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THE CASE-LAW OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES CONCERNING THE LAW OF THE WORLD TRADE ORGANIZATION AND THE AUTONOMY OF THE EUROPEAN COMMUNITY IN THE IMPLEMENTATION OF ITS COMMON COMMERCIAL POLICY

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Abstract: *In the last years some authors have questioned the autonomy of the European Community when implementing its commercial policy, due to the amount of trade agreements signed by it and especially because of the commitments acquired in the WTO. There is no doubt that the compulsory fulfilment of these commitments is a conditioning factor with regard to the implementation of the Common Commercial Policy, but that doesn't make the autonomy of the EU disappear in order to put its model of commercial policy into practice. In this respect, it's necessary to underline the ample discretionary margin in the management of the commercial policy that the Court of Justice of the European Communities recognizes in favour of the EU institutions within the framework of its case-law related to the denial of the direct effect of the WTO agreements, as we analyze in this paper.*

Key words: *WTO agreements, Direct effect, Common Commercial Policy.*

1. Introduction

Since its creation in 1957, the European Community has carried out important activities internationally, which has consolidated its position as a vital player in the international field.

This role has particular significance in the economic and commercial sphere [1], which is unsurprising if we bear in mind that the European Union constitutes the main trading power on a world level.

This performance of the European Union on an international level becomes particularly important in the current climate, as we are witnessing the increasing globalization of the economy and a strengthening of the multilateral trading system following on from the strong boost that it received as a result of the creation of the World Trade Organization in 1995.

In fact, the European Community has shown itself to be particularly active both

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on a multilateral level, taking on a leading role in the World Trade Organization (WTO), as well as on a bilateral or regional level, when it comes to finalizing trade agreements with non-member countries, thus acquiring numerous international agreements within the commercial sphere.

Although, in principle, one could maintain that a limited margin of discretion currently exists for the EU institutions as regards the management of the Common Commercial Policy, specifically due to the commitments agreed on in the World Trade Organization and those arising from the intense network of preferential agreements signed by the European Community with non-member countries, in our opinion this position is more than debatable.

There is no doubt that the compulsory fulfilment of the international commitments that link the European Community is a conditioning factor with regard to the implementation of its Common Commercial Policy, but that does not make its autonomy disappear in order to achieve its own model of commercial policy.

In this respect, it is necessary to underline the ample discretionary margin in the management of the Common Commercial Policy that the Court of Justice of the European Communities recognizes in favour of the EU institutions, despite the existence of such international engagements.

This recognition takes place within the framework of its case-law related to the denial of the direct effect of the General Agreement on Tariffs and Trade (GATT)[2], and subsequently of the World Trade Organization's agreements[3], in which the Court specifically emphasizes the flexibility of such agreements. We will hereby proceed to briefly analyze the position of the Court of Justice of the European Communities on this matter.

2. The Case-Law of the Court of Justice of the European Communities Concerning the Direct Effect of the World Trade Organization Agreements within the European Union

As is well known, in accordance with the aforementioned case-law, the Court of Justice of the European Communities has made it clear that the international agreements that are legitimately signed by the European Community form an integral part of the EU legal system, and that the regulations included in such agreements that are sufficiently necessary and unconditional may produce direct effect. However, the Court of Justice of the European Communities denies this possibility in relation to the regulations included in the GATT, due to this agreement's great flexibility when taken as a whole, in particular those regulations through which the possibility of repeals are conferred, as well as the possibility of adopting measures against situations of exceptional difficulty and the system considered for the resolution of conflicts between the contracting parties.

The Court of Justice of the European Communities equally denies the possibility that the regulations included in the WTO agreements produce direct effect, due to reasons similar to those mentioned in relation to the GATT, in other words the flexibility of such agreements. Indeed, the changes involved in the WTO's new legal framework have not led to so many changes for the Court of Justice of the European Communities that it is necessary to adopt a different position to that held with respect to the GATT[4], despite recognising the notable differences that are included in the WTO agreements in

relation to the regulations of the GATT of 1947[5].

Indeed, the flexible nature of the agreements can lead to a change in the duty of fulfilling the commitments that arise from them and, therefore, widen the WTO Members' scope for action, which at the same time means recognizing a sufficient level of autonomy of the members in the implementation of their trading policies.

