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ISSUES OF APPLICATION OF LAW OF INTERNATIONAL ORGANIZATIONS AT THE NATIONAL LEVEL - RUSSIAN EXPERIENCE

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ABSTRACT

Globalization processes and common challenges for the entire planet have resulted in existence of international organizations. Nowadays, these organizations are established regarding every sphere of life, such as trade, world security, environment etc. Most importantly, some international organizations may found their own system of law and adopt obligatory decisions for its members, which concern a broad range of issues in a field of international relations. Furthermore, these decisions may impose obligations on states in spheres that have always been areas of domestic regulation. Consequently, questions arise with regards to direct application (or non-application) of norms of international organizations at the national level. In this article, a research is focused on Russia because this country has an experience of participation in international organizations at both global (like the WTO) and regional level (for instance, Eurasian Economic Union). This allows to examine the issue in a comprehensive way and determine challenges of ensuring conformity of domestic law with law of international organizations.

Based on the aforementioned, the following aims of this paper should be emphasized:

- *studying the possibilities of direct application of law of international organizations at the national level of Russia (taking the WTO as an example) as well as comparing of such application with the system of EU law;*
- *highlighting pressing issues of application of international organizations at the national level of Russia as well as taking them into consideration in the process of creation and implementation of the joint international master programme.*

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1. INTRODUCTION

The WTO law is the most developed legal foundation in the field of international trade. This is obvious from the obligatory jurisdiction of the WTO as well as the double-stage structure of dispute resolution, strict time limits and so on. But despite the comprehensive regulation of dispute resolution procedures private persons are left beyond legal protection of the WTO. One the one hand, they do not have a direct access to the Dispute Settlement Body (DSB) once a particular trade obligation of another state has been violated. On the other hand, they cannot lodge a complaint with a national court because such a scenario is simply ruled out. There are several known reasons for which a participation of private persons in the dispute resolution system of the WTO is considered unacceptable:

1. majority of the WTO members is afraid of the WTO losing its status as the intergovernmental establishment;
2. governments wish to independently choose which cases need to be put forward to the DSB;
3. absence of an adequate system and resources for its creation which would meet the requirements of possibility of a participation of private persons in dispute settlement procedures.

In other words, the WTO members believe that the access of private persons to the Dispute Settlement Mechanism (DSM) will negatively impact flexibility of the existing trade system. And this very flexibility makes the WTO one of the leading international organizations. This causes questions of correct application of the WTO rules by states. Such questions have been already asked many times and yet are left without a proper answer. It should be kept in mind that private persons deal with international trade the most. That is why violations of the WTO law have a direct impact on their interests.

2. APPLICATION OF THE WTO LAW IN RUSSIA

Nevertheless, the above-mentioned prohibition is not absolute and practice shows that some deviations may take place which depend, first and foremost, on a status of the WTO law in a legal system of a particular state (in this case it is Russia). For example, the Protocol as well as the whole range of provisions of the Report of 16-17 November 2011 of the Working Party on the Accession of the Russian Federation to the WTO[1] mention that since the accession of Russia

[1] Report of the Working Party on the Accession of the Russian Federation to the World Trade Organization of 16-17 November 2011 (WT/ACC/RUS/70 WT/MIN(11)/2).

the WTO treaty and additional obligations of Russia undertaken according to the Protocol become a part of the Russian legal system and have priority of domestic law except for the Constitution of Russia and Federal Constitutional laws. Moreover, paragraph 151 of the Report indicates at a possibility of interpretation and application of the Protocol by judicial bodies of the Russian Federation. At the same time, access of private persons to public disputes of the WTO is restricted and consists in having a right to lodge a complaint with state bodies of the Russian Federation of competent bodies of the Customs Union about non-application or contradictory application of the WTO treaty provisions in Russia.

