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To some legal issues related to the participation of the Republic of Kazakhstan in the World Trade Organization

The global economy has faced significant difficulties after the pandemic. The idea of the globalization of the world economy seems to be no longer encouraged by the superpowers. There is a growing trend of protectionism, so-called “economic nationalism” and the unification of different countries into regional economic unions. In this regard, the role of the World Trade Organization (WTO) in the field of international trade and the foreign economic activities of developing countries is increasing as the most recognizable and reputable international economic organization. The Republic of Kazakhstan is a member state of WTO since 2015. However, we see how trade-related conflicts are arising even in the Eurasian Economic Union (EAEU) area. This article suggests drawing attention to some bright problematic issues related to the presence of Kazakhstan in various economic integration associations. During this study, both official WTO documents and research papers of well-known international lawyers were studied. The results of the study will help shed light on the problems of ordinary people and can serve as an additional source of inspiration for the academic community.

Keywords: WTO, WTO membership, regional trade agreements, EAEU, direct effect, GATT Article XXIV, Customs Union, free trade areas.

Introduction

The Republic of Kazakhstan has officially become a member state of the World Trade Organization in 2015 after complex negotiations that lasted almost two decades. Nevertheless, we observe unsolved issues in the field of international trade that arise from time to time between Kazakhstan and its economic partners. The relevance of the research topic is also increased due to criticism of WTO, which occurred in recent years.

The main objective of the research is to familiarize the scientific community and the national legislator with the existing legal issues in matters of membership of the Republic of Kazakhstan in WTO. For this purpose, the authors are intended to accomplish several tasks, including analyzing legal documents related to Kazakhstan’s accession process, studying different cases on the issue, and offering a personal opinion on a solution to the problems.

Unfortunately, full membership in the WTO cannot guarantee states’ total freedom of their goods. It is not surprising that the official website of the organization contains 45 different case studies on managing the challenges of WTO participation. Kazakhstan’s participation is not an exception in terms of arising challenges. Despite the principle of pursuit of open borders, Kazakh producers are still facing different obstacles in the export of their goods mainly to the neighboring countries. The situation is complicated by Kazakhstan’s participation in the EAEU. Free economic cooperation between its members is being endangered by different trade barriers including tariffs, sanitary and phytosanitary requirements, local content requirements, and others. When such contradictions occur within the economic union there are different perspectives on the issue from each side of the conflict. It is vital to reveal such problematic areas and work on their solutions.

Kazakhstan’s activities within the WTO after its accession in 2015 were poorly studied from the perspectives of national researchers. Despite the existence of problems with the customs authorities, trade policy, we have not yet seen worthy research work on this topic. Most of the research papers on a given topic relate to the situation before the entry of Kazakhstan into this organization or do not directly relate to the topic and do not consider the problem from a legal perspective.

In general, we can truly admit that the issue of WTO reform is being discussed by experts around the world last decade. We often observe how countries are easily involved in economic disputes. The Republic

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of Kazakhstan has not yet been involved in any serious economic dispute within the WTO. However, we cannot say it would last for long. Kyrgyzstan's appeal to the dispute resolution body of WTO is proof of this. Therefore, this topic should be studied in depth.

Experimental

This article was written using the method of data analysis from open and official sources. Official documents, including laws, intergovernmental treaties, as well as judicial cases, were observed during the research. Popular doctrines and personal opinions of respected professionals in the field were also studied. Thus, in addition, both qualitative and quantitative data collection methods were used.

The majority of legal research data concerning Kazakhstan's participation in WTO is outdated and mainly refers to the situation that was relevant before its accession to the organization. Since the field of research has an interdisciplinary nature, few authors study the given topic in the scientific sphere of Kazakhstan. Separate issues concerning Kazakhstan's participation in WTO are considered in the works of such authors as K. Maulenov, M. Sarsembayev, S. Aidarbayev, Z. Baimagambetova. Legal concerns about Kazakhstan's participation in other economic integration processes were discussed in papers of Zh. Iskakova, A. Oinarova, L. Dzhunisbekova, and others. Russian authors, in comparison, have a more pronounced interest in the problems of WTO activities in the EAEU countries. For instance, problems of the participation of EAEU states in the WTO were considered in depth in the common paper of K. Bagdasaryan and A. Pakhomov, researchers of the Russian Presidential Academy of National Economy and Public Administration. Extensive research work on the relationship between WTO law and EAEU law was carried out by D. Boklan, Associate Professor of the Department of International Public and Private Law of the National Research University Higher School of Economics.

