

PROBLEM OF ENFORCEMENT OF AN INTERNATIONAL LAW – ANALYSIS OF LAW ENFORCEMENT MECHANISMS OF THE UNITED NATIONS AND THE WORLD TRADE ORGANIZATION

ABSTRACT

This article analyzes the problems of enforcing international law in terms of fundamental principles of international law, sovereign states and the United Nations. The issue of law enforcement is a problem not only in individual states, but also with in the United Nations. The whole process of peaceful settlement of disputes through the courts in particular, is therefore irrelevant if the final decision, which the state does not want to submit to and fail to enforce. On the other hand, law enforcement mechanisms and capacities of WTO represent complex system of procedural norms of coercion, which could serve as an example for the innovation of UN law enforcement procedures.

KEYWORDS: *international law, World Trade Organization, United Nations, UN law, law-enforcement*

UNITED NATIONS AND LAW ENFORCEMENT

One of the biggest challenges that international community faces, is failure to comply with the international commitments in general. Partial but highly significant shortcoming is particularly non-compliance and possible unenforceability of judgments of the International Court of Justice as the

principal judicial organ of the United Nations. The problem of enforcement of judicial decisions within the institutional system and the peaceful resolution of international disputes UN is a phenomenon which threatens the integrity, authority and the viability of an international judicial body (Amr, 2003). Similarly, but it also undermines and weakens the stability of the international judicial proceedings as a whole and potentially international peace and security. One of the fundamental principles relating to compliance with existing commitments in international relations is the principle of *pacta sunt servanda* and the related *bona fides* (compliance with obligations in good faith). They are set forth in several international documents such as Article 26 of the Vienna Convention on the Law, which was adopted on the 6th of May 1969. According to this article, any effective agreement that is binding between the parties and obligations arising from it must be done in good faith. These terms and principles are part of the foundation and proper functioning of international relations and cooperation between states as subjects of international law. Nevertheless, the universal recognition of this principle dates back to the date of adoption of the UN Charter as the basic document that governs the functioning of the United Nations. Under Article 26 of the “All Member States are required in order to carry out the rights and obligations and obtain the benefits arising from this membership to comply in good faith with its international obligations under the Charter”. This obligation applies to any international agreement and should generally be made. However, already in the Charter itself it is a provision that puts this principle into plane idealism, respectively, *de lege ferenda*.

Monopoly on the enforcement of judgments of the International Court of Justice is in the competence of the UN Security Council. Essential provision that relates to this issue is Article 94, par. 2 according to which, if the state fails to comply, the Security Council, under certain conditions (by the applicant Initiative) granted the right to use coercion to make the decision was in fact made. Final form of above mentioned not preceded interaction of various actors in international relations, which were to have a decisive influence. It started with a conference in San Francisco, which operated on the various working groups for preparation of the Charter and the text. The Commission III., which dealt with the status and activities of the UN Security Council

representative of Norway, emphasized the need for increased attention to the possible accumulation of non-compliance and unenforceable judgments of the future International Court of Justice and its decisions (Orakheashvili, 2011). Norwegian officials believed that the so-called automatic execution or enforcement of the judgment by means of countermeasures to the possible use of force by the injured State should be from future legislation excluded. They proposed that the UN Security Council was authorized in appropriate ways to perform any final decision between states that will future International Court Justice issue and whose jurisdiction is recognized by litigants (Orakheshivli, 2011). Cuban delegation, in its proposal sought to modify the provisions of Article 13 of the Covenant of the League of Nations (Ferencz, 1984).

Norwegian proposal however was not taken into account. Cuban delegation, in its proposal sought to modify the provisions of Article 13 of the Covenant of the League of Nations (Ferencz, 1984). The members of the Cuban delegation proposed that “in the event of obligation arising from the judgment of the court functioning within the organization have the Security Council power to make recommendations or undertake specific measures which would contribute to the execution of a particular decision”. Great importance to the proposal, is the wording that was used (shall), which implies an obligation of the Security Council to act if there is no compliance with the decision. Cuban position in the negotiation process and generally in the international community, however, was in comparison with the victorious powers of World War II very weak in order to implement the proposal. Subsequently, however, in the next stages of the negotiations on the final form of the United Nations Commission IV. led by representatives of major powers has been replaced by the proposed optional formulation (may) (Ferencz, 1984). This clearly indicated excuses and efforts to limit the interference of other countries in the international community’s monopoly on power in the world (represented by the permanent members of the UN Security Council – in particular the USA and the USSR), since it is still in their discretion use of measures for non-compliance of the international commitment not only resulting from the decision of the international Court of Justice.

