

PROBLEMS OF HARMONIZATION AND IMPLEMENTATION WTO RULES AND NORMS TO THE NATIONAL LEGISLATION OF THE RUSSIAN FEDERATION

Irina Mylnikova *

ABSTRACT

World Trade organization (WTO) law is a system of rules and principles governing the whole complex of social relations are related to international trade. WTO rules and regulations must be implemented into national law of its Member States. Author focuses that WTO law do not become part of the domestic legal system automatically, moreover the agreements itself does not contain the requirements on the direct effect and the WTO members are free to determine methods of implementation and order of application into domestic law.

Russia must implement fully its obligations under the WTO Agreement, as part of the terms of its accession to the WTO. Especially paid attention to the questions of direct effect of the WTO rules and norms in relation to the national law of Russian Federation, Custom Union, taking into accounts the positions of other countries on this issue.

KEYWORDS: *World Trade Organization, the rule and norms WTO, national law, the direct effect of WTO rules and norms.*

* Assistant Professor at Institute of state and law, Tyumen State University; irin792@gmail.com.

1. INTRODUCTION

The purpose of the WTO is to create a united legal space for international trade, provide security and stability of the international trade.

Creation of the World Trade Organization gives to the states the transition of international trade regulation's from bilateral to multilateral level.

The WTO multilateral international agreements are a "lex generalis" regarding to a bilateral international agreements, concluded between WTO member States. These bilateral international agreements can not contradict the provisions of the WTO multilateral international agreements.

The feature of WTO law is a significant influence of its legal norms to the national legal system. The WTO is committed to the principle that international law is part of national legislation.

That is, the WTO rules and norms must be transferred into national legislation of its member States and receive a priority application, which allows to unify them and to create for foreign economic activity of a united legal space¹.

From this follows the idea of an over-nationalism of the WTO legal system.

Primarily WTO law contributes to the unification "de facto" national legal systems of WTO members.

According to the Marrakesh Agreement establishing the World Trade Organization: "Each Member shall ensure the conformity of its laws, internal regulations and administrative procedures with its obligations provided for in this Agreement".² Thus, one of the most important principles of the WTO law is the principle of compulsory application its norms for its members (except two agreements with a limited number of participants), which explains in order to the purpose of the WTO³: creating legal space or foreign economic activity and correlation with domestic law.

WTO rules and norms do not become the part of the domestic legal system automatically. An important feature of the WTO agreements is that they do not automatically become part of the domestic legal system, and the implementation by the member States of the requirements of the organization shall be effected by changes in the national legal regulation. Moreover the agreements itself does not contain the requirements on the direct effect.

¹ Kovalev, A.A., *Mezdunarodnoe ekonomicheskoe pravo i pravovoe regulirovanie mezhdunarodnoj ekonomicheskoy dejtelnosti*, M., 2007.

² Marrakesh Agreement Establishing the WTO, 1994

³ Marrakesh Agreement Establishing the WTO, 1994

WTO rules must be implemented into national law of its Member States. The WTO members are free to determine methods of implementation and order of application into domestic law.

So, WTO norms and rules must be implemented into national legal order of its member States and the important task of the Russian Federation is provision correspondence national law to its norms, as part of the terms of its accession to the WTO.

The system of the WTO agreements is a complex of legal documents, which cover international exchange of goods and services, and some areas of production goods in the case that directly related to international trade. WTO rules are a system of nearly 60 agreements:

GATT 1947/94 (GATT, General Agreement on Tariffs and Trade);

GATS (GATS, the General Agreement on Trade in Services);

TRIMS (The Agreement on Trade-Related Investment Measures);

TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights);

SPS (Agreement on Sanitary and phytosanitary Measures);

AG (Agreement on Agriculture);

TBT (Agreement on Technical Barriers to Trade);

CV (Customs Valuation)

SCM (Subsidies and Countervailing Measures)

SG (on Safeguards -special protective measures)

ADA (application VI GATT 1994 (antidumping))

TBT (Technical Barriers to Trade)

SPS (Sanitary and phytosanitary Measures)

DSU (Agreement on the rules and procedures of dispute resolution)

- Decisions of Appellate Body (100) and DSB panels (170).

