and policy impact. On the other hand, it mitigates the risk of conflicts (without eliminating it). Furthermore, the recent interest in public procurement from policy makers and academia led to the increased inclusion of procurement chapters in most of the new trade agreements. The level of details regulated by these chapters differs compared to the early trade agreements. For example, the PCA signed by the EU with post-Soviet countries in the 1990-s contained only short provisions on the importance of open tendering. The second-generation EU trade agreements contain extensive chapters of detailed norms on how public procurement should be regulated in national legislations of signatory countries. The more detailed the norms are, the higher is the chance of conflict of norms.

The research of around 250 RTAs discussed in Chapter 2 demonstrates that so far, the situations of conflict of norms did not affect the area of public procurement as

most of the RTAs are either based or inspired by the GPA. The results of the research can be applied also to the recent trade agreements the EU signed with Armenia and Kazakhstan, the CEPA and the EPCA respectively. In case of the CEPA, both the EU and Armenia are members to the GPA and parties reconfirm their commitments adding more scope and discipline thus going beyond the GPA. The EPCA is an almost identical copy of the GPA. As Kazakhstan is not a member to the GPA yet, the EU decided to base its relations on fairly flexible provisions of the GPA as a start. The issue of conflict of norms in cases as such are not probable though cannot be excluded.

One of the major criticisms of the research mentioned above is that it did not consider the latest regional trade agreement among five post-Soviet countries (including Armenia and Kazakhstan), the EAEU Treaty. Out of the four trade agreements examined in the current research project, the one which is most capable of creating conflict of norms is the EAEU Treaty owing to its distinctions from the GPA and the rest of the RTAs. This distinction is explained by the fact that the EAEU Treaty is largely based on Russian procurement legislation. Belarus and Kazakhstan (co-founders of EAEU) were also not GPA members and were not supposed to take into account international best practice provisions when drafting Annex 25 of the EAEU Treaty. Thus, the procurement norms of the EAEU Treaty resemble domestic legislation with many detailed mandatory rules, deadlines and regulation of the process. The more trade agreements containing detailed rules countries sign, the higher is the risk of finding themselves in the situation of conflict of norms, especially in case the procurement chapters of those agreements are not largely harmonised. So why did the relevant countries choose to sign these trade agreements?

For Armenia, joining the GPA was a deliberate policy decision as the country wished for its procurement legislation to be considered compliant with international best practice norms laid down in the GPA. The fact that the non-discrimination was the cornerstone of the national procurement legislation since the adoption of the first Law in 2000 made the accession smooth and quick. Armenian procurement market also did not see an influx of foreign suppliers: due to its landlocked geographical location, small procurement market and the lack of developed infrastructure, the country remained unattractive for foreign competitors. At the time of the accession to the GPA, Armenia was also deepening its ties with the EU and this had a decisive role in the speedy accession of the country. The EU being itself a member to the GPA was interested in seeing Armenia in the "club" thus increasing its leverage.

At this time, the legal framework for the EU-Armenia relations was the PCA entered into force still in 1999. The PCA contained two general provisions related to procurement requiring having open and competitive tender for the acquisition of goods and services as well as suggesting Armenia to make its legislation (including procurement rules) gradually compatible with the EU respective *acquis*. These provisions were later prioritised alongside many other actions in the ENP Action Plan but overall, their effect on the reform of the Armenian procurement area remained limited. Hence, a new legal basis corresponding to the fast-developing EU-Armenia relations was necessary. The next step for the EU was the negotiation of an AA/DCFTA with Armenia taking the relation to a new level. The DCFTA being based on the similar DCFTAs prepared for Ukraine, contained very detailed norms on the approximation of the Armenian procurement legislation with respective EU Directives. Though the negotiations were completed, due to the political pressure by Russia, Armenia had to abandon the signature of the AA/DCFTA in 2013. Instead, after some period of deliberations, the parties succeeded in negotiating and signing the CEPA in 2017, which contains GPA+ commitments in relation to public procurement. The "plus" elements of the CEPA are based on EU Remedies Directives.

If the EU-Armenia relations were developed over decades and reached a logical step of concluding a comprehensive trade agreement, the same cannot be claimed for the case of Armenia joining the EAEU. This move is largely seen as an example of Russian coercive foreign policy exercising its leverage over Armenia due to its dependence from remittances and energy and defence supplies. Hence, Armenia joined the EAEU for geopolitical rather than for economic reasons.

Kazakhstan had different reasons for joining the EAEU. The initial idea of Eurasian integration was voiced by the ex-President of Kazakhstan Nazarbayev who believed that it was necessary to preserve the ties between the Soviet republics after the dissolution of the USSR in 1991. Kazakhstan sees the EAEU as a largely economic union opposing any attempts of creating a political union among the five members of the EAEU. According to the available data, especially in the beginning of the creation of the EAEU, Kazakhstan did not achieve the economic results it has hoped for. In addition, the ever-closer relations with the EAEU partners, especially with Russia, was not intended by Kazakh authorities. Due to this, Kazakhstan has been keen on highlighting the inter-governmental as opposed to supranational nature of the EAEU.