Taking into account, that a great deal of powers of the Russian state in the field of regulation of foreign trade has been given to the Eurasian Economic Union and the Customs Union, paragraph 163 of the Report stipulates that in compliance with the treaty on the functioning of the Customs Union[2] provisions of the WTO treaty become an inalienable part of contractual and legal base of the Union. Furthermore, private persons may apply for the Court of the Union on grounds of violation of the mentioned treaty. Paragraph 165 of the Report takes this provision even further and introduces a right of private persons registered in countries (which are member of the Customs Union) to lodge applications with the Court of the Union in order to dispute legal acts of the Committee of the Union or its actions or non-actions if they contradict international treaties concluded within the Union, including the treaty on the functioning of the Customs Union. And, as has been shown above, this treaty implemented the WTO treaty to which Russia accessed.

The above said allows accepting that a possibility of private persons applying for Russian courts or the Court of the Eurasian Union on the basis of the WTO treaty does exist. This causes discussions on the subject of possible direct application of the WTO treaty in the Russian legal system. The situation is also complicated by the fact that high courts of Russia (The Constitutional Court in particular) tend to avoid resolving the matter on application of law of international organizations in Russia even though lawfulness of accession of Russia to such organizations has been considered by the courts repeatedly.[3]

[2] <http://www.tsouz.ru/MGS/MGS-15/Pages/P-87.aspx>, last accessed on 10/10/2015.

[3] a) <http://doc.ksrf.ru/decision/KSRFDecision179872.pdf>, last accessed on 15/10/2015.
b) Judgment of the Constitutional Court of the Russian Federation of 09 July 2012 N° 17-P/2012 (Collection of laws of the Russian Federation, 16 July 2012, N° 29, Art. 4169, in Russian).

3. APPLICATION OF THE WTO LAW IN EU

EU as well as Japan and the United States (the WTO member with a lion's share of the world trade) sticks to the approach according to which the WTO treaty does not directly apply in the EU territory, therefore when being in courts private persons may not base their claims on the WTO norms. Such a declaration was made, on the one hand, in legal acts on the ground of which the WTO members acknowledged obligatory nature of the WTO treaty and, on the other hand, in corresponding judicial practice.[4] The EU Court adheres to the monistic notion of relationships between international and domestic law which sees international law as a direct part of domestic law without necessity of its additional transformation into norms of national legislation. Firstly, support of the monistic notion is caused by political motives and guarantees of priority of EU law over law of its state members. After all, EU law, essentially, is international law. Secondly, understanding of international law as a part of domestic law is aimed at ensuring of supremacy of law and implementation of international obligations by EU members as well as by EU itself. According to the EU Court the WTO law imposes obligations on EU and its members directly, without a transformation into EU law. Thus the WTO law is an inalienable part of national law of EU members.

Nevertheless, having acknowledged a direct force of the WTO norms, the EU Court, at the same time, rejected a possibility of their direct application. Practical issues, which could arise as a result of a direct application of the WTO law, may be illustrated by the following example.

One of the first major WTO disputes was a complaint by the United States and some South-American countries with regards to the importable banana quota introduced by EU.[5] The DSB sided with applicants and rendered a decision on illegitimacy of the EU measures. Since EU did not annul its quota voluntarily the United States in November 1998 announced a list of EU goods that, as a counter measure, would be bound to a higher amount of customs (by 520 million dollars per year). After subsequent proceedings the DSB sanctioned the higher customs in a lower sum (191 million dollars per year). At the same time, the disputed EU quota remained in force. Consequently, a balance between two parties was found. It is one of the main objectives of the WTO precedent practice.

[4] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31994D0800:EN:HTML>, last accessed on 18/10/2015.

[5] <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm>, last accessed on 19/10/2015.

After the case had been considered by the DSB an American company «Chiquita» applied for the EU Court demanding losses in a sum of 564 million euros to be paid by the European Commission. The main ground for such a claim was the mentioned EU quota ruled illegitimate by the DSB. But the complaint was overruled by the EU Court as the WTO treaty does not apply in EU law directly.[6]

But if the opposite had been true the complaint by the United States company would have been granted and that would have tipped the balance in the United States favor because EU would have been obliged to annul its quota and pay all the losses. At the same time, the United States could have kept in force its sanctions against EU.

