

# FROM RUSSIA WITH LOVE: THE EU, RUSSIA, AND SPECIAL RELATIONSHIPS

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## ABSTRACT:

This paper compares the institutions and goals of the USSR, the EU, and the CIS to understand the differing origins and competing tendencies of these alternative models of transnational governance. It then projects those models through history to examine the current relationships of the former Soviet Republics to the EU and the United States. Understanding the historical sources and development of transnational relations in Eastern Europe will enable better international relations among the EU, the Russian Federation, and the other former Soviet Republics. This comparison will also help the Russian Federation and other former Soviet Republics to take up EU models of governance where appropriate (most often the case) in order to help restructure Eastern Europe, and to safeguard peace by increasing economic prosperity and interdependence.

## Keywords:

EU, USSR, Russia, CIS, Commonwealth of Independent States, EurAsEC, Eurasian Economic Community, WTO, US, NATO, eastern partnership, northern dimension, common spaces, ECHR, European Court of Human Rights, Rule of Law, Human Rights, Democracy, Legitimation, Partnership and Cooperation Agreement, PCA.

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## I. INTRODUCTION

The European Union builds peace through interdependence and prosperity by transferring elements of state sovereignty to inter-governmental and supranational bodies. An unparalleled success, the EU presents a model for transnational governance. The EU is the world's most advanced and successful example of a pragmatic mixture of supra-national and intergovernmental governance. It is thus a key vector of globalization.<sup>2</sup> Other regions of the world, such as Eastern Europe, can emulate its rules and institutions.

This paper compares the institutions and objectives of the USSR, the EU, and the CIS to understand the differing origins and competing tendencies of these alternative models of transnational governance. Understanding the systemic differences and commonalities of those models enables the contextualizing of past history, and thus im-

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<sup>2</sup> See generally Eric Engle, *Europe Deciphered: Ideas, Institutions and Laws*, 33 FLETCHER F. WORLD AFF. 63, 63-81 (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1336490](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1336490) (describing transnational governance within the EU).

proves our understanding of current relationships of the former Soviet Republics to the EU. Hopefully, understanding the historical sources and development of transnational relations in Eastern Europe will, in turn, enable better international relations between the EU, the Russian Federation, and other former Soviet Republics and the United States.

## II. COMPARING TELEOLOGIES OF TRANSNATIONAL GOVERNANCE: GOALS AND STRUCTURES

Understanding the past helps us appreciate the present and form the future. First, we compare the goals and structures of the USSR, the EU, and the CIS. By disaggregating the differing origins and competing tendencies of these distinct transnational governance models, we can see their commonalities and the historical breakdowns in order to foster improved relations by understanding shared goals and methods used to attain these goals.

### A. *The Structure and Teleology of the USSR*

The USSR was a one-party system. It was a workers' and peasants' dictatorship in name,<sup>3</sup> directed and led by the Communist Party of the Soviet Union (CPSU). The CPSU regarded itself as a vanguard party, the most advanced elements (intelligentsia) of the most advanced class (the proletariat), subject to democratic centralism (open debate within the party upon the issues, followed by a vote, and then decisive unanimous action to implement the voted decision with no further discussion or dissent), and exercising a dictatorship on behalf of the proletariat (workers and peasants). The party elite of the CPSU (the "nomenklatura") claimed to govern on behalf of and for the benefit of the workers and peasants, i.e. the peoples of the Soviet Union.<sup>4</sup> In western terms, the CPSU was a centralized, hierarchical party of elites directing a centrally planned economy via dictatorship. The dictatorship was justified as necessary to work revolutionary changes on the behalf of the workers and peasants, and, indeed, the initial performance of the USSR was breathtaking. The USSR eradicated illiteracy, literally doubled average life expectancy,<sup>5</sup> and ended the chronic

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<sup>3</sup> KONSTITUTSIJA SSSR (1936) [KONST. SSSR][USSR CONSTITUTION] art. 1, *translated in 1936 Constitution of the USSR*, BUCKNELL UNIVERSITY (Sept. 7, 2011), <http://www.departments.bucknell.edu/russian/const/36cons01.html> (stating "[t]he Union of Soviet Socialist Republics is a socialist state of workers and peasants.") [hereinafter USSR CONSTITUTION].

<sup>4</sup> A. Nove, *Is There a Ruling Class in the USSR?*, 27 *SOVIET STUDIES* 615, 615-16 (Oct. 1975).

<sup>5</sup> STEPHEN WHITE, *RUSSIA GOES DRY: ALCOHOL, STATE AND SOCIETY* 43 (Cambridge Univ. Press 1996).

famines endemic of Tsarist Russia. Leninism also instituted sex equality.<sup>6</sup> In these real human terms, Leninism was unquestionably progress as compared to Tsarism.

<i>Population</i>		1879	1920	1926	1939	1959	1970	1979
<i>Rural</i>	<i>M</i>	35.5	52.4	67.3	91.6	99.1	99.6	99.6
	<i>F</i>	12.5	25.2	35.4	76.8	97.5	99.4	99.5
	<i>All</i>	23.8	37.8	50.6	84.0	98.2	99.5	99.6
<i>Urban</i>	<i>M</i>	66.1	80.7	88.0	97.1	99.5	99.9	99.9
	<i>F</i>	45.7	66.7	73.9	90.7	98.1	99.8	99.9
	<i>All</i>	57.0	73.5	80.9	93.8	98.7	99.8	99.9
<i>Total</i>	<i>M</i>	40.3	57.6	71.5	93.5	99.3	99.8	99.8
	<i>F</i>	16.6	32.3	42.7	81.6	97.8	99.7	99.8
	<i>All</i>	28.4	44.1	56.6	87.4	98.5	99.7	99.8

Source: Narodnoe obrazovanie, nauka i kul'tura v SSSR: Statisticheskii shornik (Moscow, 1977, 9; SSSR: zarubezhnye strany, 1987: Statisticheskii sbornik (Moscow, 1988), 83.

The CPSU justified its dictatorship as the best way to obtain the well-being of the workers and peasants,<sup>7</sup> and also as necessary to help prevent or win any future world war.<sup>8</sup> Over time, however, the Soviet system degenerated, and worked increasingly for the benefit of the party establishment (the “nomenklatura”)<sup>9</sup> at the expense of the broad masses of workers and peasants. Meanwhile, the threat of invasion diminished. From this perspective, which I call dual delegitimation, we can better understand the sudden, unexpected, and relatively bloodless restoration of capitalism<sup>10</sup> in Russia. The system, *in its own*

<sup>6</sup> See, e.g., GAIL WARSHOFSKY LAPIDUS, WOMEN IN SOVIET SOCIETY: EQUALITY, DEVELOPMENT, AND SOCIAL CHANGE 136 (Univ. of Cal. Press 1978).

<sup>7</sup> USSR CONSTITUTION, *supra* note 3 (“The Union of Soviet Socialist Republics is a socialist state of the whole people, expressing the will and interests of the workers, peasants, and intelligentsia, the working people of all the nations and nationalities of the country.”).

<sup>8</sup> *Id.* art. 28.

<sup>9</sup> See generally MICHAEL VOSLENSKY, NOMENKLATURA: THE SOVIET RULING CLASS (Eric Mosbacher trans., Doubleday 1984).

<sup>10</sup> Capitalism is a system of economic production predicated on the private ownership of capital. It is distinct from state capitalism wherein the state or public-private partnerships hold capital. Many define capitalism as an industrial rather than a feudal mode of production. The Tsarist economy was semi-feudal and industrializing. Further, many of its economic projects involved heavy state participation (state capitalism). However, the ownership of capital in the hands of the financial elite distinguishes Tsarist semi-feudal (state) capitalism from the Soviet planned economy. Of course, strong state participation in the economy, directly and indirectly, remains a mark of the Russian economy. However, the post-Soviet era definitively restored private ownership of capital and the role of the Orthodox

*terms*, lost legitimacy as being no longer necessary for defense against a war that never came. Likewise, the system lost legitimacy because consumer well-being was simply higher in the west and the nightmare of Tsarist famine, illiteracy, and inequality was long past. These systemic facts help explain the near bloodless dissolution of the Soviet system.

Soviet foreign policy was less aggressive than what the U.S. foreign policy elites, particularly the military, perceived at the time. Rather than relentlessly seeking to inflame global revolution at every turn in a zero-sum struggle against the West, the USSR first sought to build socialism in one country,<sup>11</sup> and then in its own sphere of influence, to construct a stable autarchic system. The Soviets sought autarchy as the means to self-defense.

Geopolitically, the Soviet system was a series of concentric rings. The USSR was at the center, then Eastern Europe,<sup>12</sup> then Third World Marxist states, and, finally, Third World non-Marxist allies. The closer a country was geographically to the Soviet center, the greater the level of integration into the autarchic economy. Western efforts to “roll back” Marxism were generally unsuccessful,<sup>13</sup> perhaps because the Soviet system *was* autarchic. The failure of “roll back” ultimately led to the “Brezhnev doctrine,” wherein the USSR declared the attainment of “socialism” (i.e. single party state capitalism with worker safeguards) in any country as irreversible.<sup>14</sup>

To attain autarchic economic development, the USSR implemented an import substitution industrialization (“ISI”) model for economic development. ISI had already been used in the West for the industrialization of the United States and Japan.<sup>15</sup> However, the So-

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Church as the spiritual guides of the nation. Thus, I refer to this process as “capitalist restoration” rather than “capitalist instauration”. See, e.g., STEVEN ROSEFELDE, *COMPARATIVE ECONOMIC SYSTEMS: CULTURE, WEALTH, AND POWER IN THE 21ST CENTURY* 183 (Blackwell Publishers 2002).

<sup>11</sup> Josef Stalin, *The October Revolution and the Tactics of the Russian Communists*, Preface to JOSEF V. STALIN, *PROBLEMS OF LENINISM* 117 (Charles Farrell trans., Foreign Languages Press, Peking 1976), available at <http://www.marxists.org/reference/archive/stalin/works/1924/12.htm>.

<sup>12</sup> JOSEPH G. WHELAN & MICHAEL J. DIXON, *THE SOVIET UNION IN THE THIRD WORLD: THREAT TO WORLD PEACE?* 8 (Pergamom-Brassey’s Int’l Def. Publishers 1986).

<sup>13</sup> See, e.g., PETER GROSE, *OPERATION ROLLBACK: AMERICA’S SECRET WAR BEHIND THE IRON CURTAIN* 210 (2000).

<sup>14</sup> This policy was known as “The Brezhnev Doctrine.” See generally MATTHEW J. OUMET, *THE RISE AND FALL OF THE BREZHNEV DOCTRINE IN SOVIET FOREIGN POLICY* (The Univ. of N.C. Press 2003) (explaining the doctrine).

<sup>15</sup> See generally DAVID M. TRUBEK & ALVARO SANTOS, *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* (Cambridge Univ. Press 2006)

viet system's rationales were the opposite of those of the United States. The USSR justified its version of ISI through rationales of substantive equality and solidarity, and contrasted those with the merely formal freedoms conditioned by economic inequality that justified western democracies<sup>16</sup> some of which were social. Social democracies provide guaranties of basic well being, especially to workers. Socialist production in contrast is the state ownership of enterprises, a form of state capitalism.

Russia's approach to ISI was, within its own terms, rational. The Soviet leadership considered obtaining and maintaining the autarchy of the USSR a necessary, legitimate, and attainable goal.<sup>17</sup> Given the historical fact that Russia has suffered invasion after invasion, the Soviet goal of economic autarchy as a means to national security, though definitively economically suboptimal to trade and international economic integration, was politically justifiable, albeit increasingly inapt due to sub-optimal economic performance.

Pursuant to the ISI strategy, the USSR created a ruble currency economic zone, and made the ruble inconvertible.<sup>18</sup> Capital restrictions were the norm as were border controls, such as customs duties and passport checks. The policy of autarchy complemented military security by enabling independent political choices. Soviet leaders saw military security as a precondition to economic security and well-being.<sup>19</sup> To circumvent the problem of a lack of foreign currency, the inability to use the ruble for currency exchanges overseas, and related problems arising from the nature of a closed economic system, barter in, and for, real goods was taken up between the COMECON countries. That practice was known as "countertrade" i.e. cashless goods-for-goods barter. For example, the USSR would barter with Cuba, trading sugar for finished Soviet goods.<sup>20</sup> Barter also occurred at the

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(describing the exposition of the import substitution industrialization model of development).

<sup>16</sup> ERIC ENGLE, MARXISM, LIBERALISM, AND FEMINISM: LEFTIST LEGAL THOUGHT 33-35 (Serials Publ'ns 2010).

<sup>17</sup> Ronald A. Francisco, *The Foreign Economic Policy of the GDR and the USSR: The End of Autarky?*, in EAST GERMANY IN COMPARATIVE PERSPECTIVE 190 (David Childs et al. eds., 1989).

<sup>18</sup> Vladimir Sobell, *Convertibility in the CMEA: The Long Road Ahead*, RADIO FREE EUROPE RESEARCH 4 (Nov. 5, 1987), <http://www.osaarchivum.org/files/holdings/300/8/3/pdf/128-5-21.pdf>.

<sup>19</sup> USSR CONSTITUTION, *supra* note 3, at art 31.

<sup>20</sup> José F. Alonso & Ralph J. Galliano, *Russian Oil-For-Sugar Barter Deals 1989-1999*, in CUBA IN TRANSITION: VOLUME 9, PAPERS AND PROCEEDINGS OF THE NINTH ANNUAL MEETING OF THE ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY (ASCE) 335 (1999), available at <http://www.ascecuba.org/publications/proceedings/volume9/pdfs/alonso.pdf>.

micro-economic level, though not as a legitimate de jure instrument of state policy, but as a de facto necessity of everyday life, albeit of questionable legality.<sup>21</sup> “Gifts” could be justified as “social” and “fraternal” acts under the Marxist logic of transforming monetary economic compulsion into cooperative voluntary social acts. With capitalist restoration, however, the primitive version of a “gift economy” warped into generalized bribery, undermining the rule of law in the post-Soviet era.<sup>22</sup>

Preferential tariff treatment for the COMECON and Soviet client states was a key feature of the Socialist bloc’s international trade policy.<sup>23</sup> High tariff barriers were created to protect the autarchic COMECON home market.<sup>24</sup> These tariff barriers would also encourage infant industries.<sup>25</sup> Non-tariff technical barriers such as restrictions on imports for health and safety reasons also served the ISI logic. Meanwhile, intellectual property would be either unprotected or weakly protected to use Western innovation to support the USSR.<sup>26</sup> For example, piracy of Western computer software and microchip technology was the norm during the Soviet era.<sup>27</sup> Intellectual property law enforcement in Russia remains a sore spot in United States-Russian

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<sup>21</sup> See, e.g., JIM LEITZEL, *RUSSIAN ECONOMIC REFORM* 128 (Routledge 1995); see also Byung-Yeon Kim, *Informal Economy Activities of Soviet Households: Size and Dynamics*, 31 *J. COMP. ECON.* 532, 532-551 (2003).

<sup>22</sup> BARBARA WALKER, MAXIMILIAN VOLOSHIN AND THE RUSSIAN LITERARY CIRCLE: CULTURE AND SURVIVAL IN REVOLUTIONARY TIMES 174 (Ind. Univ. Press 2005).

<sup>23</sup> MARIE LAVIGNE, *INTERNATIONAL POLITICAL ECONOMY AND SOCIALISM* 175 (David Lambert trans., Cambridge Univ. Press 1985). See generally ADAM ZWASS, *THE COUNCIL FOR MUTUAL ECONOMIC ASSISTANCE: THE THORNY PATH FROM POLITICAL TO ECONOMIC INTEGRATION* (M.E. Sharpe 1989).

<sup>24</sup> COMECON (also known as the CMEA) was the USSR’s effort to form a common market within the Soviet bloc. See, e.g., J. J. BRINE, *COMECON: THE RISE AND FALL OF AN INTERNATIONAL SOCIALIST ORGANIZATION* xvi (1992).

<sup>25</sup> *Id.*

<sup>26</sup> Intellectual property remains weakly protected in the Russian Federation and the USSR successor states. “[C]ounterfeiting and piracy activity in Russia remains on a high level. The lack of effective enforcement affects Russian markets on a large scale. To be fully integrated in the world trading system, to continue to attract foreign investment and to prevent major losses for right-holders, Russia has to implement all its international obligations, in particular the ones related to Intellectual Property Rights and their Enforcement.” Directorate-General for Trade, *Intellectual Property: Dialogues*, EUROPEAN COMM’N (Aug. 22, 2011), [http://ec.europa.eu/trade/creating-opportunities/trade-topics/intellectual-property/dialogues/#\\_russia](http://ec.europa.eu/trade/creating-opportunities/trade-topics/intellectual-property/dialogues/#_russia).