Results

The analyzed data allow us to admit that the main legal problems of Kazakhstan's participation in WTO are caused by its participation in other integration associations, particularly in EAEU. We have already witnessed emerging problems in customs tariffs for goods imported into the territory of Kazakhstan and increased problems with the export of Kazakh products to the markets of neighboring countries. We remember how a custom claim from the Kyrgyz Republic over border restrictions has reached the WTO (The communication from the Kyrgyz Republic, 2017) or how Kazakh agricultural producers experienced difficulties with transporting their goods across the Russian border due to sanitary restrictions.

At the time, the main document regulating how the provisions of the WTO Agreement will be applied in the legal order of EAEU is the Agreement on the Functioning of the Customs Union within the framework of the Multilateral Trading System which was applied in 2011. Article 1.1 of it says: "the provisions of the WTO Agreement, as defined in the Protocol on the accession of the Parties to the WTO, ... become part of the legal system of the Customs Union" [1]. It also stipulates that the provisions of the WTO Agreement, including the obligations assumed by the Parties as conditions for their accession to WTO, take precedence over the relevant provisions of international treaties concluded within the framework of the Customs Union and decisions taken by its bodies.

Despite such provisions, the academic environment discusses the issue of competition of legislation, the direct effect of WTO rules in national courts, the crisis of the WTO appellate body, fulfillment of obligations of the WTO, the principle of non-discrimination, and other important issues related to the participation EAEU countries in the WTO. The results of the study indicate the need for the Kazakh legislator to work not only towards minimizing the discrepancy between the EAEU norms and the WTO law but also to anticipate the risk of such problems in the future.

These all indicate that legal problems related to membership in the WTO are becoming more and more urgent. As mentioned above, the depth of research on a given topic in Kazakhstan leaves much to be desired. Therefore, the authors confidently declare the novelty of the obtained results and state that they could serve as a source for further research in this area.

Discussion

In connection with the participation of the Republic of Kazakhstan in the WTO, legal issues, including the compliance of EAEU law with WTO norms, can be widely discussed in the academic environment. Despite the harmonization and unification of the national legislations of EAEU countries, this question still remains relevant.

The content of Paragraph 1 of Article XXIV of the GATT does not show a serious difference between the accession to WTO of states that are or are not members of any custom territory. The only requirement put forward is the compliance of such custom territory with Paragraphs 5, 6, 7, and 8 of Article XXIV. These requirements are related to the duties and other regulations of commerce within a customs union, a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time, consequences of increasing of rate of duty inconsistently with the provisions of Article II, a prompt notification of the Contracting Parties by a country deciding to enter a customs union or free-trade area, recommendations by the Contracting Parties if they find that such agreement is not likely to result in the formation of a customs union or of a free-trade area within the period contemplated by the parties to the agreement, the possibility of consultations with the Contracting Parties if the change in above-mentioned schedules and plans seems likely to jeopardize or delay unduly the formation of the customs union or the free-trade area. Paragraph 8 of Article XXIV highlights the need to abolish duties and other restrictive measures regulating trade between custom union members [2].

The practice has made it clear that there is no effective control mechanism for compliance with Article XXIV. The whole scientific works of famous international lawyers and economists around the world are devoted to the problem of this article. Zakir Hafez, Doctor of Juridical Science, professor of George Washington University Law School wrote a paper on this problem back in 2003, where he puts the validity of this article in doubt [3]. He believes that the fundamental problem is compliance with the disciplines that do exist in GATT Article XXIV. This compliance problem, according to him, exists because the disciplines are weak in the sense of being ambiguous, and certain countries (and regional custom unions) exploited these ambiguities to their advantage.

