Functions of Foreign Trade Law as Basic Vectors for Legal Regulation of Social Relations

Gubareva Anna Viktorovna
Associate Professor of Business Law Department of the Ural State Law University, PhD, Associate Professor
620137, Russia, Yekaterinburg, Komsomol'skaya st. 21-214
E-mail: shipova@mail.ru

Kovalenko Ksenia Evgenievna
Senior Lecture of Law Faculty of the Altai State University, PhD
656049, Russia, Barnaul, Altai region, Lenina 61
E-mail: kovalenko1288@mail.ru

Abstract

The legal regulation of foreign trade is a complex set of legal rules of international and national law. The collision of international and national law as well as interactions between different sectoral norms in the sphere of foreign trade relations require further enhancement of legal regulation and its conformity with the recognized international standards. The functions as a primary instrument of a legal impact on the social processes can illustrate the law in action to reflect the process of its influence on social connections. Analysis of substantive (basic) and instrumental functions can provide understanding of content and purpose of foreign trade law. The substantive function expresses the social purpose of legal institute and points at the subject of legal regulation. The instrumental functions are inherent for some elements of legal institute and are purposed to provide the implementation of a basic function.

There are two substantive functions of foreign trade law: to protect the Russian national economy from takeover by other states' national economies and at the same time to engage foreign economies in developing the Russian national economy through foreign trade agreements and investments.

The article states that the stable legal connection between relations included into the subject of foreign trade law is created not by the nature of these relations but by the basic functions of a legal regulation in the foreign trade sphere, which themselves define the specific method of legal regulation.

Keywords: trade, e-commerce, Internet, commerce, electronic contract, online store, the international market, globalization.
Introduction

Foreign trade relations are an important factor impacting the level and direction of economic development of the Russian Federation, its regions, growth of national income, improvement of quality of life, building of the national system of innovations. [1, pp. 213-216]

The multi-faceted character entails complex structure of the foreign trade law. [2, pp.593-596] It is logical, since the legal relations in the sphere of foreign trade are resulting from impact of different sectoral norms (constitutional law, financial law, tax law, customs law, currency controls regulations and others) on the economic connections with the foreign element. The relations, included into the subject of foreign trade law, should be categorized according to economic criterion. It should be taken into account, though, that this criterion must be legally significant – so as to define the legal regime applied to the categorized relations. It is the functions of the foreign trade law that define the subject of legal regulation. According to S.S.Alexeev, the law as a social institution appeared for structuring social relations and is socially significant as long as it fulfills its functions. Glitches in this fulfillment bring very negative consequences, most evidently – transfer of conflicts resolution to the extra-legal sphere. Therefore the structure of law and existence of its main elements are subordinated to specific functions of the elements. [3, p. 50] Moreover, it is the functions of a specific legal element that delineate the subject of its regulation.

Some studies express an opinion that it is necessary to divide the substantial (basic) and instrumental functions of the branch of law. The substantial functions of the branch reflect its social role and point at the subject of the legal regulation. Meanwhile, instrumental functions are inherent to some structural elements of the branch and assist in fulfillment of the basic function. [4, p. 121]

We consider these conclusions to be applicable in analysis of legal institutes as well, since as a rule it is a main element of the branch of law. At the same time we should stress that all aforementioned conclusions are made for the traditional branches of law and legal institutes and may not be fully applicable in case of cross-branch functional institutes.

Main part

The legal system in each country is shaped throughout history and its structure depends on a number of conditions: social, economic, political, national etc. The role of law in economy is exceptionally important during the periods of deep social, economic and political transformations. Naturally, the law can not stand aside the large-scale process, which includes all spheres of social life, but the role of legal institutes (both on national and regional levels), as well as forms and methods of fulfillment of the law’s economic and social functions must undergo some substantial changes.

The mechanism of implementation of these functions by the legal systems of mixed economies (i.e. all developed countries) can serve as a reference point. But it is just a reference point because each of these countries has parameters and particularities that make Russia unique. [5, 6, 7] In particular these are specifics of national mentality, political culture, co-habitation of different ethnic and national groups and cultures, denominations, unprecedented diversity of natural and climate zones, transitional economy, which is aggravated by the break of economic ties in formerly united system. The fulfillment of the law’s economic function has several basic goals, including normal functioning of market economy and prevention of social unrest in the country’s social and political system. Taking
this into account, we can list following directions of implementation of the law's economic function: ensuring the rule of law in the country (lack of it makes hardly possible effective functioning of any sphere of social life, including the economy), compliance with rules of the game by all members of the society (including market players), creation and maintenance of favorable social background for normal work of economy.

Therefore, we must address the social purpose of the law, its inherent «genetic code» to define the substantial (basic) functions of the foreign trade law.

