

EURASIAN ECONOMIC UNION COURT AND WTO DISPUTE SETTLEMENT BODY: TWO HOUSEWIVES IN ONE KITCHEN

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Using the approach of the United Nations International Law Commission, the law of the Eurasian Economic Union and WTO law might be regarded as autonomous complexes of rules. However, in all current disputes the DSB treats the norms of EAEU law as measures adopted by a specific EAEU member, but not as international law within the meaning of the ILC. These disputes concern import tariffs, anti-dumping investigations, and technical regulation and reveal a number of specific features. First, the EAEU measures are attributable to every EAEU member. Second, the WTO members may try to challenge in the DSB the measures adopted by an EAEU member in its national legislation based on EAEU law that affect national legislation of that EAEU member, rather than EAEU law as such. Third, “forum shopping” may arise, for the same measure can be challenged under EAEU law in the EAEU Court and under WTO law in the DSB. Finally, to overcome uncertainty concerning WTO law in EAEU Court jurisprudence, it is necessary to clarify the approach of the EAEU Court. The authors conclude that this approach should provide for the Court’s right to interpret EAEU law relying on WTO law and DSB jurisprudence. Such interpretation should be made within the context and object of the EAEU Treaty. However, the autonomous EAEU legal order cannot be implemented until the Treaty on Functioning of the Customs Union within the Multilateral Trading System is applicable.

Keywords: EAEU; WTO; dispute settlement; EAEU Court; DSB; Treaty on the EAEU.

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Introduction

Regionalism and multilateralism are two sides of the international trade system coin. To date, the World Trade Organization (WTO) has been notified about 312 preferential trade agreements (hereinafter PTAs), currently in force.¹ The 2014 Treaty on the Eurasian Economic Union (EAEU Treaty)² is among such agreements. Four of the five Eurasian Economic Union members are members of the WTO. Belarus is the only non-WTO member party to the EAEU Treaty. However, Belarus is involved in the process of accession to the WTO and stressed a strong commitment to conclude WTO accession negotiations by the Twelfth Ministerial Conference, which will take place in June 2020 in Astana, Kazakhstan.³ The EAEU Treaty regulates trade relations among the member States of the Eurasian Economic Union (EAEU). The treaty established the EAEU Court, which is an essential part of the EAEU legal order, the permanent judicial body⁴ authorized to settle disputes relating to the interpretation and/or application of provisions of the EAEU law.⁵ Consequently, four of the five member States (all in the near future) exist in two parallel legal regimes, both applicable to their trade disputes. These circumstances underline the significance of compatibility between WTO law and EAEU law with special focus on the WTO Dispute Settlement Body (DSB) and EAEU Court jurisprudence. Therefore this article first analyzes the place of WTO law and EAEU law within the system of international law; second, the

¹ WTO official website (Jun. 10, 2019), available at <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>.

² Договор о Евразийском экономическом союзе [Treaty on the Eurasian Economic Union] (Jun. 10, 2019), available at https://www.un.org/en/ga/sixth/70/docs/treaty_on_eeu.pdf.

³ WTO official website (Jun. 10, 2019), available at https://www.wto.org/english/news_e/news19_e/acc_blr_15feb19_e.htm.

⁴ Maksim Karliuk, *Russian Legal Order and the Legal Order of the Eurasian Economic Union: An Uneasy Relationship*, 5(2) *Russian Law Journal* 33, 38 (2017).

⁵ Art. 112 of the Treaty on the Eurasian Economic Union; Статут Суда Евразийского экономического союза [Statute of the Court of the Eurasian Economic Union], Art. 39 (Jun. 10, 2019), available at https://www.un.org/en/ga/sixth/70/docs/treaty_on_eeu.pdf.

authors consider EAEU law within the WTO with a special focus on DSB jurisprudence; third, the article addresses WTO law within the EAEU legal order, focusing on EAEU Court jurisprudence.

1. WTO Law and EAEU Law Within the System of International Law

International trade law consists of, on one hand, numerous bilateral or regional trade agreements and, on the other hand, multilateral trade agreements.⁶ Therefore, this analysis will be focused on WTO law and EAEU law as autonomous rule complexes, each part of general international law within the meaning of the International Law Commission (ILC).

The ILC underlined that

[t]he fragmentation of the international social world has acquired legal significance, as it has been accompanied by the emergence of specialized and (relatively) autonomous rules or rule complexes, legal institutions and spheres of legal practice. What once appeared to be governed by “general international law” has become the field of operation for such specialist systems as “trade law”...⁷

“Trade law” [...] has highly specific objectives and relies on principles that may often point in different directions. In order for the new law to be efficient, it often includes new types of treaty clauses or practices that may not be compatible with old general law or the law of some other specialized branch.⁸

The ILC characterizes such regimes as “*special (“self-contained”) regimes as *lex specialis**.”⁹

International trade law, and in particular WTO law, is generally considered an integral part of international law.¹⁰ WTO law is not a “system” in and of itself, but a “sub-system” of international law.¹¹

⁶ Peter Van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization* 35 (3rd ed., Cambridge: Cambridge University Press, 2013).

⁷ Yearbook of the International Law Commission 2006, Vol. II, Part Two, A/CN.4/SER.A/2006/Add.I (Part 2), para. 243.

⁸ *Id.* para. 247.

⁹ *Id.* para. 251(11).

¹⁰ Van den Bossche & Zdouc 2013, at 60.

¹¹ Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* 38 (Cambridge: Cambridge University Press, 2003).



According to Article 1(1) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU),

[t]he rules and procedures of this Understanding shall apply to disputes brought to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the “covered agreements”).

Therefore, the DSB, although resolving trade disputes, applies only to “covered agreements” concluded within the WTO.

However, Article 3(2) of the DSU provides that

[t]he [WTO] Members recognize that [the dispute settlement system of the WTO] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with *customary rules of interpretation of public international law*. (emphasis added)

The Appellate Body of the WTO, in interpreting this provision, pointed out that the general rule of interpretation as such

forms part of the “customary rules of interpretation of public international law” which the Appellate Body has been directed, by Article 3(2) of the *DSU*, to apply in seeking to clarify the provisions of the *General Agreement* and the other “covered agreements” of the *Marrakesh Agreement Establishing the World Trade Organization* (the “*WTO Agreement*”). That direction reflects a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law.¹²

Therefore, panels and the Appellate Body have the obligation to interpret WTO provisions by taking into account all relevant rules of international law that are applicable to relations among WTO members.¹³ Moreover, non-WTO rules may offer a valid defense against claims of a WTO breach. However, such rules cannot form the basis of legal claims; the jurisdiction of WTO panels is limited to claims under WTO covered agreements.¹⁴

¹² United States – Standards for Reformulated and Conventional Gasoline, WTO Appellate Body Report, 29 April 1996, para. 17.

¹³ Gabrielle Marceau, *Conflicts of Norms of Jurisdictions: The Relationship Between the WTO Agreement and MEAs and Other Treaties*, 35(6) *Journal of World Trade* 1081, 1129 (2001).