The EAEU is only one side of the Kazakh multi-vector foreign policy. The country is eager to develop harmonious relations with its close neighbors such as China and India and most importantly its biggest trading partner, the EU. Even though a PCA was also concluded between the EU and Kazakhstan (with identical provisions on procurement), its impact was even lower than in case of Armenia. This might be related to geographical distance of the counterparts as well as the lack of interest from the EU towards Central Asia in general. From early 2000s, the situation changed, however. The need to have security at the borders, to ensure diverse sources of gas and oil and to enhance infrastructure in the region led to activation of ties. Several agreements were signed covering mainly the areas of energy and transportation, but the main legal ground remained the PCA, which was outdated and was not comprehensive enough. Hence, in 2015 Kazakhstan signed the EPCA with the EU, the procurement chapter of which is based on the GPA. This means that even before joining the Agreement, Kazakhstan undertook a commitment to make its legislation compliant with the text of the GPA. The country was granted an observer status to the GPA in 2016 and needs to start negotiations for joining it within four years after joining the WTO. The WTO Ministerial Conference to be held in Nur-Sultan in 2020 is expected to give an additional impetus for the initiation of negotiations.

Thus, Armenia and Kazakhstan had different reasons for signing (undertaking to sign) trade agreements ranging from purely economic reasons to being coerced to join a regional integration project. Irrespective of the reason for signing multiple trade agreements, the proliferation of RTAs, even the ones that might not be economically viable, increase the chance of creating a conflict of norms.

Academic literature is not consistent regarding the definition of conflict of norms. Some commentators define it in a narrow sense as the conflict between two obligations stemming from different treaties simultaneous compliance with which is not possible. These cases are referred to as "real conflicts" occurring when there is a tension between two obligatory norms; or between the obligatory and prohibitive norms. The other group of academics define conflict of norms in a wide sense including also the cases where there is a conflict between the prohibitive and permissive norms, between two obligatory norms, which are not mutually exclusive or between the obligatory and exemptory norms. These commentators take into consideration that the treaties are carefully negotiated documents of rights and obligations. Not considering the rights will mean that the obligations have priorities over rights; an assumption, which is not warranted by any legal provision of any of the treaties. Such conflict of norms is described as an "apparent conflict". In this

case, even though the tension exists between the norms of different provisions of treaties, the countries participating in conflicting treaties will have the opportunity to comply with all the obligatory norms but must give up some rights envisaged in the permissive or exemptory norms.

For the purposes of the current research, the wider definition of conflict of norms was adopted to analyse the cases of procurement review mechanisms included in trade agreements signed by Armenia and Kazakhstan. The analysis of the four trade agreements demonstrated that these agreements are largely compatible in relation to the procurement review mechanisms. No case of "real conflict" was detected, meaning that the countries participating in these trade agreements in theory can comply with the mandatory requirements regulating procurement review mechanisms. Nevertheless, several instances of "apparent conflict" exist. Thus, in case of the standstill period, the countries must adopt the decision and publish it the same day as is required by the EAEU Treaty. As discussed in Chapters 3, 4 and 7, the institutional set-up of the review body as well can present a difficult choice for the countries under consideration. The combination of choices provided by the GPA, the CEPA, the EPCA and the EAEU Treaty deprive the countries of several options allowing *only* the following: the complaint to the procuring entity or non-impartial body followed by judicial review.

The possibility of having the cases of "apparent conflict" pushes the countries member to several non-harmonised trade agreements to take extra care when drafting national legislation, as discussed in Chapter 7. Both Armenia and Kazakhstan started developing their public procurement systems in late 90s. Throughout different phases of development, the legislation changed adapting to the needs of the procurement market and to local realities. The legislation of Armenia was affected by international commitments undertaken by the country more than the national legislation of Kazakhstan due to the geographical proximity of the former to the EU and to a more open policy towards cooperation with international partners. Nevertheless, the analysis of the relevant legislation in Chapter 7 demonstrated several instances of non-compliance with the obligations found in international trade agreements signed by these countries.

In the case of Armenia, the appointment of two persons to hear procurement complaints is not compliant with either the GPA (the CEPA) or the EAEU Treaty. Even though this non-compliance is a matter of policy decision related to the amended Constitution, it does not alter the fact that the national legislation is not compliant with international obligations. In addition, the CEPA sets out some

requirements for the members of the review body directed at ensuring their independence and high quality of the review. These elements are largely absent from the Armenian national legislation making it non-compliant with the CEPA.

