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1. ON THE INCORPORATION OF WTO OBLIGATIONS IN THE EUROPEAN UNION TRADE AGREEMENTS: THE DISPUTE WITH UKRAINE ON THE TIMBER EXPORT BAN AND THE ENVIRONMENTAL EXCEPTIONS

1. On June 20th, 2019, the European Union, having ascertained the impossibility of reaching a mutually acceptable solution through the conciliation phase already started on January 15th, activated for the first time the contentious phase of the dispute settlement system of the Association Agreement with Ukraine (from now on: AA) and requested the establishment of a panel of experts aimed at verifying the compatibility, with the AA itself, of measures of restriction of the export of untreated timber adopted by the counterparty.

Imports into Europe of timber from non-EU countries are on the rise, coinciding with the recovery of industrial production of paper and furnishings, but recent surveys show that about 30% of timber imported into the EU from non-European countries has an illegal origin, especially as regards its methods of retrieval.

Let us remember that the enforcement of international trade rule was identified as one of the priorities of the European Commission strategy «Trade for all. Towards a more responsible trade and investment policy».

As for the AA, in addition to obligations of trade liberalization aimed at establishing a «Deep and Comprehensive Free Trade Area» (DCFTA), it includes also rules on fundamental rights.

The DCFTA, in particular, represents a rather advanced form of integration of a third Country in the EU single market, the most extensive form of cooperation to date ever implemented with Countries that are not contextually candidates to the EU membership: it aims to extend to the associated State the freedoms of movement of goods, services, capital and natural persons (although, it must be said, the latter only enjoy short stays and not for work reasons; the regulation of movements in the latter case remains the sole responsibility of the Member States; see G. Van der Loo, P. Van Elsuwege and R. Petrov).

Art. 1 of the Agreement sets its general objectives, and more precisely imposes the Parties *a)* to favor their gradual approximation, based on common values; *b)* to create a framework in which to strengthen political dialogue in areas of mutual interest; *c)* to promote, preserve and strengthen both regional and international peace and stability, in accordance with the principles of the United Nations Charter and the context of the Organization for Security and Cooperation in Europe (OSCE), such as those set in the 1975 Helsinki Final Act and the 1990 Paris Charter for a new Europe; *d)* to strengthen

economic and trade relations in order to progressively integrate Ukraine into the EU internal market, both by creating a free trade area and by supporting Ukraine's efforts to complete its transition to a market economy, also through the approximation of its legislation to the one of the Union; *e)* to improve their cooperation in the areas of justice, freedom and security, with the aim of strengthening the rule of law and respect for human rights and fundamental freedoms; *f)* to set the conditions for a closer cooperation in other sectors of mutual interest.

Art. 2 of the AA, then, states that the Parties' internal and international activities and policies must be based on their respect for democratic principles, human rights and fundamental freedoms, which constitute «essential elements» of the Agreement itself.

2. In the so-called third generation of human rights, some authors highlight an autonomous human right to live in a "healthy", "adequate", "satisfactory" or "clean" environment that is enshrined in regional instruments such as the African Charter on Human and Peoples' Rights (artt. 16 and 24), the San Salvador Protocol, additional to the American Convention on human rights in the field of economic, social and cultural rights, the Arab Charter on Human Rights (art. 38) (for for an in-depth analysis of the right to the environment as a fundamental right see, for all, F. MUNARI, L. SCHIANO DI PEPE, *Tutela transnazionale dell'ambiente*, Bologna, 2013p. 113 ff.).

Without taking a position on the effective emergence of such an autonomous right in general international law (which, at present, appears to be rather doubtful: see J. LEE, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law*, in *Columbia Journal of Environmental Law*, 2000, p. 283 ff.), we recall that, in EU legal order, art. 37 of the Charter of Fundamental Rights of the European Union provides that «a high level of environmental protection and the improvement of its quality must be integrated into the policies of the Union and guaranteed in accordance with the principle of sustainable development» and that, as regards the EU external relations, art. 21, para. 2, lett. *f)* of the TEU provides that the EU must contribute «to the elaboration of international measures aimed at preserving and improving the quality of the environment and the sustainable management of global natural resources in order to ensure sustainable development».

Among the commitments undertaken by the Parties of the AA there is the one to both improve their «cooperation in the field of environmental protection» and respect the «principles of sustainable development and green economy».