2. THE LEGAL FRAMEWORK OF THE WTO RULES AND NORMS APPLICATION BY THE WTO MEMBERS: GENERAL POSITIONS.

WTO law has an internal hierarchy: it laid the principles for resolving potential conflicts between the some agreements of the WTO package.

WTO law has a hierarchical structure, i.e. it contains the principles for resolving potential conflicts between individual agreements “package” of the WTO.

General agreement on tariffs and trade, 1994 (GATT-94) is an international treaty governing trade regulations, which was adopted in the Uruguay round negotiations.

GATT-94 includes: GATT-47 (excluding the Protocol of provisional application); agreement on the interpretation of some articles of the GATT-47 reached during the Uruguay round; and 12 agreements regulating trade in goods, the so-called treaties, adjacent to the GATT.

GATT-94 has a compulsory application for WTO members, participating in the agreement. While General agreement on tariffs and trade 1947 (GATT-47) was applied only to the extent compatible with the laws of the member States (in accordance to the Protocol of provisional application of the GATT-47).

So, in the case of a conflict of the Marrakesh Agreement (article XVI, p. 3) with GATT, the priority has GATT norms. Thus, the text of the GATT relates to the right of the WTO as “lex specialis” (“special law”) with “lex generalis” (“General law”)⁴.

However, in the case of a conflict between the GATT rules and norms of the other multilateral trade agreements of the WTO package priority will have the last.

During the participation and the operation of WTO, the key point is the domestic application of WTO laws.

It should be added that the members of the WTO, use different approaches regarding the application of WTO law:

- 1) direct application (the national courts apply rules of the WTO agreements to resolve a dispute, private parties can bring suits in domestic courts based on WTO law, private parties can be awarded damages for violation of WTO decisions caused by the actions of public bodies or abolition national act that does not conform to WTO rules).
- 2) indirect (implicit) application (national Courts apply the WTO law for the interpretation of unclear or disputed provisions of domestic law).

There are different basic theories of international law application in national legal order:

⁴ Rachinskaja, P. O., *Pravovaja sistema, regulirujushaja dejatelnost WTO v oblasti arbitraza*, serija «Economika i pravo», № 11, 2013.

- 1) Monistic theory. According to the monistic theory, all the laws are unitary entities which are composed by the binding rules. Therefore the internal and international laws are two relative parts of a single legal structure. The nature of monistic theory is that once the treaties were signed by the constitutional law, it would become parts of internal laws directly. But in most cases it is necessary the experienced legislation to convert international laws into parts of domestic laws. And the laws without the experienced legislation are called self-executing treaties.
- 2) Dualistic theory. Dualistic theory insists that internal laws and international laws are two different separated law entities. Moreover the internal and international laws have a lot of differences on the legal subjects and the sources. The legal subjects of the internal laws are individual but the subjects of the international laws are sovereign.

Hence, the fully or partly application of international laws in specified judicial districts is the expression of prestige of the internal laws. This theory converts the international laws into internal laws for application. Then the international treaties are applied as the internal laws rather than the international laws. Once the judges come across the conflicts between internal laws and international laws, they choose to apply the internal laws.

3. THE POSITION OF EUROPEAN UNION ON THE DIRECT EFFECT OF WTO RULES

The European Union (EU) adheres to the monistic concept of correlation between national and international law, according to which international law is an integral part of the national law without requiring changes to domestic legislation⁵.

GATT directly imposes obligations on the EU and the countries - participants of the EU without the need for its transformation into EU law and thus is part of the rule of law countries - participants of the EU international treaties would become parts of internal laws directly, by the constitutional law of EU and its participants⁶.

Preamble of the EC Council Decision on the Participation of the European Community in the WTO: «by its nature, the Agreement establishing the WTO,

⁵ Gudkov, I., Mizulin N., *Pravila WTO: problem prjamogo dejstvija i effektivnosti mer otvetstvennosti za narushenija*, Vneshnetorgovoe pravo, № 1, 2012.