¹⁴ Pauwelyn 2003, at 491.



The Appellate Body came to the conclusion that it sees

no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes. Article 3(2) of the DSU states that the WTO dispute settlement system “serves to preserve the rights and obligations of Members under the *covered agreements* and to clarify the existing provisions of *those agreements*.”¹⁵

Therefore, WTO law forms part of general international law, and is also an autonomous rule complex.

Regarding EAEU law, Article 3 of the EAEU Treaty sets forth the “respect for universally recognized principles of international law” as one of the basic principles of the functioning of the EAEU. Moreover, generally-recognized principles and norms of international law are listed among the sources that the EAEU Court applies in the course of dispute settlement, and the EAEU Court applies the 1969 Vienna Convention on the Law of Treaties to interpret EAEU law.¹⁶

Thus, EAEU law is part of general international law and is an autonomous rule complex.

Articles 1(2), 4 of the EAEU Treaty provide that

[t]he Union is an international organization of regional economic integration... striving to form a common market of goods, services, capital and labor resources.

Both WTO law and EAEU law govern international trade relations.

Consequently, WTO law and EAEU law can be regarded as “specialized and (relatively) autonomous rules or rule complexes,” as well as special regimes that “regulate a certain problem area”¹⁷ within the meaning of the ILC Report on the Fragmentation of International Law.¹⁸

“Trade law” develops as an instrument to respond to opportunities created by comparative advantage in economic relations.¹⁹ Therefore, the creation of PTAs, including the EAEU Treaty, constitutes such a kind of response.

¹⁵ Mexico – Tax Measures on Soft Drinks and Other Beverages, WTO Appellate Body Report, 6 March 2006, para. 56.

¹⁶ See, e.g., Консультативное заключение от 30 октября 2017 г. о разъяснении статьи 29 Договора о Евразийском экономическом союзе [Advisory Opinion of 30 October 2017 Concerning Interpretation of Article 29 of the Treaty on the EAEU], at 3.

¹⁷ *Id.* para. (c):11-12.

¹⁸ Yearbook of the International Law Commission 2006, *supra* note 7, para. 243.

¹⁹ *Id.* para. 247.



As has already been mentioned above, both WTO law and EAEU law govern the same sphere of trade- and trade-related relations. The ILC pointed out that

[i]t is generally accepted principle that when several norms bear on a single issue, they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.²⁰

According to the ILC, this provision reflects the principle of harmonization. WTO law and EAEU law are not isolated from the system of general international law and should be interpreted and applied in accordance with the principle of harmonization aimed at the goal of systemic integration.

Therefore, the principle of harmonization should be the basis of a multilateral trade system, which consists of both multilateral and preferential trade agreements.²¹

The Appellate Body noted in *Turkey – Restrictions on Imports of Textile and Clothing Products* that the chapeau (introductory clause) of Article XXIV

makes it clear that Article XXIV may, under certain conditions, justify the adoption of a measure which is inconsistent with certain other GATT provisions, and may be invoked as a possible “defense” to a finding of inconsistency.²²

Moreover, in *Peru – Additional Duty on Imports of Certain Agricultural Products*, the Appellate Body noted that

the WTO agreements contain specific provisions addressing amendments, waivers, or exceptions for regional trade agreements, which prevail over the general provisions of the Vienna Convention, such as Article 41. This is particularly true in the case of FTAs considering that Article XXIV of the GATT 1994 specifically permits departures from certain WTO rules in FTAs.²³

²⁰ Yearbook of the International Law Commission 2006, *supra* note 7, para. 251.

²¹ For more details see Thomas Cottier & Marina Foltea, *Constitutional Functions of the WTO and Regional Trade Agreements in Regional Trade Agreements and the WTO Legal System* 43, 46–47 (L. Bartels & F. Ortino (eds.), Oxford University Press, 2006).

²² *Turkey – Restrictions on Imports of Textile and Clothing Products*, WTO Appellate Body Report, 22 October 1999, para. 45.

²³ *Peru – Additional Duty on Imports of Certain Agricultural Products*, WTO Appellate Body Report, 20 July 2015, para. 5.112. For more details see Боклан Д.С. Евразийский экономический союз и Всемирная торговая организация: соотношение правовых режимов // Право. Журнал Высшей школы экономики. 2017. № 2. С. 223–236 [Daria S. Boklan, *Eurasian Economic Union and World Trade Organization: Interrelation of Legal Regimes*, 2 Law – Journal of the Higher School of Economics 223 (2017)].



Regardless of the fact that the Appellate Body decided not to address the question of whether the rules of the free trade agreement (FTA) are rules of international law applicable among the parties,²⁴ it pointed out that

Article 31(1) of the Vienna Convention states that “[a] treaty shall be interpreted” such that the object of the interpretative exercise is the treaty as a whole, not the treaty as it may apply between some of its parties. We, thus, understand that, with multilateral treaties such as the WTO covered agreements, the “general rule of interpretation” in Article 31 of the Vienna Convention is aimed at establishing the ordinary meaning of treaty terms reflecting the *common intention of the parties to the treaty*, and not *just the intentions of some of the parties*. While an interpretation of the treaty may in practice apply to the parties to a dispute, it must serve to establish the *common intentions of the parties to the treaty being interpreted*.²⁵ (emphasis added)

More far-reaching approaches are found in international legal doctrine, according to which

RTA law generally is not “relevant” to the interpretation of WTO law. It is premised on departure from the generality of a fundamental rule of the WTO. Moreover, it partakes of WTO plus and WTO extra obligations that failed to obtain a consensus within the legislative process of the WTO and therefore stretches the notion of “relevant rules of international law applicable in the relations between the *parties*” as set out in Article 31(3)(c) of the VCLT.²⁶

Thus, from the ILC perspective, EAEU law and WTO law should be regarded as autonomous rules or rule complexes. However, these laws should be applied consistently with the principle of harmonization. But to comply with the principle of harmonization, it is necessary to establish whether the DSB can consider the PTA law to be interpreting WTO provisions and whether the EAEU Court can consider WTO law in making its findings.

2. EAEU Law in Jurisprudence of Dispute Settlement Bodies

WTO agreements do not prohibit WTO members from participating in PTAs. As enshrined in Article XXIV(5) of the GATT,

²⁴ Peru – Agricultural Products, *supra* note 23, para. 5.100.

²⁵ *Id.* para. 5.95.

²⁶ Asif H. Qureshi, *Interpreting WTO Agreements: Problems and Perspectives* 349 (2nd ed., Cambridge: Cambridge University Press, 2015).



the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area.

For the PTA to be consistent with Article XXIV of the GATT,

the duties and other regulations of commerce... shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement...

Interpreting Article XXIV of the GATT, the panel considered

that the right of Members to form a customs union is to be exercised in such a way so as to ensure that the WTO rights and obligations of third country Members (and the constituent Members) are respected, consistent with the primacy of the WTO, as reiterated in the Singapore Declaration.²⁷

Otherwise, WTO members would have the right to challenge the PTA measures that did not respect the rights of other WTO members.

