

Ахмет Байтұрсынов атындағы
Қостанай мемлекеттік университеті



**КӨПСАЛАЛЫ
ҒЫЛЫМИ ЖУРНАЛЫ**

**МНОГОПРОФИЛЬНЫЙ
НАУЧНЫЙ ЖУРНАЛ**

**Наурыз (март)
№1 2017**

ЧАСТЬ 2

“3i: intellect, idea, innovation - интеллект, идея, инновация”
2017 ж., наурыз № 1
№ 1, март 2017 г.

Жылына төрт рет шығады
Выходит 4 раза в год

А.Байтұрсынов атындағы Қостанай мемлекеттік университетінің көпсалалы ғылыми журналы
Многопрофильный научный журнал Костанайского государственного университета
им. А. Байтұрсынова

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Журнал 2000 ж. бастап шығады. 27.11.2012 ж. Қазақстан Республикасының ежелгі және алғашқы министрлігінде қайта тіркелген. № 13195-Ж куәлігі. Журнал шығарып отыратын Республика Қазақстан 27.11.2012 ж. Саясаткерлік № 13195-Ж.

А.Байтұрсынов атындағы ҚМУ-дің 05.07.2013ж №3 «3i: intellect, idea, innovation - интеллект, идея, инновация» журналы Қазақстан Республикасы Білім және ғылым саласындағы бағалау комитеті арқылы атқарылып келеді. 06.00.00-Ауылшаруашылық ғылымдары және 16.00.00-Ветеринариялық ғылымдар салалары бойынша диссертацияның негізгі нәтижелерін жариялау үшін ұсынылатын ғылыми бағаландырылған еңбектер Ресей Федерациясы Комитеті по контролю в сфере образования и науки Республики Казахстан №3 ат 05.07.2013 ж. журнал №3 ж. А. Байтұрсынов «3i: intellect, idea, innovation - интеллект, идея, инновация» журналы в Перечень журналов, издаваемых в Республике Казахстан в качестве основных результатов диссертаций по отраслям: 06.00.00-Сельскохозяйственные науки и 16.00.00-Ветеринарные науки. 2012ж аталмыш журнал ISSN (ЖЕНЕЦКО), с. Париж, Франция арқылы бағаландырылған еңбектер арқылы ғылымдарлық орталығында тіркеліп, ISSN 2226-6070 ғылымдарлық және білім. Журнал 2012 ж. тіркелтіріліп в Международном центре по регистрации сериальных изданий ISSN (ЖЕНЕЦКО), с. Париж, Франция арқылы бағаландырылған еңбек ISSN 2226-6070.

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Қостанай мемлекеттік университеті**

**Костанайский государственный университет
имени Ахмета Байтұрсынова**

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ЧАСТЬ 2

УДК 341.1/8

ИСТОРИЯ И РАЗВИТИЕ МЕЖДУНАРОДНОГО ТОРГОВОГО ПРАВА

Корытникова Н. А. – м.ю., старший преподаватель кафедры гражданского права и процесса Костанайского государственного университета им. А. Байтұрсынова

В статье представлен анализ становления и развития международного торгового права, а также его роль как инструмента правовой регламентации мировой торговли в условиях глобализации.

Глобализация, по-сути, представляет собой процесс соединения национальных экономик. Особенно интенсивна глобализация рынка товаров. В данном контексте очень важно соблюдать баланс между национальными интересами и международными стандартами обмена товарами. Именно, поэтому, глобализация мировой экономики требует переосмысления роли международного торгового права, как регулятора отношений на международном рынке торговли товарами. Без историко-правового анализа развития международного торгового права сделать это весьма затруднительно.

Хронология становления и развития Международного торгового включает три этапа: пре - Уругвайский этап, Уругвайский раунд и пост - Уругвайский этап. Каждый из этапов характеризуется с точки зрения правовых нововведений, существенно повлиявших на мировые экономические процессы. Прежде всего, анализируются положения Генерального соглашения о тарифах и торговле, а также ряда протоколов к нему.

Ключевые слова: глобализация, международное торговое право; международные соглашения, Всемирная торговая организация; Генеральное соглашение о тарифах и торговле; международное экономическое право.

