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International Trade: the Role of the National Law in International Law

Abstract: This article deals with the issue of international trade and the role of national law in international law''. The author describes the role of international and national regulations in international trade, national law and international obligations and principle of good governance.

Keywords: World Trade Organization, European Court of Justice, Vienna Convention on the Law of Treaties, European Union.

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Starptautiskā Tirdzniecība: "Nacionālās Tiesības Starptautiskajās Tiesībās"

Izklāsts: Šis raksts apskata starptautiskās tirdzniecības jautājumu "Nacionālās tiesības starptautiskajās tiesībās". Autors apraksta starptautisko un nacionālo noteikumu lomu starptautiskajā tirdzniecībā, nacionālo likumdošanu un starptautiskās saistības, kā arī labas pārvaldības principus.

Atslēgas vārdi: Pasaules Tirdzniecības Organizācija, Eiropas Savienības Tiesa, Vīnes konvencija par starptautisko līgumu tiesībām, Eiropas Savienība.

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Международная торговля: «Роль национального законодательства в международном праве»

Аннотация: В данной статье рассматривается роль национального законодательства в международном праве в вопросах международной торговли. Автор статьи описывает значение норм национального и международного права в международной торговле, а также национальные и международные обязательства и принципы эффективного управления.

Ключевые слова: Всемирная торговая организация, Европейский суд, Венская конвенция о праве международных договоров, Европейский союз

Introduction

It is customary practice to commence any discussions about the relationship between international and national law by reference to theoretical debate known as the dualist-monist controversy. While there are a number of different aspects of both doctrines, they derive their appellations - dualism and monism, from their respective viewpoint on the question as to whether international law and national law belong to two separate legal orders or the same legal order. Dualist doctrine points to differences between national and international law, such as: the subjects of the former are individuals while the subjects of the latter are states [1]; or, while the source of the former is the will of a particular state, the source of the latter is the common will of states; or the fundamental principle that underpins the national system of law is that legislation is to be obeyed, while that of international law is the principle of pacta sunt servanda.

By contrast, monist doctrine regards all law, national or international as part of one single legal structure. This doctrine is put forward either on formalistic logical grounds or from an ethical perspective to assert the supremacy of international law as the best way to project human rights. From the former perspective it is argued that the same definition of law as norms that lay down patterns of behaviour that ought to be followed is applicable to both national and international law, and accordingly they cannot be part of a unified legal structure [2]. The other monist strand proceeds from distrust for ''sovereign'' states as vehicles for guaranteeing human rights. International law is believed to be the best guarantor of human rights; and as such it is concerned, like national law, with the conduct and welfare of individuals. Furthermore, the supremacy of international law is asserted even within the municipal sphere, such that the entire monistic legal architecture is imbued with a moral purpose founded upon respect for human rights.

Much of the dualist-monist controversy turns on whether and if so, on what basis one system of law can be said to be superior to or supreme over the other. For dualist the rules of national and international systems of law are so fundamentally different that it is not possible for the rules of one system to have an effect on, or overrule the rules of the other. When national law provides for the application of international law within the national jurisdiction, rules of international law are adopted or transformed as rules of national law: thus rather than being a detraction, it is an example of the supreme authority of national law within the national jurisdiction. Monist, on the other hand, often tend to argue, either on the basis of abstract logic or because of the importance of international guarantees for the protection of human rights, that international law is superior to municipal law.

Fitzmaurice has critiqued the entire dualist-monist controversy, including the debate about supremacy, as being ''unreal, artificial and strictly beside the point'' [3]. He points out that both doctrines assume that there is a common field in which the international and municipal legal orders operate simultaneously in respect of the same set of relations and transactions. Because in reality there is no such common field, the entire controversy is as sterile as a controversy whether English law is superior to French law or vice versa. French law is supreme in France and English law in England, international law is supreme in the international field and national law in the national field. And in neither case does the supremacy result from the content or any inherent character of law, but rather from the respective fields of operation. While Fitzmaurice emphasizes that his views are neither dualist nor monist, it can certainly be regarded as a modified dualist position, because on the one hand it rests, like the traditional dualist doctrine, upon the distinctness of the two legal orders, and on the other hand it avoids, unlike the traditional dualist doctrine, the question of supremacy of one system of law over the other.