The Appellate Body established a two-tier test to analyze the consistency of the PTA measure with the GATT. First, it should be established that the "*measure is introduced upon the formation of a customs union.*"²⁸ Second, the measure must meet

the requirement in sub-paragraph 5(a) of Article XXIV relating to the "duties and other regulations of commerce" applied by the constituent members of the customs union to trade with third countries.²⁹

Meaning that Article XXIV(5)(a)

requires that the duties applied by the constituent members of the customs union *after* the formation of the customs union "*shall not on the whole be higher... than the general incidence*" of the duties that were applied by each of the constituent members before the formation of the customs union.

²⁷ Turkey – Restrictions on Imports of Textile and Clothing Products, WTO Panel Report, 31 May 1999, para. 9.184.

²⁸ Turkey – Textiles, *supra* note 22, para. 52.

²⁹ *Id.*



According to Article V of the General Agreement on Trade in Services (GATS),

[t]his Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement: (a) has substantial sectoral coverage, and (b) provides for the absence or elimination of substantially all discrimination...

Article V of the GATS does not differentiate between customs unions and free-trade areas for the following reasons. First, services are not subject to customs duties, and there is no difference for services between customs unions or free-trade areas. Second, the liberalization of services requires a higher level of economic integration than the liberalization of goods. Not all customs unions and FTAs provide for the liberalization of services.³⁰

Chapter XV and Annex 16 of the EAEU Treaty sets forth a legal regime for trade in services within the EAEU. The liberalization of services is the main objective of that regime according to Articles 65(1) and 66 of the EAEU Treaty. The most favored nation and national treatment obligations are enshrined in paragraphs 21–29 of the Annex 16 to the EAEU Treaty as well.

Generally, regardless of differences between trade in goods and trade in services, Article V of the GATS and Article XXIV of the GATT contain similar conditions with respect to PTAs, namely, a substantial coverage of trade and an obligation not to raise the overall level of barriers to trade compared to the level applicable prior to when the PTAs were adopted. Therefore, WTO law also provides for “regional trade exceptions.” These exceptions allow members to adopt measures that would otherwise be inconsistent with the WTO when they are pursuing economic integration among a group of WTO members.³¹

In addition to the requirement for PTAs mentioned above, members to PTAs must act consistently with the transparency principle,³² notify WTO members, and make information regarding the PTA available to them.

Moving directly to EAEU law in WTO DSB jurisprudence, there are four cases in which the complaining party challenged EAEU measures that will be further analyzed. In three of these cases, the norms of EAEU law were considered to be measures adopted by one EAEU member State, namely, the Russian Federation, because the EAEU itself is not a WTO member. Moreover, all the actions of the EAEU bodies were attributed to Russia.

³⁰ See also Markus Krajewski, *Services Liberalization in Regional Trade Agreements: Lessons for GATS “Unfinished Business?”* in *Regional Trade Agreements and the WTO Legal System*, *supra* note 21, at 175, 178.

³¹ Van den Bossche & Zdouc 2013, at 648.

³² See Daria Boklan & Ilya Lifshits, *Legal Aspects of Transparency in the Eurasian Economic Union*, 9(3) *Journal of Advanced Research in Law and Economics* 917 (2018).



In *Turkey – Restrictions on Imports of Textile and Clothing Products*, the panel noted that the Turkey-EC customs union is not a member of the WTO; however,

in the absence of a specific treaty provision (in the DSU as drafted) individual states remain responsible for any wrongful act committed by their common organ.³³

In addition, the panel referred to the conclusions of Judge Shahabuddeen's separate opinion in *Phosphate Lands in Nauru* case and the ILC report and concluded that

in public international law, in the absence of any contrary treaty provision, Turkey could reasonably be held responsible for the measures taken by the Turkey – EC customs union.³⁴

In *Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products*, the panel pointed out that

[i]t is clear to us that the act of applying the duty rates (i.e. the levying of duties at the time of importation) is directly attributable to Russia.³⁵

Regarding these measures, we also observe that they were not adopted by Russia but by the Eurasian Economic Union, which is an international organization of which Russia is a member State.³⁶

This background demonstrates the difference in DSB treatment of general international law and the law of PTAs. Under Article 3(2) of the DSU, general international law can be used to interpret WTO law,³⁷ whereas the law of PTAs is regarded as measures taken by members of the PTAs. Therefore, the DSB treats the norms of EAEU law as measures taken by a specific EAEU member, but not as international law within the meaning of the ILC Report on the Fragmentation of International Law.

The EAEU measures that were under the consideration of the DSB in all four cases were adopted by the Eurasian Economic Commission (EEC), an executive body of the EAEU. According to Article 6 of the EAEU Treaty, the law of the EAEU includes the decisions of the EEC. In the EAEU Court

³³ Turkey – Textiles, *supra* note 27, para. 8.3.

³⁴ *Id.* para. 9.42.

³⁵ Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products, WTO Panel Report, 12 August 2016, para. 7.46.

³⁶ *Id.* para. 7.42.

³⁷ See, e.g., United States – Import Prohibition of Certain Shrimp and Shrimp Products, WTO Appellate Body Report, 12 October 1998, paras.132, 168.



challenges directed against Commission decisions take the form of actions “concerning the compliance” of the said acts with the EAEU Treaty or international treaties within the EAEU. Likewise, the Court has the competence to assess the compliance of international treaties within the EAEU with the Treaty.³⁸

An EAEU measure was challenged in the DSB in *Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof*. In this dispute, Ukraine claimed that Customs Union Technical Regulation No. 001/2011 “On Safety of Railway Rolling Stock”³⁹ (Technical Regulation No. 001/2011), read together with the Protocol of the Ministry of Transport of the Russian Federation⁴⁰ and certain instructions, was inconsistent with several WTO provisions.⁴¹ It should be highlighted that according to the decision of the Board of the Commission of the EAEU,⁴² the Technical Regulation is applied to the whole territory of the EAEU and forms part of EAEU law.

Technical Regulation No. 001/2011 sets safety and technical requirements for market railway rolling stock. In the panel request, Ukraine specifically referred to Technical Regulation No. 001/2011 as the measure at issue, further claiming its failure to comply with the GATT and the Technical Barriers to Trade (TBT) agreement. However, during the course of the proceedings, Ukraine did not challenge Technical Regulation No. 001/2011 as such, but instead challenged certain instructions in which the Russian Federation referred to this document. Russia claimed that the measure, as challenged by Ukraine, was outside the terms of reference of the panel.⁴³ However, the panel rejected Russia’s claim.⁴⁴ This panel’s decision is now under appeal.⁴⁵

³⁸ Ekaterina Diyachenko & Kirill Entin, *The Court of the Eurasian Economic Union: Challenges and Perspectives*, 5(2) Russian Law Journal 53, 57 (2017).

³⁹ Технический регламент Таможенного союза «О безопасности железнодорожного подвижного состава» (ТР ТС 001/2011) (утвержден Решением Комиссии Таможенного союза от 15 июля 2011 г. № 710) [Technical Regulation of the Customs Union No. 001/2011 “On Safety of Railway Rolling Stock,” adopted by the Decision of the Commission of the Customs Union of 15 July 2011 No. 710].