The negotiations thus ended this “compromise” and the wording of Article 94. 2 (in particular, the words: “when it deems appropriate”), the text of which

grants the UN Security Council option to take the necessary steps to enforce the duties arising from the judgment or not. Some authors such as Shabtai Rosen believe that the final text is the result of fear of interference by political authorities in this process (Rosen, 2006). How otherwise it would be possible to establish an effective mechanism to solve this problem without formulating a strict duty of the Security Council to act in case of non-compliance? Practice of League of Nations (though singular) and its system showed that such a benevolent formulation is not effective. Under Article 13 of the Covenant of the League of Nations Security Council was the first in the history of the universal organization entitled to take the necessary steps to carry out a particular decision of the Permanent Court of International Justice, in particular the parties to propose possible solutions to the dispute. In *Central Rhodope Forests* dispute between Greece and Bulgaria in 1933 asked the first former Security Council of Nations to propose the necessary steps to oblige Bulgaria to carry out the court's decision (Schulte, 2004). Eventually, Security Council was stagnant and the dispute remained unresolved.

According to the wording of Article 94, paragraph 2, Security Council is authorized to act on the initiative of the party who is damaged. It therefore follows that it is not competent to act unless there is a specific complaint of the victim which places it in the position of non-automatic entity entitled to enforce international law (Rosenne, 2006). On this premise is thus clear that only the party requesting performance may ask the UN Security Council for action in failure. However, it may happen that litigants are mutually defendant and the applicant, and vice versa, thus would have both the opportunity to submit a proposal for action by the UN Security Council. And such a situation occurred in the dispute between Nigeria and Cameroon in 2002. Its essence was that following the judgment of Cameroon was obliged to withdraw its military forces from areas along Lake Chad and Bakassi peninsula, which according to the judgment of the International Court of Justice lay in an area where exclusive sovereignty is exercised by Nigeria (Rosenne, 2003). However, Nigeria was under the judgment, committed a similar action when its troops were stationed on the remaining part of the peninsula, which was under the exclusive jurisdiction of Cameroon. Any breach or failure by the judgment would justify litigants to recover their claims through the

mechanism referred to in Article 94. 2 of the Charter of the United Nations, which would be very problematic. In this case, it is important to point out that it is very unfortunate solution to empower UN Security Council to act only on the initiative of one or possibly two litigants.

As it might appear the UN Security Council may take action in case of non-compliance and non-enforcement of the decision of the International Court of Justice, only under the provisions of Article 94 paragraph 2 of the Charter. What would occur in the event that non-compliance with obligations under the decision was a threat to international peace and security? On this issue there are two theoretical perspectives. The first is the opinion of an expert on international law dr. Pasvolsky, who in 1945 claimed that in case of a threat by the UN Security Council could not act in accordance with paragraph 94 paragraph 2 free of determining the threat to peace and security in accordance with Article 39 of the Charter. Second, contradictory view outlined in a recent study by professor Mosler argue that the Security Council UN may act without jeopardizing the security in accordance with Article 39, if there were measures provided for in Article 41 of the Charter of the United Nations (in: Schulte, 2004) However, if in the context of non-international commitment was needed the use of force, the Security Council should act under Article 94 par. 2 (proposed by the litigant), it would be necessary to take action under Article 39 of the Charter, which means that it can act independently and without initiation of the litigants.