ХАЛЫҚАРАЛЫҚ САУДА ҚҰҚЫҒЫНЫҢ ТАРИХЫ МЕН ДАМУЫ

Корытникова Н.А. – қ.м., А. Байтұрсынов атындағы Қостанай мемлекеттік университеті азаматтық құқық және іс жүргізу кафедрасының аға оқытушысы

Мақалада халықаралық сауда құқығының қалыптасуы мен дамуы, сондай-ақ дүниежүзілік сауданың құқықтық реттеу құралы ретінде жаһандану шеңберіндегі орны сараланған.

Жаһандану, өзінің мәні бойынша, ұлттық экономикалардың қосылу үрдісін білдіреді. Негізінен, тауарлар нарығының жаһандануы қарқынды сипатқа ие. Бұл ретте, ұлттық мүдделер мен тауарлармен айырбас жасау бойынша халықаралық стандарттар арасындағы теңгерімді сақтау ете маңызды болып табылады. Осыған орай, дүниежүзілік экономиканың жаһандануы тауарларды сату халықаралық нарығындағы қатынастардың реттеушісі ретінде, халықаралық сауда құқығының рөлінің қайта қарастырылуын талап етеді. Халықаралық сауда құқығының дамуының тарихи-құқықтық саралауысыз оны зерттеу мүмкін емес.

Халықаралық сауда құқығының қалыптасуы мен дамуының хронологиясы үш кезеңді қамтиды: пре – Уругвайлық кезең, Уругвайлық раунд және пост – Уругвайлық кезең. Аталмыш кезеңдердің әрқайсысы дүниежүзілік экономикалық үрдістерге едәуір әсерін тигізген, жаңа құқықтық көзқарас тұрғысынан қарастырылған. Ең алдымен, мұнда Тарифтер мен сауда туралы бас келісімнің, сондай-ақ оған қатысты бірқатар хаттамалардың ережелері сараланған.

Кілт сөздер: жаһандану; халықаралық сауда құқығы; халықаралық келісімдер; Дүниежүзілік сауда ұйымы; Тарифтер мен сауда туралы бас келісім; халықаралық экономикалық құқық.

HISTORY AND DEVELOPMENT OF INTERNATIONAL TRADE LAW

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The analysis of formation and development of the international trade law, and also its role as tool of a legal regulation of world trade in the conditions of globalization is presented in article.

Globalization is, usually, defined as process of the intense interconnection of national economies. Goods market globalization is especially intensive. In this context it is very important to observe balance between national interests and the international standards of exchange of goods. Therefore globalization of economies demands reconsideration of a role of the international trade law as regulator of the relations in the international market of trade in goods. Without historical and legal analysis of development of the international trade law it is very difficult to make it.

The chronology of formation and development of the international trade law includes three stages: pre - the Uruguayan stage, the Uruguayan round and a post - the Uruguayan stage. Each of stages is characterized from the point of view of the legal innovations which significantly influenced world economic processes. First of all, provisions of the General agreement on tariffs and trade, and also a number of protocols to it are analyzed.

Keywords: globalization; international trade law; international agreements; World Trade Organization; the General Agreement on Tariffs and Trade; international economic law.

Public debate often refers to the intense interconnection of national economies as globalization. This term focuses primarily on the sophisticated integration of capital markets and the international trade in goods. The global integration of markets in services lags behind. Even less elaborated is the permeability of labour markets (with exceptions such as the European Union with its comprehensive freedom of movement for employees). The actual debate with many "critics" of globalization often ignores that the interconnection of economies is by no means a recent phenomenon and that there are quite different degrees of market integration as to capital, services, and persons. The integration of capital markets had reached a very high level in the period before the First World War which was attained again only a number of decades later. 28 Many industrial States still jealously restrain access to their labour markets for foreign workers [1].

It has taken a long time for economic globalization to find a normative basis in treaties on the liberalization of international trade (especially the GATT 1947 and WTO treaties of 1994) and in the agreements on an international monetary system. The elimination of barriers to foreign investments and the control of distortions of competition are also important elements of globalization. Perhaps even more important are developments within States and their constitutional structures. In a political context, the triumph of the model of a government based on democracy and the rule of law as well as the transformation of many economies with central planning into market systems catalysed the process of globalization. In many countries, this transformation dramatically reduced the public sector.