⁴⁰ Протокол Министерства транспорта Российской Федерации от 20 января 2015 г. № А 4-3 о выдаче органом по сертификации Таможенного союза сертификатов соответствия на товары, произведенные в третьих странах [Protocol of the Ministry of Transport of the Russian Federation No. А 4-3 of 20 January 2015 regarding issuance by certification authority of the Customs Union of the certificates of conformity for products manufactured by third-countries].

⁴¹ *Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof*, Request for the Establishment of a Panel by Ukraine, 11 November 2016, at 2.

⁴² Решение Коллегии Евразийской экономической комиссии от 3 февраля 2015 г. № 11 об изменении Решения Комиссии Таможенного союза от 15 июля 2011 г. № 710 [Decision of the Board of the Eurasian Economic Commission of 3 February 2015 No. 11 changing the Decision on the Commission of the Customs Union of 15 July 2011 No. 710].

⁴³ *Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof*, WTO Panel Report, 30 July 2018, paras. 7.818-7.820.

⁴⁴ *Id.* para. 7.829.

⁴⁵ *Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof*, Notice of an Other Appeal by the Russian Federation under Article 16(4) and Article 17(1) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and Under Rule 23(1) of the Working Procedures for Appellate Review, 19 September 2018, para. 10.



As was argued by Ukraine, the measure at issue is Russia's alleged decision not to recognize the validity of certificates issued for Ukrainian railway products by certification bodies in other EAEU countries that can be found in Protocol No. A 4-3 of Russia's Ministry of Transport and two individual decisions of Russia's Federal Agency for Railway Transport.⁴⁶ Ukraine claimed that

Russia bases its alleged decision on Technical Regulation 001/2011. More specifically, Ukraine asserts that Russia relied on the text of Technical Regulation 001/2011 to develop two "additional" requirements. According to Ukraine, Russia subjects the application of the Technical Regulation 001/2011 to these additional requirements. Ukraine contends that Russia has used these requirements as reasons not to recognize the validity of certificates issued for railway products of Ukrainian origin by certification bodies in other EAEU countries.⁴⁷

Thus, in fact, Ukraine was trying to challenge actions of the Russian Federation based on the document issued at the EAEU level rather than the EAEU measure as such.

The panel considered only first requirement alleged by Ukraine on the merits, finding that the second requirement is outside its terms of reference because it was not properly presented by Ukraine in its panel request.⁴⁸ Therefore, we consider the first requirement. This requirement referred to the alleged decision of Russia's authorities, which stated that

for certificates issued in another EAEU country to be recognized, the products covered by these certificates must have been produced in EAEU country.⁴⁹ (hereinafter production requirement)

As the principal legal basis for its claim, Ukraine referred to the Protocol of the Ministry of Transport No. A 4-3 adopted on 20 January 2015. The protocol contains the minutes of "the meeting of the Deputy Minister of Transport of the Russian Federation Tsydenov A.S. regarding issuance by certification authority of the Customs Union of the certificates of conformity for products manufactured by third-countries." These minutes concern the application of a company for the registration and operation in Russia of a certain Ukrainian railway product, a hopper car for grain transportation manufactured by the Ukrainian [producer]. This application sought the recognition of a conformity assessment certificate issued to a Ukrainian company by the Belarusian

⁴⁶ Russia – Railway Equipment, *supra* note 43, para. 7.811.

⁴⁷ *Id.* para. 7.812.

⁴⁸ *Id.* para. 7.825.

⁴⁹ *Id.* para. 7.823.



certification authority. The opinion of the deputy minister reflected in Protocol No. A-4-3 is that the certificates issued by the Belarusian certification entity are not valid in Russia because Technical Regulation No. 001/2011 only applies to products manufactured in the customs territory of the EAEU. The protocol indicates that the requirements and conformity assessment procedures for products produced by third countries that are not members of the EAEU are “established in accordance with the national laws” of the Russian Federation.⁵⁰

Russia argued that the measure challenged by Ukraine did not exist. According to Article 53 of the EAEU Treaty, products that are subject to the technical regulations of the EAEU are put into circulation within the territory of the EAEU after the completion of the necessary conformity assessment procedure. The EAEU countries must ensure the circulation of products that conform to EAEU technical regulations within their respective territories without introducing any requirements on top of those set out in the EAEU technical regulations or any additional conformity assessment procedures.⁵¹ Moreover, Article 1 of Technical Regulation No. 001/2011 specifies that it applies to newly developed (upgradeable) manufactured railway rolling stock and their parts put into circulation for use in the customs territory of the EAEU, irrespective of the place of production. Furthermore, Russia pointed out that Technical Regulation No. 001/2011 has been applied to products put into circulation in the customs territory of the EAEU but manufactured in third countries. Russia asserted that these products circulate freely within the territory of the EAEU, including in Russia.⁵² The protocol at issue is a document of a non-binding nature that reflects the opinions expressed in the course of a January 2015 meeting by government officials representing various Russian agencies.⁵³

However, the panel determined that the alleged production requirement challenged by Ukraine existed.⁵⁴ Ukraine alleged that the measure at issue was inconsistent with Articles 2.1, 5.1.1, 5.1.2 of the TBT agreement and Articles I(1), III(4) and X(3)(a) of the GATT. The panel found that Ukraine failed to establish the no-compliance of the measure challenged with the TBT agreement and with Article X(3)(a) of the GATT.⁵⁵

With respect to Ukraine’s claims under Articles I(1) and III(4) of the GATT, the panel established the inconsistency of the measure at issue, noting that, under the production requirement, two similarly imported products, one produced in Ukraine

⁵⁰ Russia – Railway Equipment, *supra* note 43, para. 7.162.

⁵¹ Art. 53 of the Treaty on the Eurasian Economic Union.

⁵² Russia – Railway Equipment, *supra* note 43, para. 7.833.

⁵³ *Id.* para. 7.831.

⁵⁴ *Id.* para. 7.861.

⁵⁵ *Id.* para. 8.1(d).



and the other produced in Belarus, Kazakhstan, or Russia, that are both covered by a certificate issued in Belarus would be treated differently. The Belarus, Kazakh, or Russian product thus enjoys an advantage because the certificate issued in Belarus that covers the product produced in these countries can be used to obtain the registration of the product in Russia, which is necessary for operation in Russian railway market and the operation of the product in Russian territory. The Ukrainian product can neither be registered nor operated in Russia, as the certificates issued by Belarus certification bodies are not recognized by Russian authorities. The advantage enjoyed by the Belarus, Kazakh, and Russian product is therefore not being extended immediately and unconditionally to a Ukrainian product.⁵⁶

The panel report is under appeal and, thus, was not adopted by the DSB. Russia did not appeal the findings of the panel with respect to the alleged inconsistencies of the measure at issue with Articles I(1) and III(4) of the GATT. Russia is of the view that the existence of the measure challenged was not proven by Ukraine, and the panel erred under Article 11 of the DSU in establishing the existence of this measure.⁵⁷

In conclusion, it should be highlighted that whereas the panel request refers to Technical Regulation No. 001/2011 as a measure at issue, the measure that forms part of EAEU law, in fact, Ukraine was trying to challenge another measure, certain actions, and the instructions of the authorities of the Russian Federation. Technical Regulation No. 001/2011 was not considered on the merits by the panel and fully complies with WTO law. However, the panel regarded EAEU law, the EAEU Treaty, Technical Regulation No. 001/2011, and the decisions of the Board of the EEC, in the dispute at hand as if they were measures adopted by the Russian Federation and not sources of international law.

