FREE COMPETITION - INTERNATIONAL DIMENSION

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Abstract

We can see in the last four decades the profound and growing extent of international economic relations. As an effect, are necessary international economic institutions such as World Trade Organization (WTO). A number of newer subjects are now regulated by WTO (competition policy, human rights issues, investments rules, environment, labour standards, sanctions, disputes settlement). When we are speaking about such the topic of competition at international level, the main institution involved is World Trade Organization (WTO). At present WTO has an important role in ensuring the free competition in international trade (business) relations. It got this role from GATT.

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1. Introduction

At its beginnings in 1947, GATT (General Agreement on Tariffs and Trade) was an empirical structure (construction) providing general rules, rules completed by practices with a view to facilitate the world trade (business).[2]

The GATT member states used to sign bilateral agreements, with respect to (concerning) special situations or participated in rounds of multilateral negotiations. The main objective of those was to establish some tariff concessions.

The golden GATT rule is the clause of most favourized nation. This meant that any tariff concession, granted by a state to another one, was automatically in favor of all GATT members.[3]

Along time many rounds of negotiations took place.

One of them, the Kennedy Round, emphasized the European Community (European Union) legal (juridical) personality as well as its economic strength.[4]

The following round did not refer only to customs field and the Uruguay Round (1986-1994) has created or improved the specific regulations and led to setting-up of WTO (World Trade Organization).

2. The Uruguay Round

The Uruguay Round of negotiations took place in a very difficult period for the European Community.

We are speaking here about the Spain and Portugal adhesion, about the starting of the programme of realization of internal market until the end of 1992, the reform of common agricultural policy (CAP), the German reunification the signing of the Treaty of Maastricht, etc.[5]

Despite of all these aspects, the results have been satisfactory from the Community point of view, even in the field of agriculture.

European Union and the main GATT partners have agreed to cut down the tariffs of industrial products by 37 % and the developing countries have for the first time brought their contribution to the global efforts in liberalizing the commerce (trade), through strengthening of tariffs to reach the compatible level of development.

A novelty appeared during Uruguay Round is voiced by the inclusion in the agreement of the services sector and of the rights of intellectual property. At the same time, the rules relating to

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[2] J. Schapira,, G. Tallec, J. B.Blaise., L. Idot, *Droit europeen des affaires*, Paris, PUF, 1999, p. 794.

[3] Ibid, p. 794.

[4] Ibid, p. 794.

[5] P. Mathijsen, *Compendiu de drept european*, Bucharest, Club Europa, 2002, p. 517.

solving the disputes, protection (defense) actions, antidumping rules and subsidies (subventions) counteracting have been brought up to date.[6]

The main agreement of the Uruguay Round, setting-up WTO (coming into effect on January 1st, 1995) gives it legal (juridical) personality, as well as a large field of action.[7]

Institutional structure of WTO (World Trade Organization) consists of a ministerial Conference (meeting at least every two years and adopting the main decisions) and a General Council, supervising the WTO activity and implementing the ministerial decisions. At the same time, the General Council represents the Disputes Settlement Body as well as Commercial Policy Examination Body (Structure).[8]

Apart from these, merchandise, services and TRIPS (Trade Related Intellectual Property Rights) boards have been created.

Both WTO and GATT functioning are based on consensus (agreement). This fact makes the decisions usually adopted by a majority of expressed votes.

The interpretation of the agreement and the granting of the exceptions need decisions adopted by a two thirds majority. As far as the agreement amending reffers to, specific rules are provided for.

As far as the agreements amending reffers to, specific rules are provided for. A special attention is given to tandems business-environment and business-competition.

We must mention the fact that a number of multilateral agreements heve been signed. All WTO adhering states are obliged to accept all these multialteral agreements. We mention among them the agreements referring to the merchandise trade, the General Agreement relating to Services Trade (AGCS) and the Agreement referred to the Intelectual Property Rights on Business (ADPIC).[9]

The WTO Agreement, signed at Marrakech in 15th of April 1994, was adopted in the community legal order through Council Decision nr. 94/800 from 22nd of December 1994 (Official Journal 336 from 23rd December).

Through Council decisions from 25th of June 1996 (Official Journal 167 from 6th July 1996) and 14 December 1998 (Official Journal 20 from 27th of January 1999) have been adopted the second and the third protocol-annexes to General Agreement on business services, respectively the fifth having as object financial services.[10]

For the Community, the agreement is based on articles referring to the right of residence, services, capitals, payments, approximation (harmonization) of legislation, fiscality and commercial policy of the member states. The member states are at the same time contracting parties.