<sup>27</sup> See, e.g., Shane Hart, *Computing in the Former Soviet Union and Eastern Europe*, 5 *CROSSROADS* 23, 23-25 (Mar. 1999).

relations to this day.<sup>28</sup> Most importantly, the centrally-planned economy's taxing and subsidization systems aimed to accumulate the surplus capital needed for economic development through the creation of infrastructure (e.g., housing, roads, airports) via forced saving<sup>29</sup> and also, ominously, for military production.

The political and legal institutions in the USSR and its satellites paralleled those of the West. Legal and institutional parallels included: the Warsaw Treaty Organization (the Warsaw Pact), which paralleled the North Atlantic Treaty Organization (NATO);<sup>30</sup> the Council for Mutual Economic Assistance (COMECON, also known as CMEA), for its part, paralleled the European Economic Community (EEC).<sup>31</sup> Other parallels could be found fairly readily and, in my opinion, Soviet socialist legalism should be seen as a variant of civilianist law.

Legal and political parallels arose because each system sought the same goals (economic development, technical progress, national security) albeit by somewhat different methods and justified by differing rationales. The Soviet system was an authoritarian egalitarian variant of late modernity that sought to attain economic development using the Western import substitution industrialization (ISI) model.<sup>32</sup> The Soviet systemic rationales were substantive equality and social solidarity; the West's were freedom, property and individual rights. These rationales also served as principles for organizing production and social life generally.

The Soviets, like the West, sought the same goals: to obtain a better life for workers (the people) and physical (military) security (i.e., *defense*). The means to those ends, however, differed. The USSR sought to obtain prosperity not through the capitalist anarchy of production but through centralized economic planning.<sup>33</sup> Similarly, the USSR sought to attain security through autarchy (isolation and independence) rather than through economic interdependence.<sup>34</sup> Economic

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<sup>28</sup> U.S. DEPT. OF STATE, BACKGROUND NOTE: RUSSIA (Aug. 28, 2011), <http://www.state.gov/r/pa/ei/bgn/3183.htm>.

<sup>29</sup> See generally Eric Engle, *A Social-Market Economy for Rapid Sustainable Development*, 2 J.L. DEV. & POL. 42, 42-62 (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1424695](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1424695) (explaining the ISI model in the context of Soviet development theory).

<sup>30</sup> Malcome Byrne & Vojtech Mastny, *The Warsaw Pact, Gone with a Whimper*, N.Y. TIMES, (Mar. 14, 2005), <http://www.nytimes.com/2005/05/13/opinion/13iht-edbyrne.html>.

<sup>31</sup> See BRINE, *supra* note 24.

<sup>32</sup> Engle, *A Social-Market*, *supra* note 29, at 43.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*



interdependence was the path to peace the West took, as the EU and WTO exemplify.<sup>35</sup>

The Soviet economy's key problem was the fact that it was defined around building up a military-industrial complex to fight and win a World War III if ever attacked again: autarchy as a means to security.<sup>36</sup> Tragically,<sup>37</sup> in pursuit of its military defense, the USSR and its Warsaw Pact allies wasted almost all their surplus production on unproductive military spending.<sup>38</sup> Ultimately, the United States response to the failure of rollback and the Brezhnev doctrine was to compete in fields where the USSR could not compete due to technological inferiority or due to the structure of a closed dictatorship. The United States' own arms buildup aimed to bankrupt the USSR by forcing it into an unsustainable arms race, a policy that worked.<sup>39</sup> The resulting economic strains led to constant shortages that seriously undercut the USSR's claim to be creating a workers' paradise with the highest standard of living for ordinary people on earth.<sup>40</sup> The USSR was undermined by economic dislocations, the inability of the planned economy to deliver high quality goods to the most needed areas on time, and due to the increasing strain of militarism. "The party of Lenin," despite such stunning initial success, was ultimately unable to match capital-

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Recall that tragedy, strictly speaking, means the *inevitable* downfall of a *hero* (or anti-hero) due to his *excess* of virtue. In the Soviet Union "defense of the motherland" taken to its excess became paranoia, crippling production and dooming the system to (inevitable) collapse. However, the West did not win the cold war; rather, the Soviets lost it.

<sup>38</sup> *Russian Military Budget*, GLOBALSECURITY.ORG (Aug. 25, 2011), <http://www.globalsecurity.org/military/world/russia/mo-budget.htm> ("By the mid-1980s, the Soviet Union devoted between 15 and 17 percent of its annual gross national product to military spending. . . . Until the early 1980s, Soviet defense expenditures rose between 4 and 7 percent per year."); see also ANDERS ÅSLUND, BUILDING CAPITALISM: THE TRANSFORMATION OF THE FORMER SOVIET BLOC 131 (2001).

<sup>39</sup> Kremlinology often focuses on budget questions. See, e.g., Bill Keller, *Soviet Budget Deficits Are Disclosed By Kremlin; Wasteful Subsidies Blamed*, N.Y. TIMES, (Oct. 28, 1988), <http://www.nytimes.com/1988/10/28/world/big-soviet-budget-deficits-are-disclosed-by-kremlin-wasteful-subsidies-blamed.html>; see also Timothy Sosnovy, *The Soviet Military Budget*, 42 FOREIGN AFF. 487, 487-94 (1964), available at <http://www.foreignaffairs.com/articles/23604/timothy-sosnovy/the-soviet-military-budget>.

<sup>40</sup> See, e.g., 31 V. I. LENIN, COLLECTED WORKS 516 (1966) (stating "Communism is Soviet power plus the electrification of the whole country." That is, the Soviet system justified itself as the fastest route to development, which it was for at least one generation. However, ultimately, the system lost legitimacy as it became clear and clearer that the west produced better quality consumer goods and in greater numbers).

ism in the quality and abundance of consumer goods.<sup>41</sup> This, coupled with the increasing tendency of the nomenklatura to serve its own goals rather than to seek the well-being of all the Soviet peoples, and the fact that the U.S., unlike Nazi Germany, was not threatening to invade the USSR to seize resources, led to a crisis of purpose, of legitimacy, and a capitalist restoration.

### B. *The Objectives of the EU*

The EU aims to form a single, integrated European market to: (1) break the link between territory and trade which drove Europe into at least two global wars; and (2) generate the prosperity through trade that results from specialization in production, economies of scale, and reduced transaction costs.<sup>42</sup> At one extreme, Euro-Federalists have cautiously and tentatively argued for the formation of a “United States of Europe.”<sup>43</sup> The Euro-Federalists’ ultimate goal is both unrealistic and undesirable - recreating mercantilist nation states as mercantilist continental empires would only lead to more global conflict.<sup>44</sup>

Good, practical reasons, however, validated the EU’s creation. The EU’s objectives, also (and more importantly) included preventing another European war and improving the well-being of all workers.<sup>45</sup> Those objectives were attained through the functionalist method of forming specialized institutions defined around particular goals to take advantage of unbiased expert judgment. This expert judgment in specific sectors in turn enabled the EU to attain socially desirable goals in the common interest of all Europeans in an incremental step-by-step fashion. The functionalist method first pooled together the military industries: coal, steel, and atomic power via the European Coal

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<sup>41</sup> See ALEX F. DOWLAH & JOHN E. ELLIOTT, *THE LIFE AND TIMES OF SOVIET SOCIALISM* 182 (1997).

<sup>42</sup> Engle, *Europe Deciphered*, *supra* note 2, at 65.

<sup>43</sup> See, e.g., EURO-POLITICS: INSTITUTIONS AND POLICYMAKING IN THE “NEW” EUROPEAN COMMUNITY 260 (Alberta M. Sbragia ed., 1992).

<sup>44</sup> Eric Engle, *The EU Means Business: A Survey of Legal Challenges and Opportunities in the New Europe*, 4 DEPAUL BUS. & COM. L.J. 351, 352-53 (2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1020467](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1020467).

<sup>45</sup> Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, available at [http://ec.europa.eu/economy\\_finance/emu\\_history/documents/treaties/rometreaty2.pdf](http://ec.europa.eu/economy_finance/emu_history/documents/treaties/rometreaty2.pdf) [hereinafter Treaty of Rome]. The Treaty of Rome was succeeded by the Treaty of Amsterdam (Maastricht) and then the Treaty of Lisbon which reiterated those goals: “The Union’s aim is to promote peace, its values and the well-being of its peoples.” Treaty of Lisbon Amending the Treaty on European Union and the Treaty establishing the European Community art.2, Dec. 13, 2007, 2007 O.J. (C 306) 1, available at [http://europa.eu/lisbon\\_treaty/index\\_en.htm](http://europa.eu/lisbon_treaty/index_en.htm) [hereinafter Treaty of Lisbon].

and Steel Community (ECSC)<sup>46</sup> and the European Atomic Energy Community (EURATOM).<sup>47</sup> European states also formed a customs union, the European Economic Community (EEC) to disaggregate national cartels, which were seen as a cause of wars for market share, because trade and territory had been linked and as a result the only way any state could expand its economy and resource base was by war.<sup>48</sup> Thus, the customs union aimed to attain a single integrated market via the free movement of goods, workers, capital, and enterprises (the four freedoms). Ultimately, the EU evolved into a supranational body with a common currency (the Euro), common citizenship and passports, common borders (the Schengen Area), and to some extent, a common foreign and security policy.<sup>49</sup> As a confederation,<sup>50</sup> the EU began to share many elements of classical Westphalian nation-states.<sup>51</sup>

### C. *The Objectives of the CIS*

The CIS arose in the chaotic aftermath of the collapse of the USSR, which saw competing concerns hamper political movements toward cooperative relations in the former Soviet states.<sup>52</sup> Unlike the

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<sup>46</sup> See EUROPEAN UNION, TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY (Aug. 29, 2011), [http://europa.eu/legislation\\_summaries/institutional\\_affairs/treaties/treaties\\_ecsc\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_ecsc_en.htm) (explaining that the ECSC merged into the E.U.).

<sup>47</sup> See generally *The European Atomic Energy Community (EURATOM)*, EUROPEAN COMM'N (Aug. 25, 2011), [http://ec.europa.eu/energy/nuclear/euratom/euratom\\_en.htm](http://ec.europa.eu/energy/nuclear/euratom/euratom_en.htm) (indicating that the EURATOM's Atomic Energy Commission (AEC) maintains a separate legal existence as an international organization).

<sup>48</sup> Namely, the unity of trade and territory under the Westphalian state system led to war because any state which wished to expand its economy also had to expand its territory. See, e.g., Eric Engle, *Europe Deciphered*, *supra* note 2, at 63.

<sup>49</sup> See generally Eric Engle, *I Am My Own Worst Enemy: Problems and Possibilities of European Foreign Policy Vis-a-Vis the United States*, 18 ST. THOMAS L. REV. 737, 737-38 (2006).

<sup>50</sup> See, e.g., Eric Engle, *Theseus's Ship of State: Confederated Europa between the Scylla of Mere Alliance and the Charybdis of Unitary Federalism*, 8 FLA. COASTAL L. REV. 27, 28-30 (2006).

<sup>51</sup> See Eric Engle, *The Transformation of the International Legal System: The Post-Westphalian Legal Order*, 23 QUINNIPIAC L. REV. 23, 23-25 (2004).

<sup>52</sup> See Michael Roberts & Peter Wehrheim, *Regional Trade Agreements and WTO Accession of CIS Countries*, 36 INTERECONOMICS 315, 315 (2001), available at <http://www.springerlink.com/content/4164206503711583/> ("Shortly after the collapse of the Soviet Union most of its successor states, with the exception of the Baltic States, joined the Commonwealth of Independent States (CIS). At the same time many CIS countries opened up their trade regimes by dismantling various trade restrictions, state trading monopolies, multiple exchange rate regimes as well as formal tariff barriers. However, in the course of the 1990s pressure for the

USSR or the EU, the CIS never had well-articulated goals. While one faction of the former Russian nomenklatura may well have seen the CIS as the Soviet Union by other means, another faction of Russians, comprised of those who had been the former economic criminals, may well have seen the CIS as merely a vast economic opportunity.<sup>53</sup> Even presupposing the unity of Russian nationalist leaders, the fact that such unity centered on “great Russian nationalism” rather than “proletarian internationalism” indicates that the CIS’s centralizing tendencies were disunited and unattractive to the newly independent national states. On the part of the CIS leaders, this indicates disunity of factions and of objectives. Nevertheless, even if there were a unity, if only of great Russian factions and objectives, then that unitary vision was not able to attract adhesion or persuade the newly independent national republics in, e.g. former Soviet Central Asia, to help form some variant of confederation featuring a customs union and/or common currency and/or common defense.<sup>54</sup>

The lack of a compelling and attractive central vision of shared goals and objectives for the CIS crippled it as an institution for transnational governance. Absent a common teleology or purpose, the CIS

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protection of domestic industries has increased. Import tariffs on “sensitive imports”, such as refined sugar, have started to pop up. By far the most serious barriers to trade and the ones most frequently used are non-tariff barriers. The ever more complex and constantly changing trade regimes of many CIS countries have also opened the door for corruption and smuggling.”)

<sup>53</sup> See Theodore P. Gerber, *Membership Benefits or Selection Effects? Why Former Communist Party Members Do Better in Post-Soviet Russia*, 29 SOCIAL SCIENCE RESEARCH 25, 47 (2000) (“It seems likely that such individual attributes as ambition, career-mindedness, a willingness to submit to organizational discipline, a penchant for organizational and administrative work, and perhaps what might be termed ‘opportunism’ may characterize Party members. These attributes are just as readily translated into material advantage in market institutional contexts as in the institutional context of the Soviet Union.”); Frederico Varese, *The Transition to the Market and Corruption in Post-socialist Russia*, 45 POLI. STUDIES 579, 594 (1997) (“It is harder to secure property right in the new market economy because the number of criminal opportunities is immense. . . People have had novel opportunities to cooperate and, at the same time, to defect, to cheat, and to commit crimes.”).

<sup>54</sup> See STEPHAN K. BATALDEN & SANDRA L. BATALDEN, *THE NEWLY INDEPENDENT STATES OF EURASIA: HANDBOOK OF FORMER SOVIET REPUBLICS* 18 (1997) (considering factional conflict within the Russian Soviet Federative Socialist Republic at the outset of the CIS); see also SCOTT L. GREER, *QUESTIONING GEOPOLITICS: POLITICAL PROJECTS IN A CHANGING WORLD-SYSTEM* 216-17 (2000) (noting the factionalism prevalent within the nomenklatura); Boris Grushin, *The Emergence of a New Elite: Harbinger of the Future or Vestige of the Past*, in *THE NEW ELITE IN POST-COMMUNIST EASTERN EUROPE* 53, 57 (Vladimir Shlapentokh et al. eds., 1999) (discussing the lack of vision prevalent in CIS elites).

degenerated into the political overseer of the peaceful dissolution of the USSR<sup>55</sup> and, to a limited extent, the introduction of market mechanisms to replace the planned economic system. Consequently, in Western literature the CIS is typically described as “moribund” and can accurately be compared to the present day British Commonwealth.<sup>56</sup>

### 1. *The Breakdown of the CIS*

The CIS failed to evolve into a viable transnational governing institution due to a lack of a common vision<sup>57</sup> and elite inexperience in transnational institutionalism,<sup>58</sup> particularly with regards to market liberalization.<sup>59</sup> The CIS sought to undertake the simultaneous tasks of privatization, political and economic liberalization, and the implementation of the rule of law to replace rule-by-command. However, the CIS lacked experts and practical proficiency in transnational governance beyond the context of a strong vertical hierarchy of a one-party dictatorship. Consequently, liberal western transnational governance models such as those of the European Communities could not inform the CIS’s already overwhelmed managerial class. Moreover, some of the new managerial class were Soviet era “economic

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<sup>55</sup> See Roberts & Wehrheim, *supra* note 52, at 323 (“Ten years after the break up of the USSR, CIS countries are still struggling to find the appropriate format to govern their mutual trade relations. At present a patchwork of half-implemented bilateral agreements and a series of paper framework agreements govern intra-CIS trade relations. Most of the RTAs among CIS member states remain de jure agreements. If one were to characterise this institutional framework, one might term it ‘managed disintegration’.”).