Finally, this dispute reveals that although the relations at issue are governed at the EAEU level, WTO members may try to challenge measures allegedly adopted by a specific EAEU member in its national legislation based on EAEU law. The consequence of such a challenge affects the national legislation of that EAEU member rather than EAEU law. EAEU measures were subject to consideration by the DSB in three other disputes.

The first report in which a panel had to consider EAEU measures was *Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products*. In this case, the EU as complainant challenged twelve measures adopted by the EEC, specifically, tariff treatment with respect to certain tariff lines pursuant to the Common Customs Tariff of the Eurasian Economic Union (CCT): paper and paperboard, palm oil and its fractions, refrigerators and combined refrigerator-freezers. The EU claimed that the said measures of the EEC led to an application of custom duties in excess of Russia's bound rates, which are indicated in Russia's Schedule of Concessions and

⁵⁶ Russia – Railway Equipment, *supra* note 43, paras. 7.903, 7.926.

⁵⁷ Russia, Notice of an Other Appeal by the Russian Federation, *supra* note 45, paras. 21–26.



Commitments on Goods; therefore, these measures were inconsistent with Article II(1)(a) and (b) of the GATT 1994. The twelfth measure challenged by the EU was “Systematic Duty Variation” (SDV), which, according to the complaint, presented a general practice of systematic variation by the EEC of a significant number of tariff lines in the CCT that led to the application of duties in excess of Russia’s scheduled bound rates.

Thus, the respondent in the case was Russia, but the contested measures had been adopted not by the respondent but by the body of an international organization of which Russia is a member. The panel was laconic on this matter: it merely referred to Russia’s Working Party Report, stating that Russia “is obliged both under general international law and its domestic law to apply the duty rates contained in the CCT [Common Customs Tariff].” Consequently, “the act of applying the duty rates is directly attributable to Russia”; however, the measures can be challenged “as such” independently of any act of application (as the EU did in this case). Based on these two elements, the panel constructed a presumption that Russia applies duty rates contained in the CCT and that EAEU measures are attributable to Russia.⁵⁸ This presumption has not been rebutted, and in subsequent cases,⁵⁹ the DSB applied it without further substantiation. Consequently, the panel found that eleven EEC measures were inconsistent with Russia’s WTO obligations;⁶⁰ regarding the twelfth measure (the SDV), the report stated that the EU failed to establish the existence of this measure.⁶¹ Russia fully implemented the DSB rulings; in relevant notifications, Russia referred to the decisions of the Board and Council of the EEC.⁶² Therefore, Russia complied with the DSB recommendation by ensuring the adoption of relevant decisions of the EAEU body. If this body had refused to amend decisions on tariff treatment that the DSB had found to be inconsistent with Russian WTO obligations, then the measure challenged would have been inconsistent with the WTO.

It could be concluded that the attribution of the measures of a customs union to its members due to the EAEU has been significantly developed because, before the cases against Russia, WTO jurisprudence contained only one case in which a similar issue was raised.⁶³

The second dispute regarding EAEU measures considered by the DSB highlighted the “forum shopping” issue for the complainant. This case challenged the anti-

⁵⁸ Russia – Tariff Treatment, *supra* note 35, para. 7.46.

⁵⁹ Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy; Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof.

⁶⁰ Russia – Tariff Treatment, *supra* note 35, para. 8.1(b-f).

⁶¹ *Id.* para. 8.1(g).

⁶² WT/DS485/11.

⁶³ Turkey – Textiles, *supra* note 27, para. 9.6.



dumping levies imposed by the EEC in May 2013 on light commercial vehicles (LCVs) from Germany, Italy, and Turkey. In 2014, the supplier of LCVs, Volkswagen A.G., applied to the Court of the Eurasian Economic Community (EurAsEC Court)⁶⁴ with the relevant claim to invalidate the decision of the EEC. The EurAsEC court dismissed the claim on procedural grounds: the applicant added new factual circumstances to the claim after the pre-trial notice submitted to the EEC, and therefore, according to the EurAsEC Court, the possibility of pre-trial settlement was not exhausted.⁶⁵ The chamber consisted of three members; one member (Judge Tatiana Neshataeva) presented a dissenting opinion stating that the court erred in the finding that the applicant had not complied with the requirement for pre-trial settlement because the pre-trial notice had been submitted, and the provision of the relevant treaty providing for this requirement did not prohibit the inclusion of new circumstances that were not included in the pre-trial claim in the application to the court. The dismissal of the claim on such grounds, according to Judge Neshataeva, breached the fundamental adjudication principles, especially the principle of access to justice.⁶⁶ Volkswagen A.G. could try to apply again to the EEC and then to the court, but it preferred to act via the WTO dispute settlement system, and in 2014, the European Union launched a proceeding in the DSB against the Russian Federation.

The panel and then the Appellate Body attributed the action of the EEC to the Russian Federation and concluded that the Department for Internal Market Defence of the Eurasian Economic Commission (DIMD), which conducted the anti-dumping investigation, and, therefore, the Russian Federation had acted inconsistently with the Anti-Dumping Agreement and the GATT and recommended that the Russian Federation bring its (that is, the commission's) measures into conformity with its obligations.⁶⁷ *Inter alia*, the panel report (modified by the Appellate Body) stated that a well-known producer (GAZ) was excluded from the domestic industry definition,

⁶⁴ The EurAsEC Court has functioned for two years (2012–2014) as a judicial body of the Eurasian Economic Community (EurAsEC) which comprised five states: the Republic of Belarus, Republic of Kazakhstan, Kyrgyz Republic, Russian Federation and Republic of Tajikistan. The Treaty on the termination of the functioning of EurAsEC was signed on 10 October 2014 (Jun. 10, 2019), available at <https://mddoc.mid.ru/api/ia/download/?uuiid=291c9d37-cc19-4373-ba84-b14b66e7f281>. However, the decisions of the EurAsEC court remained in force as per Art. 3(3) of this Treaty. See on the history of the Court Maksim Karliuk, *The Limits of the Judiciary Within the Eurasian Integration Process in The Eurasian Economic Union and the European Union Moving toward a greater Understanding* 171 (A. Di Gregorio & A. Angeli (eds.), Amsterdam; The Hague: Eleven International Publishing, 2017).