To this end, Chapter 13 of the AA, on «Trade and sustainable development», in art. 289, recalls both the 1992 Agenda 21 on Environment and Development and the 2002 Johannesburg Plan of Implementation on Sustainable Development and, in the art. 290, recognizes «the right of the parties to establish and regulate their own levels of domestic environmental (...) protection».

3. Ukraine, by a series of domestic regulations, adopted the contested ban on the export of unprocessed timber; in 2015 it was extended for 10 years and applied to all types of wood other than pine and, starting from 2017, the export ban was extended to the latter, and became a *total* one.

This resulted in restrictions of trade between the EU and Ukraine, and limited the possibility for European companies to access such raw materials.

At a global level, in recent years, the growth of international trade in forest products has been accompanied by an increase in fears for the environmental impact that this could cause, especially for the decrease of the "native" forests and the increase of "non-native" species, with the risk of reducing biodiversity. It is therefore understandable that the Ukrainian Parliament adopted, on March 20th 2018, a draft law on the conservation of Ukrainian forests and the prevention of illegal export of unprocessed timber.

Also the EU is aware of the environmental relevance of the timber sector: in order to fight illegal logging and protect biodiversity and ecosystem functions and the climate, it adopted the European Union Timber Regulation (see C.M. PONTECORVO, *Recent Developments in the Implementation and En-forcement of the EU Timber Regulation: Signals of an Emerging "Due Diligence Jurisprudence"?*, in *Studi sull'integrazione europea*, 2018, p. 443 ff.).

So, the EU today challenges Ukraine's violation of the art. 35 AA («Import and export restrictions»), which, inter alia, prohibits a Party to adopt or maintain prohibitions and restrictions on the export of any goods destined to the territory of the other Party, with the exception of the derogations permitted by the Agreement itself, or compliant with the provisions of art. XI GATT 1994.

Now, art. 35 not only explicitly refers to art. XI GATT; it also provides that «to this end, its interpretation is incorporated into, and made an integral part of, this Agreement».

As can be seen, therefore, it *incorporates* into the AA both the content of the GATT/WTO prohibition of quantitative restrictions on trade in goods and the regime of the exceptions therein permitted.

The following art. 36 AA («General exceptions»), moreover, provides that no provision of the same «shall be construed in such a way to prevent or enforce by any Party of measures in accordance with Articles XX and XXI of GATT 1994 and its interpretative notes, which are hereby incorporated into and made an integral part of this Agreement ». And, even if not explicitly stated, we think this incorporation must be extended to the GATT *acquis* and, in particular, to the case law of WTO dispute settlement bodies.

Now, export restrictions, previously rather marginal in the multilateral practice of international trade, have become increasingly important, particularly in the last ten years (see B. Karapinar): the analysis of the relevant WTO case law shows that most of the disputes on these issues are generated by the challenging of "unfair" advantages which recurrent Countries think that export restrictions produce to the detriment of foreign competitors, and that such measures, if adopted on raw materials, would reduce access by foreign companies that use them as a basis of their production processes and, therefore, would endanger or cancel the benefits of trade liberalization.

The pertaining disputes, therefore, can be contextualized in the dialectic between producing raw materials Countries (that is, at least tendentially, developing Countries) and "transforming" Countries (i.e. industrialized ones), thus also representing one of the elements of the conflict between "North" and "South" of the world. In short, the disputes on the restrictions on exports of raw materials can be read as relating to the competition between States regarding sovereignty over natural resources.

Restrictions on exports of raw materials are also important for the relationships between international trade liberalization obligations and non-trade values: the Countries that adopt them, indeed, often intend to prevent, or at least slow down, the depletion of their natural resources in order to preserve them for the benefit of future generations.

As known, the multilateral discipline of export restrictions contained in art. XI of the GATT – incorporated in the AA – imposes on WTO Members an absolute prohibition of quantitative restrictions on exports, with the exception of some expressed derogations.

In addition to those specific derogations, the WTO system also includes "general" exceptions, aimed at allowing States to derogate from any liberalization obligation in order to protect objectives they consider paramount. Among these, art. XX GATT - also incorporated, as we have seen, in the AA - states that, provided that their application is not made in such a way as to represent a means of arbitrary or unjustified discrimination between Countries that are under the same conditions, nor to be a surreptitious restriction of international trade, States can adopt measures derogating from their obligations of trade liberalization which are, among other things, necessary to protect health and life of people and animals, and plant conservation (art. XX, lett. *b)* GATT) and related to the conservation of exhaustible natural resources (art. XX, lett. *g)* GATT).