⁶ Ershov, S.V., *Pravovoje osobennosti formirovanija nadnacionalnoj vlasti EC v processe vzaimodejstvija prava EC i nacionalnogo prava gosudarstv-chlenov: avtoref. dis. ... kand. jur. nauk*, M., 2003.

including the Annexes thereto, is not susceptible of being directly invoked in the Community or Member State courts»⁷.

Thus, in the EU a direct effect of the WTO rules is excluded by the EU Council decision of ratification, but the ways of their implementation is the prerogative of the EU authorities.

The effect of the WTO law for the subjects of private law within the European Union became determined under the jurisprudence of the ECJ (in case Portugal v Council, Chiquita, Biret, International Fruit Company, Fiamm and Fedon and ect.).

According to the application of the GATT, it should be noted, first of all, that in the ECJ has consistently recognized direct application of norms of international law, however, the European Court of justice at the same time refused GATT in direct effect. The position of the EU was formed in European Court of Justice (in the case of Portugal v Council⁸, Chiquita⁹, Biret¹⁰, International Fruit Company¹¹, Fiamm and Fedon and others¹²).

In the EU, there is a presumption that, in respect of specific international agreements, including certain provisions of the WTO agreements, for the subjects of private law do not have direct effect, but it can be set individually by the Court of the EU under certain conditions:

- a) The contested acts intended to implement EU bodies specific provisions of the WTO agreements or specific commitments of the EU to the WTO; or
- b) The contested acts contain direct references to specific provisions of the WTO agreements.

In addition, the ECJ tirelessly refer to an important argument against the recognition of direct effect of WTO law, namely the absence of the consent of the major trading partners of the European Union.

And if the EU Court gives a direct effect of WTO law, foreign manufacturer will be able to appeal against the internal EU measures in the national courts.

⁷ EC Council Decision on the Participation of the European Communities in the WTO

⁸ Case C-149/94, Portuguese Republic v. Council, [1999] E. C.R. I-08395.

⁹ Case T-19/01, Chiquita Brands International, Inc., [2005] ECR II-315 ECJ, Case C-377/02, Léon Van Parys NV, [2005] ECR I-1465

¹⁰ Case C-94/02, Etablissements Biret et Cie SA v. Council, [2003] E. C.R. I-10565.

¹¹ Joined Cases C-21/72 & C-24/74, International Fruit Company NV v. Produktschap voor Groenten en Fruit [1972] E. C.R. I-1219.

¹² Joined Cases C-120/06 P & C-121/06 P, Fabbrica Italiana Accumulatori Motocarri Montecchio SpA v. Council, [2008] E. C.R. I-6513

At the same time, companies from member States of the EU are deprived of such opportunities in respect of measures taken outside the EU by the main partners of the European Union. Therefore, the EU Court considers that himself has no right to take unilateral disarmament of the EU, thereby creating additional competitive advantages for foreign manufacturers.

According to the Court of the EU trading partners, the EU has already concluded that “WTO provisions do not apply to the discharge standards that will directly apply their judicial authorities when considering questions about the legitimacy of the norms of internal law”¹³.

EU Court took a very tough position, saying that individuals can not claim in the courts of the EU, nor in case of recognition of the illegal EU acts contradicting with WTO law can claim damages on the not performing European Union WTO DSB decisions.

4. THE POSITION OF USA ON THE DIRECT EFFECT OF WTO RULES

In the US legal system, international law is considered as a part of national law, but the international treaties do not have priority over national law in case of conflict.

The Uruguay Round Agreements Act of 1994: «No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the US shall have effect...No person other than the US - (A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or (B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the US, any State or any political subdivision of a State on the ground that such action or inaction is inconsistent with such agreement»¹⁴.

Article 102 (a) of the Act established that the provisions of the WTO agreements will not have power in the U.S. if they are contrary to any law of the United States and no person, except the United States, cannot establish its claim or to build their defense in court on the basis of any of the provisions of

¹³ Dani, M., *Remedying European Legal Pluralism: The FIAMM and Fedon Litigation and the Judicial Protection of International Trade Bystanders*, *The European Journal of International Law*, N 2, Vol. 21, 2008.