⁶⁵ Решение Коллегии Суда Евразийского экономического сообщества от 7 октября 2014 г. по заявлению компании Фольксваген А.Г. [Judgment of the Panel of the Court of the Eurasian Economic Community of 7 October 2014 on the application of the company Volkswagen A.G.], at 2–3.

⁶⁶ Особое мнение судьи Т.Н. Нешатаевой от 7 октября 2014 г. по заявлению компании Фольксваген А.Г. [Dissenting Opinion of Judge T.N. Neshataeva of 7 October 2014 on the application of the company Volkswagen A.G.], at 1–2.

⁶⁷ Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy, WTO Appellate Body Report, 22 March 2018, para. 6.15.



and consequently, the DIMD made its industry and causation determination on the basis of information related to an improperly defined domestic industry.

The Russian Federation did not appeal on the grounds of the incorrect attribution, hence this finding was perceived as unquestionable. Neither the panel nor the Appellate Body mentioned in the reports the EAEU Treaty or any other treaties within the EAEU, and the EU claim to bring the respondent's laws and regulations in conformity with the Anti-Dumping Agreement (Art. 18.4) was not well-founded and detailed and was rejected.⁶⁸

The DSB recommendations were implemented by the Russian Federation, and the DSB was notified in June 2018.⁶⁹ Because the term of anti-dumping duties expired on 14 June 2018, the actual cancellation of the relevant decision of the EEC was not needed. Perhaps if the Panel of the Court of the EAEU which heard the Volkswagen application had followed the opinion of Judge Neshataeva, the long and expensive DSB procedure would have been unnecessary.

The latest claim filed in the DSB also concerns anti-dumping measures; the pending dispute was initiated by Ukraine: *Kazakhstan – Anti-dumping Measures on Steel Pipes*.⁷⁰ Ukraine requested consultations, stating that EEC decision No. 48 of 2 June 2016 “On Prolongation of Anti-Dumping Measures on Certain Types of Steel Pipes Originating in Ukraine and Imported into the Customs Territory of the Eurasian Economic Union” and its report are inconsistent with the GATT-94 and the Anti-Dumping Agreement, and appear to nullify or impair benefits accruing to Ukraine.⁷¹ Russia indicated its desire to join the consultations requested by Ukraine, stating the following:

The Russian Federation is a member of the Eurasian Economic Union. Since the measure is aimed to protect against dumped imports the entire territory of the Eurasian Economic Union, including the territory of Russia, the Russian Federation has a substantial trade interest in this dispute and requests to be joined in the consultations as a third party.⁷²

The delegation of Kazakhstan informed the DSB that it accepted the request of the Russian Federation to join the consultations.⁷³ No further actions have been taken

⁶⁸ Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy, WTO Panel Report, 27 January 2017, paras. 7.281, 8.3.

⁶⁹ Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy, Communication of the Russian Federation, 21 June 2018.

⁷⁰ DS 530: Kazakhstan – Anti-Dumping Measures on Steel Pipes.

⁷¹ Kazakhstan – Anti-Dumping Measures on Steel Pipes, Request for Consultations by Ukraine, Request for Consultations by Ukraine, 19 September 2017.

⁷² Kazakhstan – Anti-Dumping Measures on Steel Pipes, Request to Join Consultations – Communication from the Russian Federation, 10 October 2017.

⁷³ Kazakhstan – Anti-Dumping Measures on Steel Pipes, Acceptance by Kazakhstan of the Request to Join Consultations, 18 October 2017.



by Ukraine. In this case, Ukraine suggested the attribution of the measures of the EEC to Kazakhstan as a member of the EAEU. It seems that complainants choose the respondent based on which country is the destination of the goods at issue.

3. WTO Law in EAEU Court Jurisprudence

As mentioned above, according to Article 3(3) of the 2014 Treaty on Discontinuation of Activities of the Eurasian Economic Community, the EurAsEC Court judgments remain in their former status. Moreover, the EAEU Court referred to the EurAsEC Court position, basing such reference on Article 3(2) and noted that EurAsEC Court jurisprudence may be used by the EAEU Court as *stare decisis*.⁷⁴

The EurAsEC Court pointed out that treaties within the customs union are *lex specialis* with regard to WTO agreements governing relations exclusively within the customs union. However, in case of a contradiction between the WTO agreements and treaties within the customs union or a decision of the customs union bodies, the WTO agreements prevail.⁷⁵

In its further jurisprudence, the EurAsEC Court did not identify any contradictions between the WTO Anti-Dumping Agreement and the treaty on anti-dumping measures within the customs union,⁷⁶ and found that the latter had been lawfully applied by the commission. In another case challenging the anti-dumping levies on graphite electrodes from India, the EurAsEC Court in the first and appellate instances upheld the decision of the customs union commission by referencing not only the treaty within the customs union, but also the WTO Anti-Dumping Agreement.⁷⁷ In the decision of the appellate chamber in another case challenging of the anti-dumping duties on rolled steel with polymer coating from China, the court underlined that, from the date of Russia's WTO accession, all the relevant agreements, including the GATT and the Agreement on the Implementation of Article VI of the GATT, became a part of the legal system of the Russian Federation.⁷⁸

⁷⁴ Решение Коллегии Суда Евразийского экономического союза от 4 апреля 2016 г. (ЗАО «Дженерал Фрейт») [Judgment of the Panel of the Court of the Eurasian Economic Union of 4 April 2016 (CJSC "General Freight")], at 11.

⁷⁵ Решение Коллегии Суда Евразийского экономического сообщества от 24 июня 2013 г. по заявлению ПАО «Новокраматорский машиностроительный завод» [Judgment of the Panel of the Court of the Eurasian Economic Community of 24 June 2013 on the application of the Public JSC "Novokromatorsky Mashine Engineering Plant"], at 24.

⁷⁶ Решение Апелляционной палаты Суда Евразийского экономического сообщества от 21 октября 2013 г. по жалобе ПАО «Новокраматорский машиностроительный завод» [Judgment of the Appellate Chamber of the Court of the Eurasian Economic Community of 21 October 2013 on the appeal of the Public JSC "Novokromatorsky Mashine Engineering Plant"], at 8, 9.

⁷⁷ Решение Апелляционной палаты Суда Евразийского экономического сообщества от 23 мая 2014 г. по жалобе компаний Graphite India Limited and HEG Limited [Judgment of the Appellate Chamber of the Court of the Eurasian Economic Community of 23 May 2014 on the appeal of the companies Graphite India Limited and HEG Limited], paras. 3.1, 3.4.