In my opinion, if it is a threat to peace and security under the Charter of the United Nations, one of the basic principles of the delegation of certain competences to the authorities for the performance of their powers. Security Council is not therefore in my opinion, limited to initiating the State in the performance of the necessary measures upon breach of an international obligation, which also comprises non-compliance with the judgment of the International Court of Justice. This, however, concerns measures that are associated with the use of force, as only the Security Council has a monopoly on granting permission to use it (if we do not count the possibility of self-defense). The result of the analysis of these theories is the premise, that the UN Security Council may take action in case of non-compliance with the decision of the International Court of Justice under Article 94. 2 independently

of the other provisions of the Charter (select the necessary measures in its power) until there is not a situation where it would be necessary the use of force, ie procedure would be necessary under Article 39 of the Charter and the first determination of a threat to peace and security and the subsequent implementation of the measures with the use of force in accordance with Articles 41 and 42.

The most limiting factor is the actual decision-making process of the Security Council resolution that authorizes permanent member to veto the resolution. This means that by the mere enforcement decisions is limited by the willingness of certain countries (United States, United Kingdom, Russia, China and France). Each of these states is entitled to prevent the execution of measures under Article 94 par. 2. Another problematic issue is that if it is a permanent member of the UN Security Council a party to the dispute, shall make the decision referred to in the judgment. National interest of these countries may thus exceed the global interest, ie compliance with international obligations, including compliance with the judgment of the International Court of Justice. These countries may be due to the actual decision-making process of the UN Security Council veto resolutions not only on the use of force in international relations, but they may also fail to apply coercive measures to comply referred to in the judgment. From the historical point of view, in the functioning of the United Nations, there have been several similar situations, ie a conflict national interest with interest of the international community in meeting international commitments, which ultimately reduces the degree of enforcement of international law and respect for the obligations arising from the judgment of the International Court of Justice.

WTO AND LAW ENFORCEMENT

Unlike United Nations, there is an effective system of law enforcement functioning in one the most important governmental international organizations (World Trade Organization), which could serve as an example for eventual amendments of the United Nations system. WTO formed a mechanism, by which it is possible to settle any commercial dispute, including a system whereby the organization can carry out their decisions,

especially law enforcement procedures. Dispute settlement and enforcement rules are provided in Annex 2 of the WTO multilateral agreements on trade in goods entitled “Understanding on Rules and Procedures Governing the Settlement of Disputes”, used in the English abbreviation DSU (Dispute Settlement Understanding) (Dvorak, 1999).

DSB (WTO Dispute settlement body) plays a key role in the enforcement of WTO law. In the enforcement process, DSB fulfills the role of a guardian of compliance with the rules and respecting the obligations laid down in the decisions (Collier, Vaughan Lowe, 1999). The DSB oversees the application and implementation of the measures imposed and sets adequate time-limits for that purpose. Last but not least, there is a check on the DSB’s shoulders to see if the parties to the dispute are acting in accordance with the decisions and whether they voluntarily fulfill the imposed obligations or respect the established restrictions. In addition to actual implementation, the parties to the dispute are required to submit regular reports on how implementing measures are implemented. However, they may also submit their observations on implementation measures during the DSB negotiations. In addition, special attention must be paid to the comments made by developing countries.

In the event that the State voluntarily fails to comply with the Jury / Appeal Authority’s decision, DSB may withdraw the benefits or prerogatives arising for the State from the Agreements or the Compensation Orders (Van Graastek, 2013). The suspension of benefits has not only a repressive but also a double preventive effect. Even if a state whose benefits were suspended acts both repressive and penalizes it for an act contrary to legal standards, it acts in the form of individual prevention, where the infringer discourages such conduct in the future (Vicuña, 2004). With regard to general prevention, the imposition of a similar sanctioning measure also encourages other WTO members to refrain from doing so in the future, thus avoiding their negative consequences for their economy (Vicuña, 2004).

For the Member State of that doesn’t comply with the DSB decision, subsequent to the imposition of this sanction measure, additional rights and obligations arise. Firstly, a State which voluntarily does not accept a Jury’s decision or a Permanent Appeal Authority is obliged to negotiate with the State after the expiry of the deadline for the implementation of the measures ordered,

with the subject of the negotiations being to agree to settle the disputed issues together with the manner and amount of compensation for the harm suffered (Collier – Vaughan Lowe, 1999). If the agreement is not reached within a 20-day period, the DSU gives the two parties the same right to initiate a procedure to suspend the benefits of the legal framework of the WTO agreements.