<sup>56</sup> See *Commonwealth of Independent States (CIS)*, GLOBALSECURITY.ORG (Aug. 24, 2011), <http://www.globalsecurity.org/military/world/int/cis.htm>.

<sup>57</sup> See Rilka Dragneva & Joop de Kort, *Russia’s Role in Fostering the CIS Trade Regime*, Memorandum from the Dept. of Econ. Research of Leiden University 9 (Mar. 2006), available at <http://ssrn.com/abstract=1440809> (“The CIS was burdened with ambivalent goals. On the one hand, it aimed to assist the newly independent countries to gain economic independence, while on the other hand it was the intended institution to bring the newly independent states together in an economic union. The ambivalent character of the CIS, and the increasing self-consciousness, both politically and economically, of the newly independent states, resulted in numerous bilateral and multilateral agreements at the same time.”).

<sup>58</sup> See Margot Light, *International Relations of Russia and the Commonwealth of Independent States, in 1999* EASTERN EUROPE AND THE COMMONWEALTH OF INDEPENDENT STATES 21 (4th ed.1999).

<sup>59</sup> See Philip Hanson, *The Economics of the Former USSR: An Overview, in 1999* EASTERN EUROPE AND THE COMMONWEALTH OF INDEPENDENT STATES 74, 79 (4th ed. 1998).

criminals,"<sup>60</sup> while others were former nomenklatura. Consequently, factionalism soon ensued both between and within these two historically conflicting groups. The CIS's failure is unsurprising, and was perhaps even inevitable, given those conditions.<sup>61</sup> Lacking a common vision, the CIS defaulted into the role of the clearinghouse for the USSR's remarkably peaceful dissolution via two distinct factors: (i) privatization; and (ii) the devolution of former federal powers to individual Republics.<sup>62</sup>

The institutional problems mentioned contributed to the breakdown of CIS. For example, the CIS's transnational trade policy was characterized by incoherence. Numerous overlapping multilateral and bilateral treaties covered similar issues,<sup>63</sup> leading to economic disputes due to the contradictory obligations imposed by the various treaties.<sup>64</sup> However, these overlapping multilateral and bilateral treaties also left many issues unaddressed.<sup>65</sup> For example, the CIS' agreements were not sophisticated enough to take into account non-tariff

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<sup>60</sup> See Leonard Orland, *Perspectives on Soviet Economic Crime*, in SOVIET LAW AND ECONOMY 169, 177-78 (Olimpiad S. Ioffe & Mark W. Janis eds.) (1987) (outlining what defined a Soviet-era economic criminal). See generally Charles A. Schwartz, *Economic Crime in the USSR: A Comparison of the Khrushchev and Brezhnev Eras*, 30 INT'L & COMP. L.Q. 281, 295 (1981) (discussing the scaling back of the rigidity of economic rules allowing more economic freedom).

<sup>61</sup> Nonetheless, its failure was remarkable in that it contributed to the peaceful transition from one-party dictatorships to independent republics with varying degrees of democratic participatory government.

<sup>62</sup> See Stephen Kux, *From the USSR to the Commonwealth of Independent States: Confederation or Civilized Divorce*, in FEDERALIZING EUROPE? 325, 346-347 (Joaquim Jens Hesse & Vincent Wright eds. 1996).

<sup>63</sup> "What can be observed in the CIS is that economic cooperation takes the form of overlapping bilateral and multilateral agreements of very distinct legal quality. From an economic point of view it does not make sense that countries that have concluded a multilateral free trade agreement, as the CIS countries did in 1994, an agreement that they amended in 1999, subsequently conclude bilateral free trade agreements with their partners as well. It creates overlap, increases transaction costs, and obfuscates the status of multilateral and bilateral agreements." See Dragneva & de Kort, *supra* note 57, at 1.

<sup>64</sup> *Id.* ("What can be observed in the CIS is that economic cooperation takes the form of overlapping bilateral and multilateral agreements of very distinct legal quality. From an economic point of view it does not make sense that countries that have concluded a multilateral free trade agreement, as the CIS countries did in 1994, an agreement that they amended in 1999, subsequently conclude bilateral free trade agreements with their partners as well. It creates overlap, increases transaction costs, and obfuscates the status of multilateral and bilateral agreements.").

<sup>65</sup> See *id.* ("The agreements that are concluded often are partial and selective, while their ratification and implementation also is a mixed affair.").

trade barriers such as health, safety, and technical restrictions to trade.<sup>66</sup> In sum, CIS institutions and rules were simply ineffective.

Any effort to bring the USSR's customs and monetary union into the CIS era was thus doomed for several interlocking reasons. The absence of legal concepts important to coordinating supranational and intergovernmental tendencies and attaining by accretion the objectives of economic integration—such as “basic economic rights” (the four freedoms)<sup>67</sup> subsidiarity, proportionality, and acquired community positions (*acquis communautaire*)<sup>68</sup>—within the CIS treaties further crippled the CIS. Common institutions such as the Economic Court of the CIS were weak or entirely absent<sup>69</sup> because of a lack of a common will, common goals, and common concepts.

Although the CIS lacked the institutional expertise and juridical structure to transform the USSR into something like the EEC, this does not mean that it is currently impossible or undesirable. Accordingly, this paper considers the Eurasian Economic Community

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<sup>66</sup> See *id.* at 3 (“The CIS trade regime can be described as a symbiosis between bilateral and multilateral regimes, both of which can be described as weak regimes. Bilateral agreements cover some key free trade rules, such as tariffs, but remain minimal and quite basic. Non-tariff barriers, for instance, are generally left out, as are liberalisation of services or intellectual property to name a few issues that have become important in international trade agreements. Disputes are generally resolved through consultations”).

<sup>67</sup> The central concept to the foundation of the European Union as an economic area are the four freedoms (basic rights): the free movement of goods, workers, capital and of enterprises among the Member States. See, e.g., Engle, *Europe Deciphered*, *supra* note 2.

<sup>68</sup> Knud Erik Jørgensen, *The Social Construction of the Acquis Communautaire: A Cornerstone of the European Edifice*, 3 EUROPEAN INTEGRATION ONLINE PAPERS 1, 3, 10-12 (Apr. 29, 1999), <http://eiop.or.at/eiop/texte/1999-005a.htm> (using the Nietzsche-Foucauldian genealogical method to explore various definitions of *acquis communautaire*); *Acquis Communautaire*, BBC NEWS (Apr. 30, 2001), [http://news.bbc.co.uk/1/hi/in\\_depth/europe/euro-glossary/1216329.stm](http://news.bbc.co.uk/1/hi/in_depth/europe/euro-glossary/1216329.stm).

<sup>69</sup> Dragneva & de Kort, *supra* note 57, at 2 (“[T]he CIS presents a mix of, often overlapping, bilateral and multilateral agreements. The picture gets even more complicated as bilateral and multilateral agreements often differ in the strength of commitment they require from the signatories. Bilateral agreements rarely envision a mechanism for resolving disputes between its parties, relying on negotiations to do so. Multilateral agreements on the other hand often do attempt to strengthen the bindingness of the commitments undertaken. In 1993, the Treaty of the Economic Union even went as far as to strengthen the role of the Economic Court, by requiring that ‘if the Economic Court recognises that [. . .] a member state has not fulfilled its obligation ensuing from the Treaty, this state is obliged to take measures connected with the implementation of the decision of the Economic Court’. A year later, in 1994, a Free Trade Agreement (FTA) was concluded which ‘undermines’ the position of the Economic Court. . .”).

(EurAsEC) to see whether and how the CIS may consider and implement EU principles.

## 2. *The Eurasian Economic Community (EurAsEC)*<sup>70</sup>

Following the instauration of market mechanisms to replace the planned economic system, and because of the EU's continual success as an institution of transnational governance, the Russian Federation, Belarus, and Kazakhstan together instituted a customs union known as the "Eurasian Economic Community."<sup>71</sup> The EurAsEC could, and should, look directly to the EU's growth and evolution as a source of inspiration and also for basic legal concepts such as:

*Direct effect* of treaty provisions (that private persons have directly enforceable rights and duties under the EurAsEC treaty).

*The four freedoms* (free movement of goods, labor capital, workers and enterprises)<sup>72</sup>

*Acquis communautaire* (the idea that each step toward a single integrated market is irreversible, and that new adherents to the EurAsEC must agree to abide by the existing *acquis*)<sup>73</sup>

"*General principles of international law*" as a source of EurAsEC law

*The principle of legality* (that EurAsEC institutions should be legal, not political)

*Functionalism* (that the EurAsEC institutions should be built out incrementally to progressively attain a single integrated market)

Economic development occurs more quickly through open borders.<sup>74</sup> Thus, despite critiques of the rule of law and democracy in the former Soviet republics, the path forward is through free trade. Eco-

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<sup>70</sup> *About EurAsEC*, ЕВРАСЕЕ́СКОЕ Ў́КОНОМЪ́ЕСКОЕ СООА́УЕСТВО (Aug. 24, 2011), <http://www.evrazes.com/en/about> ("[A] customs union within the EurAsEC framework, with the Republic of Belarus, the Republic of Kazakhstan and the Russian Federation as initial members. Other EurAsEC member states will join the customs union when their economies are ready to take this step.").

<sup>71</sup> Roberts & Wehrheim, *supra* note 52, at 321 ("Russia and two other CIS countries - Kazakhstan and Belarus - established a customs union (CU) in 1995. The Kyrgyz Republic joined in March 1996 and Tajikistan in 1999. The text of the customs provided for discontinuation of all trade tariffs between member countries, tariffs for trade with other countries were adjusted to one level, [i.e., harmonized into a common external tariff] and the system of privileges was unified. In addition, certain measures were taken to unify tax policy (tax rates and application of indirect taxes). The agreements on the customs union called for coordination of customs, excise, and value-added dues.").

<sup>72</sup> See, e.g., Engle, *Europe Deciphered*, *supra* note 2, at 75.

<sup>73</sup> See Jørgensen, *supra* note 68, at 3.

<sup>74</sup> CLEMENS L. J. SIERMANN, *POLITICS, INSTITUTIONS, AND THE ECONOMIC PERFORMANCE OF NATIONS* 131 (Edward Elgar Publ'g 1998).



conomic development is the most practical and effective way to build stronger and more democratic institutions in the former Soviet Republics because wealth creates the conditions that enable genuine human rights protection.<sup>75</sup> The authoritarian democracies in the former Soviet Republics are not *systematic* violators of *the most basic* human rights.<sup>76</sup>

Functionalist incrementalism is thus more effective than extreme methods at securing human rights protection.<sup>77</sup> Economic integration resulting from freer trade and improved economic performance are positively correlated.<sup>78</sup> Likewise, improved economic performance and improved human rights protection are positively correlated.<sup>79</sup> Consequently, through a constructive engagement policy,<sup>80</sup> aid and

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<sup>75</sup> Nat'l Intelligence Council, Conference Report, *Russia in the International System* (June 1, 2001), [http://www.dni.gov/nic/confreports\\_russiainter.html](http://www.dni.gov/nic/confreports_russiainter.html) ("Living in the post-Cold War era has lent some air of stability—a peace dividend—to life in Russia. This may have a positive effect on the development of the economy and democratic institutions.").

<sup>76</sup> Eleanor Bindman, *Russia's Response to the EU's Human Rights Policy*, OPENDEMOCRACY.NET (Oct. 1, 2010), <http://www.opendemocracy.net/od-russia/eleanor-bindman/russia%E2%80%99s-response-to-eu%E2%80%99s-human-rights-policy> ("[T]he election of President Medvedev in 2008 has led to gradual changes in the previously more hard-line policy regarding human rights in EU-Russia relations. The new foreign policy doctrine appears to emphasise less confrontational and more pragmatic relations with partners such as the EU with the aim of promoting Russia's modernisation."); HUMAN RIGHTS WATCH, 2011 WORLD REPORT 456, 460, 462 (2011), available at <http://www.hrw.org/en/world-report-2011/russia> ("In 2010 Russia demonstrated increased openness to international cooperation on human rights . . .

In January 2010 - after years of delay - Russia ratified Protocol 14 to the European Convention for Human Rights, becoming the last Council of Europe (CoE) member state to do so. Protocol 14 streamlines the case review process at the ECtHR and strengthens the enforcement mechanisms of the CoE's Committee of Ministers. . . .

In 2010 Russia showed some improved cooperation on human rights, but Russia's international partners did not do enough to encourage human rights reform.").

<sup>77</sup> Elena Klitsounova, *Promoting Human Rights in Russia by Supporting NGOs: How to Improve EU Strategies* 19 (Ctr. for European Policies Studies, Working Document, No. 19, Apr. 2008), available at [www.ceps.be/system/files/book/1637.pdf](http://www.ceps.be/system/files/book/1637.pdf).

<sup>78</sup> See, e.g., U.N. Econ. & Soc. Comm'n for W. Asia, *Assessment of Trade Policy Trends and Implications for the Economic Performance of the ESCWA Region*, at 3, U.N. Doc E/ESCWA/EDGD/2009/1 (Apr. 14, 2009), available at <http://www.escwa.un.org/information/publications/edit/upload/edgd-09-1-e.pdf>.

<sup>79</sup> SIERMANN, *supra* note 74, at 131.

<sup>80</sup> Sanford J. Ungar & Peter Vale, *South Africa: Why Constructive Engagement Failed*, 64 FOREIGN AFF. 234 (Winter 1985/86) (defining constructive engagement),

trade can help improve economic well-being, leading to both improved human rights protection, and improved rule of law within the former Soviet Republics.

Supranational and intergovernmental governance worked well in the EU to leverage Member States and their immediate neighbors out of war.<sup>81</sup> The former Soviet Republics can and should use those same methods – economic integration leading to increased prosperity to foster peace and the progressive realization of human rights<sup>82</sup> – to support the rule of law and human rights protection.<sup>83</sup> Free trade generates economic prosperity, which in turn generates improved human rights protection.<sup>84</sup> Thus, free trade improves human rights protection.

### 3. Comparing CIS and EU institutions

Marx demonstrated that the business cycle of booms, panics, and depressions causes wars to obtain markets and raw materials as well as to burn off surplus production and employ the unemployed.<sup>85</sup>

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available at <http://www.foreignaffairs.com/articles/40525/sanford-j-ungar-and-peter-vale/south-africa-why-constructive-engagement-failed>.

<sup>81</sup> See, e.g., PAUL CRAIG & GRAINNE DE BURCA, EU LAW: TEXT, CASES, AND MATERIALS 3-6 (2008).

<sup>82</sup> Štefan Füle, Address at Columbia University (Aug. 25, 2011), [http://www.europa-eu-un.org/articles/fr/article\\_10447\\_fr.htm](http://www.europa-eu-un.org/articles/fr/article_10447_fr.htm).

<sup>83</sup> Zbigniew Brzezinski, *Living With Russia*, 61 THE NATIONAL INTEREST 5, 5 (Fall 2000) (“Both Russia and China may be susceptible to a strategy aimed at their inclusion in cooperative international structures. To that end, two Eurasian power triangles must be steadily managed and, over time, more directly connected: one involving the United States, the European Union and Russia; and the other involving the United States, Japan and China. For that linkage to be effective, the constructive engagement of Russia is essential.”); Jonathan M. Winer & Phil Williams, *Russian Crime and Corruption in an Era of Globalization: Implications for the United States*, in RUSSIA’S UNCERTAIN FUTURE, S. PRT. 107-5, at 97, 121 (Joint Comm. Print 2001), available at <http://econ.la.psu.edu/~bickes/jecrussia.pdf> (“Following the collapse of the Soviet Union and the ascendancy of Boris Yeltsin, U.S. policy could be defined in brief as one of constructive engagement, in which the United States aggressively and assiduously worked to secure Russian integration with the world economy, Russian political, economic and legal reform, and democratization.”); see Graham Timmins, *German-Russian Bilateral Relations and EU Policy on Russia: Reconciling the Two-Level Game?*, in RUSSIA AND EUROPE IN THE TWENTY-FIRST CENTURY: AN UNEASY PARTNERSHIP 169-70 (Jackie Gower & Graham Timmins eds., 2009) (describing diplomatic tensions between a post-Putin CIS and the European Union).

<sup>84</sup> See SIERMANN, *supra* 74, at 131; Füle, *supra* note 82.

<sup>85</sup> KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO 11 (The Echo Library 2009) (1888).