⁷⁸ Решение Апелляционной палаты Суда Евразийского экономического сообщества от 23 декабря 2014 г. по жалобе компании Angang Steel Co., Ltd. [Judgment of the Appellate Chamber of the



Moving to the analysis of the EAEU Court jurisprudence, it is worth noting that, according to paragraph 185 of the Working Party Report on the Accession of the Russian Federation to the World Trade Organization⁷⁹

from the date of accession of any CU [Customs Union] Party to the WTO, the provisions of the WTO Agreement [...] became an integral part of the legal framework of the CU [...] CU Parties were obligated when making an international treaty in the framework of the CU to ensure that the CU agreement was consistent with the WTO commitments of each CU Party. Similarly, when CU Bodies adopted and applied CU acts, those acts had to comply with those commitments. [...] the rights and obligations of the Parties resulting from the WTO Agreement, as they were set out in the Protocol of Accession of each Party, including the commitments undertaken by each Party as part of the terms of its accession to the WTO and that became a part of the legal framework of the CU could not be subject to abrogation or limitation by decision of CU Bodies, *including the EurAsEC Court* or by an international treaty of the Parties. (emphasis added)

Furthermore, Article 186 of the Working Party Report provided that

an infringement of such rights and obligations by a CU Party or a CU Body *could be challenged* by a CU Party, or CU Commission before the *EurAsEC Court*. (emphasis added)

EAEU Court jurisdiction is set out in Article 39 of the EAEU Court Statute; according to this provision, the following disputes are subject to the court's jurisdiction: disputes arising from the EAEU Treaty, disputes arising from the treaties within the EAEU, and/or disputes arising from the decisions of EAEU bodies.

The law applicable to the EAEU Court is defined in Article 50 of the Court Statute, namely, generally-recognized principles and norms of international law, Treaty on the EAEU, treaties within the EAEU, other treaties signed by EAEU member-state parties to the dispute, decisions and regulations of EAEU bodies, international customs, and evidence of a general practice accepted as law.

Therefore, the following question may be posed: could WTO agreements be regarded as "other treaties signed by EAEU member-state parties to the dispute"? The EAEU Court pointed out that there are two cumulative criteria for such treaties. First, all EAEU members should be party to such treaties, and second, such treaties

Court of the Eurasian Economic Community of 23 December 2014 on the appeal of the company Angang Steel Co., Ltd.), at 5; *see also* Judgment of the Chamber of the Court of the Eurasian Economic Community on the application of the Public JSC "Novokromatorsky Mashine Engineering Plant," *supra* note 75, at 22.

⁷⁹ Working Party Report on the Accession of the Russian Federation to the World Trade Organization, 22 August 2012, para. 185.



should relate to the sphere of the common policy of the EAEU⁸⁰ (Judge Chaika in the dissenting opinion suggested that the second criterion should instead be “the conferral of the certain competence to the Union”).⁸¹ As Belarus is not a WTO member, the first criterion is not satisfied.

Moreover, some scholars underline that the jurisdiction of the WTO dispute settlement system is exclusive.⁸² This approach was affirmed by the panel in *European Communities – Measures Affecting Trade in Commercial Vessels*, where, in interpreting Article 23(1) of the DSU, the panel stressed that

[i]nterpreted in light of its context and purpose, Article 23.1 not only ensures the exclusivity of the WTO *vis-à-vis* other international fora but also protects the multilateral system from unilateral conduct.⁸³

Therefore, DSB jurisprudence shows that the courts of PTAs, including the EAEU Court, do not have jurisdiction to resolve disputes arising from WTO agreements.

The next question is the following: may the EAEU Court use the WTO agreements as a means of interpreting EAEU law while settling disputes?

There is reasonable likelihood of RTA⁸⁴ interpretative approach mirroring those in the WTO... Most of the RTAs have specific references to actual provisions to the WTO Agreements in the text of the RTAs... Most RTAs used language resembling provisions of the WTO Agreements in varying degrees.⁸⁵

We may witness the same phenomenon in the EAEU Treaty.⁸⁶ The EAEU Court, in interpreting EAEU law, relies on rules of interpretation contained in the 1969 Vienna Convention on the Law of Treaties (VCLT); all EAEU member States are parties to

⁸⁰ Решение Апелляционной палаты Суда Евразийского экономического союза от 21 июня 2016 г. (ЗАО «Дженерал Фрейт») [Judgment of the Appellate Chamber of the Court of the Eurasian Economic Union of 21 June 2016 (CJSC “General Freight”)], at 14.

⁸¹ Особое мнение судьи К.Л. Чайки от 23 июня 2016 г. (Дженерал Фрейт) [Dissenting Opinion of Judge K.L. Chaika of 23 June 2016 (CJSC “General Freight”)], at 9.

⁸² See Van den Bossche & Zdouc 2013, at 161; Kyung Kwak & Gabrielle Marceau, *Overlaps and Conflicts of Jurisdiction Between the World Trade Organization and Regional Trade Agreements in Regional Trade Agreements and the WTO Legal System*, *supra* note 21, at 465, 467.

⁸³ *European Communities – Measures Affecting Trade in Commercial Vessels*, WTO Panel Report, 22 April 2005, para. 7.193.

⁸⁴ It is worth noting that RTAs “instead of referring to these agreements as ‘regional trade agreements,’ they are often referred to as ‘preferential trade agreements’ (PTAs).” See Van den Bossche & Zdouc 2013, at 649. Therefore notions “FTA” and “PTA” are used as synonyms in this paper.

⁸⁵ Qureshi 2015, at 350–353.

⁸⁶ See, e.g., Annexes 29, 31 of the Treaty on the Eurasian Economic Union.



the VCLT, and the VCLT codified existing customary rules on the interpretation of international law.

According to Article 31(1) of the VCLT,

[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context* and in the light of its object and purpose. (emphasis added)

The Preamble to the Treaty on the EAEU provides the parties “take into consideration norms, rules, and principles of the World Trade Organization.” This provision could be regarded as the *context* in which the EAEU Treaty should be interpreted. Moreover, Article 31(3)(c) of the VCLT provides that any relevant rules of international law are applicable in the relations between the parties. Therefore, except with regard to Belarus, WTO agreements could be regarded as “relevant rules of international law applicable in the relations between the parties” for EAEU member States.

The EAEU Court can apply and interpret the EAEU Treaty and other treaties within the EAEU, and such an interpretation can be made based on the approaches of the DSB. However, the EAEU Court is not bound by the DSB interpretation of WTO agreements.

The International Tribunal for the Law of the Sea underlined that

the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*.⁸⁷

The same approach can be found in the doctrine regarding the interpretation of RTAs in the context of WTO agreements.⁸⁸

Therefore, the EAEU Court interpreting EAEU law in the context of WTO agreements should rely on the object and purpose of the EAEU Treaty, subsequent practices of the EAEU member States, and relevant *travaux préparatoires*.

Thus, one has to agree with Igor Lukashuk that

along with development of conventional relations and strengthening their influence on national law the courts face rather difficult job to interpret and bring into accord different treaty provisions to comply with each other.⁸⁹

⁸⁷ *MOX Plant Case (Ireland v. United Kingdom)*, ITLOS Case No. 10, Provisional Measures, 3 December 2001, (2002) 41 I.L.M. 405, para. 51.

⁸⁸ See Locknie Hsu, *Applicability of WTO Law in Regional Trade Agreements: Identifying the Links in Regional Trade Agreements and the WTO Legal System*, *supra* note 21, at 525, 541.

⁸⁹ Лукашук И.И. Современное право международных договоров [Igor I. Lukashuk, *Modern Treaty Law*] 60 (2nd ed., Moscow: Wolters Kluwer, 2006).