WTO role is to make all this ensemble to function (run) and to serve as a frame for bilateral or multilateral negotiations between its members.

3. The evolution of WTO

European communities exercise their right to vote, having for it a number of votes equal to the number of member states.

The integration process into the Community legal (juridical) order of the WTO agreement involved the action of many Community institutions.

For example, the Commission has noticed the Court of Justice of European Communities to formulate a point of view (recommendation) referring to the problem of sharing the competences between the Community and the member states.

Through the notification 1/94 of 15th of November 1994, the Court made certain distinctions.[11]

In this way, referring to the agreements on merchandise commerce (trade), was brought out

[6] Ibid, p. 517.
[7] Ibid, p. 517.
[8] Ibid, p. 517.
[9] T. Flory, *L'Organisation Mondiale du Commerce, Bruylant*, 1999, p. 6.
[10] Ibid, p. 8.
[11] Ibid, p. 8.

the exclusive competence of Community, by virtue of article 113 of the European Union Treaty.[12]

Relating to AGCS, the Court has shown the existing difference between the exchange in services involving the circulation of persons (where exists a competence between the Community and the member states) and services exchange not involving circulation of persons (where we have an exclusive Community competence).[13]

Finally, in the case of ADPIC is applicable the joint (divided) competence, excepting the counterfeiting (forging) of goods (exclusive community competence).

Subsequent to this moment, after the notification of the European Parliament on 14th of December 1994, the Council, through a decision from 22nd of December (Official Journal 336 from 23rd of December 1994) adopted the Agreements of Marrakech.

After, that, every member state has ratified the agreements according to its own constitutional procedure.

Ministerial Conference that closed the Uruguay Round and led to WTO coming into being has refered to the establishing in future of a frame of rules about the international competition.

First Ministerial Conference of the WTO (held in Singapore between 9th and 13th of December 1996) decided the creation of a working group to study the problems brought to attention by members regarding the subject of interaction between business and politics where competition is involved, including anticompetitional practices.[14]

During the Second Ministerial Conference of the WTO (held in Geneva between 8th and 20th of May 1998) the General Council was authorized to present recommendations referred to the programme of WTO activity, including here the pursuit of the liberalization process on a large base, able to answer to the variety of interests of the members.[15]

But many opinions oppose to this role of WTO, respectively to serve as institutional frame of an international agreement in the field of competition.

The main argument in this sense is the existing of the provisions in matter of competition within GATT, AGCS and ADPIC.[16]

In GATT existed quantity (quantitative) restrictions cancelling (repealing) the effects of decreasing (cutting-down) the customs (tariffs) duties.

With this object in mind, in November 1960, the contracting parties have decided to (put into effect) carry out periodical consultations about restrictive practices, in order to reduce them or even to eliminate them.

In the second case (AGCS), article 8 of this agreement subordinated the behaviour of all monopolistic suppliers of services to the rule of treatment reserved to the most favourized nation.[17]

Finally, article 8 of ADPIC provided "establishing of adequate measures provided they are compatible with the provisions of the present agreement; at the same time, is necessary the avoidance of abusive use of the intelectual property rights by those that have got them, as well as the avoidance of practices that restrict the commerce (trade) in an unreasonable manner (way) or is detrimental to international transfer of technology".

With a view to repress anticompetitive behaviours, many western (occidental) states have issued their own rules of competition law.[18]

Within the national legislations in the field of competition, these behaviours perform effects according to the theory of origins. According to this theory, putting obstacles on a certain market is realized by companies established on a well defined theory.

Globalization and mondialization of trade made the juridical analyzes in this field more complex.

The efficiency of the international competition law is put on trial in the situation of

[12] Ibid, p. 8.
[13] Ibid, p. 7.
[14] B. Okiemy, *OMC face a la problematique de l'institution d'un droit international de la concurrence*, Bruylant, 2001, p. 80.
[15] Ibid, p. 80.
[16] Ibid, p. 81.
[17] Ibid, p. 81.
[18] Ibid, p. 82.

manifestation of behaviours born outside borders, causing (bringing about) a possible conflict between the internal law and the foreign state sovereignity.

In absence of some international regulations, in the field and having to cope with mondialization or transnationalization of exchanges, the competition problems can be debated in more national courts.

We can mention in this context the Boeing-McDonnell fusion (merger).

Although was a strict american-american operation (being applicable only the American law), it had to be ratified by the European Commission because of its influences on the Community territory.[19]

In 1991, the Canadian competition authorities have approved the fusion (merger) initiated by the companies Alenia (Italy) and Aerospatiale (France) with De Havilland company (regional transport aircraft manufacturer, operating from Canada, but belonging to Boeing company). Informed about it, the Commission raised the objection that it can affect the European market of regional transport planes.