Both the EU<sup>86</sup> and the USSR sought to prevent such wars and to attain well-being for ordinary workers. However, their similar teleological goals were to be attained by differing means. Institutionally, the USSR was, at least nominally, a workers' and peasants' dictatorship: an advanced vanguard party would exercise a dictatorship on behalf of the proletariat<sup>87</sup> to prevent<sup>88</sup> the wars for market share that capitalism unleashed in economic crises at the trough of business cycles.<sup>89</sup> While we might criticize the idea of a vanguard party exercising a dictatorship on behalf of workers and peasants, we should also understand that the USSR's proletarian dictatorship shared the same stated objectives as the EU. Paradoxically, the EU and USSR both sought to transform the state (coercion) into society (voluntarism), but through opposite means. The USSR, following Marx's prescription to transform the state into civil society,<sup>90</sup> sought to end market relations entirely<sup>91</sup> to attain the goal of peace and prosperity. The EU sought to use market forces to attain that same goal.<sup>92</sup>

Like the EU, the USSR was multinational, multilingual, and attained a monetary union with the free movement of goods, labor, and capital. But, the USSR did not in fact attain the best standard of living for workers. Life expectancy was only a few years lower than in

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<sup>86</sup> See, e.g., DAMIAN CHALMERS ET AL., *EUROPEAN UNION LAW: CASES AND MATERIALS* 7 (Cambridge Univ. Press 2010).

<sup>87</sup> See generally PETER BÜRGER, *THEORY OF THE AVANT-GARDE* (Michael Shaw trans., Univ. of Minn. Press 1984).

<sup>88</sup> See VLADIMIR ILYICH LENIN, *IMPERIALISM, THE HIGHEST STAGE OF CAPITALISM* (1916), reprinted in 1 LENIN: *SELECTED WORKS* 667 (Progress Publishers 1963), available at <http://www.marxists.org/archive/lenin/works/1916/imp-hsc/ch09.htm>.

<sup>89</sup> See 1 KARL MARX, *CAPITAL* (Samuel Moore & Edward Aveling trans., Frederick Engels ed., 1867), available at <http://www.marxists.org/archive/marx/works/1867-c1/>; 2 KARL MARX, *CAPITAL* (I. Lasker trans., Progress Publisher 1956) (1885), available at <http://www.marxists.org/archive/marx/works/1885-c2/index.htm>; 3 KARL MARX, *CAPITAL* (Tim Delaney et al. trans., 1999) (1894), available at <http://www.marxists.org/archive/marx/works/download/pdf/Capital-Volume-III.pdf>; see also VLADIMIR ILYICH LENIN, *STATE AND REVOLUTION* (1917), in 25 *Collected Works* 381-492, available at <http://marxists.org/archive/lenin/works/1917/staterev/index.htm>; MARX & ENGELS, *supra* note 85, at ch. 2.

<sup>90</sup> FRIEDRICH ENGELS & KARL MARX, *SOCIALISM: UTOPIAN AND SCIENTIFIC* 68 (Andrew Moore ed., Edward Aveling trans., Mondial 2006).

<sup>91</sup> See, e.g., *USSR CONSTITUTION*, *supra* note 3, at art. 4 ("The socialist system of economy and the socialist ownership of the means and instruments of production firmly established as a result of the abolition of the capitalist system of economy, the abrogation of private ownership of the means and instruments of production and the abolition of the exploitation of man by man, constitute' the economic foundation of the U.S.S.R. 1936.").

<sup>92</sup> See, e.g., *Treaty of Rome*, *supra* note 45, at pmbl.

the West but double that of Tsarist Russia.<sup>93</sup> Leisure was assured, but consumer goods were always in short supply.<sup>94</sup> The quality of goods suffered from production deadlines at the end of the five-year planning cycles when production goals had to be met, though this improved over time.<sup>95</sup> However, in sum, the quality of Soviet life did not match Western European standards. This was mostly because so much of the government's resources were wasted on building a military-industrial complex that did not advance the well-being of Soviet citizens.<sup>96</sup>

Moreover, the planned economy faced an increasingly complex task: the centralized coordination of production and distribution of a growing variety of goods.<sup>97</sup> Central planning of a primitive industrializing economy with only a few basic inputs is considerably easier than for a diversified industrial economy with hundreds of consumer goods. The Soviet planned economy succeeded in shifting the USSR from a semi-feudal economy producing but a score of basic goods into an industrial economy.<sup>98</sup> This newly created industrial economy, however, produced a myriad of different goods.<sup>99</sup> This production diversity doomed the centrally planned economy. Namely, the ever-greater product variety made central planning increasingly complex and thus less efficient when coordinating production and consumption. Soviet production was not, however, entirely inefficient. Soviet weaponry was cheap, durable, easily maintained and reliable. The USSR was the first country to put a satellite into space, and later a man into orbit. Still, the USSR's centrally planned economic production system was more appropriate for a semi-feudal industrializing society with few goods than for a highly developed industrial economy producing a myriad of goods.<sup>100</sup>

The institution of a single party dictatorship and the teleology of the USSR were not apt to liberalism.<sup>101</sup> Thus, the customs and mon-

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<sup>93</sup> WHITE, *supra* note 5, at 43.

<sup>94</sup> See generally Robert Whitesell, *Why Does the Soviet Economy Appear to be Allocatively Efficient?*, 42 SOVIET STUDIES 259, 259-268 (Apr. 1990).

<sup>95</sup> Zigurds L. Zile, *Consumer Product Quality in Soviet Law: The Tried and the Changing*, in 2 SOVIET LAW AFTER STALIN: SOCIAL ENGINEERING THROUGH LAW 202 (Donald D. Barry ed., 1978) (discussing the rising quality of Soviet goods between 1960s and 1970s).

<sup>96</sup> See Engle, *A Social-Market*, *supra* note 29, at 42.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Engle, *A Social-Market*, *supra* note 29.

<sup>100</sup> See generally Ludwig von Mises, *Introduction to LUDWIG VON MISES, ECONOMIC CALCULATION IN THE SOCIALIST COMMONWEALTH* 2, 2-3 (S. Alder trans., 1920), available at <http://mises.org/econcalc.asp>.

<sup>101</sup> I mean liberalism in the sense intended by Aristotle and Locke; an open democratic form of governance in which people are free to enter into economic transac-

etary union of the CIS quickly degenerated into national economies with separate currencies and tariff barriers still trying to implement the ISI development model – a model that neoliberalism had long surpassed.<sup>102</sup> The establishment of inter CIS customs and tariff barriers raised transaction costs and reduced economies of scale.<sup>103</sup> Restructuring a centrally planned dictatorial economy centered on autarchy and war into a consumer oriented networked globalizing economy exacerbated those problems. The result was sub-optimal economic performance.<sup>104</sup> At times, the newly independent Republics were trying to implement outdated and inefficient liberal or Soviet models of economic development. At other times, they became disposable experiments in neoliberalism. All too often the results were chaos, corruption, asset stripping, and economic failure<sup>105</sup> resulting in a *declining* average life expectancy in the post-Soviet years.<sup>106</sup> These results explain why multiparty liberal democracy did not take root in some of the former Soviet Republics. The return of one-party rule in some former Soviet Republics after the collapse of the USSR resulted from the chaos of the failed Soviet planned economy model, the failed ISI model, and the asset stripping and kleptocracy which resulted from neoliberal experimentation. The CIS's lack of institutional experience and personnel expertise in the principles and practices of liberal markets and transnational governance in any context other than that

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tions as they themselves choose. See JOHN LOCKE, *SECOND TREATISE OF CIVIL GOVERNMENT* (1690), available at <http://www.constitution.org/jl/2ndtreat.htm>.

<sup>102</sup> See, e.g., MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (Univ. of Chicago Press 1962). While I critique certain points of Friedman, Friedman's views on monetary policy seem entirely correct to me and replaced the failed theory of John Maynard Keynes's "General Theory of Employment, Interest and Money." Compare FRIEDMAN, *supra*, with ERIC ENGLE, *LEX NATURALIS, IUS NATURALIS* 220-428 (Donna M. Lyons & Jacob D. Zillhardt eds., 2010), available at <http://tinyurl.com/lexnaturalis>, and JOHN MAYNARD KEYNES, *GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* (1936), available at <http://www.marxists.org/reference/subject/economics/keynes/general-theory/>.

<sup>103</sup> WORLD BANK, *BELARUS: PRICES, MARKETS, AND ENTERPRISE REFORM* 1 (1997).

<sup>104</sup> See, e.g., *id.*

<sup>105</sup> *Privatization: Lessons from Russia and China - Employment Sector*, INT'L LABOR ORG. (Joseph Prokopenko ed.), available at <http://www.ilo.org/public/english/employment/ent/papers/emd24.htm> ("By the beginning of 1997 the Russian economy had perhaps reached its lowest point. GNP fell by 6 percent in 1996, compounding a decline of more than 50 per cent since 1991 (although the shadow economy has expanded). Many enterprises are on the brink of collapse; the proportion of loss-making enterprises in the main economic sectors is approximately 43 per cent.").

<sup>106</sup> See, e.g., D. A. Barr & M. G. Field, *The Current State of Health Care in the Former Soviet Union: Implications for Health Care Policy and Reform*, 86 AM. J. PUB. HEALTH 307, 308 (1996).

of a single party dictatorship in turn explains the failure of the CIS member states to have adopted EU governance models in the late 1990s.

### III. CONCEPTS IN TRANSNATIONAL GOVERNANCE

This section describes the relationships between the rule of law, the economy, human rights protection, and democracy. It outlines ideas about political legitimation and presents practical methods to advance transnational relations to explain how international relations between the United States, the E.U., and the former Soviet Republics may be improved.

#### A. *Historical Materialism Revisited*

A key question for transnational governance is: how to untangle the relationships among the rule of law, democracy, the economic system, and human rights? The rule of law, democracy, free trade, and human rights protection are all positively associated - improving the protection of one tends to improve protection of the others.<sup>107</sup> Does any hierarchy order their relations?

I hypothesize that the rule of law is needed for an optimally productive market economy, and that a productive economy and the rule of law in turn lead to effective human rights protection *de jure* and *de facto* respectively. I also argue that democratic institutions are less important to human rights protection or to the attainment of the rule of law than is usually thought to be the case.<sup>108</sup> That is because, in practice, democratic processes are used only to reinforce and legitimize policies which were already formed by elites rather than to actually create public policies.<sup>109</sup> Most legislative bills are introduced not by democratic referenda but by elected republican representatives.

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<sup>107</sup> See, e.g., AMAZU A. ASOUZA, INTERNATIONAL COMMERCIAL ARBITRATION AND AFRICAN STATES: PRACTICE, PARTICIPATION AND INSTITUTIONAL DEVELOPMENT 42 (2001); Henry J. Steiner, *in Do Human Rights Require a Particular Form of Democracy?*, in DEMOCRACY, THE RULE OF LAW AND ISLAM 193, 202-204 (Eugene Cotran & Adel Omar Sherif eds., 1999); Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1 (2008).

<sup>108</sup> See, e.g., Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95, 96-97 (1998).

<sup>109</sup> EVA ETZIONI HALEVY, FRAGILE DEMOCRACY: THE USE AND ABUSE OF POWER IN WESTERN SOCIETIES 16 (1989); DAVID HELD, MODELS OF DEMOCRACY 164 (2006); JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 269-83 (1942); see HARRY ECKSTEIN ET AL., CAN DEMOCRACY TAKE ROOT IN POST-SOVIET RUSSIA?: EXPLORATIONS IN STATE SOCIETY RELATIONS 134 (1998) (explaining government institutions in the context of Russia).

Policies are typically proposed by elites<sup>110</sup> which are then either taken up or rejected by masses through the democratic process.<sup>111</sup>

The West tends to equate democracy with the rule of law,<sup>112</sup> and wrongly presumes that the democratic process is necessary to the rule of law and human rights protection. I maintain that the rule of law leads to a productive economy.<sup>113</sup> The rule of law and a productive economy together foster democratic processes and provide substantive human rights protection. These ideas are summed up in the following “key points”:

The rule of law is necessary for a productive open market;<sup>114</sup>  
 A market economy with social protections favors prosperity;  
 Economic prosperity favors protection of human rights;  
 Democratic deficit can be *ex post facto* legitimized by the success of public policies that were politically unpopular at the time of their enactment.

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<sup>110</sup> See CHARLES WRIGHT MILLS & ALAN WOLFE, *THE POWER ELITE* 3-4 (2000).

<sup>111</sup> Anne Peters argues, as does this paper, for “legitimation *ex post*” i.e. legitimation by success. See ANNE PETERS, *ELEMENTE EINER THEORIE DER VERFASSUNG EUROPAS* 517, 580 (2001); see also Andrew Arato, *Dilemmas Arising from the Power to Create Constitutions in Eastern Europe*, *CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES* 165, 186 (Michel Rosenfeld ed., 1994); ALAN KEENAN, *DEMOCRACY IN QUESTION: DEMOCRATIC OPENNESS IN A TIME OF POLITICAL CLOSURE* 28 (2003).

<sup>112</sup> See, e.g., Richard Bellamy & Dario Castiglione, *Constitutionalism and Democracy - Political Theory and the American Constitution*, 27 *BRIT. J. POL. SCI.* 595 (1997).

<sup>113</sup> David Silverstein & Daniel C. Hohler, *A Rule-Of-Law Metric for Quantifying and Assessing the Changing Legal Environment of Business*, 47 *AM. BUS. L.J.* 795, 818-19 (2010) (“For more than half a century, a prevailing view motivating Western foreign aid approaches was that rule of law correlated in some positive and significant way with economic development and an attractive business climate for foreign investment . . . . More recent literature in this field, however, has led to growing skepticism about the validity and general application of the assumptions that served as the touchstones for Western development initiatives. Debate continues, for example, over whether a causal relationship between rule of law and a successful market economy exists and, if so, in which direction that causation runs, whether these variables may be mutually reinforcing, what key elements characterize a rule-of-law system, and how does one explain away the many anomalies.”)

<sup>114</sup> See, e.g., Edgardo Buscaglia, U.N. Office for Drug Control & Crime Prevention [UNODCCP], Ctr. for Int’l Crime Prevention [CICP], *Judicial Corruption in Developing Countries: Its Causes and Economic Consequences* 6-7, U.N. Doc. CICP-14 (Mar. 2001), available at <http://www.unodc.org/pdf/crime/gpacpublications/cicp14.pdf>.

Rather than adopting the position that democratic processes are either the source of human rights protection or a necessary precondition to the rule of law, I argue that the rule of law and economic development positively correlate<sup>115</sup> and that each is a precondition to effective and meaningful human rights defense. I also argue that democratic legitimation can be an outcome of economic and legal development.<sup>116</sup>

These arguments reiterate the historical materialist claims that economic processes ultimately drive legal and ideological rationalizations of any given political system.<sup>117</sup> The dialectical materialist refinement of that argument is to note that the economic base (the forces of production) *generally* determines the legal forms of the superstructure (the relations of production), but that *exceptionally*, at particular times and under certain conditions, the superstructure (ideology) can determine the base (production).<sup>118</sup> In other words, the material forces of production *generally* constitute and constrain the ideological superstructure that rationalizes them – but, *exceptionally*, at certain times and places in history, the ideological superstructure can influence and compel the structure of the material forces of production.

Marxism aimed to act as a catalyst for the natural and inevitable movement of history by intervening “at the margins,” - these excep-

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<sup>115</sup> Frank Richardson, *Pro Bono Work Has Burgeoned Over the Past Few Years Both Geographically and in Its Legal Range*, 64 INT’L B. NEWS 26 (Aug. 2010) (explaining the positive correlation between rule of law and economic performance; negative correlation between corruption and economic performance).

<sup>116</sup> There is a plethora of literature, much of it contradictory, on the relationships among the rule of law, prosperity, democracy, and human rights. See, e.g., Susan D. Franck, *Judicial Independence and Legal Infrastructure: Essential Partners for Economic Development: Foreign Direct Investment, Investment Treaty Arbitration, and Rule of Law*, 19 PAC. MCGEORGE GLOBAL BUS. & DIV. L.J. 337, 342-43 (2007); Stephan Haggard et al., *The Rule of Law and Economic Development*, 11 ANN. REV. POL. SCI. 205 (2008); James R. Jones, *Open Markets, Competitive Democracy, and Transparent and Reliable Legal Systems: The Three Legs of Development*, 83 CHI.-KENT L. REV. 25 (2008); Randall Peerenboom, *Social Networks, Rule of Law and Economic Growth in China: The Elusive Pursuit of the Right Combination of Private and Public Ordering*, 31 GLOBAL ECON. REV. 3 (2002); John Hewko, *Foreign Direct Investment: Does the Rule of Law Matter?* (Carnegie Endowment for Int’l Peace, Democracy and Rule of Law Project, Working Paper No. 26, 2002), available at <http://carnegieendowment.org/files/wp26.pdf>.

