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LEGAL PRACTITIONER IN CONTEMPORARY INTERNATIONAL LAW: NEW OPPORTUNITIES

В этой статье речь идет о роли адвоката в международном праве, а именно проводится анализ практических функций и возможностей применения адвокатом норм международного торгового права в торговых расследованиях, проводимых Украиной.

Ключевые слова: адвокат, международное торговое право, торговые расследования, антидемпинговое расследование, специальное расследование.

У цій статті йде мова про роль адвоката у міжнародному праві, а саме проводиться аналіз практичних функцій та можливостей застосування адвокатом норм міжнародного торгового права у торговельних розслідуваннях, що проводяться в Україні.

Ключові слова: адвокат, міжнародне торгове право, торговельні розслідування, антидемпінгове розслідування, спеціальне розслідування.

This article deals with the role of the lawyer in international law, in particular the analysis of the practical functions and opportunities is performed for application by the lawyer of international trade law in trade investigations conducted by Ukraine.

Key words: lawyer, international trade law, trade investigations, anti-dumping investigation, safeguard investigation.

Problem at issue. In the aftermath of proclaiming independence in 1991 Ukrainian lawyers obtained new opportunities for development of legal practice. These possibilities appeared since Ukraine became party to a number of international treaties and ratification of variety of bilateral agreements. Moreover, it can be stated that Ukrainian practicing lawyers gained such opportunities for the first time to apply international law together with domestic legislation. Furthermore due to the international law Ukrainian legal market broadened its practices to brand new ones. Among the most intellectually challenging international trade practice can be named.

Analysis of the research and publications. Academic research concerning the role of a trade lawyer practicing in Ukraine in trade investigations has never been conducted. However, analysis of the functions of trade lawyer is highly discussed in the USA and European Union.

The purpose of the article is to provide the concept of practical application of the norms of international trade law in Ukraine.

Lawyer's role in international trade law and international trade regulation. Legal practitioner in contemporary international law, in particular economic law can advise on various aspects on both international trade law and domestic trade regulation. Moreover, such areas as regional integration, customs valuation, sanitary and phytosanitary measures, technical barriers to trade, licensing, dispute resolution, regulation of trade in services, trade aspects of the law of intellectual property, regulation in trade of agricultural products constitute a major part of both profit-making directions of

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the lawyers and academic research. Many respected legal offices advise on analysis of compliance of regulations and other measures of state regulation with WTO rules and on trade policy (including assistance in preparing the position of public bodies, associations or private companies on measures of state regulation of international trade). As a separate practice within the law firms or individual trade lawyers services on dispute settlement proceeding should be mentioned.

For instance a number of companies advise on various aspects of trade in energy goods and services, including the trade-related implications of climate change mitigation efforts worldwide. Law firms also have experience in advising clients, including WTO Members, during the process of trade negotiations outside the WTO. Legal practitioners provide opinions and support on free trade agreements (FTAs) and bilateral investment treaties (BITs). Trade lawyers provide ongoing advice to industry and governments throughout all stages of the negotiations, enabling them to participate as equals when negotiating with major players such as the United States and the European Union [1, p. 1].

In this article we would like to focus on the particular role of lawyer in two spheres: trade investigations conducted under both international law and domestic legislation and analyze the role of legal practitioner from the prospective of trade aspects of climate change.

Functions of Lawyer in trade investigations. Legislation of Ukraine as a WTO member state envisages the procedure of conducting three types of trade investigations against import originating from foreign countries: antidumping, safeguard and countervailing. As a result of these trade investigations Ukraine may establish anti-dumping, safeguard or countervailing measures, respectively.

Anti-dumping and countervailing measures are introduced in a form of duties and safeguard measures – in a form of either duties or quotas. Since Ukraine has no practice in conducting countervailing investigations and currently legislation as regards countervailing investigations is being updated it is reasonable to focus on role of lawyer in the anti-dumping and safeguard investigations.

Trade investigations in Ukraine are conducted by the Interdepartmental Commission on International Trade (Commission), the Ministry of Economic Development and Trade (Ministry) and State Customs Service of Ukraine. The Ministry, namely its Department on Cooperation with the WTO and Trade Defense Matters, is entitled to conduct trade defense investigations, but not to adopt preliminary or final determinations. Upon results of the conducted investigation the Ministry prepares a report, which is a basis for the Commission to make a determination regarding imposition or non-imposition of preliminary or final measures.