The amount of discussion around this article is so great that the WTO has given an official interpretation to it where the main provisions of the article include the general incidence of the duties and other regulations of commerce, reasonable length of time for the formation of such a customs union or of such a free-trade area, the procedure to be followed after a member state forming a customs union proposes to increase a bound rate of duty according to Paragraph 6 of Article XXIV. Issues concerning understanding what customs unions and free-trade areas are, dispute settlement, and reasonable measures as may be available to it to ensure observance of the agreement have also been clarified in the document [4].

After that, the WTO adopted a decision on a transparency mechanism for regional trade agreements in December 2006 (Document WT/L/671). It should be noted that the Committee on Regional Trade Agreements and the Committee on Trade and Development was established to implement this transparency mechanism, and under their regulation end of the implementation process should be completed for the Eurasian Economic Union in 2025. Unfortunately, due to the consensus rules, the Committee on Regional Trade Agreements was unable to accept any report on the inconsistency of the WTO RTAs, despite the repeated recorded discrepancies. The role of the committee was reduced only to obtaining the texts of Regional Trade Agreements. There are no other control mechanisms under the WTO. The problem is described in detail in various studies. For example, the Master's thesis entitled "The Committee on Regional Trade Agreements: A Symptom of WTO. Breakdown?" by one of the graduates of the Faculty of International Relations of Sao Paulo University was completely devoted to this problem [5].

Furthermore, the issue of development aspects of countries within customs unions has also become a subject for discussion. On October 28, 2011 proposal for the implementation of Article XXIV of GATT 1994, to harmonize current WTO dispositions on development aspects of regional trade agreements for inclusion was made. Co-sponsors proposed that additional flexibilities should be considered for developing countries when they are contracting parties to regional trade agreements notified under Article XXIV of GATT 1994. These flexibilities, according to the proposal, should be similar to those already established in Article V.3 of GATS, and the Enabling Clause [6]. The influence of GATT Article XXIV from the point of view of the welfare of the people was researched by a group of economists from leading universities in England and Australia. In their joint paper, they reflect that, under the influence of the so-called "composition effect" of GATT Article XXIV, in which countries endogenously organize themselves into the customs unions that form, GATT Article XXIV may be bad for world welfare [7].

If we study all decisions of the WTO Dispute settlement body where article XXIV was primarily considered since 1995, we will find that there are not so many such cases. The collection of decisions on dispute resolution 1995–2020 issued by WTO itself contains 3 of them. They are "Turkey-Textiles (DS34)", "Canada-Autos (DS139,142)", "Brazil-Retreaded Tyres (D332)" [8]. In all three cases, the organization opposed any restrictive measures or exceptions and refuted the arguments of the parties: In the first case, the Turkey-

EC customs union, in the second — NAFTA, in the third — MERCOSUR. Therefore, considering these examples, we can conclude that in Kazakhstan, due to its participation in the EAEU, there is a risk of such disputes in the future.

One of the discussed problems for WTO and EAEU is the correlation of their jurisdictions. A fair question arises: which jurisdiction is hierarchically higher? Most international lawyers of post-Soviet countries agree that there is no hierarchy (A. Smbatyan, T. Neshataeva). However, there are other interesting opinions on the situation. In the decision of the EurAsEC Court of June 24, 2013, where the dispute between JSC Novokramatorsky Mashynobudivny Zavod (NKMZ, Ukraine) and JSC Uralmash (Russian Federation) regarding the compliance of the dumping measures with WTO standards was considered, the Court indicated that since August 22, 2012 (Date of Russia's accession to the WTO), the provisions of WTO agreement have become part of the legal system of the Customs Union, but at the same time, correlation of two agreements (WTO Agreement and the Customs Union Agreement) should be regulated under the principle *lex specialis derogat lex generali*. "The WTO Agreement does not apply to the investigation of the Ministry of Industry and Trade and decision 904, since the investigation was carried out and the decision was made before Russia's accession to the WTO" the Court concluded [9]. Citing this court decision as an example, Russian international lawyer V. Tolstykh explains that the priority of the Customs Union agreements declared by the Court in relation to the WTO agreements may be the subject of discussion [10, 487]. He also refutes the special nature of the agreements concluded with third parties who did not participate in the creation of the customs union [11, 101].