¹⁴ Uruguay Round Agreements Act, 1994

the WTO agreements. may not be challenged on the basis of WTO rules and none of the provisions of internal regulations, as well as the action or inaction of any governmental body.

Conflicts between internal laws and international laws will be solved with the priority of the internal laws.

The Uruguay Round Agreements Act solved a question of a priority of WTO law in a way that the above mentioned agreements will have no direct effect, if they are contrary to any law of the United States.

A more difficult question is the indirect effect (interpretation of the US law norms). Interpreting the provisions of domestic law, US courts do not give priority to WTO norms, DSB solutions - they give priority to the interpretation given by an executive authority (case *Charming Betsy*¹⁵, case *Chevron*¹⁶).

The legislative and executive authorities of the States shall decide on the execution of decisions DSB WTO (not executed, not properly executed U.S. or refuse to do), thereby showing a clear disagreement with the direct effect of WTO law.

Thus, similarly to the United States, the European Union rejected direct effect of WTO law.

However, the ECJ's approach to WTO law appears to be more flexible and allows more opportunities for indirect application of the WTO law.

5. THE POSITION OF RUSSIAN FEDERATION ON THE DIRECT EFFECT OF WTO RULES

In accordance Article 15 of the Constitution "The universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied"¹⁷.

At the same time, paragraph 151 of the Report of the working group on Russia's accession to the WTO States that "from the date of ratification by the Russian Federation of the Protocol of accession, including the WTO Agreement and other commitments of the Russian Federation as part of the conditions of accession to the WTO, it becomes an integral part of the legal system of the

¹⁵ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 [1804].

¹⁶ *Case Chevron U.S. A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U. S. [1984].

¹⁷ Constitution of Russian Federation, 12/12/1993, Art. 15

Russian Federation. The judicial authorities of the Russian Federation shall be competent to interpret and apply its provisions”¹⁸.

Thus, paragraph 151 of the Report of the Working group reproduces the provisions of Art. 15 of the Constitution and the Federal law “On international treaties”

The representative of the Russian Federation further explained that, international treaties of the Russian Federation formed an integral part of the legal system of the Russian Federation, the judicial authorities of the Russian Federation would interpret and apply its provisions, international treaties had priority in application over both prior and subsequent Federal laws, as well as all subordinate regulatory acts (Decrees and Regulations of the President, Resolutions and Regulations of the Government, acts of Federal Executive bodies). So, the Report of the Working Group does not exclude the possibility of lawsuits from private parties in the domestic courts based on WTO law and is still unresolved the question of direct or indirect effect WTO law within the framework of the Russian legal system.

Some of the matters regarding the application of WTO law include: the possibility of lawsuits from private parties in the domestic courts based on WTO law, private parties can be awarded damages for violation of WTO decisions by Russia, interpretation of WTO law and Russian domestic law by national courts.

Plenum of the Supreme Court of the Russian Federation establishes that the norms of the officially published international treaties of the Russian Federation, which do not require the publication of domestic instruments for applications that apply in the Russian Federation directly¹⁹. It is highlighted that international agreements, endowed with the power of direct action in the legal system of the Russian Federation, are applicable by the courts in case that the international agreement establishes rules other than the applicable law of the Russian Federation²⁰.

Thus, Russian legislation and decisions of the highest courts of our country took a very tough position on the priority of international law over the domestic, namely the international treaties have precedence over laws enacted both before and after the entry of treaties into force.

As part of the process of adaptation of the normative legal base of Russia to the WTO requirements, have been adopted a number of new federal laws and amended existing laws.

¹⁸ Report of the Working group 17/11/2011

¹⁹ Postanovlenije Plenuma Verhovnogo Suda RF, 31/10/1995, N° 8.

²⁰ Postanovlenije Plenuma Verhovnogo Suda RF, 10/10/2003, N° 5.