But in any case, the points raised by Fitzmaurice have much practical significance. Despite their intellectual or ideological appeal, theories indeed are not very helpful in understanding the actual process of interaction between national and international law. The tremendous growth in international law during the second half of the twentieth century has increasingly made the relationship between natio-

nal and international law less clear and more complex than it was during the nineteenth and the first half of the twentieth century, when both the dualist and the monist doctrines were put forward.

A gradual emergence of individuals as subjects of international law in such areas as human rights, investment, international administrative law, or international criminal law has thwarted one of the basic premises of the dualist doctrine. International law has also made considerable inroads into national legal systems in various ways, for instance by stipulation in treaties for states to take effective legislative, administrative or other measures to implement treaty provisions. The WTO treaty contains an entire range of obligations that has far-reaching systemic or constitutional repercussions for the WTO members' domestic legal systems. There have also come into being even more effective and ''powerful'' international adjudicative bodies with competence to review whether national legislative, administrative or judicial acts are in complete accord with international obligations. The European Community legal order, which in many respects partakes the characteristics of a domestic federal constitutional structure but yet remains an international treaty-based system, provides another instance where the traditional dividing lines between national and international law seem entirely inapt [4].

Do this and other similar developments mean that the distinction between national and international law has become so vague that the contemporary international legal order is to be described as monist? The answer, of course, must be in the negative. Various reasons can be given for still treating the two legal orders as distinct: the methods of creation of rules of national and international law remains, as underscored in the traditional dualist doctrine, meaningfully different. And it is still difficult to imagine that rules of international law can have effect within the national legal order without the sufferance of the letter.

However, if so included, one can take issue with these generalizations. For instance, the political organs of the European Community have authority to make laws that in some respect can be compared to the law-making power of national institutions. Equally notable are the twin principles of direct effect and supremacy of EU law. According to the former, EC law - both treaty provisions and laws made by the European Community organs - become part of the national legal systems of member states without any interventions by national governments or legislatures to adopt of transform those provisions or laws as rules of national law. And according to the letter, EC law takes precedence over both prior and subsequent national law. But, again, with respect to the legislative power of the EC organs, it is of course the case that such power is delegated to those organs by the EC member states themselves under express treaty provisions. The principles of direct effect and supremacy can be somewhat more difficult to explain, because these were proactively developed by the European Court of Justice (ECJ) through a process of teleological interpretation of the EC treaty, and in the absence of any explicit provision envisaging either of the two principles [5]. But, enunciation of either of these two principles could have had any significance had they not been accepted at the national level. In other words, both principles became operative within the national legal systems of the member states only because they were allowed to became so operative, either by national legislative means or through accommodation by national courts.

The important sources of national law arranged in the order of their juridical binding force are:

- statutes,
- judicial precedents,
- opinions of experts,
- customs,
- ideas of justice, reason, or expediency. [6]

The last three of these sources are in themselves indefinite, and courts will generally apply international law, in appropriate cases, where resort must be made to such source. In all states international law is deemed to be incorporated in such sources of law. The opinions of experts include the opinions of text writers on international law. International law, which is itself founded on custom, is the law applied when custom is resorted to in determining a case involving international elements. So also, rather than appeal to unaided reason,

judges will seldom refuse to lean on the authority of a rule of international law, if such exists, applicable to the case in hand. In Civil Law countries judicial precedents have little more weight than expert opinions and will seldom in themselves stand in the way of a judicial application of international law. [7]

National law and International Obligations

International regulation of this matter has a number of different dimensions: first of all, it is a well-established rule, supported by a range of judicial and arbitral decision, that to justify violations of international obligations a state cannot refer to provision in its construction or its laws. With respect to treaties, this rule is also provided for in Article 27 of the Vienna Convention on the Law of Treaties (VCLT) [8], which lays down that provision of national law may not be invoked as justification for failure to perform obligations imposed by a treaty [9]. Thus a state that has breached an international law obligation cannot plead that it acted lawfully under its domestic law or that its domestic law required the breach or that it was prevented from acting consistently with the international obligation because of the lack of or deficiencies in its own legislative provision. The rationale for this rule is self-evident: it prevents evasion of international obligation by means of domestic legislations and as such, it is a sine qua non for the effectiveness of international law.