<sup>117</sup> See generally G. A. Cohen, *Base and Superstructure: A Reply to Hugh Collins*, 9 OXFORD J. LEGAL STUD. 95 (1989).

<sup>118</sup> The dialectical relationship between the material forces of production (base) and the ideological relations of productions (superstructure) is a basic tenet of Marxism. See KARL MARX, *Preface to A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY* (R. Rojas trans., Progress Publishers 1977) (1859), available at <http://www.marxists.org/archive/marx/works/1859/critique-pol-economy/preface>.



tional points in social life where superstructure can influence base.<sup>119</sup> Perhaps the vanguard party's altruism outran the basic needs for consumption of the productive base (the workers) it was leading. Perhaps the vanguard party became corrupted. Perhaps both explanations apply. Nevertheless, the USSR shows that vanguard parties exercising a dictatorship on behalf of the proletariat are very effective at ending illiteracy and starvation, and at introducing sex equality, but are not terribly effective at coordinating production and consumption in a complex consumer economy.<sup>120</sup>

The rule of law, economic development via free trade and open markets, human rights protection, and democracy all correlate positively and are mutually reinforcing.<sup>121</sup> These concepts form an interrelated hierarchy. I postulate their priority as follows. Without basic laws, economic development is impossible due to physical insecurity and legal uncertainty. Without economic development, human rights protection is impossible or at least meaningless. Meanwhile, democratic processes require a basic legal system and at least minimal economic well-being. Human rights protections without economic development are sub-optimal. For example, religious freedom in the face of starvation is merely the right to receive one's last rites, so to speak. While dying with dignity isn't utterly meaningless, would it not be better to choose life, somehow? By placing survival rights, such as the right to food,<sup>122</sup> ahead of psychological rights, or even political rights, we will better protect people in real terms.

In any case, *democracy, productive open markets, human rights protection, and the rule of law* are all positively correlated, and mutually reinforcing. As Russia increasingly implements the rule of law, transaction costs will decline, which will strengthen the economy. This, in turn, creates an environment where it is possible to envision better human rights protections and practically apply the material re-

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<sup>119</sup> See, e.g., KARL MARX, *Afterword to the Second German Edition, CAPITAL* (1873); MARX, *CAPITAL*, *supra* note 87, at ch. 24 § 1; see also FRIEDRICH ENGELS, *DIALECTICS OF NATURE* (Andy Bluden et al. trans., 2006) (1883), available at <http://www.marxists.org/archive/marx/works/1883/don/index.htm>.

<sup>120</sup> See generally ENGLE, *MARXISM*, *supra* note 16.

<sup>121</sup> See Pamela K. Star, *The Two "Politics of NAFTA" in Mexico*, 16 L. & BUS. REV. AM. 839, 841 (2010) (discussing how trade liberalization, economic performance, democratization are correlated positively); see, e.g., North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

<sup>122</sup> See, e.g., Jean Ziegler, Special Rapporteur on the Right to Food, *Economic, Social and Cultural Rights: The Right to Food*, U.N. Doc. E/CN.4/2001/53 (Feb. 7, 2001), available at <http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/f45ea4df67ecca98c1256a0300340453?OpenDocument> (indicating that a well-functioning economy facilitates the furtherance of the right to eat).

sources needed for substantive human rights protection and enjoyment.

### B. *Functionalism*<sup>123</sup>

Functionalism argues that institutions should be understood and formed in terms of the functions that they aim to fulfill.<sup>124</sup> Functionalist approaches to transnational governance seek to safeguard peace by drawing nations together,<sup>125</sup> rather than splitting them apart.<sup>126</sup> Functionalism forms specialized institutions incrementally<sup>127</sup> to attain specific practical purposes.<sup>128</sup> When functionalism is linked to market liberalism, it seeks to obtain peace, obviate war, and generate prosperity and economic interdependence by delink-

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<sup>123</sup> As a theory of sociology, functionalism analogizes society to an organism, with each member having particular functions, like organs of a body. See, e.g., Kent McClelland, *Functionalism*, GRINNELL COLLEGE (Oct. 15, 2011, 12:15 PM), <http://web.grinnell.edu/courses/soc/s00/soc111-01/IntroTheories/Functionalism.html>.

<sup>124</sup> Steve Charnovitz, *Triangulating The World Trade Organization*, 96 AM. J. INT'L L. 28, 48 (2002) ("The core idea of functionalism is that international governance should be organized according to 'tasks' and 'functional lines.'").

<sup>125</sup> BARTRAM S. BROWN, THE UNITED STATES AND THE POLITICIZATION OF THE WORLD BANK: ISSUES OF INTERNATIONAL LAW AND POLICY 14-15 (1992) ("Functionalism is a theory of international organization which holds that a world community can best be achieved not by attempts at the immediate political union of states, but by the creation of non-political international agencies dealing with specific economic, social, technical, or humanitarian functions. Functionalists assume that economic, social and technical problems can be separated from political problems and insulated from political pressures.").

<sup>126</sup> Juliet Lodge, *Preface: The Challenge of the Future*, in THE EUROPEAN COMMUNITY AND THE CHALLENGE OF THE FUTURE, at xix (Juliet Lodge ed., 2d ed. 1993) ("The logic behind the approach is to prevent war not negatively - by keeping states apart - but positively by engaging them in cooperative ventures . . . to establish functionally specific agencies, initially in what were then seen as non-contentious areas like welfare. These were to transcend national boundaries and be managed by rational technocrats (not swung by the vagaries of political ideology and power-hungry political parties) owing their allegiance to a functionally specific organization not to a given nation state . . . Their tasks will cover those areas of the economy essential to running military machines. Governments, deprived of control over those areas, will be unable to pursue war and will eventually be left to manage residual areas not covered by functional bodies . . .").

<sup>127</sup> Sabino Cassese, *European Administrative Proceedings*, 68 L. & CONTEMP. PROBS. 21, 23 (2004) ("functionalism . . . has enabled the incremental, progressive development of the European Union").

<sup>128</sup> Lodge, *supra* note 126 ("Functionalism starts from the premise that by promoting functional cooperation among states it may be possible to deter them from settling disputes over competition for scarce resources aggressively.").

ing trade and territory.<sup>129</sup> One tenet of functionalism is that economic and political integration is best achieved not at one fell swoop with grandiose and impossible ideas,<sup>130</sup> but rather through incremental efforts in diverse fields.<sup>131</sup> Functionalism is realistic and pragmatic: it seeks to attain the possible here and now rather than utopian dreams that never really come true. Its methods obtain political legitimacy after the fact because of the success of the institution at achieving practical goals.<sup>132</sup> Ultimately, functionalists aim to prevent war not by keeping states apart, but by drawing them together - by establishing transparent, responsible, and effective transnational governance structures in specific sectors. Neo-functionalism takes functionalism one step forward by seeking political integration.<sup>133</sup>

Just as functionalist methods were successfully applied to create the EEC and grow them into the EU, so can they be used to build stable prosperous transnational governance among the former Soviet Republics, and foster the rule of law and human rights protection through increased economic prosperity.<sup>134</sup> Specifically, the functionalist method would focus on developing the idea of the rule of law in Eastern Europe. First is the idea of an impartial independent judici-

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<sup>129</sup> There is vast literature on functionalism. *See, e.g.*, ERNST B. HAAS, *THE UNITING OF EUROPE: POLITICAL, SOCIAL, AND ECONOMIC FORCES, 1950-57* (Stanford Univ. Press 2004).

<sup>130</sup> Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 *AM. J. INT'L L.* 260, 283 (1940) ("Grandiose legalistic schemes purporting to solve the ills of the world have replaced the less spectacular, painstaking search for the actual laws and the facts underlying them.").

<sup>131</sup> *See id.* at 284.

<sup>132</sup> Ernest A. Young, *The Trouble With Global Constitutionalism*, 38 *TEX. INT'L L.J.* 527, 540 n.86 (2003) ("The neo-functionalist theory that has driven much of European integration, for example, posits that supranational institutions formed for fairly narrow purposes will attract political support over time and will thereby be able to expand their functions.") (citing BEN ROSAMOND, *THEORIES OF EUROPEAN INTEGRATION* 51-52 (2000)).

<sup>133</sup> Lodge, *supra* note 126 ("Neofunctionalists have a common starting point with functionalists in their attachment to . . . learning processes, allegedly apolitical, technocratic socio-economic welfare functions, consensus-building and functional specificity, neofunctionalists adopt a pluralist perspective. They argue that competitive economic and political elites mediate in the process and not only become involved in it but become key players. . . . Neofunctional integration sees integration as a process based on spillover from one initially non-controversial, technical sector to other sectors of possibly greater political salience, involving a gradual reduction in the power of national government and a commensurate increase in the ability of the centre to deal with sensitive, politically charged issues.").

<sup>134</sup> Jackie Gower, *EC Relations with Central and Eastern Europe*, in *THE EUROPEAN COMMUNITY AND THE CHALLENGE OF THE FUTURE* 286 (Juliet Lodge ed., St. Martin's Press, 2d ed. 1993).

ary seeking to implement the national will as expressed in legislation. Second is the idea of law as more than mere positive command, but law also as persuasive attractive, and moral appeal. Third is the idea of legal certainty. This requires further construction of a but partially existent legal culture. In Estonia, for example, Soviet era judges were effectively shunted aside to secondary tasks, retrained, and entered retirement or academia. New judges were selected from shockingly young candidates. To a much lesser extent this is also happening in Russia. The lack of institutional retraining initiatives extending from the United States or E.U., however, can be partly to blame. Educating and reforming an entire legal culture is necessary, but initiatives to do so are starkly lacking. With the formation of a neutral independent unbiased judiciary it would then be possible to form transparent, responsible and effective institutions. A functionalist approach would then seek to protect human rights sequentially, focusing first on survival rights, then on economic rights, progressively attaining ever greater human rights protections: the hierarchy of norms<sup>135</sup> to attain the hierarchy of needs.<sup>136</sup> I have argued elsewhere for hierarchizing some of the basic human rights as follows: the right to one's own life, then the right to food,<sup>137</sup> then the right to shelter, then political rights and cultural rights.<sup>138</sup> In other words, one's basic needs in the hierarchy must be met before the more advanced and complex needs can be satisfied.<sup>139</sup> All these rights are vital to a good life, but some naturally precede others.

From the Russian perspective, establishing a judiciary or administrative institution is easy: The President and Prime Minister issue the order. But the question is, how can Russia form an

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<sup>135</sup> See Eric Allen Engle, *Universal Human Rights: A Generational History*, 12 ANN. SURV. INT'L & COMP. L. 219, 236 n.120 (2006), available at <http://ssrn.com/abstract=1020464> (explaining the hierarchical evolution of human rights); see also ENGLE, *LEX NATURALIS*, *supra* note 102 (discussing the logical hierarchization of human rights).

<sup>136</sup> See, e.g., JIM IFE, *HUMAN RIGHTS AND SOCIAL WORK: TOWARDS RIGHTS-BASED PRACTICE* 83 (2001).

<sup>137</sup> Universal Declaration of Human Rights, art. 25 ¶ 1, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/> ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.").

<sup>138</sup> AMITAVA MUKHERJEE, *HUNGER: THEORY, PERSPECTIVES AND REALITY* 83-84 (2002).

<sup>139</sup> See e.g., Babu Joseph, *Human Rights and Poverty: A Philosophical Perspective*, in 2 *HUMAN RIGHTS AND POVERTY IN INDIA: THEORETICAL ISSUES AND EMPIRICAL EVIDENCES* 24 (S. N. Chaudhary ed., 2005).

*independent and unbiased* judiciary? From the EU perspective, forming judicial expertise is not difficult. It is a matter of training in western legal methods. Joint E.U.-Russian judicial and administrative bodies might enable the positive implementation of neutral unbiased adjudication. EU judges would also thereby be able to compare experiences, methods, and ideas with their Russian counterparts. This is to merely indicate the extent of the problem and suggest possible ways ahead.

### C. *Ex Post Legitimacy and Democratic Deficit in the EU*

Democratic deficit in the EU was not an obstacle to economic and political integration because of legitimation after the fact. As long as processes are transparent (i.e. open, governed by the rule of law) and not tainted with secrecy and deception (i.e. political), policies can attain legitimacy after their implementation by virtue of their efficacy.

The EU was a long term project driven by elites with minimal mass support.<sup>140</sup> It was built gradually and sequentially, using the functionalist method that focused first on aggregating the war industries, and then on dissolving national cartels by building a single integrated market for goods, labor, capital, and services. The war industries were made subject to common control not to prepare for a war against the Soviet bloc, but to prevent yet another Western European War. While NATO greatly facilitated the EU's development by providing a defensive umbrella under the premise of collective security, two World Wars had already shown that collective security alone is insufficient to prevent war. Something beyond nation-state alliances are necessary to achieve lasting peace. That something is economic integration.

The EU was built without the mass public support often thought needed for political legitimization. Despite this democratic deficit, the EU has emerged to become one of the world's most competent and effective transnational organizations. One lesson of the EU for the former Soviet Republics is that the former Soviet Republics problem of democratic governance is surmountable. We can and should draw all the lessons from the EU's experiences. Democratic institutions in Eastern Europe can be built gradually over time using functionalist methods. Transnational governance via functionalism will generate the economic well-being necessary to create a foundation for improved respect of human rights.

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<sup>140</sup> See, e.g., PAUL C. ADAMS, ATLANTIC REVERBERATIONS: FRENCH REPRESENTATIONS OF AN AMERICAN PRESIDENTIAL ELECTION 50 (2007) (discussing how whole forests have been felled to rehash the famous issue of "democratic deficit"); see also Jeffrey J. Anderson, *Introduction* to REGIONAL INTEGRATION AND DEMOCRACY: EXPANDING ON THE EUROPEAN EXPERIENCE 1 (Jeffrey J. Anderson ed., 1999).

We now turn our attention to the relationship between the EU and Eastern Europe. This will help us understand exactly how Eastern Europe can apply EU governance models to build effective, transparent participatory state systems governed by the rule of law, and thus enjoy economic prosperity and improved human rights protections.

#### IV. THE EU AND RUSSIA

“We propose the creation of a harmonious economic community stretching from Lisbon to Vladivostok” - Vladimir Putin<sup>141</sup>

The success of the EU as an example of transnational governance and the growing number of Eastern European legal scholars familiar with the basics of EU law explain the growing acceptance of the EU in the former Soviet republics. The Russian Federation’s ultimate long-term goal with the EU is to form an economic union to achieve trading synergies and encourage technological innovation<sup>142</sup> to generate economic development. Schumpeter rightly noted that innovation generates wealth.<sup>143</sup> EurAsEc and the EU complement each other<sup>144</sup> because each has the same goals: to attain economic development via free trade and to engage in economic integration to create the economic base needed for human rights protection, to guarantee the rule of law, and to obviate the risk of war. EurAsEc could develop independently of the EU, but the logic of economic synergy resulting from specialization and economies of scale enjoyed as a result of free trade, however, explains why both transnational organizations are more effective when cooperating rather than when competing with each other. These economic benefits are further augmented by the fact that good foreign relations means fewer resources wasted on weapons.

France’s Nicholas Sarkozy supports Russia’s desire for economic integration with Europe, as does Italy’s Silvio Berlusconi.<sup>145</sup> As earlier noted, the desire for increased economic integration is partly driven by the fact that trade between Russia and Europe is growing.

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<sup>141</sup> C. G. H., *From Lisbon to Vladivostok: Putin Envisions a Russia-EU Free Trade Zone*, SPIEGEL ONLINE INT’L (Nov. 25, 2010, 11:44 AM), <http://www.spiegel.de/international/europe/0,1518,731109,00.html>.

<sup>142</sup> Valentina Pop, *Putin Proposes Russia-EU Union*, EU OBSERVER (Nov. 26, 2010, 09:29 AM), <http://euobserver.com/19/31361>.

<sup>143</sup> JOSEPH SCHUMPETER, *THE THEORY OF ECONOMIC DEVELOPMENT* 154 (Redvers Opie trans., 1934).

<sup>144</sup> European Parliament Resolution of 17 June 2010 on the Conclusions of the EU/Russia Summit (31 May – 1 June 2010), 2011 O.J. (C 236 E/103) para. 1, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:236E:0101:0104:EN:PDF> [hereinafter EU/Russia Summit].

