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International Trade and the Law of the WTO

Abstract. This article deals with the issue of international trade and the Law of the WTO. The author describes the role of international rules in international trade, regional trade agreements in the EU and basic rules and principles of the WTO law. The author argues that international trade rules are necessary, and the WTO legal system shall prevail over domestic law. The article also discusses WTO dispute settlement and bilateral regional trade agreements. The author's work aims to provide society with greater insights into the relationship between international trade and the law of the WTO.

Key words: World Trade Organization, North American Free Trade Agreement, General Agreement on Tariffs of Trade, European Community, European Union, International Trade, Dispute Settlement System, European Court of Justice, National Law, International law, National Treatment.

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Starptautiskā tirdzniecība un PTO tiesības

Anotācija. Šis raksts veltīts starptautiskai tirdzniecībai un PTO tiesībām. Autors apraksta starptautisko tiesību normu lomu starptautiskās tirdzniecības jomā, ES reģionālās tirdzniecības nolīguma nozīmi, ka arī PTO pamata noteikumus un principus. Autors apgalvo, ka starptautiskās tirdzniecības noteikumi ir nepieciešami un PTO tiesību sistēmai ir jāprevalē pār valsts iekšējām tiesību normām. Šajā rakstā arī ir apskatīti strīdu, kuri izriet no divpusējiem reģionālajiem tirdzniecības līgumiem, izšķiršanas jautājumi. Šī darba mērķis ir sniegt sabiedrībai plašāku ieskatu par starptautiskās tirdzniecības un PTO noteikumu attiecībām.

Atslēgas vārdi: Pasaules tirdzniecības organizācija, Ziemeļamerikas brīvās tirdzniecības līgums, Vispārējā vienošanās par tarifiem un tirdzniecību, Eiropas Kopiena, Eiropas Savienība, starptautiskā tirdzniecība, strīdu izšķiršanas sistēmas, Eiropas Kopienu tiesa, nacionālās tiesības, starptautiskās tiesības, nacionālais režīms.

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Международная торговля и право ВТО

Аннотация. Эта статья посвящена вопросам международной торговли и праву ВТО. Автор описывает роль международных норм в области международной торговли, значение регионального торгового соглашения в странах ЕС, а также основные правила и принципы права ВТО. Автор утверждает, что правила международной торговли необходимы и правовая система ВТО должна иметь преимущество над внутренним законодательством стран. В этой статье также рассматриваются вопросы урегулирования споров, вытекающих из двусторонних региональных торговых соглашений. Данная работа направлена на предоставление обществу более глубокого понимания взаимосвязи международной торговлей с правом ВТО.

Ключевые слова: Всемирная торговая организация, Североамериканское соглашение о свободной торговле, Генеральное соглашение по тарифам и торговле, Европейские сообщества, Европейский союз, Международная торговля, система урегулирования споров, Европейский суд, национальное право, международное право, национальный режим.

Introduction

The World Trade Organization was established and became operational on 1 January 1995. It is the youngest of all the major international intergovernmental organizations and yet is arguably one of the most influential in these times of world globalization. As Marco Bronckers stated, it has 'the potential to become a key pillar of global governance' [1].

Many critics of the WTO claim that the WTO is 'pathologically secretive, conspiratorial and unaccountable to sovereign states and their electorate' [2]. Developing-country members criticize the WTO and object to what they consider to be their marginalization within the WTO's negotiation and rule-making process. While for many years international trade law was not part of the mainstream international law, the WTO law is now the 'new frontier' of international law. Nobody questions that the WTO law is an integral part of public international law. However, the relationship between the WTO rules and other, conflicting rules of public international law, such as rules of MEAs, is controversial. A generally accepted view on this relationship is yet to emerge.

With regard to the relationship between the WTO law and the national law of WTO member states, it should be noted that, while some WTO scholars forcefully plead for the granting of direct effect to WTO law in the domestic legal order of WTO member states, none of the major trading nations grants such effect to the WTO law. In most WTO member states, a breach of the WTO law obligations cannot be challenged or invoked in national courts.

As regards relationship between the WTO and the EC, the EC and the WTO shares many obvious features, they are both organizations set up primarily to promote trade between states. Some authors consider the EC and the WTO even as constitutional entities with similar roots. Other authors see them as a main shared sign that the members of the EC and the WTO have tied their hands in matters of trade policy and have tried to extend this tying to cover domestic policies that may affect trade. Concerning the role of the EC, there are many exceptions from the MNF and NT duties due to the Article XXIV of GATT. Each organization has its own legal framework. It is very interesting, how in substantive and procedural terms the process of political and legal decision-

making in the European Communities is affected by the fact, that the EC are the member of the WTO. The most significant issues can be described as [3]:

- the question of the exact legal status and effect of the WTO norms within the European legal order;
- how particular EU policies are affected by the provisions of the relevant WTO agreements;
- the question of extent to which and the way in which the EU institutions and bodies seek to integrate the substantive obligations contained in various agreements into their political and legislative processes;
- the general principles and due process norms developed by the dispute settlement bodies.