The flexibility of the World Trade Organization agreements is mainly established by the important role that is reserved for negotiation between the Parties in the framework of the system resulting from such agreements (as was the case with the GATT).

In this sense, the Court of Justice of the European Communities emphasizes that even though the main objective of the WTO's dispute settlement body (as emerges from the understanding relating to the regulations and procedures that govern the settlement of disputes) is, supposedly, the withdrawal of certain measures if they are proved to be incompatible with the regulations of the WTO, this understanding had however anticipated the possibility of obtaining a clearance as a provisional solution until the withdrawal of the incompatible measures, in the case that it is not possible to immediately withdraw such measures[6].

In light of these circumstances, it also states that imposing the judicial bodies with the obligation of refraining from applying the domestic legal regulations that are incompatible with the WTO agreements would consequently deprive the contracting parties' legislative or governing bodies from the possibility (granted them in article 22 of the aforementioned Understanding) of reaching, although only temporarily, negotiated solutions[7].

Likewise, the Court of Justice of the European Communities also argues its refusal to recognize the direct effect of the WTO agreements based on the principle of reciprocity, since it states that the lack of reciprocity of third parties (who have reached the conclusion that such agreements are not included amongst the regulations that their judicial bodies take into account when controlling the legality of their domestic legal regulations) entails the risk of an imbalance being produced in the application of the WTO's regulations if direct effect were to be recognized for its regulations in the European Union.

In this respect, the Court of Justice of the European Communities emphasizes that the agreement by which the WTO is established, as well as its Annexes, continues to be based on the principle of "reciprocity and mutual advantages" (as already occurred with the GATT), with the High Court declaring that "*to accept that the role of ensuring that those rules comply with Community law devolves directly on the Community judicature would deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners*"[8].

3. The Autonomy of the European Community in the Implementation of the Common Commercial Policy

As we have seen in the previous paragraph, the Court of Justice of the European Communities emphasizes the need to maintain the same *"discretion"* for the Community as that which the legislative or executive bodies of the WTO's Members dispose of, in order to negotiate temporary solutions for the non-fulfilment of certain commitments arising from the agreements taken in the framework of the WTO.

In this respect, one can declare that the EU institutions continue at present to enjoy

a high level of autonomy in the implementation of the Common Commercial Policy, despite the commitments acquired by this policy in the framework of the World Trade Organization[9].

Furthermore, as is pointed out by the Court of Justice of the European Communities, the WTO Agreements "*do not determine the appropriate legal means of ensuring that they are applied in good faith in the legal order of the contracting parties*"[10], and consequently the *"discretion"* of the European Community goes beyond the negotiation of temporary solutions for the specific non-fulfilment of such agreements, by also covering the free choice of the measures that it considers to be most appropriate to fulfil the commitments arising from the agreements.

The report of the Special Group in charge of examining, in the heart of the WTO, a difference between the Community and the United States in relation to sections 301-310 of the North American Trade Act of 1974, fully coincides with the above statement.

This report shows that in order to assess whether the national legislation of a WTO Member complies with the obligations arising from the WTO's regulations, one must take into account the huge diversity of the Members' legal systems. Thus, compliance can be achieved by different means in the different legal systems, with the final result being what counts, and not the way in which the result is reached. The Special Group concludes this reasoning by stating that only by understanding and respecting the specific features of each Member's legal system, can a correct assessment of compliance by carried out[11].

Therefore, a significant level of discretion exists for the Members of the WTO when it comes to ensuring their legislation is in accordance with the obligations arising from the regulations of the WTO, and in this respect these must be given "*the maximum autonomy* (underlined by the author) *in ensuring such conformity and, if there is more than one lawful way to achieve this*, (it) *should have the freedom to choose that way which suits it best*"[12].

Consequently, it is not always necessary to substantially alter the domestic legislation in order to fulfil the obligations arising from the WTO agreements, meaning that the European Community continues to maintain considerable room for manoeuvre in this respect as well.

In fact, in relation to the Anti-dumping Agreement, the European Community makes known the Agreement on Subsidies and the Agreement on Safeguards, all of which are annexes to the Agreement by which the World Trade Organization is established, which "*decided that in view of the extent of the changes brought about by these new Agreements and in order to ensure an adequate and transparent implementation of the new rules, it would be appropriate to transpose the texts of the new agreements into Community legislation to the extent possible, and for this purpose the above Agreements, rather than the prior Community legislation, were directly taken as the basis for the new legislation*"[13].