Trade investigations are quasi-judicial procedure and by its nature constitute specialized administrative proceeding. Administrative proceeding as a procedural activity of the bodies of administrative jurisdiction concerning adoption of the legal act or decision by any executive branch is determined by general rules, legal norms and principles of the administrative process. If to speak about the trade investigation process – the principles of competitiveness, legality, transparency and maintenance of procedural terms constitute the essential part. All these principles are inherent to the trial. The sense of the principle of competitiveness in trade investigation process is namely to ensure that parties to the investigation plead before the competent authority and by means of evidence convince it in any point.

Moreover, legislation on trade remedies is inextricably linked with the legislation of Ukraine on protection of economic competition, on foreign economic activity and customs legislation. Furthermore, application of other legislative acts and regulations apart from trade remedy laws is prescribed by the Law of Ukraine «On Protection of National Producer against Dumped Imports» itself. In particular, article 38.4 of the AD Law of Ukraine says: «laws and other legislative acts of Ukraine are applied to the extent not to intervene the provisions of this Law» [2].

Anti-dumping investigation is commonly initiated by the domestic producer of the product in relation to the dumped imports of the like product produced by foreign manufacturer and causes injury to the national producer. In order to apply anti-dumping measures it is necessary to prove the simultaneous facts of dumping and injury to the domestic producer. The safeguard investigation ex-

amines the facts of imports surge to Ukraine that causes serious injury or threatens to cause serious injury to the domestic producers of the like or directly competitive product. The participants of the trade investigations are national producer(s) – applicants, foreign producers and exporters who are the respondents in the case. Moreover, associations of both domestic and foreign producers can join the investigation. Trade missions or trade representatives of the exporters' or producers' country of origin also participate in the investigations rather frequent.

Furthermore application of trade defense instruments and even the mere fact of initiating the investigation against the products manufactured by a foreign producer immediately affect bilateral trade relations between these states. Negotiations in this regard constitute one of the best ways to settle the dispute. In these circumstances a lawyer assists governments in bargaining preparing the position paper and settlement proposals, concessions for instance.

Basically trade investigation commences upon approval of competent authority that the Complainant of domestic producer contains sufficient evidence of the facts of dumped imports (for anti-dumping investigation) or imports surge that causes injury or threatens to cause injury to the domestic producer The criteria for evidences of the latters are set forth in the relevant legislation. Engagement of lawyers is highly recommended during this stage. Additionally, if the lawyer represents foreign producer or exporter, the so-called «Initial Commentaries» (mainly response and comments on Complainant, however not limited to) or general commentaries on initiating and conducting of the investigation are to be submitted.

In order to achieve the success in the trade investigation and ensure the efficient defense the strategy of both legal and diplomatic argumentation has to be elaborated. In particular, trade legal counsels are familiar with the national procedure of investigation, but the ability to apply internationally recognized jurisprudence may be of the utmost importance if the investigation is conducted by the WTO Member state.

Submission of the tremendous amount of documents is inherent in the majority of trade investigations. The peculiarity of the trade investigation is preparation of almost all documents in confidential and non-confidential versions. Should the participant be unable to provide non-confidential version it is obliged to supply non-confidential summary of the confidential version of state the reasons for inability to provide such resume. Upon WTO accession the competent authorities tend to treat very accurately the importance of non-confidential summary to ensure the core WTO principle – transparency.

The other stage in trade investigation is completion of the questionnaire (either for domestic producer of foreign). This is one of the main documents within the investigation where the competent authority asks questions related to the enterprise, product, data on sales, production, capacities, financial statements, product cost, etc. Commonly additional documents, supporting data is requested consequently. It is essential that lawyer draft these documents.

Furthermore hearing is one of the procedures of the trade defense investigation conducted by the authorized bodies aimed at providing interested parties to the investigation with the possibility to consider crucial points of the case and submit additional case-relevant information.

Article 6.2 of the WTO Anti-dumping Agreement establishes fundamental [4, p. 134] due process right of all interested parties to have full opportunity to defend their interests [3, p. 13], with the main objective to ensure this possibility throughout all investigation.

Article 3.1 of the WTO Agreement on Safeguards (SG Agreement) sets forth conducting public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties. Moreover, in the course of the hearing interested parties have the right to submit their views, inter alia, as to whether or not the application of a safeguard measure would be in the public interest.

The Laws of Ukraine «On Protection of National Producer against Dumped Imports» [1] and «On Application of Safeguard Measures against Imports to Ukraine» as of 22 December 2012 [5]

establish the possibility for the interested parties to demand hearing. However neither WTO Agreements nor national Ukrainian laws have the procedural requirements as to the structure of conducting hearing. As a result, practice of the WTO member states differs.

Some countries conduct public hearing with taking record of the procedure. Others prefer informal hearing in the course of which authorized officials only take notes [3, p. 272]. Holding of public hearing is prescribed in the USA. To ensure interested parties with such possibility practically from the beginning of the investigation the schedule of the crucial procedural event in the investigation (including the date of the hearing) is released on the official webpage of the US Trade Commission.