Let us examine the examples of such countries as Germany, France and China. [8]

Germany and France, which both are members of the Romano-Germanic family of law, witnessed the birth and development of economic jurisprudence in the latest decades.

The development of the national German law regulating economy may be linked to the early XX century. Before year 2000 the existence of independent branch of economic law was under question. The predecessors of German economic law were the business law (Wirtschaftsrecht), trade law (Handelsrecht), entrepreneurship law (Unternehmensrecht), corporate law (Gesellschaftsrecht), trust law (Konzernrecht) and cartel law (Kartellrecht). [9, pp. 11-13]

Starting from the middle 2000-s economic development lead to the growth of attention towards the economic law which becomes a widely-used term in business transactions.

The fundamental renewal of the French national law took place after WWII. This period witnessed the growth of the state's influence in the economy. The rising presence of state in the economic sphere led to strengthening of administrative law's role in regulation of economy. Besides, economic development resulted in appearing of new and renewed complex branches, like tax law, banking law, and customs law.

Nowadays economic activity of public bodies in France (public-private partnership, mechanism of concession, public services) is regulated by the norms of Le Droit Administratif Economique. The French public (administrative) economic law includes also Property Administrative Law (Droit Administratif des Biens), which regulates the State's property, public works and procedures of expropriation. [10, pp. 136-151]

As a result we can state the existence in Germany and France of mega-branch (Economic Law) which includes different legal institutes, has no exact boundaries and reflects national specifics in development of economy and law.

Historically China is a member of the traditional law family. But starting from the early XX the Chinese legal system started its «Europeanization» and after 1949 heavily adopted from the Soviet law.

The «Cultural revolution» period (1957-1976) witnessed the weakening of legal regulation but in 70-s the revival of law in China was closely related with the economic reform, which included stronger administration of economy, establishment of tax law and other economy-oriented branches. The whole block of economic legislation was adopted. Today the China's economic law is a branch, which regulates the relations in the sphere of production, trade and state administration of such activities. [11]

We should note that during the Soviet and post-Soviet periods the official Russian legal doctrine recognized the existence of economic law as a part of the Russian legal system. But prior to 1917 there was no any systemic regulation of foreign trade in Russia. There were some legal institutes but the system of regulation and doctrinal foundation did not exist. The view that the foreign trade should be regulated by the International Private Law prevailed in czarist Russia. Certainly, there existed customs law, foreign trade and investments but
regulation of foreign economic relations lacked coordination.

The government of the Soviet Russia immediately established State's foreign trade monopoly, [12] which brought a very specific institute of legal regulation. State's monopoly on foreign trade meant not only the exclusive right of State to establish foreign economic relations but also its exclusive right to define forms and means of the residents' participation in the global trade and nonresidents' participation in the national economy. [13, p.10-14] The first one may be called administrative monopoly and the second one - regulatory monopoly.

Retrospective analysis shows that during the Soviet period, the state admitted possibility of abandoning or temporary suspending of the administrative monopoly, but it never considered the possibility to stop the regulative monopoly.

The reason for the State's unwillingness to drop the exclusive right of defining forms and methods of residents' participation in international trade as well as nonresidents' participation in the national economy was formulated by Vladimir Lenin [14, pp. 335] and it retained its relevance: the gross disparity between rich and poor countries means that rejection of the State monopoly in foreign trade will lead to economic takeover of the poor country's resources by the rich country.

The history of the Russian Empire serves as a convincing confirmation of the Lenin's statements. Two times Russia was drawn into bloody wars. According to Tilsit peace treaty 1807, Russia was forced to join the Napoleon's continental blockade of England. But Russia was unable to comply with this blockade because, starting from the middle of XVIII century, England was importing 50-70% of Russian export. Therefore blockade of England meant cancellation of all foreign trade, because France could not substitute it neither in assortment of goods nor in volume of supply. As a result Russia systematically violated the continental blockade, which became the motive for the French invasion in 1812. [15, pp. 224-227]

Before the WWI the foreign capital controlled practically all strategic spheres of Russian economy. The dominance of English and French capital made inevitable Russian involvement in WWI as a member of Entente. [16, pp. 112; 17, pp. 69-77]

The modern history also supports the necessity of regulative monopoly in this sphere. For example, prohibition of direct participation of foreign banks was meant to protect the national Russian banking system. [18]

Besides, the practice of implementation of economic coercive measures by States currently attracts special attention. National legal norms are implemented both on the State's territory and abroad. The State independently decides on the limits of its territorial and extraterritorial jurisdiction. [19, pp. 11-18] The territorial jurisdiction means that the law may be applied to all subjects who act within the State's territory. The implementation of the State's law abroad is called extraterritorial and means that it is applied to the subject outside of the State's jurisdiction. The legal studies frequently characterize extraterritorial jurisdiction as a feature of the private law which allows it to regulate relations with the foreign element. It is connected with the fact that in most cases it is the norms of private law that cross the border of the national territory. Implementation of public norms beyond the borders is considered as an exception. [20]

