THE ACQUIS COMMUNAUTAIRE WITHIN TTIP - THE CASE OF ROMANIA

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Abstract: *On every enlargement, European Union applies to all its new Member States a set of common legal norms, known under the name of acquis communautaire, norms that also include multilateral or bilateral international agreements the EU is part of. Currently, the EU and the US are negotiating a regional trade agreement, namely the Transatlantic Trade and Investment Partnership (TTIP), of which effects over the Member States will be established according to their particular national legal order, as part of the EU acquis, presented under the form of secondary EU legislation. As part of the 28 EU Member States, Romania's legal system will apply the European international norms that regard the dispute resolutions that might occur among states or states and investors, in accordance with the European's Court of Justice (ECJ) jurisprudence, as it will be provided by the legal text of TTIP, after it will be adopted, ratified and implemented by the EU, and subsequently, by each of the European Union's Member States.*

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Introduction

Divided into 31 chapters, the European Union (EU) acquis represents the accumulated legislation, legal acts together with the court decisions which constitute the EU legislative baseline. Within each of the EU enlargements, the accession countries are required to adapt their legislation in the relevant areas, to the EU acquis communautaire, in the sense of harmonizing their national regulatory framework with the EU law (Kasteng, 2014).

Regional trade agreements the EU is part on, represent a piece of the ongoing process of developing the acquis. International law, that includes multilateral or bilateral international agreements, like the Transatlantic Trade and Investment Partnership (TTIP), represent separate legal orders. The legal effect that an international treaty might have in a given national order is being determined by the state's legal order, and not by the international law. The principle in regard with an international legal agreement that has to have legal effect within the European Union's legal order, states that provisions need to be firstly implemented within the EU, by adopting or amending EU secondary legislation (Gerstetter *et al., 2013).* Once the process is completed, the international agreement has the same legal effect as EU law and needs to be properly implemented, in accordance with its international legal provisions.

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The Transatlantic Trade and Investment Partnership is a currently negotiated free trade agreement between the European Union and the United States of America. The negotiations started in July 2013, after the established High Level Working Group on Jobs and Growth issued a report through which it recommended for the negotiations to start. It aims to bring EU and US economies closer together (European Commission, 2013) by working on setting global standards and a greater compatibility between the two actors' regulations.

The practical impact that TTIP would have on the EU acquis would depend, inter alia, on the legal effect of the bilateral trade and investment agreement TTIP pretends to have, within the EU legal order and also on the way it would be enforced. Enforcing TTIP would depend not only on the extent the parties would implement it and the effects it might have on the domestic legal order of the Member States, but also on the level to which they can rely on additional mechanisms, in order to enforce it.

1. The direct effect on the EU trade and investment agreements

The common way used by the companies that wish to seek remedies for determining EU to fail to implement an agreement it has concluded, is to raise concerns before Member States' courts, or, subsequently, to the European Court of Justice (ECJ). The jurisprudence shows that such cases where ECJ had to decide whether an international trade and/or investment agreement that has been previously concluded and ratified by the EU, has a direct effect inside the EU legal order, have previously been met. Within these circumstances, a complaint may rely on the agreement that the EU concluded, before a Member State's courts and in particular, the problem consists in whether ECJ can or cannot invalidate EU actions.

EU law uses the concept of "direct effect" as a provision of an EU treaty that can be used as a basis for a lawsuit within a Member State's courts. Within its jurisprudence, ECJ's main position is that a plaintiff can rely on the European Union's international legal provisions only in the case they are capable of conferring rights to the citizens of the Community (Gerstetter *et al*., 2013). Within this type of circumstantial cases, the European Court of Justice assesses the cases by analyzing the subject matter, the purpose of the rules and whether the international legal provisions that comply with the case are "unconditional and precise obligation" (ECJ, 1982).

ECJ also refers to the cases of multilateral trade agreements and WTO agreements, where it positions that they have no direct effect over the nationals, due to the fact that they have as a base international negotiations that are considered to be flexible in regard to their provisions (ECJ, 1972).

