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TO THE QUESTIONS OF THE INTERNATIONAL LEGAL PERSONALITY OF SUBNATIONAL ENTITIES IN THE INTERNATIONAL FINANCIAL LEGAL ORDER

Oksana VAITSEKHOVSKA

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Oksana VAITSEKHOVSKA[1]

Abstract

The article analyzes the doctrinal approaches to the concept of the "subject of international law" and the criteria for their separation from other legal entities involved in the financial relations with a foreign element. The basic international documents and legal acts of foreign countries that regulate at the national level the legal status of communities of administrative-territorial units as the subjects of local self-government and give the right to enter into cross-border contractual relations are investigated. Exploring the forms of cooperation of subnational individuals at the regional and universal levels, they distinguish between such forms of network cooperation as infrastructure, which are factors of international legal regulation (aimed at economic solidarity) and political, in which cities are often agents of international intergovernmental organizations.

Based on the analysis of international documents and national legal acts regulating the legal status of subnational persons and their relations with subjects of international law, as well as domestic and foreign doctrine of international legal personality, a scientific approach to the status of subnational persons in financial relations with a foreign element is formulated. Administrative-territorial units as complementary subjects of international legal relations with a special international legal personality are defined: on the formal legal plane, they are endowed with rights in foreign economic activity with legal norms of national law, which govern these relations; similarly, city states (like other subnationals) are representatives of the public interest of urban communities; in the economically practical plane, they act as independent subjects of economic relations of an international character.

Keywords:
Territorial community; international legal personality; local government.

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[1] Yuriy Fedkovych Chernivtsi National University

1. Introduction

Unlike states and international intergovernmental organizations, whose international legal personality is enshrined in international treaties and does not raise doubts in scientific circles, the legal status of subnational entities in the international legal order is ambiguous and questionable from a scientific and a practical points of view. Considering the primary origin of subnational entities within the national legal system, questions of their international legal personality might not have arisen, since the activities of these subjects may never go beyond the state of their origin during the whole period of their existence. However, the modern globalization of the economy has led to the emergence of relations between states (or international intergovernmental organizations) and subnational entities, which caused a rethinking of their legal status in international law by some scholars.

2. Theoretical Background

Among the scholars who studied the problem of international legal personality of participants in international financial relations, there are Yu. A. Rovinskyi, V. I. Lisovskyi, V. M. Shumilov, G. V. Petrova, L. L. Lazebnyk, and others. However, a close investigation of the legal personality of subnational entities in cross-border financial relations was not carried out.

3. The argument of the paper

Subnational entities, which involve subjects of the federation in federal states and territorial communities of different administrative-territorial units of unitary states in each power, depending on the peculiarities of its political-territorial and administrative structure, the forms of government and political regime, historical, national, geographical and other features have a specific shape and name [1].

Today, the science of international law calls into question whether subjects of federations and other subnational entities have signs of international legal personality. The fact that subnational entities may establish relationships with international intergovernmental organizations, foreign states, foreign subnational entities, and foreign private individuals on many issues, among which economic and financial matters occupy the most significant place, makes scientists pose such questions. The right of entities to enter into financial relations with foreign subjects is attributed to the implementation of these two components of the legal status of subnational entities: 1) material and financial independence according to which

subnational entities have their own, separate from the state, property and funds; 2) legal independence, due to which subnational entities have their legal powers, delegated by the national legislation, within which they act independently and bear responsibility for their activities. Moreover, as rightly states P.S. Patsurkivsky, "the sectorial legal principle of the state financial activity is complete independence of the financial activity of local self-government bodies within the legal limits established by the current state legislation" [2: 83].

The legal independence of subnational entities is, to a different extent, enshrined in the constitutions of foreign states. In the constitutions of countries with a federal government structure, it is guaranteed that subnational entities have the right to sign contracts with foreign counterparts, besides the mentioned above. For example, Article 16 of the Austrian Constitution states, "In matters within their own sphere of competence the Laender can conclude treaties with states, or their constituent states, bordering on Austria [3]." Article 32 of the Basic Law of the Federal Republic of Germany says, "Insofar as the Länder have power to legislate, they may conclude treaties with foreign states with the consent of the Federal Government [4]."

Constitutions of unitary countries do not contain such legal regulations. Mostly, they: 1) either do not regulate the legal status of administrative-territorial units (the Constitution of Georgia, the Constitution of Lithuania) 2) or determine only the basis for the local self-government in the country, and refer to the national legislation for the more detailed regulation of the legal status of self-government entities (Article 146 of the Constitution of Ukraine); 3) sometimes establish the right to join and collaborate with international associations of local and regional communities in accordance with the national legislation (Article 172 of the Constitution of Poland).

Financial relations between subnational entities and foreign subjects are split up into the commercial and non-commercial as to their legal nature. Let us examine in detail the characteristic features of each of the varieties.