A number of foreign researchers consider international economic sanctions to be a function of the foreign trade law, but this point of view requires cross-disciplinary approach. [21-26] After events in Crimea and South-East of Ukraine, the European Union, Canada, USA, Switzerland and other states adopted economic measures against physical and legal persons, which were implicated, in their opinion, in destabilizing the situation in Ukraine. The
sanctions affected Ukrainian and Russian citizens and companies, some programs of cooperation were suspended. Adoption of such coercive measures raised several issues like definition of economic sanctions, their legal nature, mechanism of their implementation, implications for legal status of physical and legal persons, fulfillment of contracts, rights of foreign investors. [27]

To sum it up, the first substantive function of the foreign trade law is a protection of the Russian national economy from takeover by other states' national economies.

Therefore, the state has *ratione loci* jurisdiction to apply special economic measures within its territory as well as *ratione personae* jurisdiction to adopt prohibitions for its citizens and companies. [28]

The second substantive function is directly connected with the first one and constantly compete it – it is attraction of foreign resources for development of the Russian national economy through foreign trade agreements and investments.

Comparison of the said functions with the functions of the Russian antitrust legislation [29] shows their evident similarity. This is not a coincidence because the foreign trade law regulates the competition of foreign economies and transnational corporations on the Russian market while preventing unfriendly takeover of the Russian national economy. Therefore the foreign trade law may be called “competition law in foreign trade”.

It is not a coincidence that the UN decided on necessity of international regulation of business. The UN Conference on Trade and Development (UNCTAD) attracted attention to the main danger – monopolist activities or, in other words, restrictive business practice, which negatively affects the foreign trade and does not help in improving international economic relations. UN recommends following methods to oppose monopolism: adoption of antitrust legislation to create, foster and protect competition; to control concentration of capitals; to promote innovations; to defend prosperity for the whole society; to protect consumers; to limit activities of trans-national corporations; to enhance effectiveness of judicial and administrative controls over business malpractice; to improve collecting data about companies' activities; exchange of experience and information on antitrust activities between countries. [30, pp. 22] Companies are directly prohibited to participate in price-fixing, market divisions, sales and production quotas; to impede competition through predatory pricing or price discrimination; collusion on restricted entrance to agreement or association; mergers and acquisitions of companies. [31, pp. 11-18.]

The violations of these prohibitions lead to sanctions like loss of reputation of reliable partner in international agreements, which in its turn result in economic and political losses; deprivation of diplomatic (governmental) protection; denial of access to subsidies etc.[32]

**Conclusion**

To sum it up, two basic functions of the foreign trade law outline its subject: relations that appear not only during the international circulation of goods, but also during the State's protection of the Russian national economy from takeover by other states' national economies. These opposite functions of the foreign trade law provide superficial and conditional unity of social relations it regulates.

Instrumental functions of the foreign trade law are supposed to implement the substantial functions. They match the general functions of law, as categorized by S.S. Alexeev: regulative-dynamic, regulative-static and protective. [3, pp. 51] In the foreign trade law they define elements of regulation method and not its subject, because the relations
themselves are segmented. Only subordination of relations, included in the subject of the foreign trade law, to the unified method allows implementation of the institute's basic functions.

The stable legal connection between relations, included into the subject of foreign trade law, is created not by the nature of these relations, but by the basic functions of legal regulation, which in their turn define specific method of regulating such relations. This fact emphasizes the special status of foreign trade law.

References

13. Bublik V. A. Civil Legal Regulation of Foreign Trade Activities in Russia: Problems of Theory, Legislation and Implementation. - p.10-14
   International Sanctions: Between Words and Wars in the Global System / Eds. P.
   Conflict Resolution Series. L.: Routledge, 2011;
24. Eriksson M. Targeting Peace: Understanding UN and EU Targeted Sanctions. Farnham,
   UK: Ashgate, 2011;
   Lopez. Lanham, MD: Rowman & Littkefield, 2002;
27. Chernyavsky A. G. On implementation of the Law's Economic Function. // Works of
28. Van Houtte H. The Impact of Trade prohibitions on Transnational Contracts. P. 147, 154:
31. Chernyavsky A. G. On implementation of the Law's Economic Function. //Works of
32. General Agreement on Trade in Services, European Rules on Community Sanctions and
   Measures, UN General Assembly resolution No 3202 (S-VI). Programme of Action on the
   Establishment of a New International Economic Order.