Globalization with a high mobility of money and other forms of capital fosters competition among States to attract domestic and foreign investors. This competition also refers to legal parameters of the investment climate such as rules on establishment of undertakings, taxation, labour law, and social security as well as other conditions for the production and marketing of goods. From this perspective, globalization enhances competition among legal systems [2]. The widespread liberalization of markets for services brought about the removal of State monopolies and privatization of public services, in particular in the sectors of post and telecommunication.

Economic globalization is associated with treaties and other international instruments for the protection of certain goods of material relevance for the entire international community. Among these 'global commons' ('global public goods') rank the protection of the ozone layer and other aspects of climate protection, clean water, and clean air as well as the protection of the cultural heritage and of biological diversity. In a legal context the most attractive facet of globalization is related to universal standards of human rights, which increasingly influence the economic order. Human rights may reinforce and support the economic freedoms associated with liberalization (freedom of communication or guarantee of property).

The notion 'International Economic Law' encompasses a complex architecture of rules governing international economic relations and transboundary economic conduct by States, international organizations, and private actors. The term essentially refers to the regulation of cross-border transactions in goods, services, and capital, monetary relations and the international protection of intellectual property. To some extent, it also addresses the movement of companies and natural persons as well as aspects of international competition.

International law also develops binding standards and 'soft law' (codes of conduct) for multilateral corporations. From the view of multinational corporations and other private actors with transboundary economic activities, international rules and national law must be read together.

The core areas of international economic law are international trade law, the law of regional economic integration, and other bi- or multilateral trade agreements, international investment law, international monetary law. It also comprises areas related to trade and investment such as international commercial arbitration, double taxation agreements, and international intellectual or industrial property law as well as international competition law. Advanced integration of economies as realized in the European Union will require a regime for the movement of persons, including free establishment, and finally, common antitrust rules.

The international agreements on the exchange of goods and services across borders are based on the reciprocal character of the respective rights and obligations of the parties and purport to achieve mutual benefits for all of them.

Traditional international law recognizes only a limited number of entities capable of possessing international rights or duties and of bringing international claims. The primary legal subjects in international law have always been States. The others are international (intergovernmental) organizations are also recognized as having international legal personality, the most prominent of them being the United Nations.

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Since the end of the Second World War, the number and importance of international organizations with an economic mission such as the IMF, the World Bank Group, and the WTO, has increased steadily.

The World Trade Organization (WTO) provides the institutional basis for global trade relations and is built on pre-existing structures under the General Agreement on Tariffs and Trade (GATT 1947). Its principal objectives are to reduce existing trade barriers and to expand international trade, raise the standard of living, realize sustainable development, and secure an adequate share in the growth of international trade for developing countries (WTO Agreement, preamble). The institutional system of the WTO administers a number of trade agreements. The GATT (1947 and 1994) is the basic legal instrument for substantially reducing tariffs and other barriers to trade in goods and for eliminating discriminatory treatment. General exceptions allow for restrictive measures in the interest of enumerated public interests such as the protection of public morals or health. Specific exceptions, inter alia, relate to the protection of domestic producers against unforeseen serious harm arising from imports and trade concessions (safeguards) [3]. The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement) complement the GATT rules. Other WTO agreements establish a special regime for the agricultural sector (Agreement on Agriculture) or address subsidies, antidumping measures, trade-related aspects of intellectual property (TRIPS), trade-related investment measures (TRIMs), and government procurement [4]. The General Agreement on Trade in Services (GATS) integrates services into the WTO system.

Stages of development of International Trade Law.

1. Development up to the Uruguay Round

As early as in 1941, the Atlantic Charter¹ emphasized non-discriminatory access to markets and raw materials as a principle of the post-war order and expressed the commitment to intensive international cooperation in the interest of improved labour standards, social security, and economic progress in the post-war order:

The President of the United States of America and the Prime Minister, Mr. Churchill, representing His Majesty's Government in the United Kingdom, being met together, deem it right to make known certain common principles in the national policies of their respective countries on which they base their hopes for a better future for the world. Fourth, they will endeavour, with due respect for their existing obligations, to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity; Fifth, they desire to bring about the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labour standards, economic advancement and social security; [1].