In the case where WTO law would have a direct effect within EU legal order, ECJ stands to the point where the executive and legislative branches would be deprived of the ability of freely negotiating, and would also lead to imbalances within the relation with the trade partners that do not comply their national legal order with the WTO law. In the cases concerning EU's bilateral agreements, the international trade law does not generally have a direct effect.

In regard with the lack of direct effect of the WTO law over the EU's compliance with trade and investment agreements it has ratified, concerns are settled under the provisions of Treaty on the Functioning of the European Union (TFEU). Within this internal EU legislative organ, Art. 340 (2) enunciates that in the cases of non-contractual liabilities, the Union shall act in accordance with the general principles that are common to the laws of the Member States i.e. the international general accepted principles (TFEU, 2012), commonly known as acquis communautaire. The exception of this rule recognized by the ECJ asserts that a complainant is allowed to invoke WTO law in contradiction with the provisions of the EU law in the case when the specific norms of EU law were adopted specifically in order to implement WTO law (ECJ, 2005). More precisely, ECJ ruled that "It is only where the Community has intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules" (ECJ, 2005).

ECJ took the abovementioned decisions in respect with the WTO provisions and considering the multilateral trade law. There is no reason to assume that in the case of a bilateral trade and investment agreement as TTIP presumes to be after the negotiations will come to an end, EU's position would be different. TTIP represents a specific situation where EU has intended to implement a particular obligation assumed within the treaty text, or an EU measure that refers expressly to a provision TTIP might contain; in such a case (Gerstetter *et al.,* 2013), TTIP would likely have a direct effect within the EU law.

2. Dispute resolution within EU international legal framework

When about a dispute related with the interpretation and compliance with a trade and investment agreement, there can not only be used the national courts but also the judicial institutions at the international level. In this regard, subsequently described, there are two cases of mechanisms that can be used.

The first case relates with mechanisms that allow the states that have the quality of being a party within a dispute, to settle talks among themselves; these situations develop under the name of inter-state dispute settlements, characterized by the fact that one party opines that the other one hasn't complied with its obligations. Within WTO, the inter-state disputes are developing under the WTO Dispute Settlement System (WTO, 2015); in such a case, an inter-state dispute resolution may have a beneficial character in the situation when the respective bilateral agreement contains norms that might be the subject of an international judicial dispute.

The second mechanism that may be used in the cases of dispute resolutions, which are mostly present in the cases of international investment agreements, is the Investor-State Dispute Resolution (ISDR). This procedure is meant to solve the disagreements within the private sectors, mainly companies that are unsatisfied of the fact that a state which is a party to a certain investment agreement, does not coordinate its actions according to the agreements provisions, in the sense of bringing claims against that party by using a judicial forum. Alongside with the judicial systems of the relevant states, ISDR grants the foreign investors with the opportunity of an additional tool in the process of protecting their investments and business expectations. Generally, the protection granted under ISDR offers, has a stronger character than the one provided by the legal systems of the involved states.

Arbitration is a form of dispute resolution outside the national or international courts; within these cases, the parties to the dispute agree to be bound to a decision of one or more persons that must judge the case by existing legal rules. There are several acting bodies that regulate with regards to investor-state arbitration in Bilateral Investment Treaties (BIT's), by which the World Bank's International Centre for Settlement of Investment (ICSID) is better known.

The process of arbitrating a cause involves specifically appointed arbitrators that have the obligation of judging the case under the provisions of the rules of law agreed by the parties; in the case of non-existence of such an agreement, the case will be judged by firstly considering the law of the state involved and secondly, the specific rules of international law. Parties may consent for the arbitral awards to be made public. The most common ICSID cases deal with investors that seek for monetary compensations by bringing to the host state the accusations of behaving unlawfully. In the case when the claim is considered to be justified, arbitrators will award by specifying an amount of damages that the state must pay to the investor; in most of the cases, these awards specify very high amounts. An ICSID decision in such a case is considered to be directly executable, being equivalent to a court judgment for all the ICSID contracting states (ICSID, 2015).