This article is divided into two main parts which concentrate primarily on the most interesting questions outlined above. The first part considers briefly some of the points of comparison and contrast between the EU and the WTO. Also the relevance of these similarities and differences for the interpretation and effect of the respective norms of these institutions will be examined. The second part dwells on the domestic impact of the WTO law. It is more than obvious, that the EU law, WTO law and national law are in close contact every day and the relations between them should be clear.

International Rules for International Trade

Globalization and international trade need to be properly managed if they are to be of benefit to all humankind. The author states in this section the need and existence of international rules for international trade. The former GATT and WTO director-general, Peter Sutherland, wrote in 1997: 'The greatest challenge facing the world is the need to create an international system that not only maximizes global growth but also achieves a greater measure of equity, a system that both integrates emerging powers and assists currently marginalized countries in their efforts to participate in worldwide economic expansion. The most important means available to secure peace and prosperity into the future is to develop effective multilateral approaches and institutions' [4].

But what exactly is the role of legal rules and, in particular, international legal rules of international trade? How do international trade rules allow countries to realize the gains of international trade? There are basically four related reasons why there is a need for international trade rules.

Firstly, countries must be restrained from adopting trade-restrictive measures both in their own interest and in that of the world economy. International trade rules restrain countries from taking trade-restrictive measures. National policy-makers may come under considerable pressure from influential interest groups to adopt trade-restrictive measures in order to protect domestic industries from import competition. Such measures may benefit specific, short-term interests of certain groups advocating for them, but they very seldom benefit the general economic interest of the country adopting them. 'Governments know very well, that by tying their hands to the mast, reciprocal international pre-commitments help them to resist the siren-like temptations from rent-seeking, interest groups at home' [5]. Countries also realize that, if they take trade-restrictive measures, other countries will do so too. This may lead to an escalation of trade-restrictive measures, a disastrous move for international trade and for global economic welfare. International trade rules help to avoid such escalation.

The second, and closely related reason why international trade rules are necessary, is the need of traders and investors in a degree of security and predictability. International trade rules offer a certain degree of security and predictability. Traders and investors operating, or intending to operate, in a country that is bound by such legal rules, will be able to predict better how that country will act in the future on matters affecting their operations in that country.

The third reason why international trade rules are necessary is that national governments alone simply cannot cope with the challenges presented by globalization. International trade rules serve to ensure that countries only maintain national regulatory measures necessary for the protection of the key societal values [6]. Furthermore, international trade rules may introduce a degree of harmonization of domestic regulatory measures

and thus ensure effective, international protection of these societal values.

And the fourth and final reason why international trade rules are necessary is the need to achieve a greater measure of equity in international economic relations. Without international trade rules, binding and enforceable on the rich as well as on the poor, at the same time recognizing special needs of developing countries, many of these countries would not be able to integrate fully in the world trading system and derive an equitable share of the gains of international trade.

However, for legal rules to play these multiple roles, in international trade such rules have, of course, to be observed. It is clear that international trade rules are not always adhered to. All countries and their people benefit from the existence of rules in international trade making the trading environment more predictable and stable. However, provided that the rules take into account their specific interest and needs, developing countries, with generally limited economic, political and military power, should benefit even more from the existence of rules on international trade. The weaker countries are likely to suffer most where the law of the jungle reigns. They are more likely to thrive in a rule-based, rather than a power-based, international trading system.

The international trade law consists of, on the one hand, numerous bilateral or regional trade agreements and, on the other hand, multilateral trade agreements. Examples of bilateral and regional trade agreements are manifold. The North American Free Trade Agreements (NAFTA) and the Mercosur Agreement are typical examples of regional trade agreements. The Trade Agreements between the United States and Israel or the Agreement on Trade in Wine between the European Community and Australia are example of bilateral trade agreements. The number of multilateral trade agreements is more limited. This group includes, for example, the 1983 International Convention on the Harmonized Commodity and Coding System (The Brussels Convention) and the 1973 International Convention on the simplification and Harmonization of customs procedures, as revised in 2000 (the Kyoto Convention). The most important and broadest of all multilateral trade agreements is the Marrakesh Agreement Establishing the World Trade Organization, concluded on 15 April 1994. It is the law of this Agreement, the law of the WTO.