Consequently, the close link that exists between EU legislation in these fields and the different WTO agreements appears to be the result of an independent decision made by the European Community in order to comply with the commitments arising from the above-mentioned agreements, and not an inevitable obligation imposed by such agreements.

However, it must also be stressed that, in the light of the case-law of the Court of Justice of the European Communities, not all the commitments that the EC takes on in a conventional manner can be

compared. In this respect, the High Court distinguishes between the WTO agreements and the agreements signed by the Community with non-member countries that create special relations of integration or that introduce a certain asymmetry of obligations, because the latter are not based on the principle of "reciprocal and mutually advantageous arrangements". This justifies the fact that the High Court acknowledges that certain stipulations of the latter agreements may produce direct effect[14].

In this way, one can maintain that the EU institutions' margin of discretion is greater when it comes to complying with the commitments taken in the heart of the WTO than in the case of those arising from bilateral or regional agreements.

In other words, the conditioning factor of the European Community's commercial policy from a domestic point of view is less intensive when the commitments are taken on in the setting of the WTO, rather than when commitments are agreed on at a bilateral or regional level.

4. Conclusions

We can therefore reach the conclusion that the European Community enjoys a sufficient level of independence that allows it to present its model of commercial policy in the different acts that is takes on unilaterally[15].

Indeed, the obligatory compliance by the Community of the international agreements is a conditioning factor as regards the implementation of the Common Commercial Policy, but it does not remove the Community's autonomy to carry out its own model of commercial policy.

In this respect the Court of Justice of the European Communities has commented, recognizing a wide margin of discretion in favour of the EU institutions as regards their case-law relating to the denial of the direct effect of the GATT, and subsequently of the WTO agreements.

Similarly, it must also be emphasised that, in the light of the case-law of the Court of Justice of the European Communities, not all the agreements made by the Community in a conventional manner can be compared, distinguishing in this respect between the WTO agreements and the agreements signed by the Community with non-member countries creating special relations of integration or introducing a certain asymmetry of obligations.

Consequently, one can declare that the European Community's margin of discretion is greater when it comes to fulfilling the commitments made in the heart of the WTO than for the commitments arising from certain bilateral or regional agreements.

In short, the intense activity displayed by the European Community regarding trade on an international level, through the numerous agreements with non-member countries as well as the commitments made within the framework of the WTO, does not prevent the European Community from continuing to use its own model of commercial policy in the relations that it maintains with non-member countries and international organisations, nor does it prevent the European Community from having its own perspective when creating the model.

References

1. See LIÑÁN NOGUERAS, D. J.: "Las relaciones exteriores de las Comunidades Europeas (II)", in MANGAS MARTÍN, A. & LIÑÁN NOGUERAS, D. J.: *Instituciones y Derecho de la Unión Europea*, Tecnos, 5º ed., Madrid, 2005, p. 664, which mentions the "*EC's long journey as an international economic player and its*

active participation in the regulation of international economic relations". Similarly, ESTEVE, F. & PI, M. (eds.): *La proyección exterior de la Unión Europea en el Tratado constitucional. ¿Mejora o maquillaje?*, Fundació CIDOB, Barcelona, 2005, p. 15, point out that the importance of the role played firstly by the European Community, and then by the European Union, internationally in this economic and commercial sphere, cannot be disputed.