Subnational entities enter into different kinds of *commercial* relations, which sometimes transcend the nation-state, to fulfill their public tasks and meet the needs of a self-governing community in various fields. The right for such activities is enshrined in special laws governing the legal status of subnational entities. In the sphere of foreign economic activity, Article 35 of the Law of Ukraine "On the Local Self-Government in Ukraine" gives the executive bodies of a village, town and city councils the right to enter into contracts with foreign partners for purchase and sales of goods, for works and services and ensure their execution under the legally established

procedure [5]. Since it is possible to receive from a foreign counterpart amid other products such a product as a loan, international credit relationships are built up. Regarding the participation of local governments in financial and credit relations Article 70 of the Law of Ukraine "On the Local Self-Government in Ukraine" claims that a local council or, by its decision, other local governments can resort to local borrowings and receive loans for local budgets in accordance with the requirements established by the Budget Code Of Ukraine [5]. In its turn, Article 16 of the Budget Code of Ukraine establishes the right of the Verkhovna Rada of the Autonomous Republic of Crimea, Kyiv, Sevastopol City Council, city councils of regional significance to make external borrowings [6].

Subnational entities similar to states have analogous immunities on the territory of foreign states, but in relations with a foreign natural or legal personality according to Article 10 of the UN Convention on Jurisdictional Immunities of States and Their Property [7] and the Law of Ukraine "On Foreign Economic Activities" they cannot invoke immunity. Local authorities act as legal entities in such relations and the relationships relate to private law and are governed by international private law. In this case, all local councils can make local external borrowings by obtaining loans from international financial organizations [6].

In addition to the commercial relations discussed above, a large number of *non-commercial* agreements on cooperation in the political, economic, social, cultural and environmental spheres between subnational entities from different states have been concluded nowadays. Subnational entities do not act as legal entities in these relationships. The corresponding bodies of territorial self-government units are representatives of public authorities of their communities, and the interest that motivates local councils in concluding such agreements with a foreign public official is also public. Since there is no reason to consider such treaties as private-law (commercial) agreements, what is the legal nature of them? If such treaties are international, then one can speak of international legal personality (or at least about its features) of subnational entities in such relations.

The legal grounds for concluding agreements on cooperation between the local authorities from different countries are international legal treaties and the national legislation of the countries, that draw up cardinal rules to legitimize external relations. The fundamental legal principles of such cooperation are enshrined in the European Framework Convention on Cross-Border Cooperation of Territorial Communities and Authorities (1980), The European Charter of Local Self-Government (1985), the World Declaration of Local Self-Government (1985), the European Charter of Cities (1992), the European Declaration of Urban Rights (1992). The next

level of legitimation of such cooperation on the international level is bilateral international treaties [8: 85-95] between countries on good-neighborliness, friendly relations, and cooperation [9], including interregional cooperation [10]. Adoption of this set of international legal regulations to develop a unified national legislation of European states became possible due to rapid integration processes that began in Europe in the middle of the XIX century [11: 6].

The legal provisions of the mentioned international documents establish the right of local authorities, under conditions determined by law, to cooperate with local authorities from other countries, the right to join international municipal unions / associations to protect and pursue common interests [12], to enhance an interchange, and to promote international understanding [13] and inter-municipal cooperation [14], etc. Thus, the right of local authorities for such cooperation is legitimate only under the conditions provided by *the national legislation*. Therefore, in accordance with the Agreement between the Government of Ukraine and the Government of the Republic of Poland on interregional cooperation (1993), regional bodies of state administration and local self-governing bodies within their competence can conclude agreements in accordance with *the national legislation* of both states [10] (our italics – O.V.).

Analysis of international conventions and bilateral international treaties on cross-border cooperation as well as agreements on cross-border cooperation between regional self-governing bodies from different countries permits us to state that subnational entities do not have the following basic elements of international legal personality as independence and direct subordination to international law in such agreements. The relevant international acts do not have a direct impact on subnational entities (their legal power is possible only after ratification by the state) and the rules for this type of cooperation are clearly defined by the state in such national acts as the constitution and laws on local self-government. The Consultative Body of the Council of Europe i.e. the Congress of Regional and Local Authorities of Europe includes representatives of local councils, but this is only the specific requirement of this body about the representation of subjects and not the right of local bodies for independent membership in international organizations.

Agreements on cooperation between local self-government bodies cannot be regarded as international treaties since the national laws of the countries regulate the procedure for their conclusion. For example, in accordance with Article 5 of The Agreement between the government of Ukraine and the government of the Republic of Poland on inter-regional cooperation (1993), regional bodies of state administration and local self-

government may sign agreements on cooperation on issues in question within their competence, in compliance with the domestic legislation of both states [10]. In turn, the failure to comply with such agreements entails liability under the national law. By its legal nature, the agreement between local authorities from different countries is the implementation by states, rather than by subnational entities, provisions of international treaties on cross-border cooperation.