4. REPERCUSSION OF DIRECT APPLICATION OF THE WTO NORMS IN THE LEGAL SYSTEM OF RUSSIA

Direct application of the WTO law in Russia could have put it in unequal position with other countries – trade partners (including EU and US) whose legal systems do not give the WTO treaty a direct application in their territories. That could bring about a serious disparity in terms of legal protection foreign subjects in Russia and Russian subjects abroad by the WTO law.

The disparity may be seen both in legal procedural and material aspects. The procedural aspect consists in the following: private persons who are subjects of states that do not accept a direct application of the WTO law cannot apply for domestic courts based on violations of the WTO treaty. In this case the only possible way for them is to lodge a complaint with a particular body of the state power asking to start proceedings in the DSB against a state that, allegedly, violated the WTO treaty.

The opposite is true for the WTO members which established a direct application of the WTO law in their legal systems. If happened, a violation of the WTO treaty may cause not only the so-called «horizontal» international proceedings in the DSB but, at the same time, «vertical» judicial cases instituted by private persons against a state that does not observe the WTO rules.

The most important is, however, the legal material aspect. There is less responsibility for states that do not apply the WTO norms directly. On the other hand, countries with a direct enforcement of the WTO law could suffer negative consequences of violations of the WTO law both form the WTO law itself

[6] Judgment of the Court of First Instance (Fifth Chamber, extended composition) of 3 February 2005 (ECLI:EU:T:2005:31).

and domestic law. That makes a responsibility much greater. For instance, it is possible to demand losses of private persons to be compensated, which is unthinkable for states with no direct application of the WTO law.

A direct application of the WTO law could also entail a significant damage of trade interests of some countries. And that gets in the way of goals of the DSM one of which is to achieve compromise between trade interests of the member states. The above-said is obvious from the EU-US case.

Anyway, as a public entity the WTO precedent decisions influence a private sphere to a great extent. That is why, it seems to be an apt question to provide for mechanisms of protection against violations of the WTO law and rendered on its basis decisions by the DSB. It is important to adopt such a method of solution of this issue which would take into consideration interests of private persons and, at the same time, would not damage the existing system because one of its aims is to promote mutually beneficial interests of the WTO members.

5. STATUS OF INTERNATIONAL ORGANIZATIONS IN RUSSIAN DOMESTIC COURTS

Development of international organizations has become the object of close attention in the doctrine[7]. In this context, international organizations have been the primary focus for international legal scholars since they tend to engage in regulatory activities and frequently need to engage in legal relations with the members and with third parties.

As will be shown in this paragraph, courts of the Russian Federation may affect a significant number of international organizations to varying degrees. The relevant cases provide a possibility to study their role in and influence on domestic court proceedings.[8]

The participation of international organizations in Russian court proceedings has some specific characteristics. The first one is that universal international organizations are usually not parties to proceedings because no such international organization is seated in Russia, making regional and interregional international organizations the most significant before Russian courts. That

[7] R. M. Valeev, «Grazhdanskoye Obshestvo v Deyatelnosty OON», in S V Bakhin (ed), Mezhdunarodnye Otnosheniya I Pravo: Vzglyad v XXI Vek (SPb 2009) 463 (in Russian).

[8] Marochkin S.Yu., Russian Federation, in: A. Reinisch (ed.), The Privileges and Immunities of International Organizations in Domestic Courts. (Oxford University Press, 2013). Pp. 221-239.

being said, the regional character of such international organizations does not diminish their importance. On the contrary, it is particularly on the regional level that states accept a higher level of integration and the corresponding international organizations are set up with the aim of addressing many important and vital issues of everyday life (such as issues relating to trade, health, or the environment).[9]

Another peculiarity is that the contending parties and the court itself necessarily base their legal argumentation on international law and the corresponding need to take into account its effect and applicability in the Russian legal system. The norms of international law have a direct effect and application in the legal system of Russia. Accordingly, the courts hear cases involving international organizations on the basis of Russian law and international law. The reasons why the latter is applied may vary: an appeal to it for legal reasoning, passing a judgment on the basis of the joint application of national law and international law, or priority application of international treaties over the domestic laws in case of discrepancy.