The legal text of the ICSID Convention., at Art.1 (2) uses a wording as "conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States" (ICSID, 2006), meaning that the arbitration procedure may only be used by an organized political community i.e. a state. European Union is a politico-economic union consisting in 28 member states, and not a state by itself; within this case, TTIP might raise concerns from a legal point of view; due to this fact, it is impossible to comply with the conditions set in Art. 67 of the ICSID Convention and to endorse it. However, all the 28 member states of the EU have already ratified the ICSID Convention; within these conditions, investors have the possibility of using ICSID arbitration against the EU member states instead of EU. Given the fact that TTIP has only reached in July 2015 the 10th round of negotiations, EU and US can still agree over using a different arbitral institution to deal with Inter-State Dispute Resolution (ISDR) cases.

3. ISDR within the bilateral trade and investment agreements

In favor of including ISDR in the bilateral investment agreements the EU will be part of, it can be mentioned that within the inter-state dispute resolutions, investors should be able to rely on the political will of their home states, in order to support their actions. From the states' point of view, engaging into an inter-state dispute settlement, might damage the existent relations among trade partners. This argument is not also valid for the case of investor-state dispute resolution, due to the fact that the process is being initiated by the private companies. The administrative and financial costs of the proceedings are supported by the EU or a state, if there is the case when one of these entities initiates the process of an inter-state dispute resolution. But, if there is the case when the process is being open by a private actor, the costs do not have to be covered by the EU.

Another relevant argument for including ISDR in bilateral investment agreements would regard the developing countries whose legal systems are often not very effective, swift or transparent, an additional reason for the investors to have the alternative of using a different legal forum, if necessary.

In this regard, the corporate sector that is actively involved in the TTIP negotiations process has presented its agreement for the inclusion of ISDR clause within the final negotiated text. US has implemented in 2012 in its Bilateral Investment Treaty Program (BIT) a series of ISDR provisions that are meant to improve the existing legislation in respect with the area of transparency (U.S. Department of State, 2015). EU does not currently have a BIT model to apply; despite this fact, reports of the EU Commission circulated among Member States a draft document that dealt with ISDR provisions to be applied and respected within the future EU investment agreements (Gerstetter *et al.*,

2013). TTIP negotiations will have to overcome the main existing differences between the US's BIT and the EU Commission's draft document. In this respect, the Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America that was issued in 2013, specify a set of conditions for EU to respect, when negotiating over ISDR within TTIP (Council of the European Union, 2014).

An investment agreement must have substantive provisions in the case when an investor makes a claim and wins the case within an arbitral court. The decisions in the investment cases given within the arbitral courts may not be used as a consistent body of law, meaning that they are not to be considered as jurisprudence, but they are very much case-specific. Due to this fact, national or international tribunals may refer to arbitral decisions in respect with their interpretation of a case. TTIP's negotiated provisions include expressions as "fair and equitable treatment" that in the light of the existing treaty language, may be interpreted by the international arbitrators in both for and against involved states, attitude that is often criticized by the literature (Gstrein *et al.* 2015).

As a concluding remark, TTIP would contain widely framed essential provisions (Gerstetter *et al.,* 2013) concerning investment protection in regard with the Member States' regulatory freedom that, if combined with the ISDR legal framework, might have a negative impact over the actions concerning the public interest of the EU. There are certain ways through which this risk could be avoided; firstly, the ISDR specifications could not be inserted at all within the TTIP legal text, or if not avoided, there could be used a pre-condition for using it. Secondly, ISDR could be inserted under the form of remedying deficiencies or limitations of existing legal international rules and systems. A strong argument of not inserting ISDR within TTIP text is that such provisions aren't needed, since there is a long trade history among EU and US and that foreign investors may use this highly evolved and stable relationship in order to seek protection under the domestic legal systems, where the risk of being treated unfairly because of the treaty language interpretation, is considerably reduced. A third valid argument regards with introducing ISDR provisions within TTIP text, in relation to the benefits that the potential investors might have; in such a case, a special attention should be given to the wording of the agreement, as not to affect the parties right to regulate. Anyhow, existing treaty language interpretations could be suggested to be used in an investment-friendly manner within the international arbitral courts awards (Gerstetter *et al.,* 2013).