The classic vision of international law that recognizes to all states the jurisdiction sovereignity over their national territory is contested in the field of right of competition by the "theory of effect".

This theory, sanctioned by the USA Supreme Court of Justice in 1945 in the case "Alcoa" allows the national competition authorities to take notice of the cases caused abroad and having effects on their territory. For this has to be found the place of main effects. This impact can be measured by the calculation of the total turnover carried out on the national territory and within the market parts cumulated by the examined enterprises on the considered territory.

This study of impact is very little taken into consideration by the americans. For americans, the theory of affect applies if the export is made on their territory, even if has no effect on american consumer.

It is enough for the restriction of competition born abroad to be liable (susceptible) to produce a direct effect, predictable and substantial to the export of goods and services in the United States.

A document of the american (US) authorities (Second Restatement Act-1965) says:[20]

"A state has the competence to adopt a legal (juridical) rule having juridical consequences with regard to a conduct taken place outside its territory, but producing effects on its territory if:

- the conduct and its effects are constitutive elements of the activity the legal rule refers to;
- the effect on its territory are substantial;
- the effects are the direct and predictable results of the conduct exterior to its territory".

Another document (Third Restatement Act-1987) completes, underlining that:

"A state is able to adopt a legal rule regarding:[21]

- a conduct taken place outside its boundaries and intended to produce a substantial effect on its territory;
- all agreements referring to US commerce (trade) and taken place outside United States, as well as all conducts or business agreements applied (enforced) in principal outside United States, if one of the principal (main) objectives (purposes, goals) of the conduct or agreement refer to United States commerce, as well as this agreement or effect on their business;
- all other agreements or conducts referring to the US commerce (trade) are subject to the normative competence of the United States if these agreements or conducts have a substantial effect (consequence) on the United States commerce and if the competence exercise has a reasonable character."

In a decision of the Court of Justice from 25th of November 1971 (*Beguelin case*) is shown that "the action of a company participating in an agreement placed (located) in a third country, doesn't represent an obstacle in application of the article 95 if the respective agreement became

[19] Ibid, p. 60.
[20] Ibid, p. 70.
[21] Ibid, p. 71.

effective on the Common Market territory".[22]

In a 1994 decision of the Commission, this has sanctioned an agreement (understanding) between scandinavian, american and canadian paper paste manufacturers, agreement established with a view to fix (set-up) a unique (single) price of the paper paste exported on community territory.[23]

Before sanctioning the use of theory of effect, the Court of Justice resorted "the theory of economic unity". According to it, the community (communitary) competence was employed if a branch of a company, located outside community (communitary) territory acted anticompetitive practices on community territory.[24]

4. Relations WTO - European Union – United States of America

The wish to homogenize different national legislations in the field of competition caused the signing of many bilateral agreements.

The most important agreement of this kind is the one between the United States of America and the European Union.

On 23rd of September 1991 was signed an agreement between the European Commission and the United States of America (Official Journal 95 from 27th of April 1995 and Official Journal 134 from 20th of June 1995) having as the cooperation and coordination between the two parties, as well as to reduce the risks of appearance of misunderstandings (disputes, disagreements) regarding the application of the law of competition or diminishing such effects.[25]

Art. 2 of the agreement is provided for a reciprocal obligation of information, every time when a competition procedure can be detrimental (prejudicial) to the other part.

As a continuation, art. 6 invite each (every) part to consider in different stages of procedure to take into consideration the other part interest.

This last article is inspired by the traditional or negative courtesy translated by abstaining of competition authority from committing an action in other one advantage, if a prior action produced a prejudice sometimes in the past.

Art. 5 (applying the rules of positive courtesy) refers to the application of national legislation on rivalry of the effects of a anticompetitive conduct originated outside borders (boundaries). The use of the rules of positive courtesy involves surpassing the borders of a simple taking into consideration of the other part within a competition procedure.[26]

Art. 4 institutes a procedure of coordination of the rules of competition for the two parties.

Art. 3 organizes a general procedure for exchanging informations based on periodical meetings of the representatives of competition authorities. Completing art. 3, art. 8 shows that the exchange of informations has to be governed by the principle of ensuring the confidentiality.[27]

Confidentiality of informations disclosed by a company to a competition authority conditions its economic survival. For this, prudence and restraint have to guide the activity of competition authority.