Some international authors not only draw attention to the existence of possible contradictions in the jurisdictions of WTO and regional agreements but also offer their solutions to this problem. C. Furner, N. Lederer, C. Sergaki, a group of lawyers from various international law firms, by illustrating the interaction between the Dispute settlement understanding WTO and NAFTA Chapter 20, particularly, demonstrating it in the case of Mexico — Tax Measures on Soft Drinks and Other Beverages, proposed four possible solutions for such overlaps in jurisdictions: first, the application of international commercial law principles as a means of dealing with the overlaps and conflicts; second, good faith and interpretation principles call for adjudicators to not only be aware of but also, to give deference to, other bodies' jurisdictions; third, fork in the road clauses could address dual jurisdiction if properly drafted. Ensuring such clauses are watertight, and addressing structural weaknesses in existing regional trade agreement dispute settlement mechanisms may return strength to them, thereby enhancing their 'gravitational pull', and thus, attractiveness to parties, in resolving their WTO disputes; fourth, there should be a shift in the appellate body's mentality towards recognition of the role of regional trade agreement dispute settlement mechanisms in the international trading system [12, 24–30]. It is possible to agree with the proposals put forward, however, it is impossible not to take into account the fact that in this case there will be more and more appeals to regional dispute resolution mechanisms, and the role of the WTO dispute settlement body may weaken, which may lead to other problems.

It is interesting to discuss the possible problem caused by the 'direct effect' of WTO norms. We recall, that the "direct effect" is understood as cases when individuals use not the applicable provisions of national legislation, but the norms of an international treaty (in this case, the norms of WTO agreements) to justify their position when considering a dispute in a national court. The absolute majority of countries adhere to the prohibition on such application of WTO rules, resolving this issue at the legislative level or through appropriate explanations of the higher courts. 102 Article of the Uruguay Round Agreements Act of the United States, for example, declares that "No State law, or the application of such a state law, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with any of the Uruguay Round Agreements, except in an action brought by the United States for the purpose of declaring such law or application invalid" [13]. The European Union's position on WTO law was formed in a number of decisions of the EU Court, largely taking into account the trade conflicts between the EU and the United States that took place at that time.

In the Republic of Kazakhstan, there are not yet any cases concerning the direct effect of WTO norms. Nevertheless, this possibility remains high. Therefore, in this paper, we will consider the situation in neighboring Russia. A. Ispolinov, a Russian specialist of international law, by considering the decision of the Board of Administrative Disputes of the Supreme Court of the Russian Federation in the case of PROMMET LLC revealed some shortcomings of the Russian national legislation. In this case, for the first time at the level of the Supreme Court of the Russian Federation, an attempt was made to formulate an attitude to the direct effect of WTO law in the Russian legal order, and specifically to the possibility of challenging the adopted governmental normative act based on its contradiction to one of the points of the Protocol on Russia's acces-

sion to the WTO. In his paper, the authors expressed hope for a speedy solution to this problem, considering the fact that the plaintiff appealed the decision of the Board of Administrative Disputes of the Supreme Court [14, 21–26]. In his other works, A. Ispolinov draws attention to the problem of the EAEU courts in this matter (Priority, direct effect and direct effect of the norms of the law of the Eurasian Economic Union, *Journal of International Law and International Relations*. 2017. N 1–2 (80–81). P. 11—21). This directly concerns Kazakhstan.

These problems in the legal science of the Republic of Kazakhstan should be covered more widely. Moreover, considering the work of the Court and Arbitration of the Astana International Financial Center in Kazakhstan, this problem becomes even more urgent.