Basic Rules and Principles of the WTO Law

The law of the WTO is complex and specific. It deals with a broad spectrum of issues, ranging from tariffs, import quotas and customs formalities to intellectual property rights, food safety regulations and national security measures. However, six groups of basic rules and principles can be distinguished [7]:

- the principle of non-discrimination;
- the rules on market access, including rules on transparency;
- the rules on unfair trade;
- the rules on conflicts between trade liberalization and other societal values and interests;
- the rules in special and differential treatment for developing countries; and
- some key institutional and procedural rules relating to decision-making and dispute settlement.

These basic rules and principles of the WTO law make up what is commonly referred to as the multilateral trading system. Referring to this system, Peter Sutherland and others wrote in 2001: 'The multilateral trading system, with the World Trade Organization (WTO) at its centre, is the most important tool of global economic management and development process.'

In this connection the WTO dispute settlement will now be looked into. One of the most remarkable and successful aspects of the WTO is its automatic and compulsory dispute settlement system. It is one thing for countries to agree to a treaty and quite another to enforce compliance with that treaty. The WTO agreements provided for many wide-ranging rules concerning international trade in goods, services and trade-related aspects of intellectual property rights. In view of the importance of their impact, economic and otherwise, it is not surprising that the WTO members do not always agree on the correct interpretation and application of these rules. Member states frequently argue about whether or not a particular law or practice of a member constitutes a violation of a right or

obligation provided for in a WTO agreement. The WTO created a remarkable system to settle such disputes between the WTO members concerning their rights and obligations under the WTO agreements. The WTO dispute settlement system has been operational for nineteen years now. In that period it has arguably been the most prolific of all international dispute settlement systems. Between 1 January 1995 and September 2013, a total of 628 disputes had been brought to the WTO system for resolution. In almost a quarter of the disputes brought to the WTO system, the parties were able to reach an amicable solution through consultations, or the dispute was otherwise resolved without recourse to adjudication. In other disputes, parties have resorted to adjudication.

Under international law, states can only be brought before an international court or tribunal if they have consented to the jurisdiction of that court or tribunal. In many cases, this implies that the breach of a treaty cannot be challenged in a third party adjudication, or when a dispute arises it can be settled in a judicial fashion only with the explicit consent of both parties.

In the WTO, the situation is dramatically different. Whenever a WTO member has a complaint against another WTO member for any matter falling under any WTO covered agreement (as defined in DSU Article 1) [8], it can invoke the WTO's dispute settlement system, without needing the approval of the defending party. This remains the case even if the matter raised not only involves trade but also more sensitive questions such as health or environmental protection, public morals, or national security. As compared to most other international adjudication regimes, the WTO dispute settlement has detailed procedural rules, an appellate process, and back-up arbitration mechanisms to deal with non-implementation and the calculation of trade sanctions in response to continued non-compliance. Most important, the WTO members have frequently used the dispute settlement system (between 1995 and April 2011, 424 disputes were filed) and in the large majority of cases (with some notable exceptions) the system has managed to resolve the dispute. A better understanding of the WTO dispute settlement system not only allows one to formulate and guide complaints through the multiple stages of enforcing trade agreements at the WTO, be it in pursuit of government or private client interests, but it also offers a fascinating study of state-to-state adjudication and international law enforcement more broadly.

An effective dispute settlement system is critical to the operation of the World Trade Organization. It will make little sense to spend years negotiating detailed rules in international trade agreements if those rules can be ignored. Therefore, a system of rule enforcement is necessary. In the WTO this function is performed by the Understanding on Rules and Procedures Governing the Settlement of Disputes (usually called the «Dispute Settlement Understanding» or simply the «DSU»). As stated in Article 3.2 of the DSU, «the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system [9].» In the commercial world, such security and predictability are viewed as fundamental prerequisites to conducting business internationally. The DSU is effectively an interpretation and elaboration of GATT Articles XXII and XXIII, which were not modified in the Uruguay Round. As noted above, these articles were the basis for dispute settlement in the GATT system, and since all of the agreements annexed to the Marrakesh Agreement Establishing the World Trade Organization rely on GATT Articles XXII and XXIII or very similar provisions as a basis for dispute settlement, they are the basis for dispute in the WTO system as well. Article XXII provides that one WTO Member may request another Member to consult with respect to any matter affecting the operation of the agreement. Generally speaking, Article XXIII provides for consultations and dispute settlement procedures where one Member considers that another Member is failing to carry out its obligations under the agreement. There are essentially four phases in the WTO dispute settlement process: consultations, the panel process, the appellate process and surveillance of implantation. After outlining some of the more important general provisions of the DSU, each of these four phases is discussed in turn [10].