After the end of the Second World War, the Economic and Social Council of the United Nations convened a number of conferences on trade and employment, responding to an initiative of the United States (the conferences of London in October 1946, Geneva in August 1947, and Havana from November 1947 until March 1948).² After the organization of the international monetary and finance system with the International Monetary Fund and the International Bank for Reconstruction and Development (World Bank), this process aimed at new structures for international trade with an International Trade Organization (ITO) as an institutional platform. The Havana Charter of 1948³ encapsulated these structures in a comprehensive framework. The Havana Charter contained rules not only for all areas of trade, but also for competition, development, and the labour market. In the end, the Charter proved to be an over-ambitious instrument in its time and never entered into force. The main reason was growing opposition in the US Congress which was afraid that the Charter might establish too far-reaching restraints on to the foreign trade policy of the United States [5].

Shortly before the Havana Conference, negotiations on the reduction of tariffs and other aspects of free trade led to the General Agreement on Tariffs and Trade (GATT). The GATT was signed on 31 October 1947 and entered into force on 1 January 1948, according to a protocol on its preliminary application. The GATT was meant to be an integral element of the Havana framework. The protocol on the preliminary application of the GATT was meant to bridge the often lengthy process of parliamentary ratification. Up to now, the GATT has been the cornerstone of the world trade system [3].

The "grandfather clause" of the protocol allowed the Contracting States to maintain "existing legislation", i.e. municipal law already in force on 30 October 1947, even if it conflicted with Part II of the GATT.

After the failure of the Havana Charter, the 'provisional' GATT became the new framework for world traders.

The GATT assumed some of the functions assigned originally to the ITO and became a sort of de facto international organization with a somehow unclear legal status.⁴ The basis was Article XXV which provided for joint action of the contracting parties:

1. Representatives of the contracting parties shall meet from time to time for the purpose of giving effect to those provisions of this Agreement which involve joint action and, generally, with a view to facilitating the operation and furthering the objectives of this Agreement. Wherever reference is made in this Agreement to the contracting parties acting jointly they are designated as the contracting parties.

2. The Secretary-General of the United Nations is requested to convene the first meeting of the CONTRACTING PARTIES, which shall take place not later than March 1, 1948.

3. Each contracting party shall be entitled to have one vote at all meetings of the contracting parties.

4. Except as otherwise provided for in this Agreement, decisions of the contracting parties shall be taken by a majority of the votes cast.

5. In exceptional circumstances not elsewhere provided for in this Agreement, the contracting parties may waive an obligation imposed upon a contracting party by this Agreement; Provided that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties. The CONTRACTING PARTIES may also by such a vote

(i) define certain categories of exceptional circumstances to which other voting requirements shall apply for the waiver of obligations, and

(ii) prescribe such criteria as may be necessary for the application of this paragraph [3].

In order to eliminate trade barriers, Member States have periodically conducted negotiation rounds. The earlier rounds (in Geneva in 1947, in Annecy in 1949, in Torquay in 1950/51, again in Geneva in 1956, 1960–62 (so-called 'Dillon Round'), and 1964–67 (so-called 'Kennedy Round')) focused on the reduction of tariffs. Since the so-called 'Tokyo Round' (1973–79) the focus of negotiations shifted on the elimination of non-tariffs barriers to trade. The so-called 'Uruguay Round' (1986–94) which began in Punta del Este led to far-reaching changes of the world trade system with the new World Trade Organization. Under the auspices of the World Trade Organization, the current 'Doha Round' started in 2001.

In the light of their power, transferred by the Member States, to regulate trade the European Communities have been treated like a member to the GATT. In 1994, the European Community (now replaced by the European Union) acceded formally to the GATT and the other WTO agreements in 1994 [4].

2. The Uruguay Round

The 'Uruguay Round'⁵ brought about comprehensive reform of the world trading system with

- a new institutional framework based on the World Trade Organization (WTO);
- a dispute settlement mechanism with strong quasi-judicial elements; and
- a number of new agreements extending the scope of world trade law.

The final Act of the 'Uruguay Round' with the bundle of new agreements and other documents⁶ was signed in Marrakesh in April 1994 and entered into force on 1 January 1995 [6].