<sup>145</sup> *See, e.g., Berlusconi Wants EU-Russia Visa Tegime to be Scrapped*, RIANOVOSTI (Apr. 18, 2008, 7:25 PM), <http://en.rian.ru/world/20080418/105424007.html>.

This growing trade reflects Russia's comparative advantage in hydrocarbons<sup>146</sup> and, to a lesser extent, atomic energy. This growing trade also reflects the asymmetric European comparative advantage in certain industrial goods. Though Western Europe is even more dependent than the U.S. on imported petroleum, alternatives exist to Russian natural gas. Solar energy has become much more efficient in the past decades.<sup>147</sup> Wind turbines, too, are increasingly competitive. Though Germany largely rejects atomic energy<sup>148</sup> for environmental reasons, France uses it extensively.<sup>149</sup> It is even possible, albeit expensive, to liquefy coal into petroleum products.<sup>150</sup> Likewise, ethanol has been used successfully in Brazil as an alternative automotive fuel.<sup>151</sup> Thus, the energy dependence on petroleum imports of countries such as the United States or Germany is only relative. Russian energy exports are driven not by geopolitical ambitions, but by the practical fact of who

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<sup>146</sup> *Balance Human Rights & Energy with Russia Says Knut Fleckenstein MEP*, EUROPEAN PARLIAMENT (June 23, 2010, 2:52 PM), <http://www.europarl.europa.eu/sides/getDoc.do?language=EN&type=IM-PRESS&reference=20100618STO76329> ("The European Union's relationship with Russia is one of its most important and most complicated. Strong trade and energy ties bind both although many in the EU are concerned about Moscow's human rights record.").

<sup>147</sup> FEDERAL MINISTRY FOR THE ENVIRONMENT, NATURE CONSERVATION AND NUCLEAR SAFETY, RENEWABLE ENERGY SOURCES IN FIGURES 8 (2010), *available at* [http://www.erneuerbare-energien.de/files/english/pdf/application/pdf/broschuere\\_ee\\_zahlen\\_en\\_bf.pdf](http://www.erneuerbare-energien.de/files/english/pdf/application/pdf/broschuere_ee_zahlen_en_bf.pdf) ("The expansion of renewable energy sources in Germany has been an exemplary success. Since 2000, renewable energies' contribution to final energy supply has increased 2.5-fold to a level of 10.3 %. In the electricity sector, the German Government had originally aimed to achieve a 12.5 % renewables' share of gross electricity demand by 2010. This target was already surpassed, considerably, by 2007. In 2009, a share of over 16% had been reached.").

<sup>148</sup> Eben Harrell, *Germany Decides to Extend Nuclear Power*, TIME (Sept. 6, 2010, 7:38 AM), <http://ecocentric.blogs.time.com/2010/09/06/germany-decides-to-extend-nuclear-power/> ("Every [sic] since Chernobyl puffed its radioactive plume over Europe in 1986, Germany has been deeply suspicious of nuclear power. Opposition to *Atomkraft* is at the center of the country's green movement, and almost a decade ago the country decided to phase out its nuclear plants by 2021.").

<sup>149</sup> *Nuclear Power in France*, WORLD NUCLEAR ASS'N (Oct. 15, 2011, 12:35 PM), <http://www.world-nuclear.org/info/inf40.html> ("France derives over 75% of its electricity from nuclear energy. This is due to a long-standing policy based on energy security.").

<sup>150</sup> *Sasol's Synthetic Fuels Go Global*, S. AFRICA INFO (Mar. 16, 2007), <http://www.southafrica.info/business/success/sasol-130307.htm>.

<sup>151</sup> Larry Rohter, *With Big Boost from Sugar Cane, Brazil Is Satisfying its Fuel Needs*, N.Y. TIMES (Apr. 10, 2006), [http://www.nytimes.com/2006/04/10/world/americas/10brazil.html?\\_r=1&pagewanted=1&sq=Bush%20Brazil%20ethanol&st=nyt&scp=5](http://www.nytimes.com/2006/04/10/world/americas/10brazil.html?_r=1&pagewanted=1&sq=Bush%20Brazil%20ethanol&st=nyt&scp=5).

will pay the most.<sup>152</sup> Recall that, during the Cold War, the USSR did not participate in the Arab oil embargos and continued to sell petroleum to the U.S.<sup>153</sup> This experience demonstrates that energy issues are not determinative of foreign relations between the Russian Federation and other states, but merely constrain outcomes because of the fact that energy dependence is *relative*, not absolute. While the importance of those economic relationships is obvious, they are not the EU's primary *legal* concern. Nor are these economic relationships the driving force of efforts toward Russia's *de jure* economic integration into the EU or the WTO. Meanwhile, *de facto* economic integration is, and will continue to further deepen regardless of political issues because of practical economic facts.

Mutual economic interests between the EU and Russia are leading to *de facto* economic integration. Europe is dependent on Russian primary resources and exchanges them for investments into Russia's secondary and tertiary markets.<sup>154</sup> This creates conditions under which the rule of law is likely to be increasingly respected because 1) Increasing wealth makes rule breaking less frequent due to reduced desperation; 2) Foreign investors do not wish to see their economic interests nationalized and foster the rule of law through private contractual mechanisms such as jurisdiction and binding arbitration clauses; and 3) International commerce requires legal stability so that contracts clear quickly and efficiently, thus incentivizing the Russian judiciary to professionalism. This extensive wealth creation in turn indirectly makes the real protection of human rights much likelier in practice. I argue that *de jure* economic integration will accelerate the inevitable process of *de facto* economic integration *and* help contribute to the formation of the rule of law in the former Soviet Republics, at least in an exemplary fashion, though hopefully also through formation of institutions and comparison of expertise.

What about human rights? Often people think of the false dichotomy: "either the market or human rights." In fact, trade leads to prosperity resulting in better human rights protection.<sup>155</sup> Trade also

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<sup>152</sup> MARSHALL GOLDMAN, *PETROSTATE: PUTIN, POWER AND THE NEW RUSSIA* 136-70 (Oxford Univ. Press 2010).

<sup>153</sup> Dina R. Spechler & Martin C. Spechler, *The Soviet Union and the Oil Weapon: Benefits and Dilemmas*, in *THE LIMITS TO POWER: SOVIET POLICY IN THE MIDDLE EAST* 96, 96-98 (Yaacov Ro'i ed., 1979).

<sup>154</sup> See, e.g., *Europe and Russia's Resources: "We Are Mutually Dependent on Each Other"*, SPIEGEL ONLINE INT'L (July 14, 2006), <http://www.spiegel.de/international/spiegel/0,1518,426555,00.html>.

<sup>155</sup> See, e.g., Céline Charvériat & Romain Benicchio, *Trade and Human Rights: Friends or Foes?*, in *PEACE AND PROSPERITY THROUGH WORLD TRADE* 279 (Fabrice Lehmann & Jean-Pierre Lehmann eds., 2010); Craig Forcese, *Human Rights Mean Business: Broadening the Canadian Approach to Business and Human*



leads to interdependence, making war unprofitable. Accordingly, the EU seeks to create an open integrated market with the Russian Federation. Both partners desire increased integration because the EU is Russia's main trading partner<sup>156</sup> and because the level of trade between the EU and Russia continues to rapidly grow.<sup>157</sup>

Key institutions created to channel EU-Russia relations include the EU-Russia Partnership and Cooperation Agreement ("PCA"), the four "common spaces" pursuant to the PCA, and the Northern Dimension. Finally, to understand how the EU relates to other former Soviet Republics that are not EU Member States, we must also understand the EU's Eastern Partnership program.

#### A. *The EU's Concerns with respect to the Russian Federation*

To understand the relations between the EU and the Russian Federation, we must understand the perceptions of the EU toward the Russian Federation. The issues that cause concern among the EU's leadership or its citizens with respect to the Russian Federation are political, economic, and legal in nature. This section briefly summarizes the EU's position on all three issues to show how they, albeit discretely, interact to a significant degree. Ultimately, this section illustrates how the EU and Russia are moving closer to each other in the post-Soviet era.

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*Rights, in* GIVING MEANING TO ECONOMIC, SOCIAL, AND CULTURAL RIGHTS 74 (Isfahan Merali & Valerie Oosterveld eds., 2001); ADAM GEAREY, GLOBALIZATION AND LAW: TRADE, RIGHTS, WAR 133 (2005).

<sup>156</sup> Directorate-General for Trade, *Trade: Russia (Bilateral relations)*, EUROPEAN COMM'N (Oct. 7, 2011), [http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/russia/index\\_en.htm](http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/russia/index_en.htm) ("The EU is by far Russia's main trading partner, accounting for 52.3% of its overall trade turnover in 2008. It is also by far the most important investor in Russia.")

<sup>157</sup> Press Releases, European Union, Review of Russia-EU Relations (Nov. 5, 2008) <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/678&format=> ("*Trade and investment* between the EU and Russia are substantial and growing, and it is in our mutual interest that this trend should continue. Russia is our third most important trading partner and we see growth rates of up to 20% every year. Energy is a major factor, but impressive growth figures have also been seen in services. With its sustained high growth rates and emerging middle class, Russia is an important emerging market on our doorstep that offers opportunities to EU enterprises. The EU is the major investor in Russia, accounting for 80% of cumulative foreign investment.") [hereinafter Russia-EU Relations].

### 1. Political Concerns

Politically, the EU's concerns with respect to the Russian Federation go to questions of the rule of law, democracy,<sup>158</sup> and human rights protection.<sup>159</sup>

As to the rule of law, a Russian procedural rule of law state enables construction of durable and predictable *legal* institutions, rather than uncertain *political* ones, with the aim of transforming zero-sum political interactions into positive-sum economic interactions. Corruption in the domestic governance of the Russian Federation is a substantive problem for Russia's relationship with the EU because it threatens the security of economic relations<sup>160</sup> and undermines protection of human rights.

The EU's desire to foster democracy, in turn, is not merely an issue of the legitimacy of state power. The existence of democratic institutions is also taken – to some extent erroneously – as evidence or guarantor of the rule of law.<sup>161</sup> The EU's concern with democracy in

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<sup>158</sup> European External Action Service, *Freedom, Security and Justice*, EUROPEAN UNION (Oct. 15, 2011, 4:50 PM), [http://www.eeas.europa.eu/russia/common\\_spaces/fsj\\_en.htm](http://www.eeas.europa.eu/russia/common_spaces/fsj_en.htm) (“The EU has supported the development of democracy, the protection of human rights and the development of a healthy civil society in Russia notably through the European Initiative for Democracy and Human Rights (EIDHR).”) [hereinafter *Freedom, Security and Justice*].

<sup>159</sup> With democracy, respect for human rights, fundamental freedoms and the rule of law an essential element of EU-Russia relations, it is only natural that these issues are regularly discussed at all levels. In 2005 regular, six-monthly EU-Russia human rights consultations were established. They have provided for a substantial dialogue on human rights issues in Russia and the EU and on EU-Russian cooperation on human rights issues in international fora. The EU also maintains a regular dialogue with both Russian and international NGOs on human rights issues. Issues that the EU raises with Russia in the human rights consultations include: the human rights situation in Chechnya and the rest of the North Caucasus, including torture and ill-treatment; freedom of expression and assembly, including freedom of the media; the situation of civil society in Russia, notably in light of the laws on NGOs and extremist activities; the functioning of the judiciary, including independence issues; the observation of human rights standards by law enforcement officials; racism and xenophobia; legislation relating to elections. For its part the Russian side raises matters of concern to it in developments inside the EU. *Id.* (“The EU has supported the development of democracy.”).

<sup>160</sup> European Union Action Plan on Common Action for the Russian Federation on Combating Organised Crime, 2000 O.J. (C 106/5) 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:106:0005:0012:EN:PDF>.

<sup>161</sup> EU/Russia Summit, *supra* note 144, at para. 1 (“[the EU] [r]eaffirms its belief that Russia remains one of the EU's most important partners in building long-term cooperation and a commitment to working together to address common chal-

the Russian Federation<sup>162</sup> can be seen as a proxy for concerns about the rule of law.<sup>163</sup> However, *equating* democracy and the rule of law – and they do correlate – means that failure to attain the former is seen, wrongly, as *necessarily*, i.e. *inevitably*, impinging on attainment of the latter, and this can prevent progress. The rule of law is a precondition to stable business relations, in turn generating prosperity<sup>164</sup> and leads to effective human rights protection.<sup>165</sup> Democratic legitimation can thus be obtained after the fact and is not a *necessary*, indispensable precondition to improving human well-being in real terms.

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lenges by means of a balanced, results-oriented approach based on democracy and the rule of law.”).

<sup>162</sup> See, e.g., Maria Elena Efthymiou, *Fact Sheets on the European Union: Russian Federation*, EUROPEAN PARLIAMENT (Jan. 25, 2011), [http://www.europarl.europa.eu/parliament/expert/displayFtu.do?language=EN&id=73&ftuId=FTU\\_6.4.2.html](http://www.europarl.europa.eu/parliament/expert/displayFtu.do?language=EN&id=73&ftuId=FTU_6.4.2.html) (“The fundamental values and principles of democracy, human rights, the rule of law and the market economy underpin the EU-Russia bilateral relationship and its legal basis, the Partnership and Cooperation Agreement (PCA). Russia and the EU are committed to work together to combat new threats to international security, such as terrorism, organised crime, illegal migration and trafficking in people as well as drugs.”).

<sup>163</sup> See, e.g., EU/Russia Summit, *supra* note 144, at para. F (“whereas, as a member of the Council of Europe and of the Organisation for Security and Cooperation in Europe (OSCE), Russia has committed itself to protect and promote human rights, fundamental freedoms and the rule of law, and to respect the sovereignty of its European neighbours; whereas EU-Russia relations have faced a number of serious challenges over the last few years, notably as regards concerns about democracy and human rights in Russia”).

<sup>164</sup> Cf. Smock, *Kozlovsky on Russia's Failed Democracy*, BOYCOTTSOCHI.EU (Nov. 24, 2009), <http://boycottsochi.eu/breaking-human-rights/401-kozlovsky-on-russias-failed-democracy> (reviewing Oleg Kozlovsky, *Russia: Lessons of Russia's Failed Liberalization, in 20 YEARS AGO, 20 YEARS AHEAD: YOUNG LIBERAL IDEAS* (Ulrich Niemann & Neli Kaloyanova eds., 2009)) (“Property rights are not guaranteed and can easily be violated via the corrupt police, courts and other government agencies. As a result, free markets cannot function and the best competitor is not the most efficient but the one with the best connections.”). While I respectfully think Mr. Kozlovsky overstates the case, his identification of the rule of law as a needed precondition to the most productive open market economy is accurate. However, I argue that even a corrupt yet productive economy will generate improved human rights protection and the rule of law indirectly over time, but not as rapidly as a “clean” economy would. Corruption is a significant transaction cost and a source of inefficiency.

<sup>165</sup> Cf. *Country Strategy Paper 2007-2013: Russian Federation*, EUROPEAN UNION, at 3 (2007), [http://ec.europa.eu/external\\_relations/russia/docs/2007-2013\\_en.pdf](http://ec.europa.eu/external_relations/russia/docs/2007-2013_en.pdf) (“The EU places emphasis on the promotion of democracy, the rule of law and good governance in general, as well as respect for human rights and fundamental freedoms.”).

Open governance institutions and processes are needed for the economy;<sup>166</sup> the rule of law is *also* crucial for human rights protection.<sup>167</sup> Poverty resulting from legal uncertainty and corruption reduces the real level of human rights protection and the legitimacy of Russian democracy.<sup>168</sup>

The relationships between the rule of law, a productive economy (which results from an open market, free trade, and the rule of law), democracy, and the attainment of human rights are mutually reinforcing and intertwined in complex ways. They are, however, all positively associated: improvement in one tends to encourage improvement in the others.

## 2. *Economic Concerns*

As mentioned earlier, the economic context of Russian-EU trade can be summed up as “raw materials for finished goods,” a normal pattern of trade between developed and developing countries.<sup>169</sup> In other words, the EU and the Russian Federation have an economic relationship based on interdependence. Nevertheless, Russian-EU

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<sup>166</sup> See Sergei Guriev, *Tackling Corruption in the Russian Economy*, OPENDEMOCRACY.NET (Nov. 12, 2009), <http://www.opendemocracy.net/od-russia/sergei-guriev/tackling-corruption-in-russian-economy> (“Growth requires specific economic institutions: the protection of ownership rights and of competition, the fulfillment of contracts (i.e. an independent and effective court system.”).

