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The Summer 2008 Georgian Conflict: International Actors and the Law on the Use of Force

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This article evaluates, from a legal-technical perspective, the conduct of the conflicting parties during the armed conflict in Georgia in Summer 2008. The objective of this article is to discuss the conflict as it occurred from the point of view of the law on the use of force and to analyze the various theoretical doctrines invoked by the parties in justification of their actions.

In doing so, the current writer limits himself to an analysis of merely those parties of the conflict which were, on the level of international relations, openly recognized as sovereign states at the time the conflict started, i.e. Russia and Georgia. Various separatist groups are therefore omitted from the scope of this article. Similarly, as international actors are currently rapidly changing their views concerning newly self-proclaimed states, be it Kosovo (whose case - an advisory opinion - is, at the time of writing, pending before the ICJ) or South Ossetia, this matter is not appropriate for a responsible analysis at the time being and it is therefore omitted from the picture for the purpose of this article.

It will be up to historians in a few decades time to answer definitively the question as to who actually orchestrated this armed conflict in the first place and who in fact fired the first shot. Any conclusions on this matter still seem to be at this stage premature; as indicated above, this article therefore addresses merely the technicalities of the outbreak of the conflict. What can be said with certainty at the moment, however, is that the armed conflict never fulfilled the threshold for war,[2] as this was never declared; at least not in the legal sense of the word.[3]

As mentioned above, this article will only address matters related to the legality of the use of force by the internationally recognized parties to the conflict. Any such analysis must start by repeating that both parties are members of the UN, and as such they are bound by the UN Charter. As such, the prohibition under Art 2(4) of the Charter on the use or threat of force against the territorial integrity or political independence of any state or any other conduct inconsistent with the Purpose of the United Nations is binding upon them.

I.1. Georgia

In order to answer the question of whether the acts of Georgia were in conformity with international law, one has to start by clarifying whether international law is applicable. This depends on how the area where the hostilities took place is viewed by international law. The answer seems to be negative.

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[2] Hence warring in quotation marks above.
[3] On the distinction between armed conflict in general and war as a subset of the former under contemporary international law see L.C. Green, The Contemporary Law of Armed Conflict (2000), at p.70

Consideration should be given to the Montevideo Convention which has become the customary norm for determining questions of statehood.[4] According to Art 1 thereof, a state as a person under international law exists provided that it has a) a permanent population, b) a defined territory, c) a government, and d) possesses the capacity to enter into relations with other states. The last condition of the above was not fulfilled in the case of South Ossetia, and as a result the attempt of Georgian governmental units to re-conquer the area must be considered as being merely a domestic matter, within the Georgian state. The reason for this conclusion is as follows.[5] Although contemporary law on statehood no longer requires recognition as another criterion for the existence of statehood, a state is only capable of entering into relations (official ones) as long as other states accept its existence as a subject of international law, i.e. recognize its existence at least factually by treating it accordingly. As this had not been the case (at the time of the Georgian offensive) as far as South Ossetia's dealings with any established international player including Russia[6] (officially at least)[7] were concerned, this territorial *de facto* unit was incapable of entering into diplomatic relations with other states. One therefore has to conclude that the conflict, as it was before the start of the Russian counter-action was one of internal strife,[8] perhaps civil war, although with possible indirect foreign involvement.[9] The territory of South Ossetia was Georgian territory.

I.2. Russia

Basing the analysis of what happened in the described conflict on the above criteria (namely that one was dealing with an internal strife within the territory of Georgia), one has to conclude that the Russian Federation breached Art 2(4) of the UN Charter when it directed its armed forces against the territory of Georgia. Such an act directly breached the *duty not to intervene* as well as one of the key principles on which international law as

[4] Convention on Rights and Duties of States (Montevideo Convention) of 1933, 165 LNTS 19

[5] One could perhaps argue that some aspects of what has become international law would apply, namely the law regulating the conduct of internal hostilities. This is not contested by the writer; this article, however, merely focuses on *jus ad bellum*.