2. See Judgment of 12 December 1972, *International Fruit Company* (21-24/72, *Rec*. p. 1219); judgment of 24 October 1973, *Schlüter* (9/73, *Rec*. p. 1135); judgment of 19 November 1975, *Nederlandse Spoorwegen* (38/75, *Rec*. p. 1439); judgment of 16 March 1983, *SIOT* (266/81, *Rec*. p. 731); judgment of 16 March 1983, *SPI and SAMI* (267-269/81, *Rec*. p. 801); judgment of 16 March 1983, *CSS and GS* (290-291/81, *Rec*. p. 847); judgment of 5 October 1994, *Germany/Council* (C-280/95, *Rec*. p. I-4973).
3. See Judgment of 23 November 1999, *Portugal/Council* (C-149/96, *Rec*. p. I-8395); judgment of 14 December 2000, *Dior/Assco* (C-300/98 and C-392/98, *Rec*. p. I-11307). See the following on these judgments CASTILLO DE LA TORRE, F.: "OMC, competencia prejudicial y efecto directo – la sentencia *Dior*/Assco", *Revista de Derecho Comunitario Europeo*, n.º 9, 2001, pp. 281-302; DÍEZ-HOCHLEITNER, J., ESPÓSITO, C.: "La falta de eficacia directa de los Acuerdos OMC (A propósito de la sentencia del Tribunal de Justicia de 23 de noviembre de 1999 en el asunto C-149/96, *Portugal c. Consejo*)", *Gaceta Jurídica de la UE*, n.º 206, pp. 10-23; EGLI, P., KOKOTT, J.: "European Community – WTO agreements – effect of international agreements in European Community law – ability of individuals and member states of European Community to rely on WTO agreements", *American Journal of International Law*, vol. 94, n.º 4, 2000, pp. 740-745; MENGOZZI, P.: "La Cour de justice et la applicabilité des règles de l'OMC en droit communautaire à la lumière de l'affaire Portugal c. Conseil", *Revue de Marché Commun et de la Union Européenne*, n.º 3, 2000, pp. 509-522; ZONNEKEIN, G. A.: "The Status of WTO Law in the EC Legal Order. The Final Curtain?", *Journal of World Trade*, vol. 34, n.º 3, 2000, pp. 111-125.
4. This interpretation is corroborated in the statement of the last legal reason of the Council Decision 94/800/EC, of 22 December 1994, concerning the conclusion on behalf of the European Community of the WTO agreements *(OJ L 336*, 23.12.1994, p. 1), which literally reads as follows: "*Whereas, by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts*". It is worth mentioning, as do DÍEZ-HOCHLEITNER, J., ESPÓSITO, C.: "La falta de eficacia directa de los acuerdos OMC en la Unión Europea", in REMIRO BROTONS, A., ESPÓSITO, C. (eds.): *La Organización Mundial del Comercio y el Regionalismo* Europeo, Dykinson, Madrid, 2001, pp. 163-164, that in an order on 2 May 2001, pronounced in the case C-307/99, the Court of Justice of the European Communities considered its case-law on this matter to be consolidated.

5. There are many references on the GATT's and WTO's agreements' lack of direct effect. As well as the bibliography mentioned in previous notes, see, DÍEZ-HOCHLEITNER, J.: *La posición del Derecho Internacional en el Ordenamiento comunitario*, McGraw-Hill, Madrid, 1998; *BOURGEOIS*, J. H. J.: "The Court of Justice of the European Communities and the WTO: Problems and Challenges", in WEILER, J. H. H. (ed.): *The EU, the WTO, and the NAFTA. Towards a Common Law of International Trade*, Oxford University Press, Oxford, 2000, pp. 71-123; EECKHOUT, P.: "The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems", *Common Market Law Review*, vol. 34, 1997, pp. 11-58.
6. See Judgment of 23 November 1999, *Portugal/Council*, *cit.*, section n.º 37.
7. See section. n.º 40 of the judgment of 23 November 1999, *Portugal/Council*, *cit.*
8. *Ibid*., section n. 46.
9. Although, as stated by DÍEZ-HOCHLEITNER, J. & ESPÓSITO, C.: "La falta de eficacia directa de los Acuerdos OMC en la Unión Europea", *loc. cit.*, p. 167, the important role given to the negotiation between the parties in the heart of the WTO should not lead us to the conclusion that we are not before true legal obligations.
10. Judgment of 23 November 1999, *Portugal/Council*, *cit.*, section n.º 41.
11. See Report of the Panel, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, of 22/12/1999, Section 7.24.
12. *Ibid*., Section 7.102.
13. WTO: Trade Policy Review. European Union. 1995. Report by the European Communities, WTO Publications Service, Geneva, 1995, vol. II, p. 36.
14. See section n.º 42 of the judgment of 23 November 1999, *Portugal v. Council*, *cit*.
15. For information about the European Community's model of commercial policy, in particular as a result of the adoption of the Lisbon Treaty, see CEPILLO GALVÍN, M. A.: "Los objetivos de la Política Comercial Común a la luz del Tratado de Lisboa", in MARTÍN Y PÉREZ DE NANCLARES, J.: *El Tratado de Lisboa. La salida de la crisis constitucional*, Iustel, Madrid, 2008, pp. 373-392.