<sup>167</sup> Cf. Murad Tangiev, *Political Leadership and Transitional Democracy in the Russian Federation: Challenges and Prospects*, 11 J. PEACE CONFLICT & DEV. 3 (2007) (“Democracy and human rights are considered to be fundamental prerequisites for a [sic] sustainable development and long-term peace.”).

<sup>168</sup> See, e.g., Jonathan D. Weiler, *Human Rights in Post-Soviet Russia*, DEMOKRATIZATSIIYA (Spring 2002), available at [http://findarticles.com/p/articles/mi\\_qa3996/is\\_200204/ai\\_n9062371/](http://findarticles.com/p/articles/mi_qa3996/is_200204/ai_n9062371/) (“declining state capacity, fiscal austerity, and growing social inequality, characteristic features of many of the new democracies, translate into gross violations of the rights of socially vulnerable groups.”).

<sup>169</sup> See *EU-Russia Energy Relations*, EUROPEAN COMM’N (Sept. 13, 2011), [http://ec.europa.eu/energy/international/russia/russia\\_en.htm](http://ec.europa.eu/energy/international/russia/russia_en.htm) (“The Russian Federation is the 3rd biggest world trade partner of the EU. Energy represents 65% of total EU imports from Russia. Russia is the biggest oil, gas, uranium and coal exporter to the EU. In 2007, 44.5% of total EU’s gas imports (150bcm), 33.05% of total EU’s crude oil imports, and 26% of total EU coal imports came from Russia. In total, around 24% of total EU gas sources are originating from Russia. In general, energy dependency varies significantly between different Member States / regions in the EU. The EU is by far the largest trade partner of the Russian Federation: 45% of Russia imports originate from the EU, and 55% of its exports go to the EU, including 88% of Russia’s total oil exports, 70% of its gas exports and 50% of its coal exports. The export of raw materials to the EU represents around 40% of the Russian budget, and the EU represents 80% of cumulative foreign investments in Russia.”).

trade has not, to present, coalesced into a binding legal document or relationship<sup>170</sup> beyond the existing partnership and cooperation agreement.

The key to peace and prosperity in the war 21st century is economic interdependence rather than isolation. Trading states have a strong incentive to renounce war against each other.<sup>171</sup> For example, the United States, unlike the EU, does not trade heavily with the Russian Federation.<sup>172</sup> Perhaps as a consequence, U.S. analysts seem to overemphasize security aspects of the West's relationship with Russia.<sup>173</sup>

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<sup>170</sup> See *id.* (“[F]ollowing the gas crisis from 2009, it is essential to reinforce mutual confidence and to establish a strong and stable legal framework for EU-Russia energy relations.”).

<sup>171</sup> PAUL D’ANIERI, *INTERNATIONAL POLITICS: POWER AND PURPOSE IN GLOBAL AFFAIRS* 184 (2d ed. 2010); see BRINK LINDSEY, *AGAINST THE DEAD HAND: THE UNCERTAIN STRUGGLE FOR GLOBAL CAPITALISM* 71 (2002).

<sup>172</sup> *Russia*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Aug. 30, 2011), <http://www.ustr.gov/countries-regions/europe-middle-east/russia-and-eurasia/russia> (“Russia is currently our 24th largest goods trading partner with \$31.7 billion in total (two way) goods trade during 2010. Goods exports totaled \$6.0 billion; Goods imports totaled \$25.7 billion. The U.S. goods trade deficit with Russia was \$19.7 billion in 2010. Russia was the United States’ 37th largest goods export market in 2010 U.S. goods exports to Russia in 2010 were \$6.0 billion, up 11.9 percent (\$636 million) from 2009.”); *Trade in Goods with Russia*, U.S. CENSUS BUREAU, available at <http://www.census.gov/foreign-trade/balance/c4621.html#2010> (showing data that in 2010 the U.S. exported but 6.0064 billion dollars of goods to Russia and imported only 25.6910 billion dollars of goods from Russia.).

<sup>173</sup> See, e.g., NORMAN A. GRAEBNER, RICHARD DEAN BURNS & JOSEPH M. SIRACUSA, *REAGAN, BUSH, GORBACHEV: REVISITING THE END OF THE COLD WAR* 2, 47 (2008); John Prados, *A World of Secrets: Intelligence and Counterintelligence*, in *THE CENTRAL INTELLIGENCE AGENCY: SECURITY UNDER SCRUTINY* 143 (Athanasios G. Theoharis et al. eds., 2006) (explaining that errors in U.S. analysis of Russian capabilities and intentions are a fairly consistent historical fact). See generally Eric Engle, *Beyond Sovereignty? The State After the Failure of Sovereignty*, 15 *ILSA J. INT’L & COMP. L.* 1 (2008); Engle, *Europe Deciphered*, *supra* note 2; Engle, *The Transformation*, *supra* note 51; Eric Engle, Working Paper, Contemporary Legal Thought in International Law: A Synopsis (2010), <http://www.law.harvard.edu/students/orgs/hela/working%20papers/2010/EngleContemporaryLegalThought.doc> (explaining that this results from 1) individualist method which does not consider historical tendencies of groups 2) presuming the opponent has the same experiences and objectives (failure in opponent modeling) 3) presuming the opponent is an (implacable) adversary and cannot be a partner. These sorts of errors are the result of applying the outmoded realist state centric view of the world to international relations).

### 3. *Legal Concerns*

The EU's legal concerns with Russia touch a myriad of issues. This section covers only some of the most salient ones. One concern is criminality,<sup>174</sup> which includes arms and drug trafficking.<sup>175</sup> Human migration is also a concern, with fears that Russian workers might flood European labor markets.<sup>176</sup> These fears, however, are not particularly realistic. Most people are not criminals, and most criminals are eventually caught. The EU's eastward expansion did not lead to the flooding of Western European labor markets with cheap Eastern labor.<sup>177</sup> Western European fears of a flood of Eastern European workers have shown themselves to be unrealistic and overstated.<sup>178</sup> Like most modern industrialized countries, the Russian Federation faces net labor inflows rather than outflows.<sup>179</sup> In fact, about ten million foreigners, mostly from China and Northern Korea, work in the Rus-

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<sup>174</sup> See Matthew Day, *EU Immigration Fears over Polish Visa Deal with Russia*, THE INDEPENDENT.IE (Dec. 28, 2010), <http://www.independent.ie/world-news/europe/eu-immigration-fears-over-polish-visa-deal-with-russia-2475682.html> ("Poland is pushing for citizens of the Russian enclave of Kaliningrad to have visa-free travel, despite fears this could increase smuggling and illegal migration into the European Union.").

<sup>175</sup> Cf. *Freedom, Security and Justice*, *supra* note 158 ("Our cooperation contributes to the objective of building a new Europe without dividing lines and facilitating travel between all Europeans while creating conditions for effectively fighting illegal migration. Moreover, the EU has a considerable interest in strengthening cooperation with Russia by jointly addressing common challenges such as organised crime, terrorism and other illegal activities of cross-border nature.").

<sup>176</sup> *Russia-EU summit: Is Russia Part of Europe?*, RIANOVOSTI (June 2, 2010, 5:04 PM), <http://en.rian.ru/analysis/20100602/159271440.html> ("The visa barrier between the EU and its eastern neighbors has been growing stronger since the 1990s as a result of Europe's fear of a wave of poor immigrants from the East. As it turns out, this fear was unjustified. Even after Poland joined the EU and all restrictions on Polish immigration were lifted, Poles continued to immigrate to other European countries legally for jobs they had already secured and with enough travel money in their pockets. There was no wave of immigrants from Belarus, Ukraine or Russia, even though Ukrainians, for example, can get a Schengen visa from Poland free of charge.").

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Russia to Announce Amnesty for Millions of Illegal Guest-Workers*, RUSS. DAILY NEWS INFO. SERV. (Sept. 13, 2011), <http://www.english-to-russian-translation.com/russian-translation-news-091105.html> ("The chairman of the Federal Migration Service said that there were up to 15 million illegal workers living in present-day Russia. About 80 percent of them come from the countries of the former USSR.").

sian Federation, most of them illegally.<sup>180</sup> Thus, Russian-EU economic integration will not cause a flood of Russian labor into the EU.

The aforementioned political, economic and legal concerns return us to the question of the relationships between the rule of law, democracy, the economic system, and human rights – questions to which we now focus our attention.

### B. *The EU-Russia Partnership and Cooperation Agreement (PCA)*

The EU and the Russian Federation aim to create an open integrated market. Just as the EU created a single integrated market in order to generate prosperity and interdependence to obviate and avert war, so too do the EU and Russian Federation seek to create an integrated market.<sup>181</sup> This open and integrated market is to be attained via the Partnership and Cooperation Agreement, which is the principal legal instrument governing EU-Russia relations.<sup>182</sup> The EU also uses PCAs to relate to several other former Soviet Republics.<sup>183</sup> The PCAs seek, via functionalist incrementalism, to create over time the same base found in the EU: a customs union featuring the free movement of goods and capital, the right to establish enterprises, and eventually to include the exchange of professional services and workers.<sup>184</sup>

The EU-Russia PCA forms the basis of the four “common spaces” between the EU and the Russian Federation<sup>185</sup> resulting in an

<sup>180</sup> *Russia Cracking Down on Illegal Migrants*, N.Y. TIMES (Jan. 15, 2007), <http://www.nytimes.com/2007/01/15/world/europe/15iht-migrate.4211072.html>.

<sup>181</sup> *EU-Russia Common Spaces Progress Report 2009*, EUROPEAN COMM’N (Mar. 2010), at 5, *available at* [http://www.st-gaterus.eu/\\_media/commons\\_spaces\\_prog\\_report\\_2009\\_en.pdf](http://www.st-gaterus.eu/_media/commons_spaces_prog_report_2009_en.pdf) (“The overall objective of the Common Economic Space is the creation of an open and integrated market between the EU and Russia.”) [hereinafter *Progress Report*].

<sup>182</sup> See Agreement on Partnership and Cooperation Establishing a Partnership Between the European Communities and their Member States, of One Part, and the Russian Federation, of the Other Part, 2007 O.J. (L 327), *available at* [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21997A1128\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21997A1128(01):EN:HTML).

<sup>183</sup> See *Partnership and Cooperation Agreements (PCAs): Russia, Eastern Europe, the Southern Caucasus and Central Asia*, EUROPEAN UNION (Sept. 29, 2010), [http://europa.eu/legislation\\_summaries/external\\_relations/relations\\_with\\_third\\_countries/eastern\\_europe\\_and\\_central\\_asia/r17002\\_en.htm](http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/eastern_europe_and_central_asia/r17002_en.htm) (showing that the EU has signed PCAs with almost all of the former Soviet Republics).

<sup>184</sup> *Id.*

<sup>185</sup> JOSEPH FRANCOIS & MIRIAM MANCHIN, ECONOMIC IMPACT OF A POTENTIAL FREE TRADE AGREEMENT (FTA) BETWEEN THE EUROPEAN UNION AND THE COMMONWEALTH OF THE INDEPENDENT STATES 102 (CASE Network Reports, ENEPO Project, No. 84/2009), *available at* [http://www.case-research.eu/upload/publikacja\\_plik/23704363\\_CNR\\_84\\_final.pdf](http://www.case-research.eu/upload/publikacja_plik/23704363_CNR_84_final.pdf). (“The Partnership and Co-operation Agreement (PCA) which entered into force in 1997 has been the framework of the EU-Russia

effective institutional framework functioning through the Permanent Partnership Council.<sup>186</sup> At the 2003 Petersburg Summit, the EU and Russia agreed to strengthen cooperation by creating four “common spaces” in the framework of the Partnership and Cooperation Agreement.<sup>187</sup> These are:

1. The Common Economic Space, covering economic issues and the environment;
2. The Common Space of Freedom, Security and Justice;
3. The Common Space of External Security, including crisis management and non-proliferation; and
4. The Common Space of Research and Education, including cultural aspects.

This approach parallels the “pillar” structure that was one aspect of the EU prior to the Lisbon Treaty. The Russian Federation wants to be treated as an equal partner to the EU. Thus, a pillar approach, rather than the European Neighborhood Policy (ENP), was established. The pillar approach, however, in fact parallels the ENP approach.<sup>188</sup>

### 1. *Common economic space*

The essence of the European Union is a “single integrated market.” The EU-Russian common economic spaces seek to attain “an open integrated market.” Formation of the common economic space re-

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relationship for a decade. The agreement regulates the political, economic and cultural relations between the EU and Russia and is the legal basis for the EU’s bilateral trade with Russia. In 2003 the EU and Russia agreed to create four EU-Russia “common spaces”, within the framework of the existing Partnership and Co-operation Agreement (PCA). The Common Economic Space (CES) aims at increasing economic cooperation with creating grounds for establishing a more open and integrated market between the EU and Russia.”).

<sup>186</sup> Russia-EU Relations, *supra* note 157 (“EU-Russia relations are based on the Partnership and Cooperation Agreement (PCA) in force since 1997, which was further complemented by the Four Common Spaces in 2005. This results in an institutional framework which in many respects works well, particularly at political level [sic] through the Cooperation Council (now Permanent Partnership Council in Foreign Ministers’ format).”).

<sup>187</sup> European External Action Service, *EU-Russia Common Spaces*, EUROPEAN UNION (Aug. 29, 2011), [http://www.eeas.europa.eu/russia/common\\_spaces/index\\_en.htm](http://www.eeas.europa.eu/russia/common_spaces/index_en.htm).

<sup>188</sup> *Commission Report Reviews Progress Under EU-Russia Common Spaces*, N. DIMENSION P’SHP IN PUB. HEALTH AND SOC. WELL-BEING (Apr. 23, 2010), [http://www.enpi-info.eu/maineast.php?id=21349&id\\_type=1&lang\\_id=450](http://www.enpi-info.eu/maineast.php?id=21349&id_type=1&lang_id=450) (“Russia is not part of the European Neighbourhood Policy. Its relationship with the EU is defined as a Strategic Partnership, consistent with the ENP but evolving along different lines.”).



quires the “gradual approximation of legislation.”<sup>189</sup> Legal harmonization is one means to the end of improving the rule of law in Russia. Legal harmonization increases legal certainty and reduces transaction costs as do the suppression of tariff barriers, quantitative restrictions, and legal provisions with similar effect.

## 2. *Common Space on Freedom, Security and Justice*

This common space essentially governs police cooperation.<sup>190</sup> Here, the EU addresses its concerns earlier mentioned of criminality.<sup>191</sup> The essence of this common space is cooperative and largely a political, rather than legal, arrangement. Regarding travel freedoms, travel to and from Russia is still generally subject to visas. Second is the ongoing concern of unauthorized migration. As to security, the central focuses are countering the problems of crime and terrorism. As to justice, the primary human rights issues involve press freedoms and overreactions against terrorism by the Russian State, and secondarily is the concern with ultra-nationalist violence.<sup>192</sup>

## 3. *Common Space on External Security*

This common space parallels the former common foreign and security policy (CFSP) pillar of the EU.<sup>193</sup> The goals here are non-proliferation of weapons of mass destruction (especially nuclear weapons), anti-terrorism collaboration, and EU-Russia security cooperation. Today, the EU and the Russian Federation cooperate militarily in

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<sup>189</sup> European External Action Service, *Common Economic Space*, EUROPEAN UNION (Aug. 29, 2011), [http://www.eeas.europa.eu/russia/common\\_spaces/economic\\_en.htm](http://www.eeas.europa.eu/russia/common_spaces/economic_en.htm).

<sup>190</sup> *Freedom, Security and Justice*, *supra* note 158 (“The EU and Russia agreed at the St. Petersburg Summit of May 2003 to create in the long-term a ‘Common Space on Freedom, Security and Justice’. A road map agreed in 2005 sets out the objectives and areas for cooperation in the short and medium term. Its gradual development takes place in the framework of the Partnership and Cooperation Agreement.”).

<sup>191</sup> *Id.* (“Our cooperation contributes to the objective of building a new Europe without dividing lines and facilitating travel between all Europeans while creating conditions for effectively fighting illegal migration. Moreover, the EU has a considerable interest in strengthening cooperation with Russia by jointly addressing common challenges such as organised crime, terrorism and other illegal activities of cross-border nature.”).

<sup>192</sup> *See generally Progress Report*, *supra* note 181, at 41-43.

<sup>193</sup> European External Action Services, *External Security*, EUROPEAN UNION (Aug. 29, 2011), [http://www.eeas.europa.eu/russia/common\\_spaces/external\\_security\\_en.htm](http://www.eeas.europa.eu/russia/common_spaces/external_security_en.htm) (“The EU and Russia have agreed to reinforce their cooperation in the area of external security. . .”).

certain peacekeeping missions in Africa pursuant to the common space of external security.