Conclusions

To sum up, we can say that in recent years, many countries have begun to pursue protectionist economic policies. In such realities, the role of regional economic associations is increasing. However, their existence may provoke the appearance of legal conflicts and contradictions. The Republic of Kazakhstan, being both a member of the WTO and the EAEU, may well directly feel the severity of this problem. The results of the research suggest academics pay attention to several obvious issues that might negatively affect Kazakhstan's foreign economic activity. First of all, we should clarify the force of Article XXIV of the GATT to coexist successfully within the framework of various integration projects. If Kazakhstan cannot fully understand the system of the control mechanism of this article, does that mean that the organization itself is waiting for reform? Next, the authorities of the country should give clear answers concerning the hierarchy of the different legislations. There should be no doubt about the correctness of the application of specific norms in the decisions of national courts. This also concerns the issue of the direct effect of the WTO rules. Our partners in the EAEU are already facing this, and over time, conflicts involving the WTO may become more frequent. What to do next — whether to adopt special provisions in advance, based on the experience of others, to exclude such discrepancy, or to wait for the appearance of such court proceedings so that the Supreme Court of the Republic of Kazakhstan gives explanations — this is a question that should concern the law creators in our country now. At a minimum, the legal scientific environment of Kazakhstan should actively discuss these issues.

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Қазақстан Республикасының Дүниежүзілік сауда ұйымына қатысуына байланысты кейбір құқықтық мәселелер

Әлемдік экономика пандемиядан кейін айтарлықтай қиындықтарға тап болды. Әлемдік экономиканың жаһандану идеясын бұдан былай супер державалар қолдамайтын сияқты. Протекционизмнің, «экономикалық ұлтшылық» деп аталатын және әртүрлі елдердің аймақтық экономикалық Одақтарға бірігуінің өсіп келе жатқан тенденциясы байқалады. Осыған байланысты Дүниежүзілік сауда ұйымының (ДСҰ) дамушы елдердің неғұрлым танымал және беделді халықаралық экономикалық ұйым ретіндегі халықаралық сауда және сыртқы экономикалық қызметі саласындағы рөлі артып келеді. Қазақстан Республикасы 2015 жылдан бастап ДСҰ-ға мүше мемлекет болып табылады. Алайда, сауда жанжалдарының Еуразиялық экономикалық одақ саласында да қалай туындайтынын көріп жүрміз. Мақалада Қазақстанның түрлі экономикалық интеграциялық бірлестіктерге қатысуына байланысты кейбір жарқын проблемалық мәселелерге назар аудару ұсынылған. Мақаланы жазу кезінде ДСҰ-ның ресми құжаттары да, танымал халықаралық заңгерлердің зерттеу жұмыстары да зерттелді. Зерттеу нәтижелері қарапайым адамдардың мәселелерін шешуге көмектеседі және академиялық қоғамдастық үшін қосымша шабыт көзі бола алады.

Кілт сөздер: ДСҰ, ДСҰ-ға мүшелік, өңірлік сауда келісімдері, ЕАЭО, тікелей әрекет, ГАТТ XXIV бабы, Кеден одағы, Еркін сауда аймақтары.

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Некоторые правовые вопросы, связанные с участием Республики Казахстан во Всемирной торговой организации

Мировая экономика столкнулась со значительными трудностями после пандемии. Идея глобализации мировой экономики, похоже, больше не поощряется экономическими державами. Наблюдается растущая тенденция протекционизма, так называемого «экономического национализма» и объединения разных стран в региональные экономические союзы. В этой связи возрастает роль Всемирной торговой организации (ВТО) в области международной торговли и внешнеэкономической деятельности развивающихся стран как наиболее узнаваемой и авторитетной международной экономической организации. Республика Казахстан является государством-членом ВТО с 2015 г. Однако мы видим, как торговые конфликты возникают даже в сфере Евразийского экономического союза. В настоящей статье предложено обратить внимание на некоторые яркие проблемные вопросы, связанные с присутствием Казахстана в различных экономических интеграционных объединениях. Во время написания статьи были изучены как официальные документы ВТО, так и исследовательские работы известных юристов-международников. Результаты исследования помогут пролить свет на проблему для простых людей и могут послужить дополнительным источником вдохновения для академического сообщества.

Ключевые слова: ВТО, членство в ВТО, региональные торговые соглашения, ЕАЭС, прямое действие, статья XXIV ГАТТ, Таможенный союз, зоны свободной торговли.

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