The WTO system also contains a specific agreement on «Sanitary and PhytoSanitary measures» (SPS Agreement), which, in art. 5, allows States to take into account ecological and environmental conditions.

No reference to the environment is explicitly contained, instead, in the two aforementioned GATT clauses, which, however, have been used by States before the WTO dispute bodies - alone or in combination with the Agreement SPS - to try to justify measures aimed at protecting environmental objectives.

The outcomes were initially poor and, only later, somehow successful: the category of «exhaustible resources» referred to in art. XX lett. *g)*, originally considered applicable only to non-living resources, was subsequently read as including flora and fauna, but the State that aims to use these clauses to justify measures to limit trade for environmental protection is burdened by the proof that the risk to life or health is scientifically proven, and that the measures are necessary and proportionate (see Analytical index of the GATT; WTO Secretariat, *WTO rules and environmental policies: GATT exceptions*).

Now, SPS measures, to which the Ukranian restriction could be ascribed, are also contemplated by AA Chapter 4, which reaffirms the obligations of the parties under the WTO SPS Agreement. With regard to disputes relating to such measures, art. 322 of the AA provides that «the arbitration panel shall not decide on the question but the Court of Justice of the European Union to give a ruling on the question».

4. Let's try to understand if the export ban adopted by Ukraine and contested by the EU can be considered compatible with these international obligations. It must be reiterated that the WTO practice applying art. XX GATT and the SPS Agreement, although has registered a trend of progressive relevance of environmental reasons, only to a lesser extent takes them into account.

Therefore, if the EU wanted to give greater importance to environmental reasons in compliance with the art. 21, par. 2, lett. *f)* TEU, it could contemplate a "decoupling" of bilateral trade rules from the multilateral ones, by drafting specific provisions and exceptions, not dependent on the GATT *acquis*.

If on the one hand, in fact, the WTO rules incorporation guarantees a greater compatibility of the EU trade rules with the multilateral system, thus combating fragmentation, on the other hand, there is high risk of flattening those rules on trade interests, with the pretermission of *other* values.

So, if the Ukraine measures will be read just in the light of WTO practice, it is likely that they will be declared incompatible with liberalization obligations, and this especially if Ukraine will fail to prove there is a scientific assessment of the existence of environmental risk and that, in application of the necessity criterion and the proportionality principle, there were no less restrictive alternatives to the adopted measures.

The panel, on the other hand, could offer greater relevance to environmental reasons by interpreting the WTO rules incorporated in the AA in the light of the principle of systematic interpretation of the art. 31, par. 2 lett. *c)* of the Vienna Convention on the Law of Treaties (to which Article 320 of the AA refers) and then coordinate and read them in light of the provisions of AA Chapter 13, which we have seen to be explicitly related to environmental protection.

As for the consistency of the positions of the EU institutions, it should be noted that, just one month before the Commission started the conciliation with Ukraine, the European Parliament, on the occasion of the adoption of a report on the implementation of the AA (2017/2283 (INI)), expressed its concerns for the activities of illegal or excessive exploitation of natural resources (such as amber, coal, sand and timber), which damage and endanger landscapes and habitats and prevent a sustainable management of natural resources; it therefore welcomed the adoption of the aforementioned draft law on the conservation of Ukrainian forests and the prevention of the illegal export of timber, believing that any liberalization of the timber trade should be placed in a legal context that fights and prohibits illegal exports.

The assumption, by EU institutions, of mutually incompatible positions towards international partners, could be not fully compatible with the principle of horizontal coherence expressed by art. 21, par. 3 TEU, according to which «the Union ensures coherence between the various sectors of external action and between these and other policies».

Moreover, if the panel considers the disputed measures falling within the scope of application of AA Chapter 4, relating to SPS measures, it could not decide on the merits of the dispute but, pursuant to art. 322 AA, would be obliged to refer the matter to the Court of Justice of European Union.

The Court has generally proceeded to a case-by-case assessment of the internal conflicts between economic freedoms and fundamental rights, in a condition of "substantial equilibrium", that is to say without *a priori* guaranteeing prevalence to any of them.

In the present case, moreover, the Court would operate as a "real" international court and could, therefore search a balance between economic freedoms and fundamental rights without being harnessed by the need to evaluate the effects of international law in EU law (on these issues see C. Eckes).

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