Thus, by analyzing the above, we can agree with the statement of Djumoulin I.I.²¹ that there is “own Russian way” of adopting national legislation with the WTO rules. The specifics of this “way” is that the rapprochement of the Russian law and WTO law is provided in three areas: reception of the WTO rules, transfer them into the Russian normative legal acts, reference to the rules of WTO law, if the presence of normative legal acts, is not contrary to WTO rules.

One should agree with Gubarev V.I. that “the practice of active actions of Russian Federation for implementation of the WTO agreements into national law has actually face to the fact, that in Russia for a long time exists the WTO law framework, and Russia is not a member of this organization yet”²².

The national courts practice speaks generally of different approaches. All these create a space for discussion about the possible direct effect.

The points of report of the working group dedicated to correlation of the Customs Union and WTO law are: “Rights and obligation of members states of the Customs Union under the WTO agreements will take priority over all the normative acts of the Customs Union”.

Moreover, according to p. 186 of the report, if the rights and obligations of a member state of the Customs Union are violated by acts of the Customs Union, may be appealed to the Court of Eurasian economic community (EurAsEC Court) by States, bodies of the Customs Union and individuals. Thus, in the report of the working group is assumed that WTO law is directly applicable to appeals against acts of the Customs Union within the EurAsEC Court.

So the decision of EurAsEC Court of 24 June 2013 (plaintiff -Novokramatorsk plant) is called a Landmark decision.²³ According to that decision, “the relationship of the international treaties concluded within the WTO and those within the framework of the Customs Union, are not in a hierarchical subordination to each other. To establish priority of one, it requires the existence of contradictions between these two norms”.

However, in the present case, court has not found the contradictions - “The Court sees no contradiction between the universal international treaties concluded within the WTO, regional and international agreements concluded by States - members of the Customs Union ... so, the Court comes to the conclusion that the international treaties concluded within the framework of the Cus-

²¹ Dimulen, I.I., WTO — osobennosti pravovogo i organizacionnogo ustrojstva, sovremennaja rol, 2-epererabotannoje izdanije, M., 2000.

²² Gubarev, V.I., Recepcija rossijskim pravom norm soglashenij WTO, Jurist, N° 10, 2005.

²³ Decision of EurAsEC Court, 24/06/2013, Bujllujten EurAsEC Court, N° 2, 2013, C.18

toms Union, are in special relation to contracts concluded within the WTO, as regulating relations exclusively within the Customs Union”.

Neshataeva TN, Deputy Chairman of the EurAsEC Court said: “We joined the WTO, under the condition that WTO law has a priority in the contradictions with national law, but lawyers need brain not to find any controversy”²⁴.

We can say that the impact of WTO law on the rule of Customs Union will be determined by legal interpretation given in the decisions of EurAsEC Court. It remains an open question about direct and indirect application WTO law in the legal order of the Customs Union, that is: the right of individuals to invoke the law of the WTO in the EurAsEC Court challenging acts of commission or Eurasian in the interpretation of the Customs Union law. Currently issues are controversial and give space for discussion until EurAsEC and the Highest Court of RF find landmark decisions.

6. CONCLUSION

So, the questions concerning direct or indirect application of WTO law, if private parties can bring suits in domestic courts based on WTO law, interpretation of the Customs Union law leaves open.

We can say that the impact of WTO law on Customs Union law will be determined by a legal interpretation given in decisions EurAsEC Court.

But the EurAsEC Court will cease to exist from January 2015 and authority pass to the Court of Eurasian Economic Union.

According to opinion Neshataeva T.N. “the period of EurAsEC Court existence is a preamble for the appearance of the Court of Eurasian Economic Union and EurAsEC Court creating the base for, over nationalism fixed in judicial decisions, laid approaches to the hierarchy of international treaties, fixing dualistic method of legal regulation in integration relations”.

One will be able to say whether it will be used by the new Court of Eurasian Economic Union in the near future, as we hope.