[6] The Russian Federation only officially recognized the independence of South Ossetia (and that of Abkhazia) on 26 August 2008. See Medvedev addressing the people of Russia and announcing the recognition of these entities (in official Kremlin's English translation): http://www.kremlin.ru/eng/speeches/2008/08/26/1543_type82912_205752.shtml (8/26/2008 9:30 PM); for the Russian version of this notice see: http://www.kremlin.ru/appears/2008/08/26/1445_type63374type82634_205744.shtml (8/26/2008 9:30 PM).
An abstract from this speech reasoning for the recognition (taken from the above page):
"Tbilisi made its choice during the night of August 8, 2008. Saakashvili opted for genocide to accomplish his political objectives. By doing so he himself dashed all the hopes for the peaceful coexistence of Ossetians, Abkhazians and Georgians in a single state. The peoples of South Ossetia and Abkhazia have several times spoken out at referendums in favor of independence for their republics. It is our understanding that after what has happened in Tskhinval and what has been planned for Abkhazia they have the right to decide their destiny by themselves.
The Presidents of South Ossetia and Abkhazia, based on the results of the referendums conducted and on the decisions taken by the Parliaments of the two republics, appealed to Russia to recognize the state sovereignty of South Ossetia and Abkhazia. The Federation Council and the State Duma voted in support of those appeals.
A decision needs to be taken based on the situation on the ground. Considering the freely expressed will of the Ossetian and Abkhaz peoples and being guided by the provisions of the UN Charter, the 1970 Declaration on the Principles of International Law Governing Friendly Relations Between States, the CSCE Helsinki Final Act of 1975 and other fundamental international instruments, I signed Decrees on the recognition by the Russian Federation of South Ossetia's and Abkhazia's independence."

[7] In fact by this declaration, Russia recognized independence of peoples that it considers its citizens. This may be at costs of internal unrests in Tatarstan, for instance. See: http://www.iht.com/articles/2008/09/10/asia/separatist.php (9/13/2008 10:04 AM)

[8] It is also irrelevant here to go into whether the South Ossetians are possibly being refused the right for self determination. Although one could argue that such a right currently exists as a matter of customary *jus cogens* (perhaps corresponding to Art. I of the International Covenant of Economic, Social and Cultural Rights (1966), 993 UNTS 3, even if this were true it would not mean that until such a right had been successfully made use of, the matter would remain a domestic one within the sovereign territory of a state that possessed international legal personality.

[9] As claimed by Georgia at the UN SC 5952th Meeting: http://www.un.org/News/Press/docs/2008/sc9418.doc.htm (8/16/2008 7:58 PM)

well as the UN is based, namely the principle of *sovereign equality*[10] (and non-intervention). Whether such an act breaching Art 2(4) of the UN Charter was illegal or not depends on whether there exists any doctrine of international law that would provide for exceptions from the *duty to refrain from the use of force*.

Between August 8 and 15, the period analyzed in this article, the representatives of the Russian Federation made several statements that aimed at justifying to the world's public their invasion of the territory of Georgia. These statements can be summarized with the following intended justifications:

a) *Humanitarian intervention*[11] (possibly with the implied suggestions of *the responsibility to protect)*,

b) *Protection of Nationals* as a form of self-defense (civilians[12] as well as military personnel).

Below, it will be analyzed to what extend these statements are relevant in regard to any existing doctrine of international law. The doctrines that these statements are aimed to justify will also be analyzed to see whether they constitute part of positive international law.

Before we proceed to this analysis, however, it is to be noted that the parallelism of the two statements aimed at justification is not unproblematic. As the statements reproduced in footnotes below indicate, various top representatives of the Russian Federation did not follow any uniform line in terms of how to address the claimed protection of the South Ossetian inhabitants. There was a struggle of doctrines present, namely regarding the protection of their own nationals and regarding the intervention for humanitarian reasons to protect the nationals of a foreign country. The doubt that the officials have shown here is based on the fact that about 97 per cent of the inhabitants of the region were granted Russian citizenship on an extraterritorial basis, which is not unproblematic *per se.*

In any case, both these invocations in regard to the justification of the actions of the Russian Army were used in parallel for which they will be analyzed accordingly.