United States Congress adopted in 1994 a law regarding the international assistance in the matters of applying (enforcing) antitrust measures (International Antitrust Enforcement Assistance Act). This law allows the american competition authorities to take all measures with a view to obtaining informations requested by foreign competition authorities. At the same time, they can ask and obtain from the foreign authorities all necessary confidential informations.[28]

The agreement with the USA has made the object of an action in annulment submitted by France, motivating that was signed by the Commission without mandate from the Council.

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[22] Ibid, p. 71.
[23] Ibid, p. 71.
[24] Ibid, p. 72.
[25] Ibid, p. 77.
[26] Ibid, p. 80.
[27] Ibid, p. 77.
[28] Ibid, p. 78.

The Court of Justice has rendered void (annulated, rejected, canceled) the agreement appealing to the incompetence of the Commission to sign it.

For this was necessary a common decision of the Commission and the Council in April 1995, in order to overcome this problem of competence.

In spite of this fact, euro-american cooperation in the matter of competition was strengthened by a new agreement, of 4th of June 1998, completing the previous one.

It stipulates that one part of the agreement must take steps against an anticompetitional practice having an effect on the territory of the soliciting part. It results from here that that the soliciting part didn't use any legal provision in the field. As consequence, a practice that infringes the rules of competition and has no effects on the soliciting part, will determine the application of the rules of the soliciting part.

Finally, in case that respective anticompetitional practice has effects on both parts territory, will be put to action the rules of the most affected part.

The characteristics and the role of WTO (including the field of competition) represents one of the expressions of the process of globalization of the economy, process that started in the thirties, continued after the Second World War and expanded unprecedently after 1990.

At the beginning, globalization appeared as a reaction against the economic nationalism (the contingency of goods importing, increase of custom taxes, control of economic exchanges, handling of the exchanges, with a purpose to create competitional advantages for the national producers).[29]

Starting of the globalization process had initially as goal (purpose, scope) the organizing of the international economic relations based on opening and cooperation, as a modality of avoiding in the future of a world conflagration.

First ideas regarding this have got expression within the bilateral anglo-american relations during World War II, getting expression later in the three pillars of international economic order, respectively World Trade Organization (WTO-OMC), International Monetary Fund (IMF-FMI) and BIRD (International Bank for Reconstruction and Development).[30]

FMI and BIRD developed as a follow-up of the Breton Woods 1944 Conference.

In 1948 has been signed the Havana Charter, aimed to give birth (or to give rise) to the International Organization of Commerce (OIC). Even so, this Charter has never been ratified, having instead a provisional agreement that became later GATT (General Agreement on Tariffs and Trade). Afterwards, as a follow to Uruguay Round, has absorbed GATT within the new architecture of the international business (trade) system.

A very important role in the process of globalization is played by the G 8 Group (United States of America, Canada, Great Britain, France, Germany, Italy, Japan and Russia). The yearly meetings of the group reunited in the seventies the head of states and governments of the respective countries. They were joined at the beginning of the eighties by the ministries of finance together with the governors of the national (central) banks. Also participated the president of the Council of the European Union and the president of the European Commission.[31]

Although marked progresses, in the last period globalization was subjected to ample (broad) movements of contestation (disputes). These appeared sometimes as attempts of creation of rival organizations (like World Social Forum of Porto Allegre).

Contestations (disputes) are motivated by:[32]

- the growing power of multinational companies accompanied by the decrease of the power of national governments as well as acceleration of fusions and mergers of companies, delocalizations of activities, massive lay-offs, etc;
- the accentuated mobility of capitals;
- insufficient attention towards environment protection and natural resources protection;
- growth of gaps between rich and poor states (countries), as well as the poor states running

[29] J.J. Rey, J. Dutry, *Institutions Economiques Internationales*, Bruylant, 2001, p. 18.
[30] Ibid, p. 19.
[31] Ibid, p. 36.
[32] Ibid, p. 38.

into debts;

- the gap between the action of the international organizations and public opinion concerns.

5. Conclusions

The contests show a hybrid character, coming first from non-government organizations.

International organizations should face unjust reproaches and founded criticism. Among these we count the level of transparence of their activity as well as taking into consideration of non-economic problems.

Another aspect that must be taken into consideration within the international economic relations is elimination of rivalry existing before 1990 between the market economies and the centralized state economies. In the former communist countries, the market economy, although determined economic growth, brought about insatisfactions too.

The market economies support the difference (unbalance, lack of poise) between the globalization sustained by the technological progress and erosion of regulating powers of national authorities.

But the market needs efficient regulating powers, in order to ensure a correct functioning.

At the same time, without a mondial (world) state, international organizations can play this role, if they have the necessary means.

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