²⁴ <http://www.rg.ru/2014/07/01/souz.html> on 01.07.2014

LITERATURE:

1. Chuprina, Ja.S., Nazarenko, N.A., Realizacija norm WTO: porjadok primenenija i mehanismi obespečenja, Sovrenenije nauchnije issledovanija, Vipusk 2, 2014– ART 54279. – URL: <http://e-koncept.ru/2014/54279.htm>. – Gos. reg. El. No FS 77-49965. – ISSN 2304-120X.
2. Dimulen, I.I., WTO — osobennosti pravovogo i organizacionnogo ustrojstva, sovremennaja rol, 2-epererabotannoje izdanije, M., 2000.
3. Dani, M., Remedying European Legal Pluralism: The FIAMM and Fedon Litigation and the Judicial Protection of International Trade Bystanders, *The European Journal of International Law*, Vol. 21, N 2, 2008.
4. Danilov, I., Soglashenija i pravopije standarti WTO, Materiali mezunarodnoj naucho-practicheskoy konferencii “Realizacija pravovih standartov WTO v sudebnoj praktike” Visshij arbitraznij sud RF, Moskva, 30/11/2012.
5. Ershov, S.V., Pravovoje osobennosti formirovanija nadnacionalnoj vlasti EC v processe vzaimodejstvija prava EC i nacionalnogo prava gosudarstv-chlenov: avtoref. dis. ... kand. jur.nauk, M., 2003.
6. Gianni, Fabrizio Di and Antonini, Renato. DSB Decisions and Direct Effect of WTO Law: Should the EC Courts be More Flexible when the Flexibility of the WTO System has come to an end, *Journal of World Trade*, No 4, Vol. 40, 2006.
7. Gubarev, V.I., Recepcija rossijskim pravom norm soglashenij WTO, *Jurist*, N° 10, 2005.
8. Gudkov, I., Mizulin N., Pravila WTO: problem prjamogo dejstvija i effectivnosti mer otvetstvennosti za narushenija, *Vneshnetorgovoe pravo*, N° 1, 2012.
9. Guljaeva, T.K., Fedosova, Ja.K., Pravo WTO: Kak instrument regulirovanija mezunarodnoj trgovli v epohu globalizaciji// http://vgnki.ru/cooperation/wto_law
10. Ispolniov, A.S., Voprosi prjamogo primenenija prava WTO v pravoporjadke Rossiji, *Zakonodateljstvo*, N 2, 2014.
11. Jia Liu, The Domestic Application of WTO Laws, *Journal of Politics and Law*, No 3, Vol. 2, 2009.
12. Kovalev, A.A., Mezunarodnoe ekonomicheskoe pravo i pravovoe regulirovanie mezunarodnoj ekonomicheskoy dejtelnosti, M., 2007.
13. Mamlyuk, Boris N., Russia & Legal Harmonization: An Historical Inquiry into IP Reform As Global Convergence and Resistance, *Washington University Global Studies Law Review*, Issue 3, Volume 10, 2011.
14. Muranov, A., Primenenije prava WTO v rossijskih sudah: statistika, prakticheskiye voprosi, problemi, vozmoznoje budučeje, Materiali Mezunarodnoj konferencii ICC Russia «Primenenije norm WTO i zashita rossijskogo biznesa: nastupateljnaja i oboroniteljnaja strategija, Moskva», 03/10/2013 g., www.rospravo.ru

15. Neshataeva, T.N., K voprosam o sozdanii Evrazijskogo sojuza: integracija i nadnacionalizm, Zakon, № 6, 2014.
16. Pascal, Huizinga, The laws and legislation of the World Trade Organization and its effect on European Trade, <http://www.europesefiscalestudies.nl/upload/Huizinga,%20Pascal.pdf>
17. Rachinskaja, P.O., Pravovaja sistema, regulirujushaja dejatelnost WTO v oblasti arbitraza, serija «Economika i pravo», № 11, 2013.
18. Smbatjan, A.S., Perspektivi Suda EurAsEC v sisteme organov mezdunarodnogo pravosudija, Mezdunarodnoe pravo i mezdunarodnije ogranizacii, M.: NOTA BENE, № 1, 2013.
19. Shegolev, S.I., Primenenija prava WTO sudami uchastnikov WTO: mezdunarodnij i zarubeznij opit, Zakon, № 5, 2013.

