



The Domestic Application of WTO Laws

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Abstract

On 1 January 1995 a new international economic organization came into being. The WTO is either a modest enhancement of the GATT or a watershed moment for the institutions of world economic relations reflected in the Bretton Woods system. Indeed, the WTO Agreement, including all its elaborate Annexes, is probably fully understood by no nation that has accepted it, including some of the richest and most powerful trading nations that are members. And for a long time we just focus on the agreements on the global levels but how about the actually domestic application of treaties? This article will try to analysis the basic domestic application of WTO treaties and take American as a typical example. Then try to get tentative conclusion about the elements that effect the domestic application of WTO agreements.

Keywords: WTO, Domestic application, Treaty

1. The basic sources of WTO laws

There are 2 levels of WTO's operation including the global level and the international level. In order to take part in WTO the applicant countries need to experience a tough process of multilateral negotiation with other member countries. Therefore the sources of WTO laws not only include the GATT\GATS\TRIPS and some other global wide treaties but also include a series of multilateral treaties. Most of the time people pay a lot attention to the treaties on the global level. But they ignore the treaties on the multilateral levels. It is necessary for us to treat the global and international treaties as one whole entity. The key point during the participation and the operation of WTO is the domestic application of WTO laws. Although it is important to carry out the global level supervision of the performance situation of the member countries' WTO obligation, the performance of the international treaties is the root.

2. The theories of the domestic application of international and global treaty

There is no doubt that the WTO laws have strict binding effects on member countries compared with other kinds of international and global laws. Can we say that the respective applications of WTO laws in different countries are the same? Once you dig deeply, it would not be hard for you to realize that due to the different internal situations of different countries, the application principles for the WTO laws are different. Generally speaking there are 3 kinds of theories referring to the domestic application of the international and global laws. They are monistical theory, dualistic theory and the third theory.

2.1 Monistical theory

According to the monistical 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 monistical 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 to experience legislation to convert international and global laws into parts of domestic laws. And the laws without experiencing the legislation are called self-executing treaties.

2.2 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 individuals but the subjects of the international and global laws are the sovereignties. The sources of the internal laws root in the intentions of the internal legislators while the sources of the international laws root in the

common intentions of different countries. Neither the internal laws nor the international laws can directly change or confirm the counterpart's legal order. Hence, the fully or partly application of international and global laws in specified judicial districts is the expression of internal laws' prestige. This theory converts the international and global laws into internal laws for application. Then the international treaties are applied as the internal laws rather than the international or global laws. Once the judges come across the conflicts between internal laws and international laws, they choose to apply the internal laws.

Although these theories are helpful in explaining the relationship between internal laws and international laws, courts and some other legal institutions merely get conclusion about the regular problems according to the sole application of monistical theory, dualistic theory or some other theories. Conversely, most of the time courts base on the constitutional rules and principles to judge the cases with the application of internal laws. In this respect, the constitutional rules of different countries are different. And it is common that both theories are simultaneously applied by some countries. But in some countries the courts just adopt one theory exclusively. For example, Switzerland exclusively adopts the unitary theory and England is the representative of most developed binary theory. There are many compromised forms between these two extreme forms.

2.3 Mixed theory

In recently years, people began to pay attention to the third theory. Gerald Fitzmaurice believes that the arguments between the unitary theory and binary theory are illusive and not realistic because the argued subjects are not existed. There aren't two different legal rules that absolutely matched with their respective regulated scope. According to his theory, these two legal systems don't conflict with each other due to the different regulated scope. Although international and global laws are operated on the world stage, the domestic courts view internal laws as the uppermost rules. Although the application of internal laws will lead to the international obligation of the countries, at the time when international laws conflict with the internal laws, internal laws should be treated as the upmost. Therefore it is necessary for us to focus on the practical operation in the domestic courts.

3. Take American as an example

3.1 The basic types of treaties in American

According to American constitutional law there is only one type of treaty. Americans call these international contracts treaty. And there is only one sanction method which is called "advice and consent". The treaty require a 2/3 majority of senate votes in favor for it to be passed. But there is another existing international treaty in American which is called executive agreements. Although the American constitutional law never mentioned it, most of the treaties signed by the American are executive agreements. The American Supreme Court precedents and some academic compositions agree with the theory that the executive agreements belong to one sort of treaty in American.

3.2 Some problems referring to the domestic application of treaty in American

3.2.1 The direct application of statute-like law treaty

First of all, we must make one problem clear. Can the domestic courts view valid treaties as the binding domestic laws? The courts are set up according to the domestic constitutional law. Therefore the courts get the responsibility to obey domestic constitutional law. It is possible that the constitutional law expressly provide the measures of fixing the status of treaties. But it is also possible that the constitutional law doesn't expressly mention any measure of fixing the status of treaties. Under this kind of context, courts can operate according to implied instruction. And these implied instructions can be deduced from some others interpretation sources.