One last characteristic feature is the 'geography' of such proceedings. As a general rule, they are limited to where the offices of the international organizations represented in Russia are located, i.e. Moscow and the Moscow region, and sometimes to St Petersburg.

The legal basis for the consideration of cases involving international organizations is established in the Russian Constitution of 1993 (part 4 of article 15) which says that the generally recognized principles and norms of international law and international treaties of the Russian Federation shall constitute an integral part of its legal system. If an international treaty of the Russian Federation establishes rules other than those stipulated by the law, the rules of the international treaty shall apply.[10]

This quite radical provision on the interaction of national law and international law means, that the latter has direct effect and application in the Russian legal order and does not always need incorporation. This interpretation was officially confirmed by the Constitutional Court in the Special ruling concerning the Federal Law on international treaties.[11] Thus, it is clear that Russian courts base their reasoning and judgments not only on domestic law, but also directly on international law.

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[9] UN General Assembly, 2005 World Summit Outcome Document, 24 October 2005, UN Doc A/RES/60/1, para 170.

[10] <http://www.constitution.ru/en/10003000-01.htm>, last accessed on 01/11/2015.

[11] Ruling of 27 March 2012 No 8-P, (2012) 15 Collection of laws of the Russian Federation (CL Russian Federation), Item 1810.

Since the Russian legal system belongs to the continental legal family, the basic aspects of the status of international organizations in Russian law are outlined in the substantive and procedural laws, especially in the main codes (Civil Code, Tax Code, Arbitration Procedure Code (APC), Civil Procedure Code (CPC)) and other federal laws. Resolutions of the Government, which are also part of positive law and designed to specify and develop the provisions of federal laws, are also relevant in that regard. Regulations of ministries and other federal agencies, then, further develop and specify federal laws and government resolutions.

It seems fair to state that regardless of the peculiarities of the legal systems of different countries and whether or not the judicial system is based on the principle of binding precedent, courts tend to follow their own practice[12] and judicial precedents. Officially, these are not recognized as a source of law in Russia. However, elements of precedent have actually been a part of Russian judicial activity for a long time, since higher courts are entitled to outline the general practice and interpretation of the law, with binding effect for lower courts. There exists a firm conviction not only about particular (in a concrete case) law-enforcement, but also about the general law-making and precedential character of the legal positions and judgments of superior courts.[13]

Summing up the present paragraph, a few words should be said about the status of international organizations in the Russians courts from positions of both a plaintiff and/or a defendant.

In the majority of cases, international organizations appear as plaintiffs. In other words, they commonly go to court seeking protection of their rights arising from their special status. Mainly, these applications contest authoritative actions of administrative bodies related to tax issues.

In Russian court practice, international organizations actively maintain their rights and status by utilizing all domestic and international tools for substantiating their claims. Due to their special (international) status, they mainly rely on the Russian Constitution and international law, first of all on treaties and agreements concerning their establishment and operation.

For example, the Joint Institute for Nuclear Research (JINR) filed a lawsuit in the Arbitration Court of the Moscow region seeking a declaration of its title

[12] A Reinisch, 'The International Relations of National Courts: A Discourse on International Law Norms on Jurisdictional and Enforcement Immunity' in A Reinisch and U Kriebaum (eds), The Law of International Relations—Liber Amicorum Hanspeter Neuhold (EIP 2007) 305.