Furthermore, the issue of concluding, enforcing and terminating of treaties between the states, between the international intergovernmental organizations, between the states and international intergovernmental organizations is governed by Vienna Convention on the Law of International Treaties (1969) [15]. However, neither this Convention nor other international instruments presuppose the autonomous capacity of subnational entities to conclude international agreements.

Of course, one would assume that this type of treaties appeared not so long ago and the relevant international documents as to their legal nature have not appeared yet, but in practice, the large numbers of them are signed and states acknowledge them as international treaties. Such a mechanism of recognition of the rule of conduct as a norm in international law is possible (*opinio juris*), but a thorough analysis of the national legislation of countries gives a clear understanding of the attitudes of states – such treaties are not recognized as international. None of the legal and regulatory instruments, which in their subject matter relate to international treaties, mentions those that are concluded by subnational entities. National laws of countries on international treaties do not specify such type of international agreement as an agreement on behalf of a subnational entity (for example, Article 3 of the Law of Ukraine "On International Agreements of Ukraine") [16]. Moreover, neither constitutions of countries nor laws on Constitutional Courts establish rules on the verification of contracts between subnational entities and foreign subnational entities in the matter of their compliance with the constitution although this procedure is mandatory for international treaties between states. Thus, according to Article 7 of the Law of Ukraine "On the Constitutional Court of Ukraine", the powers of the Court include the decisions on conformity to the Constitution of Ukraine of applicable international treaties of Ukraine or of international treaties submitted to the Verkhovna Rada of Ukraine for its consent to a binding nature thereof [17]. According to article 3 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation" from July 21, 1994, the Constitutional Court of the Russian Federation resolves issues of compliance of international treaties of the Russian Federation with the Constitution of the Russian Federation pending their entry into force [18].

Concerning the right of subnational entities with the consent of relevant state authorities to enter into agreements with a foreign state or its subnational entity on opening their representative offices on the territory, such offices do not have the status of diplomatic missions, their employees do not enjoy appropriate privileges and such agreements are not regarded as international.

In view of the mentioned above, we believe that agreements on cross-border cooperation between subnational entities do not belong to international treaties. This standpoint is adopted in the science of international law [19: 120] and in the official positions of foreign countries. Thus, Article 7 of the Federal Law of the Russian Federation from January 4, 1999 "On the Coordination of International and Foreign Economic Relations of the Subjects of the Russian Federation" says that the agreements on the implementation of foreign economic and international relations concluded by the state authorities of the constituent member of the Russian Federation regardless of the form, name, and content ***are not international treaties*** [20] (we highlighted – O.V.). In turn, subnational entities do not possess all the constituents of international legal personality, respectively, cannot be considered as subjects of international law and international financial law, in particular. Regarding such a component of international legal personality as the right to establish relations with other subjects of international law (for example, with international organizations), it is not intrinsic to subnational entities because of their legal nature, but it is given to them according to the will of the state.

As to the legal nature of agreements on cross-border cooperation reached between subnational entities from different countries, representing public interests of their local communities, the following should be mentioned. In the legal system of any country, one can clearly identify private and public law agreements. Moreover, private law agreements are subdivided into national private law contracts and private law contracts with a foreign element. Regarding public law agreements, which, for example, involve agreements between government agencies and local bodies, between local self-government bodies from different administrative-territorial units of one country and other agreements, we believe that it is necessary to acknowledge the existence of a separate group of public law agreements with a foreign element, concluded between territorial self-government units on cross-border cooperation.

Designation of agreements between sub-national entities from different countries, used in national regulatory acts of countries, is important in the context of clarifying their legal nature. Unfortunately, some of them, use the term "international treaties" (improper from a legal point of view),

others intentionally avoid any designation. Thus, Article 3 of the Charter of Voronezh Region (2006) specifies that state government bodies of Voronezh Region, within the powers granted to them by the Constitution of the Russian Federation, federal and regional legislation, have the right to conduct negotiations with subjects of foreign federal states, administrative-territorial entities of foreign states as well as to conclude with them *agreements on implementation of international and foreign economic relations* [21] (our italics – O.V.).

4. Conclusions

Therefore, regardless of the name that is used in the scientific literature and national regulatory and legal acts for agreements between subnational entities from different countries, they are cross-border public treaties by their legal nature and are governed by the national legislation of countries. The name of the international instrument – the European Framework Convention on Cross-Border Cooperation of Territorial Communities and Authorities (1980) indicates that the nature of cooperation between territorial self-government units is cross-border. The lexical meaning of this term conveys the idea that these relations go beyond the borders of one country i.e. they are relations with a foreign element, but they are not international in the sense of "between subjects of international law". Subnational entities *do not belong to international law*.

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