WTO law and National Law

The following part of the paper addresses the position and legal impact of the WTO law in domestic law. We may observe this issue at first, from the point of view of international law, which shapes the prerogative of the WTO law. And secondly, the domestic point of view on the EC law will be considered. The relationship of WTO law and domestic law (including EC law) is in full line with the principles of general public international law [11]. There are two aspects of the relationship between the WTO law and the national law that need to be examined. Firstly, the place of the national law in the WTO law; and secondly, the place of the WTO law in the domestic legal order. With regard to the place of the national law in the WTO law, Article XVI:4 of the WTO Agreement states: 'Each member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements'[12]. It is a general rule of the international law, reflected in Article 27 of the Vienna Convention, that: 'A party may not invoke the provisions of its internal law as justification for its failure to perform treaty' [13]. With respect to the role of the WTO law in national legal order, firstly, it should be observed that, where a provision of national law allows different interpretations, this provision should, whenever possible, be interpreted in a manner that avoids any conflict with the WTO law. In the United States, the European Union and elsewhere, national courts have adopted this doctrine of treaty-consistent interpretation. The European Court of Justice (ECJ) stated in 1996 in Commission v. Germany (international Dairy Arrangement) with regard to the GATT 1947: 'When the wording of secondary EC legislation is open to more than one interpretation, preference should be given as far as possible to the interpretation which renders the provision consistent with the treaty. Similarly, the primacy of international agreements concluded by the Community over the provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner consistent with those agreements' [14].

The ECJ confirmed the doctrine of treaty-consistent interpretation of national EC law with regard to the WTO Agreement in its judgments in Hermes, (1998) and Schieving-Nijstad (2001) [15]. In many cases, however, it will not be possible to avoid a conflict between a provision of national law and a WTO law provision through treaty-consistent interpretation. First of all, it is the general public law, which interferes with the relationship of the WTO law and domestic or EC law. The principle of pacta sunt servanda is applied and noncompliance actions of any state shall be invoked. From the point of view of international law, the relationship is an easy one: the international legal order necessarily prevails over domestic law. This is well established, on all accounts. Primacy is a matter of logic as international law can only assume its role of stabilizing a global order if it supersedes particular and logical rules [16]. There are no doubts that from the WTO law perspective with regard to the WTO agreements [17], the WTO legal system shall prevail over domestic law. From the perspective of the EC law, the EC Treaty is essential. Article 300, par 7 says that agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States. According to the practice of ECJ, to the extent that international agreements have been concluded by the Community in its own competence, they became an integral part of EC law [18]. The WTO agreements are so called mixed agreements as they do not belong exclusively in the competence of the EC, but they belong in the competence of both the Community and a member state. Therefore a member state is also involved in the implementation of such agreements and the WTO law shall be concerned as an international agreement within each member state's legal order. The WTO law is an integral part of international law and when its relationship with national law, is examined, two things need to be asked: the place of national law in the WTO law and the place of the WTO law in the domestic legal order [19]. A position of the WTO law in the hierarchy of the EC law is between the primary and secondary law, when induced by the Community in its own competence. Therefore the WTO law shall be taken into account by the Community authorities in the creation and interpretation of the secondary law, as it is consequently endowed with the power to derogate national law. At last, both EC and its

member states are bound in their own rights, from the point of view of international law.

Conclusion

Based on the carried out review of the theory on International Trade and the Law of the WTO, the following conclusions can be made.

Firstly, the concept of international Trade and the Law of the WTO should be acknowledged as a multi-faceted phenomenon, more specifically as part of the mainstream of international law.

Secondly, it should be noted, there are two models of international trade stability: 1.The minor model, puts forward the most significant economic factors that contribute to the stability of trade, namely, unemployment, the level of tax, growth in incomes and inflation.

2. The major model of trade stability illustrates how factors, such as the level of social vulnerability, corruption, elite corruption, trust in institutions, labor unrest, the country's neighborhood and regime type, impact on the overall level of trade stability in a WTO country. Today the WTO really has a very good, simple and stable liberal legislation but globalization and global processes require legislative reforms. A reform of the current system can mean two basically different things: on the one hand, one can think of changing the rules on decision-making in the WTO Agreement (along with changing the practice). On the other hand, reforms can mean exploring the scope for improvement within the framework of the existing rules, i.e. changing the practice, but not the rules. Finally, because of important interaction of domestic and international rules and institutions as they relate to trade policy in this area of trade, it is necessary to create a more stable and more liberal legislation which will be the same and equal for all people. 'We are all the same on the inside', this is the main principle of democracy. All these perspectives on trade norms simplicity and neutrality are equally important for international free trade.

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