The nature of the sanction imposed will be taken into account by the DSB in several respects, and the sequence of sanctioning measures under Art. 22 par. (3) of the DSU, where the assessment criterion is likely to be the extent and gravity of the breach of WTO law by the infringing State and the extent and nature of the complainant's injuries (Van Graastek, 2013). This article contains a taxative calculation of possible restrictive sanctions, with the two basic criteria mentioned, in my view, not only the consequences of such a measure for the state economy, but also the importance of a specific sanction for the affected sector for a Member State (Collier – Vaughan Lowe, 1999). In principle, sanctions are to be imposed in the same sector as the dispute. If this is not practical or if this measure is not effective, sanctions may be imposed in another sector of the same agreement. If this too is not effective or sufficient to make redress and the circumstances are quite serious, the measure may be imposed under any WTO agreement.

The result of the arbitration procedure is:

- 1) a recommendation to suspend the privileges at the proposed level, or
- 2) to bring the proposed countermeasures into line with the principles of their establishment under Art. 22 ods. Article 3 D.) for dispute settlement;
- 3) rejection of the proposal for inappropriateness and recommendation to amend the proposal.

It is no longer possible to appeal against the decision of the arbitrator and is final. The parties can not appeal against it. Eventually, it should be recalled that the specific mechanism for enforcing WTO law is enshrined in Art. 24 DSU under the title “Special procedure concerning the least developed Member States”, where the inadequate hardness set by the rules under Art. 22 DSU and the specific conditions for the sanction of developing countries.

CONCLUSION – IMPLICATIONS ARISING FROM DSU RULES FOR UN LAW ENFORCEMENT SYSTEM

The biggest problem in the area of peaceful resolution of disputes is the absence of modification of a more efficient mechanism within the institutional system, their progress and the application of specific measures. While the UN Charter is naming them, no international law prescribes specific effective ways and procedures to deal with. The precise embedding of the course, the subjects and the mechanisms of their solution in the Charter or other convention would certainly make the international dispute settlement process more efficient. The first implication of the World Trade Organization's Dispute Resolution System would be the establishment of a UN-independent body that would be divided into several sections according to the international dispute (use of force, border and territorial disputes, environmental disputes, etc.). Creation of such a mechanism would be able to respond more effectively to international conflicts in cooperation with the international law enforcement force.

In judicial remedies for international disputes, it is very important to reflect on the status and activities of the International Court of Justice as the highest judicial body within the United Nations and the effectiveness of its procedure. The biggest problem is the limitation of its activities due to the absence of binding jurisdiction and the central coercive system, in the absence of a party to the obligation to comply with the obligation stated in MSD. The second impetus of WTO dispute settlement is, in particular, the compulsory establishment of jurisdiction in the event of an international dispute and a more detailed treatment of the procedural conditions and rules of procedure at the International Court of Justice. As mentioned in the part of an article dealing with the enforceability of MSD's judgments, the state may, but do not have to deal with its international disputes through court proceedings, and the application of many types of international arbitrations (though increasingly popular) does not have mechanisms to enforce its arbitration findings. In line with the WTO, it would be necessary to set up an independent and impartial commission that would not only be able to force States to resolve their disputes through MSD but also to act on the perpetrator's state by effective sanctioning mechanisms capable of making him comply with the obligation

laid down in the judgment. Here, however, is the major problem that WTO membership in the WTO brings him, in particular, the economic benefits that make him subject to the case-law. The same could be said in analogy with the system of enforceability of European Union law and the participation of the European Commission in this process in cooperation with the Court of Justice of the EU. However, from the membership of the European Union, there are a number of economic and other benefits greater than at global and specialized levels, so this system of enforceability is considered to be very effective.

However, due to the current power structure within the United Nations, it is only possible to argue about proposed innovations and changes. Current events in Ukraine and Syria clearly indicate that it is necessary to envisage the amendment of the UN Charter, its sanctions and enforcement mechanisms, the extension and clarification of cooperation with other international organizations in the process of enforceability of international law. Taking an example from history, the international community, after two world wars, realized the need to create a universal organization to protect international peace and security. It remains to be hoped that no further global conflict will occur and the reform of the United Nations will not be carried out ruinously but in a gradual, consensual way.

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Endnotes

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