However, the negative import of this rule is readily apparent. That is to say, it simply forbids something, i.e. opposing national law as a legal bar to the fulfilment of international obligation, and does not require a state to take any positive steps to implement international obligations in national laws. Unlike the issue of non-opposability of national laws, with respect to the issue of implementation there is no unequivocal international practice, and publicists also seem to hold divergent views. While many contemporary international treaties contain express provisions in this regard, the perplexing question is: what are the requirements for implementation in the absence of express provisions and as a matter of general (customary) international law? As regards treaty obligations, Articles 26 and 27 the VCLT [10] can be seen as the codification of the general international law requirements. This two articles hardly speak of any positive implementation measures that states are obliged to take. Not Surprisingly in the WTO treaty the issue of implementation is dealt with expressly and with due emphasis. Article XVI:4 of the WTO Agreement, which requires members to ensure the conformity of their laws, regulations and administrative procedures with the WTO obligations, is one of the more notable provisions on this subject.

As regards the means of implementation, it is clear that general international law gives each state complete freedom: that is to say, it does not regulate the manner in which a state may choose to put itself domestically in the position to meet its international obligations. Thus, each state can determine in accordance with its own constitutional practice whether to give direct domestic law effect to international rules or whether to transform, adopt or incorporate those rules into domestic law by statutes or by some other (e.g. judicial or administrative) means. There is a related issue of whether a state must have laws that are compatible with international obligations, or conversely, must not have laws that are not so compatible, and with respect to this issue, the situation is far from clear. In the exchange of Greek and Turkish population case, the Permanent Court of International Justice stated that: a state which has contracted valid international obligations is bound to make in its legislation such modification as may be necessary to ensure the fulfilment of the obligation undertaken. First, although it is eighty years old, the dictum has hardly been judicially reiterated. Second, publicists seem to hold widely divergent views on this issue. Some have argued apparently on the bases of the dictum of the PCIJ, that states have a general duty to bring national laws into conformity with international obligations. The view that, there is no such general duty seems more plausible for a number of reasons. Many international treaties explicitly require the contracting states to adopt legislative measures to implement specified treaty obligations.

The fact, that with respect to some obligations, the members of the international commu-

nity take care to provide expressly for a duty to enact implementing legislation lends support to the point of view that a general duty to this effect may not exist.

Principle of Good Governance

The principle of good governance needs to be understood from a number of different perspectives. I think, the key objective of different systemic obligations to which references have been made earlier is to promote good governance within national legal systems. In this context it is worth recalling once again that such obligations include those requiring transparency and fairness in the adaptation, implementation and administration of domestic law,besides obligating members to make available domestic legal procedures for the review, modification and reversal of actions of domestic administrative authorities and for the enforcement of private rights by individuals [11].

Second, various substantive obligations also promote good governance in important ways. To note but a few examples: the non-discrimination principles of most-favoured nation (MFN) and national treatment (this is principle which lies at the heart of the substantive WTO obligations) promote good governance by

- guaranteeing some protection for the commercial interest of foreign states, which have little or no representation in the political life of a state enacting or implementing a trade or trade related law or measure;
- Ensuring that national trade policy is not unjustifiably biased in favour of one domestic constituency at the expense of another domestic constituency.

The requirements under different WTO agreements [12] that health protection, environmental, sanitary and phytosanitary, and technical laws and measures should not be arbitrary, discriminatory or more trade-restrictive than necessary, promote good governance by outlawing arbitrariness, unjustifiable discrimination and disproportionality.

The agreement on government procurement is an instance of a ''good governance-spirited'' text that seeks to increase accountability and prevent corruption in public procurement through its elaborate provisions on non-discrimination, bidding procedures, transparency, etc. [13].

And the last one, WTO dispute settlement, which often operates as a further layer of judicial review of national laws and administrative measures, has important good governance ramifications. Genuine access to fair and impartial judicial review is widely considered to be an important element in ensuring good governance, because it acts as a check on legislative and administrative bodies. WTO dispute settlement organ makes a review of the legality, i.e. WTO-compatibility, of national laws and administrative measures and this also acts as a check on national legislation and executives.

Conclusion

It is a well-established principle of international law that national laws are facts before international courts and tribunals. This principle has a number of different dimensions. Firstly, it means that judicial notice does not apply to matters of national law, which must be proved by introduction of necessary evidence, and thus different evidentiary rules including those of burden of proof for the establishment of facts are fully applicable in this regard [14].

In additional, sometimes it is suggested that because national laws are merely facts, an international tribunal does not interpret such laws. It is problematic in that it fails to take into account that rules of national law do not lose their normative quality in relation to the rights, obligations, and transaction that they seek to regulate, simply because their content or meaning is determined as a factual matter and on the bases of evidence. And the normative import of a rule of law can hardly be ascertained without a certain amount of interpretation.

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