As a standard practice hearing in the trade investigations in Ukraine is conducted in the middle of the term of the investigation. Only interested parties to the investigation are admitted to such hearing in Ukraine.

However the common rule for all WTO members as regards conducting hearing is that authorized bodies have the right to hold meetings separately with each interested party and organize them. Moreover participation in the hearing is not mandatory for the interested party. Thereby if the party-initiator of the hearing was not duly notified on the date and time of the hearing, the procedure shall not be held in its absence.

The general procedure of the hearing is rather simple and consists of three stages: opening, consideration (presentations of the interested parties) and closure [7, p. 271].

In European Union hearing is the principle and fundamental right. Commission is obliged not only to listen to the participants of the hearing but to provide them with necessary information. Formally hearing is the procedural element ensuring the principle of fair hearing in the anti-dumping process. Breach of this principle leads to weakening of the legal force of the decision and gives possibility to cancel it [7, p. 271].

EU legislation envisages two types of hearing: hearing of one party (ex parte) and confrontation meetings [7, p. 271]. Pursuant to Article 6.5 of the COUNCIL REGULATION (EC) No. 384/96 the interested parties which have made themselves known in accordance with Article 5 (10) shall be heard if they have, within the period prescribed in the notice published in the Official Journal of the European Communities, made a written request for a hearing showing that they are an interested party likely to be affected by the result of the proceeding and that there are particular reasons why they should be heard. Such hearing is conducted during the period specified in the notice on initiation of the anti-dumping investigation. Hearing of one party is conducted by the Commission staff. In the course of such hearing authorized representative of the Commission only hears out the position and arguments of the interested party according to the prior agreed list of questions or related to it specifications.

Confrontation meetings are set forth in Article 6.6 of the above mentioned EC Regulation. The opportunities shall, on request, be provided for the importers, exporters, representatives of the government of the exporting country and the complainants to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. It should be noted that there is no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case.

The Ministry of Economic Development and Trade of Ukraine conducts hearing on the condition that interested parties have duly made themselves known to the Ministry pursuant to the terms set in the notice on initiation of the anti-dumping investigation. Moreover, interested parties have an obligation to prove that they will be subject to potential anti-dumping measures and there exist specific reasons to hold hearing.

Oral information provided in the course of the hearing by the interested party to the Ministry of Economic Development and Trade of Ukraine shall be taken into account in so far as it is subsequently confirmed in writing (commonly, the term is 5 days).

As regards hearing in the safeguard investigation, in addition to the requirements of the term for submission of the post-hearing brief, interested parties have to present arguments concerning national interests that may be affected by the safeguard measures.

The agenda for the hearing in Ukraine commonly includes the following questions: whether the applicant is a proper national producer (the criteria are set forth in the respective law), likeness of the product produces by applicant and imported, existence of the imports surge (for the safeguard investigations) or existence of dumped imports (for anti-dumping investigations), existence of injury caused by either increased imports or dumped imports to the applicant, presence of the causal link between dumped imports (imports surge) and injury, national interests. According to the terms and conditions of the hearing applicant commonly has 10 minutes to present its position and each interested party has up to 5 minutes. General discussion of the question can reach 20 minutes.

Apart from presenting position and arguments by interested parties, one of the advantages of conducting hearing (unfortunately, not used in Ukraine) is provision to the authorized investigators possibility to ask information, evidence that might affect the investigation. Moreover, authorized investigators have an opportunity to ask questions relevant to the injury determination. In this regard, investigators should identify in advance of the hearing the subjects about which additional information or clarification is likely to be sought. In addition, questioning of witnesses may be conducted [3, p. 272-273].

Considering the foregoing it should be noted that conducting of the hearing in the course of the trade investigation provides interested parties with opportunity to protect their interests, present position and reflects one of the core principles of WTO – transparency and additionally ensures competition between parties proving that hearing is the quasi-judicial procedure.

Alongside with the mandatory documents particular for the trade investigation lawyers prepare requests, motions on the conduction of the expertise that can be utilized ad additional evidence in the investigation.

Legal assistance may also be required after the investigation is terminated in case of challenging the decision in the national courts.

Conclusion. We consider that application by Ukrainian lawyers of international trade law in trade investigations will develop progressively not only due to universal norms of WTO law but by reason of bilateral free trade agreements, such as EFTA. In this regard in our opinion it is indispensable to deepen the study of the practical aspects of both international trade law and the domestic law governing the procedure of trade investigations, and to intensify the training of students to participate in moot courts on this issue conducted in the English language.

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