Such an approach was taken by the EAEU Court in its judgment in *ArcelorMittal Kryvyi Rih*, 27 April 2017, where the court, in interpreting the anti-dumping provisions of EAEU law, took into account the GATT and the Agreement on the Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement).⁹⁰ The Court emphasized that Article VI of the GATT was implemented in EAEU law, particularly by Article 49(2) of the Treaty on the EAEU.⁹¹ Moreover, the Court relied on the WTO panel jurisprudence with respect to the determination of the period of investigation and injury investigations.⁹²

Furthermore, the Court reaffirmed this position in its Advisory Opinion of 30 October 2017, referencing Article XX of the GATT and stating that

for the purposes of comprehensive and correct understanding of mentioned above principles of functioning of internal market of goods, exercising of freedom of movement of goods recourse to the WTO law (hereinafter WTO) is of practical importance.⁹³

Therefore, to overcome uncertainty concerning WTO law in EAEU Court jurisprudence, it is necessary to clarify the approach of the EAEU Court. In our opinion, the application of WTO law is out of the EAEU Court jurisdiction; however, the Court may interpret EAEU law by relying on WTO law and DSB jurisprudence. Such interpretation should be within the context and object of the EAEU Treaty.

Conclusion

From the ILC perspective, both EAEU law and WTO law must be regarded as autonomous rules or rule complexes. However, these rules should be applied in a manner that conforms with the principle of harmonization.

The DSB treats norms of EAEU law as measures adopted by a specific EAEU member, but not as international law within the meaning of the ILC Report on the Fragmentation of International Law. The complainants have been trying to challenge the measures adopted by the EEC dealing with import tariffs, anti-dumping investigations, and technical regulations.

These disputes reveal several specific aspects that appear when EAEU measures are challenged. First, the EAEU measures are attributable to every EAEU member.

⁹⁰ Решение Коллегии Суда Евразийского экономического союза от 27 апреля 2017 г. по заявлению ПАО «АрселорМиттал Кривой Рог» [Judgment of the Panel of the Court of the Eurasian Economic Union of 27 April 2017 on the application of the Public JSC “ArcelorMittal Kryvyi Rih”], at 5–6.

⁹¹ *Id.* at 22–23.

⁹² *Id.* at 16.

⁹³ Advisory Opinion Concerning Interpretation of Article 29 of the Treaty on the EAEU, *supra* note 16, para. 7.



Second, while certain relations are governed at the EAEU level, a WTO member may try to challenge the measures allegedly adopted by a specific EAEU member in its national legislation based on EAEU law. The consequence of such a challenge would affect the national legislation of that EAEU member rather than EAEU law. Third, the “forum shopping” issue may arise because WTO law and EAEU law govern the same relations. Thus, the same measure can be challenged under EAEU law in the EAEU Court and under WTO law in the DSB.

The case law of the EAEU Court and its predecessor shows that WTO law and DSB jurisprudence are used to interpret EAEU law.

A grouping of States often tends to create its own legal system and the declaration of an autonomous legal order differing from international law and from the domestic law of its member States. Several years after its establishment, the Court of the European Communities introduced the doctrine of direct effect and the supremacy of community law and declared the autonomy of the community legal order.⁹⁴ Thus, the EU legal order created a fence with respect to general international law, including WTO law: relations between EU member States are not governed by WTO agreements, except for certain exclusions that do not have a direct effect on the EU legal order.⁹⁵

The EAEU Court, in the wake of the establishment of the European Court of Justice and with reference to its case law, introduced the basic legal concepts essential for the development of integration processes: primacy, the direct application of EAEU law, and the exclusive supra-national competence of the union bodies.⁹⁶ The next expected step would be the doctrine of an autonomous legal order and exclusive jurisdiction of the EAEU Court to settle trade disputes between member States.⁹⁷

⁹⁴ *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, C-26/62, 5 February 1963, [1963] E.C.R. 1, at 12; *Flaminio Costa v. ENEL*, C-6/64, 15 July 1964, [1964] E.C.R. 585. See also Tetyana Komarova, *The Court of Justice of the European Union and International Legal Order*, 5(3) Russian Law Journal 140 (2017).

⁹⁵ In the preamble of the decision of the Council of the European Union implementing the Marrakesh Agreement in EU law, it was clearly stated that this agreement, including annexes, “is not susceptible to being directly invoked in Community or Member State courts.” Council Decision of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986–1994), 1994 O.J. (L 336) 1–2; this provision was further supported by the Court practice: *Portuguese Republic v. Council of the European Union*, C-149/96, 23 November 1999, [1999] E.C.R. 1-8395, para. 48.

⁹⁶ Консультативное заключение Суда Евразийского экономического союза от 4 апреля 2017 г. [Advisory Opinion of the Court of the Eurasian Economic Union of 4 April 2017], at 6; Консультативное заключение Суда Евразийского экономического союза от 7 декабря 2018 г. [Advisory Opinion of the Court of the Eurasian Economic Union of 7 December 2018], at 5; Консультативное заключение Суда Евразийского экономического союза от 20 декабря 2018 г. [Advisory Opinion of the Court of the Eurasian Economic Union of 20 December 2018], at 7.

⁹⁷ A. Smbatyan has already noticed certain claims for an autonomous legal order in the *lex specialis* discourse in the above cited Judgment of the Panel of the Court of the Eurasian Economic Community of 24 June 2013 on the application of the Public JSC “Novokromatorsky Mashine Engineering Plant.” See *Смбатян А.С. Концепция «особости» правопорядка Таможенного союза в решении Суда ЕвразЭС по прокатным валкам // Евразийский юридический журнал. 2013. № 8. С. 31–36*



However, this expectation cannot be met by reason of the Treaty on the Functioning of the Customs Union within the Multilateral Trading System of 19 May 2011, which is implemented in EAEU law through Protocol No. 31 to the Treaty on the EAEU. Recent case law confirmed the application of the former treaty, which ambiguously established the priority of WTO law in the EAEU legal order. It seems that this priority could have led to the direct application of WTO law by the EAEU Court. However, the application of WTO law is within the exclusive competence of the DSB, and the jurisdiction of the EAEU Court to settle disputes on the basis of WTO agreements is doubtful. Therefore, to overcome uncertainty concerning WTO law in EAEU Court jurisprudence it is necessary to clarify the position of the EAEU Court. In our opinion, the application of WTO law is outside the EAEU Court jurisdiction; however, the Court may interpret EAEU law relying on WTO law and DSB jurisprudence. Such interpretation should be within the context and object of the EAEU Treaty.

The idea of an autonomous EAEU legal order cannot be implemented until the Treaty on the Functioning of the Customs Union within the Multilateral Trading System is applicable. Moreover, the exclusivity doctrine has met some resistance in the Russian Constitutional Court, which held that the final word in interpreting international agreements belongs to the Constitutional Court rather than to international adjudicators.⁹⁸ Therefore, the “two housewives” have to get along with each other, and, for the moment, two dispute settlement systems appear to exist in the EAEU.

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