Kazakhstan's national legislation is also not completely compliant with the undertaken obligations. Thus, there is an obvious case of non-compliance concerning the time-period allowed as a standstill. It is much less than required by the EPCA (the GPA) and contradicts the EAEU Treaty. In addition, regarding the remedies a case of partial non-compliance can be observed, as the review body is not entitled to award damages and there is no stipulation of such function being carried out by the courts. The fact that the EPCA procurement chapter (or the GPA) is still not in force for Kazakhstan might be the reason of such non-compliance and it will need to be seen how and if the Kazakh Law will change when affected by the EPCA (the GPA).

Overall, it can be concluded that even in the absence of the "real" conflict of norms, countries which accede to different, largely not harmonised RTAs are deprived of rights established in each RTA. The "spaghetti bowl effect" is becoming more and more evident: the national authorities will certainly struggle in the jungle of rights and obligations contained in RTAs when trying to draft national procurement legislation compliant with all international obligations of the country.

One way of avoiding situations of conflict of norms is the increased harmonisation among international treaties containing procurement norms. The GPA itself, though, comprised of international best practice norms and being a source of inspiration for many RTAs, can benefit from further amendments and clarifications especially related to the standstill period. As it currently stands, the ten-day period given to the aggrieved suppliers for the submission of complaints is not called a "standstill period", and it is unclear whether contracting authorities can go ahead and sign the contract within this period. Another area that can arguably benefit from streamlining is anti-corruption. It is advised to elaborate a non-exhaustive, non-mandatory list of possible steps the parties can take to eradicate the problem of corruption in procurement area.[2] Several Work Programs related to sustainable

[2] For detailed elaboration of the link between the GPA and the anti-corruption efforts in procurement area, see Robert Anderson, William Kovacic and Anna Caroline Mueller, "Promoting Competition and Deterring Corruption in Public Procurement Markets: Synergies with Trade Liberalisation", (2017) Public Procurement Law Review 2.

procurement, SME participation, reporting of statistical data and others can also pinpoint the possible directions of the GPA development.[3]

A major step towards the harmonisation of the discussed trade agreements would be the possible alignment of the EAEU Treaty with the internationally recognised best practice norm found in the GPA, UNCITRAL Model Law and the EU Directives while moving away from the Russian legislation on public procurement. This will result in a more flexible framework for the regulation of public procurement in the EAEU MS. In particular, from the point of view of review bodies and procedures, the EAEU Treaty as a first step should clearly differentiate between the functions of monitoring/control and review. The current reading of the Treaty does not provide much clarity about the institutional set-up of the review mechanisms. Rather, it seems to imply confusingly that monitoring and review functions should be concentrated in a single government body. In addition, there is no reference to the "independence" of the mentioned government body (or of another body reviewing its decisions) while this feature is acknowledged to be an important characteristic of many review mechanisms described in the relevant international treaties. Furthermore, the EAEU Treaty does not contain provisions on the remedies, procedural rules, standard of review leaving the regulation of these important matters to the discretion of the MS. All these omissions might be related to the fact that the EAEU Treaty is based on a different underlying logic than the other international treaties analysed in this thesis. Taking into account that Russia itself is currently negotiating its terms of accession to the GPA,[4] it becomes clear that sooner or later the EAEU Treaty will be heading towards harmonisation with the GPA. The sooner this happens, the easier it will be for the countries member to both treaties, to draft national legislation fully compliant with their international obligations.

In addition to addressing the questions raised in this research and providing some recommendations, this thesis also leads to new questions such as how exactly national legislation should be amended to comply with international obligations. Further research can also investigate whether the options left to the countries that signed different RTAs are optimal for their legal realities and whether there are cases of conflict of norms involving other elements of procurement system (e.g. methods). Answering these and other related questions will help the countries,

[3] See Annex B to the Adoption of the Results of the Negotiations Under Article XXIV:7 of the Agreement on Government Procurement, Following Their Verification and Review, As Required by the Ministerial Decision of 15 December 2011 (GPA/112), Paragraph 5, 2 April 2012 (GPA/113).

[4] See Jean Heilman Grier, "Russia's WTO Commitment to Join the GPA: Advancing?", *Perspectives on Trade*, 07 February 2018. Viewed at: https://trade.djaghe.com/?tag=russia-gpa-commitment.

intending to join the GPA, the EAEU Treaty or wanting to sign bilateral trade agreement with the EU, to understand the possible limitations and to take an informed decision. In addition, such countries will need to make deliberate and very cautious choices when drafting domestic legislation for it to be compliant with undertaken international obligations. The suggestion for such countries to refrain from signing RTAs seems to be far-reaching and unattainable, but it will be helpful to negotiate terms that are compliant with the already existing international obligations or at the very least be prepared to deal with the practical challenges that the signing of different trade agreements with overlapping *ratione materia*e entails.

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