[13] L Lazarev, Pravovie Pozitsii Konstitutsionnogo Suda Rossii (Moscow 2008), 53, 75 (in Russian).

to economic management of the administrative building, and later specified the claim to ownership of the named building. It referred to the Agreement on location and conditions of operation in grounding its claim for the inviolability of its property and for declaring that the inclusion of buildings into the Federal Register of Property constitutes a violation of property immunity.[14]

The analysis of the Russian judicial practice reveals ambiguity and even inconsistency. Most obviously, this is illustrated by the example of a series of cases involving one and the same international organization with a similar subject matter: EAPO claims on refund of VAT paid. Initially, the claims were not permitted by the relevant courts, including the highest court, by virtue of absence of a due procedure of such tax refund and of the variety of interpretations of international treaties. Thus, the Arbitration Court of Moscow in the decision of 24 July 2006 held: «The Applicant's claims are not justified by norms of the international agreement and tax legislation . . . ; in the court's opinion, the Applicant interprets loosely the Agreement [between the Russian government and the EAPO on the EAPO headquarters], as far as the Agreement does not contain any norms providing a right for VAT recovery».[15]

A re-evaluation of these views took place in the Case on the claim of the EAPO, when the first instance Arbitration Court of Moscow (supported afterwards by higher courts) judged the positions and argumentation of the parties in a different way: «The argument of the Inspectorate [for taxes and levies, the defendant in the case] which says that article 9 of the Agreement has its limits, namely that the exemption from all taxes, duties, fees etc., does not cover those taxes which are due to the payment for particular kinds of services related to staff support, maintenance of premises, transport and other services, while the Applicant requests to recover VAT paid for these above-mentioned services, and hence has no right for recovery, is dismissed by the court».[16]

Cases where international organizations stand as defendants usually arise from private law disputes on the issues of seizure of property, eviction, recovery of wages, and compensation for moral harm in the event of illegal dismissal of an employee. In such cases, just as in those where organizations perform the role of plaintiffs, international organizations rely on the international law when defending their positions. Moreover, the argumentation is accompanied by quite expansive reference to the provisions of the relevant treaties, the justification

[14] Ruling of the FAC of the Moscow District of 14 July 2008 on the case No A41-K1-12052/05.

[15] Ruling of the FAC of the Moscow District of 23 April 2007 on the case No A40-43308/06-118-294.

[16] Decision of the Arbitration Court of Moscow of 22 November 2007 on the case No A40-31682/07-116-116.

for their use on the basis of article 15 of the Russian Constitution, and on their primacy in case of disagreement with domestic legislation. International organizations often resort to the European Court of Human Rights (ECtHR) judgments.

Where international organizations are involved as defendants, courts of first instance often dismiss the procedure, alluding to the fact that international organizations are beyond their jurisdiction due to immunity; in general, this position is supported by the appellate courts. Higher courts sometimes cancel such judicial acts in supervisory proceedings by finding that the lower courts had wrongly extended the immunities of the organization to all of its relationships and activities.[17]

The general trend of all Russian cases (regardless of whether international organizations are applicants or defendants) is the predominance of decisions in favor of the interests of international organizations. Apparently, their special status and the existence of immunities carry a greater weight among the other arguments of the parties to the dispute, even if this may not in all cases be justified.

6. STUDYING OF LAW OF INTERNATIONAL ORGANIZATIONS IN THE MASTER PROGRAM OF DOUBLE DIPLOMAS «INTERNATIONAL AND EUROPEAN LAW»

It should be noted that the new double diplomas master program «International and European law» (the Tempus project) pays significant attention to, including but not limited to, essence and challenges of the application of law of international organizations. For example, one of the courses of the program is titled as «Dispute settlement in International and European law». The course comprises studying by students of principles and ways of dispute resolution in International and European law as well as competence of such bodies as the International Court of Justice, the DSB or the EU Court.

At the same time, thoughts set forth in the present article show that knowledge and sets of skills necessary for practical, analytical and research work in the field of international dispute resolution are difficult to achieve without a proper understanding of foundations of law of international organizations both global and regional (which, as a rule, establish systems of dispute resolution, like the UN or the WTO) as well as its application at the national level. Methodology of the mentioned discipline is oriented towards students' abilities to operate

[17] Decision of the Russian Federation SAC Presidium of 20 January 2004 on the case No A40-12973/03-23-148.

with legal acts and analyze diverse legal occurrences, juridical facts or relationships which are subject-matters of consideration of international courts and the EU Court. Comprehension of collisions in law is also crucial. In other words, understanding of all debatable aspects of application of law of international organizations at the national level seems especially valuable.

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