American courts adopt the mixed attitude on the problem if the courts have the obligation to perform the treaty. The courts make the decision on whether adopt the treaties according to the specific situations of different cases. In some cases the international treaties can fully be applied but in some cases the international treaties are partly applied.

3.2.2 The invocability

Although the specified international treaties or parts of them can be treated as the statute-like laws, there is another important question. Do the parties have the right to invoke the international treaties in the legal proceedings? In other words, invocability means if the international treaties could be directly executed, would the parties in the specified cases use these treaties as laws? According to the analysis of relevant precedents, when the American courts are discussing the invocability, they will not separate invocability from self-executing. However, in some cases it is obviously that the courts separate the concept of invocability from the concept of self-executing. Take *Smith v. Canadian Pacific Airways Ltd* precedent for example. In this case, although court admitted the self-executive nature of Warsaw treaty, court denied the parties' adoption of this treaty due to the federal jurisdiction. The court held to the belief that because of the specified situation in this case there is no need to adopt the Warsaw treaty to bring an action for claims. Moreover, in the *Dreyfus v. Von Vinck* case, court also separated self-executing from invocability.

3.2.3 The legal hierarchy of rules

Under the self-executive principle, it is possible that the conflicts will appear between international treaties which are adopted by parties and domestic rules. Under this context, court must make the decision about which rule should prevail others. That is the legal hierarchy of conflicted rules. Once we came across the conflicted situations the following steps could be taken to make sure which rules should be adopted.

First of all, we should find out whether there are void rules in the conflicted rules. Under this condition, the court will adopt the valid rules. When the conflicted rules are all applied to the specific case and it is impossible to get harmonization or coexistence among them, the court is facing the difficulties of adoption. In America, in order to resolve this problem, court need to analyze the type of international treaties and the constitutional law.

Secondly, it is possible to harmonize the conflicted rules. If all the conflicted rules are international treaties, the court would try its best to interpret these rules in one kind of harmonious way. If one of the conflicted rules was international rule, American court would interpret the domestic rules in the way of avoiding conflicts with international obligations. If this didn't work, court got the discretion to decide which rule should be preferred adopted.

3.3 American courts' interpretation of international treaty

For the purpose to interpret the international treat, the American courts will take into account travaux préparatoires, foreign precedents, state practice and some other elements which are helpful in interpreting the treaty.

Most of the countries interpret the international literally and view the attentions of treaties as subsidiary elements. But American courts take totally different measures. The usual concept of the words in the treaties is subsidiary element. American courts interpret the treaty according to the real attention of contractual parties. Moreover American courts tend to refuse to interpret the international treaty literally. Except this, American courts accept the rule of liberal interpretation to make the contractual parties' attention clear. If American court still could not get proper interpretation of international treaty after used up all the mentioned measures, the court would turn to domestic law terms for help. But most of the time, these domestic law terms are not the *lex fori*. However, the adoption of American law concept is another problem. American adopts the Charming Best rule as one important rule in domestic law interpretation. The interpretation of domestic laws should consistent with American's international obligation despite the root of obligation.

3.4 The domestic application of WTO laws in American

Historically, American courts granted trade treaties the self-executing status. But the latest ratified trade treaties including the WTO laws exclude self-executing. This obviously acts against American's constitutional tradition, which grants the direct application to treaties.

If the WTO laws conflicted with the American domestic laws, American domestic laws would get the priority and the WTO laws would be viewed as void. No domestic laws can be declared void due to its conflicts with rules of URA.

Compared with the previous positive laws and international treaty, according to the later-in-time-rule, the later made laws get priority. If the positive laws were ambiguous and there is no specific provision about the adoption of URA, the administrative agency would against the WTO obligation. If the interpretations were reasonable, according to the Chevron rule, American courts would respect administrative agency's interpretation of the positive laws. In the American administrative declaration, it is said that American positive laws don't mean to conflict with TRIPS but once the conflicts were unavoidable, American courts would be binding by the later created laws. American supreme court insists that the legislature enjoys the legislative authority and has the right to make laws that are different from previous ones in spite of the possibility that the later made laws will turn American to be perfidious.

In the predictable future we can't get any track about the direct application of WTO laws in American. Denying the direct application of WTO laws in American will inspire the domestic interest group to seek for the application of laws and administrative rules which are against the WTO laws. In the trade review field, American is lack of valid and efficient judicial review mechanism.

4. Conclusion

There are many elements effect the domestic application of WTO laws including the political sensitivities, state practice, member countries' domestic legal environment, legal techniques, international relationships, domestic interest groups and so on. Different countries' domestic applications of WTO laws are different. From some countries' attitude toward the domestic application of WTO laws, we can find out that they want to protect their domestic laws from the threat of WTO laws. In this way, the priority of domestic laws can be sustained in their own country. The WTO legal system is a very big and complex mechanism. No member country, even the most developed country, can fully understand its countless details. In order to realize the aim of global free trade market we still have a long way to go. During this process all the countries should work together and discard prejudice as well as discrimination.

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