The revised GATT ('GATT 1994'⁷) consists of the pre-existing GATT as amended in the past ('GATT 1947'), of new understandings on various GATT provisions and the Marrakesh Protocol to GATT 1994. Article 1 of the GATT 1994 states:

1. The General Agreement on Tariffs and Trade 1994 ('GATT 1994') shall consist of:

(a) the provisions in the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (excluding the Protocol of Provisional Application), as rectified, amended or modified by the terms of legal instruments which have entered into force before the date of entry into force of the WTO Agreement;

(b) the provisions of the legal instruments set forth below that have entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement:

- (i) protocols and certifications relating to tariff concessions;
- (ii) protocols of accession (excluding the provisions (a) concerning provisional application and withdrawal of provisional application and (b) providing that Part II of GATT 1947 shall be applied provisionally to the fullest extent not inconsistent with legislation existing on the date of the Protocol);
- (iii) decisions on waivers granted under Article XXV of GATT 1947 and still in force on the date of entry into force of the WTO Agreement;
- (iv) other decisions of the CONTRACTING PARTIES to GATT 1947;

(c) the Understandings set forth below:

- (i) Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994;
- (ii) Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994;
- (iii) Understanding on Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994;

(iv) Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994;

(v) Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994;

(vi) Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994; and

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(d) the Marrakesh Protocol to GATT 1994 [7].

The substantive principles of the GATT 1947 are continued by the GATT 1994. In institutional terms, the crucial achievement of the 'Uruguay Round' is the establishment of the World Trade Organization (WTO). The WTO law considerably extends the reach of world trade law. The General Agreement on Trade in Services (GATS8) now covers the service sector. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS9) and the Agreement on Trade-Related Investment Measures (TRIMS10) bring new areas within the ambit of the WTO regime. Specific agreements address sanitary and phytosanitary measures, technical barriers to trade, safeguards, trade in the agricultural sector, anti-dumping measures, as well as subsidies and countervailing measures. The new Dispute Settlement Understanding (DSU) vests the WTO regime with mechanisms which are more judicial than political in character and with palpable sanctions. The dispute settlement system has strongly enhanced the pull to compliance [1].

The new Agreement on Government Procurement (GPA),¹¹ replacing a previous GPA agreement, opens the access to public procurement also on the regional and local level and applies to the procurement of goods and services for water and energy supply as well as transportation, whilst no agreement could be achieved on public procurement in the area of telecommunication systems.

It must be conceded that the main beneficiaries from the trade liberalization agreed upon in the "Uruguay Round" are the industrialized States of North America, Europe, and Asia with highly competitive producers of goods and services. Still, significant welfare gains have accrued or will, in the long run, accrue to many developing countries. In any case, due consideration of developing countries, especially those with an economy essentially based on agriculture, remains a lasting challenge for the WTO regime,¹² especially as about three-quarters of the WTO members are developing countries [8]

3. Post-Uruguay Perspectives and Challenges for the WTO System

In November 2001, a new world trade round was opened at the WTO meeting in Doha (Qatar). The Doha Ministerial Conference adopted the "Doha Declaration"¹⁴ which outlines the agenda for negotiations on further development of the WTO system. A separate declaration lists a number of 'implementation-related issues and concerns'.^[9] Among the issues of negotiation are more support for the least developed countries, the progressive liberalization of markets for services, the resolution of intellectual property controversies (eg. with respect to patents for biotechnological inventions), measures of environmental protection, and the further elimination or reduction of measures distorting international competition, especially export subsidies for agricultural products and electronic commerce.

The Sixth Ministerial Conference of December 2005 in Hong Kong¹⁶ has brought about a package of measures to support the least developed countries. The industrialized countries and the willing emerging market countries shall grant duty- and quota-free access to these countries' markets for at least 97 per cent of their products. In addition, export subsidies and other measures to support agricultural exports shall be further reduced until 2013 [10]. Despite this progress, further negotiations failed. The informal Ministerial Conference of July 2008 was hampered by insurmountable frictions between industrialized countries on one side, and developing and emerging countries on the other. Especially the issue of fair market access for agricultural goods remains controversial. In recent negotiations, the so-called Group of 21 (G-21), led by the People's Republic of China, India, and Brazil, has gained increasing influence vis-a-vis the traditionally dominant powers, ie the United States, the European Union, and Japan [1].

Apart from specific trade issues, the inclusion of common environmental standards ('Greening the GATT') ranks highly in the agenda of the world trading system.¹⁷ The World Trade Organization has established a Committee on Trade and Environment (CTE) in order to examine the interrelation between trade liberalization, economic development, and environmental protection. Another important issue is the inclusion of core labour standards on the basis of cooperation between the World Trade Organization and the International Labour Organization [11].

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