4. Romania's legal implications under TTIP acquis

TTIP will represent a mixed agreement that after finishing the negotiations, will be subject of approval for the European Parliament and ratification by all the 28 Member States. Considering the

fact that the internal legal system of each Member State is different, TTIP might not only require the approval of the national parliaments, but also the one of the governments, parliaments and chambers that represent the regional level (The European Committee of Regions, 2015).

Romania joined the European Union within the 2007 EU enlargement wave, becoming a Member State with full rights as considered by the European Commission, on the 1 of January of the same year.

In support of the EU accession, after signing the official EU application, Romania started implementing a number of EU norms on a series of different areas known under the term of acquis communautaire, restoring internal economic and judicial structures, fact that influenced it's regional relations.

According to Van Gend en Loos criteria (Benvenisti *et al., 2014)*, the Treaties the EU is part of, have a direct effect over the national courts. In the case when TTIP will be concluded, along with the other 27 national parliaments of the Member States of the EU, the Romanian national parliament will have to also approve it, in order for TTIP to be enforced.

Since TTIP would have a direct effect over the EU law, Member States legal systems, as in the case of Romania, will have to comply with the provisions of the new adopted treaty, determining the national Courts to rule according to its contents, only after the EU will adopt it, determining the Member States to apply it as secondary EU legislation.

When about interpretation of the legal text of the treaty, Romania will use the international mechanisms the EU recommends as being suitable for the cases when the state is a party within a international state to state or investor- state dispute, or in the case of ICSID settlements, that according to the ECJ jurisprudence, prevail over the national laws. Romania would attend as a party to such law suits or international arbitral awards, as an independent self-standing member of the EU, and not through representatives of the Union.

The Romanian internal legal system would support the investors in their actions, in the case of ISDR within TTIP provisions. ISDR provisions are meant to improve the legislation of both EU and the Member States; under this light, until the TTIP text will be concluded, ratified and implemented, the international arbitrators may interpret the existing treaty language on both ways in regard with the state involved.

As previously used in such cases, ECJ jurisprudence represents the baseline for the national Courts in support of taking decisions in disputes concerning norms of bilateral treaties' applicability.

When concluded, TTIP will condition the Member States, including Romania, to comply with every requirement under the EU acquis, meaning that the provisions of this bilateral trade and

investment treaty will affect all the sectors involved, in all the EU member states, reinforcing its primary goal of setting standards for economic globalization (Frankfurter Allgemeine, 2015).

Final Remarks

TTIP future agreement is about the way two of the World's bigger markets can bridge their divergences, and set regulations and standards that are meant to support their collaboration and enforce the common regulation ground as being a standard setting power.

The two parts that are currently negotiating over TTIP, EU and US, have different traditions concerning the regulatory approaches that they use. In this regard, the European Union's regulation system is supported by *ex-ante* regulation and by the public intervention; this behavior is known under the name of precautionary principle, which combined with the Common Market's provisions, ensure to the EU a high role within the international standardization. On the opposite side, the United States legislation is rich in provisions concerning liability regulations and jurisprudence, determining it to rely more on the market.

TTIP is meant to determine a larger cooperation among the two negotiators, aiming to become a so-called "living agreement" where all the Member States of the EU will be actively involved within the cooperation with the United States of America, by upgrading their existing rules, regulations and standards by issuing new provisions under TTIP acquis.

Due to the EU regulatory formation assumed under the legal clauses of the Treaty on the Functioning of the European Union, every bilateral treaty to which EU ratified becomes a part of the EU acquis communautaire, as secondary legislation. Given this situation, every EU Member State will have to adopt and implement it within its national legislation and use the new Treaty provisions within legal courts on national and international level.

In the case when TTIP will be concluded, governments, parliaments and chambers of the EU Member States will have to approve it, in order for this trade and investment treaty to have a direct effect and become a part of the EU acquis communautaire.

As part of the European Union, Romania will beneficiate from the provisions of TTIP, applying its rules both on national and international level, within courts and arbitral forums, by using ISDR provisions and ICSID settlements, reinforcing and supporting the TTIP main goal, that of boosting EU and US economies and changing the global economy's rules of play.

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