#### 4. *Common Space of Research and Education, Including Cultural Aspects*

This common space seeks to foster intellectual exchanges and encourage scientific and technical innovation as a key contributor to economic growth.<sup>194</sup> From the Russian perspective, it involves developing the Skolkovo research and industrial park, which is considered the Russian Silicon Valley.<sup>195</sup>

#### C. *The Northern Dimension*

The Northern Dimension's objective is to promote environmentally sustainable development throughout the region.<sup>196</sup> It is a regional political framework established to govern the Baltic and Arctic regions.<sup>197</sup> Most notably, it focuses on environmental pollution and cleanup issues that particularly concern radioactive waste<sup>198</sup> resulting from the decommissioning of Soviet-era nuclear vessels, and related issues such as health and maritime transit.<sup>199</sup> The Northern Dimension's objective is to promote environmentally sustainable development throughout the region.<sup>200</sup>

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<sup>194</sup> European External Action Services, *Research and Development, Education, Culture*, EUROPEAN UNION (Aug. 29, 2011), [http://www.eeas.europa.eu/russia/common\\_spaces/research\\_en.htm](http://www.eeas.europa.eu/russia/common_spaces/research_en.htm) ("In the area of research and development the objective is to enhance EU-Russia cooperation in mutually agreed priority fields. . .").

<sup>195</sup> *Russia to Spend \$132 Million on Skolkovo Research Hub in 2010*, RIA NOVOSTI (Aug. 29, 2010, 19:29), <http://en.rian.ru/business/20100729/159987299.html>.

<sup>196</sup> *NDPHS - About NDPHS - Background, Mission, Priorities, Strategy, Actors and Activities*, N. DIMENSION P'SHIP IN PUB. HEALTH AND SOC. WELL-BEING (Aug. 29, 2011), [http://www.ndphs.org/?about\\_ndphs](http://www.ndphs.org/?about_ndphs) ("The mission of the NDPHS is to promote the sustainable development of the Northern Dimension area by improving peoples' health and social well-being.").

<sup>197</sup> European External Action Services, *European Union: Northern Dimension*, EUROPEAN UNION (Aug. 29, 2011), [http://ec.europa.eu/delegations/russia/eu\\_russia/fields\\_cooperation/regional\\_issues/northern\\_dimension/index\\_en.htm](http://ec.europa.eu/delegations/russia/eu_russia/fields_cooperation/regional_issues/northern_dimension/index_en.htm) ("The Northern Dimension Policy of the European Union answers to the EU's intensive cross-border relations with Russia in the Baltic Sea and Arctic Sea regions.").

<sup>198</sup> *Id.*

<sup>199</sup> European External Actions Services, *Northern Dimension*, EUROPEAN UNION (Aug. 29, 2011), [http://eeas.europa.eu/north\\_dim/](http://eeas.europa.eu/north_dim/) ("To facilitate project implementation within the framework of the ND policy, partnerships on the following issues were created: the environment (NDEP), public health and social wellbeing (NDPHS), culture (NDPC) and transport and logistics (NDPTL).").

<sup>200</sup> *NDPHS - About NDPHS - Background, Mission, Priorities, Strategy, Actors and Activities*, N. DIMENSION P'SHIP IN PUB. HEALTH AND SOC. WELL-BEING (Aug. 29, 2011), [http://www.ndphs.org/?about\\_ndphs](http://www.ndphs.org/?about_ndphs) ("The mission of the NDPHS is to

#### D. *The Eastern Partnership*

The EU frames its relations with the Ukraine, Moldova, and the Caucasian republics within its Eastern Partnership framework.<sup>201</sup> The *Joint Declaration of the Prague Eastern Partnership Summit* stated that “[t]he main goal of the Eastern Partnership is to create the necessary conditions to accelerate political association and further economic integration between the European Union and interested partner countries.”<sup>202</sup> To attain this goal of open borders and economic integration to foster economic development and ultimately political stability, the respect of human rights, and the rule of law, “[t]he European Commission proposed a ‘differentiated, progressive, and benchmarked approach’ to the new neighbors which was specified in the European Neighborhood Policy (ENP) Strategy paper.”<sup>203</sup> To promote this strategy, the EU has jointly mobilized aid and trade as rewards for the attainment of the rule of law and human rights protections to EU standards.<sup>204</sup>

Both Russia and the EU have sometimes perceived the Eastern Partnership as a point of contention between the EU and the Russian Federation. Each side inaccurately perceived the other as trying to carve out “spheres of influence” to “freeze out” the other.<sup>205</sup> The obsta-

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promote the sustainable development of the Northern Dimension area by improving peoples’ health and social well-being.”).

<sup>201</sup> See European External Action Services, *Eastern Partnership*, EUROPEAN UNION (Aug. 29, 2011), [http://eeas.europa.eu/eastern/index\\_en.htm](http://eeas.europa.eu/eastern/index_en.htm) (“The European Commission put forward concrete ideas for enhancing our relationship with: Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine. This would imply new association agreements including deep and comprehensive free trade agreements with those countries willing and able to enter into a deeper engagement and gradual integration in the EU economy.”).

<sup>202</sup> Press Release, Council of the European Union, *Joint Declaration of the Prague Eastern Partnership Summit* (May 7, 2009), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/09/78&format=HTML&aged=0&language=EN&guiLanguage=EN>.

<sup>203</sup> FRANCOIS & MANCHIN, *supra* note 185, at 9.

<sup>204</sup> See, e.g., *European Neighbourhood and Partnership Instrument: Georgia, National Indicative Programme 2007-2010*, EUROPEAN COMM’N 4 (Sept. 13, 2011), [http://ec.europa.eu/world/enp/pdf/country/enpi\\_csp\\_nip\\_georgia\\_en.pdf](http://ec.europa.eu/world/enp/pdf/country/enpi_csp_nip_georgia_en.pdf).

<sup>205</sup> See, e.g., *Motion for a Resolution on the EU-Russia Summit*, COM (2010) B7-0297 (June 9, 2010), available at <http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2010-0297&language=EN> (“whereas there is a latent dispute between the EU and Russia on creating spheres of influence in the common neighbourhood; whereas this competition prevents the solution of frozen conflicts and risks to create new one’s; whereas the European Union and the Russian Federation could and should play together an active role in promoting peace and stability in the common neighbourhood,”); Pop, *supra* note 142; Andrew Wilson et al., *The Future of EU-Russia Relations*, EUR. PARL. 15-16 (2009), <http://>

cles that had been hindering improved economic integration, however, will be increasingly surmounted by visionary leadership in the EU, Russia, and the other former Soviet Republics. This is because of increased transnational institutional awareness and improved mutual understanding. Most importantly, it is also because of the mutual recognition that EU cooperation with the formation of EU-modeled transnational governance in the Russian Federation and the former Soviet Republics is complementary and not conflicting.

### E. WTO Accession

The EU views Russia's accession to the WTO as a means of achieving the end of increased prosperity through freer trade, and the construction of legal institutions as the formation of a Russian rule of law state.<sup>206</sup> The United States shares this view.<sup>207</sup> For its part, the Russian Federation wishes to join the WTO<sup>208</sup> and coordinates its accession with EurAsEC<sup>209</sup> and the EU<sup>210</sup> toward that goal. This paper

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[www.europarl.europa.eu/meetdocs/2004\\_2009/documents/dv/pe407011en\\_wilsonpopes/pe407011en\\_wilsonpopescu.pdf](http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/pe407011en_wilsonpopes/pe407011en_wilsonpopescu.pdf).

<sup>206</sup> EU/Russia Summit, *supra* note 144, at para. G (“whereas Russia’s accession to the World Trade Organisation (WTO) would make a substantial contribution to further improving economic relations between the EU and Russia, subject to a binding commitment on Russia’s part to full compliance with and implementation of WTO undertakings and obligations, and would pave the way for a far-reaching, comprehensive economic integration agreement between the two partners on the basis of genuine reciprocity, and whereas Russia established a customs union with Kazakhstan and Belarus on 1 January 2010”).

<sup>207</sup> 2007 EU-U.S. Summit Promoting Peace, Human Rights and Democracy Worldwide, EUROPEAN UNION 2 (2007), [http://www.eeas.europa.eu/us/sum04\\_07/statement\\_political\\_security\\_issues.pdf](http://www.eeas.europa.eu/us/sum04_07/statement_political_security_issues.pdf) (“We note the importance of our relationship with Russia. A stable, prosperous and democratic Russia remains in our common interest. We seek in our relations with Russia to promote common values such as political pluralism, the rule of law, and human rights, including freedom of media, expression and assembly, and note our concerns in these areas. We will continue to work with Russia in areas of mutual interest, including non-proliferation, counterterrorism, energy security and regional issues, such as the resolution of frozen conflicts. We will also continue to work with Russia towards its accession to the World Trade Organization.”).

<sup>208</sup> *Events: Russia’s WTO Accession is Our Foreign Economic Policy Priority – Deputy Prime Minister Alexander Zhukov*, OFFICIAL WEBSITE OF THE GOV’T OF THE RUSS. FED’N (Dec. 1, 2010), <http://government.ru/eng/docs/13142/> (“Russia’s WTO accession is our foreign economic policy priority.”).

<sup>209</sup> *Prime Minister Vladimir Putin Meets with Representatives of the German Business Community*, OFFICIAL WEBSITE OF THE GOV’T OF THE RUSS. FED’N (Nov. 26, 2010), <http://premier.gov.ru/eng/events/news/13120/> (“We believe that we have come close to meeting every requirement for this. Moreover, I can tell you that, as our negotiators report, in practical terms we have agreed, at least with the Euro-

argues that free trade leads to specialization and economies of scale, and that the rule of law increases legal certainty and reduces transaction costs. This in turn leads to increased prosperity and the reduced likelihood of war. The EU and EurAsEc are aiming to achieve the same goals of greater prosperity and political security through free trade. Thus, the EU and EurAsEc are not in conflict, but rather compliment each other.<sup>211</sup> The WTO extends the logic of free trade as the path to peace and prosperity to the global level.<sup>212</sup> It is therefore desirable for the Russian Federation to join the WTO, since joining will both reflect and increase acceptance by the West of the Russian Federation's economic growth and future potential. Political issues appear to have needlessly hindered that economic process.

Following derailment of Russia's WTO accession process because of its 2008 war with Georgia, the Russian Federation is now back on track to conclude its accession to the WTO Treaty.<sup>213</sup> The EU

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pean Union (EU), on every major issue. I hope that we will document this in the near future. And, finally I'd like to comment on an issue that is worrying many people. I'm referring to our Customs Union, which is to be followed by the Common Economic Space (CES), and that will mean further integration with Belarus and Kazakhstan. I see here a lot of my acquaintances and even friends. And this is what I want to tell you: I think you should be grateful to us for our enormous and complicated work on coordinating the positions of our partners from Belarus and Kazakhstan. . . . the process of coordinating those positions, which are almost identical to WTO rules, was indeed complicated and exhausting. This means that our partners in Europe . . . will be able to work, in the near future, both in Belarus and in Kazakhstan by nearly common rules, rules that are very close to WTO requirements. If you study in detail what we are negotiating, you will see that there are practically no deviations from WTO rules.”)

<sup>210</sup> Press Release, European Union, Joint Statement of the Delegations of the Russian Federation and of European Union on the Occasion of the Conclusion of the Bilateral Talks on the Key Issues in the Accession of the Russian Federation to the WTO (Nov. 24, 2010), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1599&format=HTML&aged=0&language=EN&guiLanguage=EN> [hereinafter Joint Statement on Russia] (“Both sides are confident that this agreement will greatly facilitate the overall process of accession of Russia to the WTO.”).

<sup>211</sup> EU/Russia Summit, *supra* note 144, at para. G.

<sup>212</sup> *The 10 Benefits: 1. Peace*, WORLD TRADE ORG. (Feb. 6, 2011), [http://www.wto.org/english/thewto\\_e/whatis\\_e/10ben\\_e/10b01\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/10ben_e/10b01_e.htm); *see also Comparative Advantage*, WORLD TRADE ORG. (Aug. 22, 2011), [http://www.wto.org/english/res\\_e/reser\\_e/cadv\\_e.htm](http://www.wto.org/english/res_e/reser_e/cadv_e.htm); DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 7.13-7.16 (Library of Econ. & Liberty 1999) (1817); ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 3 (Univ. of Chi. Press 1976) (1776) (noting an example of increased production in a pin factory due to specialization).

<sup>213</sup> *See* Joint Statement on Russia, *supra* note 210 (“Both sides are confident that this agreement will greatly facilitate the overall process of accession of Russia to the WTO, and they re-affirm their shared commitment to continue working in a

and Russia appear to have worked out their differences<sup>214</sup> and are prepared to see the Russian Federation join the WTO.<sup>215</sup> Both the EU and the Russian Federation consider Russian participation in the WTO as desirable since it creates new economic opportunities on both sides of the ledger.<sup>216</sup> Russian adhesion to the WTO should not be impeded by Russia's existing free trade with areas such as EurAsEC.<sup>217</sup> The bottom line: Russia and the EU need each other, and the United States should foster that process as part of globalization because it will lead to greater stability and productivity for all.

## V. CONCLUSION

This paper has argued that the Russian Federation and other former Soviet Republics can apply EU governance models in their relations with each other, and with the EU. To make that case, this paper

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constructive and co-operative spirit on the remaining questions in this multilateral process to achieve this goal as soon as possible.”).

<sup>214</sup> Lyudmila Alexandrova, *No Key Differences Left at Russia's Talks on WTO Membership*, THE ORG. OF ASIA-PACIFIC NEWS AGENCIES (Nov. 27, 2010), <http://www.oananews.org/view.php?id=143824>.

<sup>215</sup> *Russia to Sign WTO Accession Document with EU Next Week - EU Official*, RIA Novosti: JOHNSON'S RUSSIA LIST (Nov. 29, 2010), <http://www.cdi.org/russia/johnson/russia-wto-europe-nov-366.cfm>.

<sup>216</sup> See Joint Statement on Russia, *supra* note 210 (“Both sides stressed their strong expectation that the rapid accession of Russia to the WTO will greatly contribute to the opening of new opportunities to do business with and in Russia and strengthen the international competitiveness of the Russian economy by harmonising its economic regime with global trading rules.”).

<sup>217</sup> See Roberts & Wehrheim, *supra* note 52, at 316 (“Normally, setting up a customs union or free trade area would violate the WTO's ‘most-favoured-nation’ principle which assures equal treatment for all trading partners. However, three WTO articles provide derogations from this principle. Article XXIV of the GATT (complemented by an ‘Ad Art XXIV’, and updated by the 1994 Understanding) allows regional trading arrangements to be set up under certain conditions. Article XXIV contains the primary provisions covering customs unions (CUs), free trade areas (FTAs) and interim trade agreements (necessary for the formation of CUs and FTAs). It is based on four main criteria: Duties and other restrictive regulations of commerce must be eliminated (XXIV:8) on ‘substantially all trade’ between constituent territories of a customs union or free trade area. Interim arrangements leading to the formation of a free trade area or customs union should exceed ten years only in exceptional circumstances. Furthermore, Article V of the General Agreement on Trade in Services allows WTO members to sign regional agreements on services provided that such agreements have substantial sectoral coverage, eliminate existing discriminatory measures and/or prohibit new or more discriminatory measures. Finally, the ‘Enabling Clause’ allows derogations from the most-favoured nation treatment principle in favour of developing countries and permits preferential arrangements among developing countries in goods trade.”).

compared the objectives and institutional structure of the USSR, the EU, and the CIS. The USSR and EU both tried to react to the problem of war to obtain the best standard of living possible for their people. Nevertheless, they pursued these objectives in radically different manners. Recognizing that both the USSR and EU shared common goals helps us to contextualize the USSR's collapse and the CIS' failure. It also enables us to propose workable governance models based on the EU's extensive historical experiences in transnational governance. Such institutions and rules can serve as a basis for the formation of the rule of law in Eastern Europe that, in turn, will generate economic prosperity, especially through trade liberalization. This will consequently improve the real protection of basic human rights in the region and make conflict less likely. Understanding the mutually reinforcing character of a market economy, the rule of law, and human rights protection enables all actors to pursue the best rules and processes to obtain optimal outcomes for all. Common teleologies, coupled with conflicting methods of competing governance models contextualize historical experiences: understanding these broad tendencies enables mutual understanding, and enables us to build bridges instead of walls.