I.2.1. The Responsibility to Protect

The statements of the Russian officials did not distinguish between humanitarian intervention and the responsibility to protect and the latter was never expressly invoked (as far as the writer is aware). There were, however, some implications of this doctrine when the Russian representative to the UN talked of genocide being committed by the Georgian troops. Accordingly, this doctrine is also worth exploring (and indeed commencing with)

[10] Art 2(1) UN Charter
[11] The Russian representatives stated their justification of the actions as being the protection of civilians of Georgian nationality from what was ultimately called genocide by the Russian officials.
Russian PM V.V. Putin:
"The actions of the Georgian powers in South Ossetia are, of course, a crime - first of all against their own people. The territorial integrity of Georgia has suffered a fatal blow."
(9 August 2008; source: BBC @ http://news.bbc.co.uk/2/hi/europe/7556857.stm; 8/16/2008 9:52 PM)
[12] Russian President Dmitry Medvedev:
"I must protect the life and dignity of Russian citizens wherever they are. We will not allow the deaths to go unpunished. Those responsible will receive a deserved punishment."
(8 August 2008; source: BBC @ http://news.bbc.co.uk/2/hi/europe/7556857.stm; 8/16/2008 9:52 PM)
„Russia does not reject the principle of territorial integrity but its foreign policy will take into account the will of the peoples of South Ossetia and Abkhazia, who are unlikely to want to remain in the same state with Georgia. If someone continues to attack our citizens, our peacekeepers, then of course we will answer just as we did."
(15 August 2008; source: ibid.)

since, provided that there existed such a doctrine, it might constitute a valid ground for excluding the possible illegality of such an intervention.

The term of "*responsibility to protect*" emerged in settled form in 2001. As Stahn[13] points out, this doctrine was first developed by the Canadian-based International *Commission on Intervention and State Sovereignty.*[14] Currently there exist four approaches to the term "humanitarian intervention" all of them differing one from another.

Stahn summarizes the first as follows:

"[S]overeign states have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation –but […] when they are unwilling or unable to do so, […] responsibility must be borne by the broader community of states."

According to the proposal of this Commission, it should be the Security Council that is the first "port of call".[15] Although the document briefly discusses also the question of what should happen in case the SC is not functional, it does not provide any suggestion allowing the unilateral action of a single state.

A slightly different approach was taken by the UN High-Level Panel in its report. Here the ambiguity of the text lends itself to an interpretation, as Stahn[16] points out, where "[t]he responsibility of the host state shifts to every other state in cases where the former is unable or unwilling to act."[17] This possible meaning of the document was criticized by some states, namely the US.

The subsequent two Documents, namely the UN Secretary's General Report and the 2005 World Summit Outcome Document shift the accent from possible duty to intervene militarily to rather non-forcible methods of intervention. In particular the 2005 World Summit Outcome Document clearly indicates that state actors were not ready to accept a full scale shift from the principle of state sovereignty in favor of collective intervention in the case of humanitarian crisis. Accordingly the section titled "Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity" reads:

"138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter of the United Nations, to help protect populations from genocide, war

[13] C. Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' 1 AJIL 2007, at 99
[14] http://www.iciss.ca/menu-en.asp (8/16/2008 22:20)
[15] The Report of the Commission on Intervention and State Souvereignty, para 6.28
[16] C. Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' 1 AJIL 2007, at 105
[17] Ibid.

crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

140. We fully support the mission of the Special Adviser of the Secretary-General on the Prevention of Genocide."[18]

One thus has to conclude that as of now there exists no settled doctrine of responsibility to protect. In other words, there exists no international obligation of a state or the community that would entitle it *erga omnes* to intervene in the case of gross breaches of human rights. This therefore means that to invoke such a non-existing doctrine cannot render one's otherwise illegal acts permissible.

I.2.1. Humanitarian Intervention

Having ruled out the duty to intervene, one now has to look at the possible mere right to do so. Is there any such doctrine as humanitarian intervention? If so, is this doctrine of a customary nature?

This concept has indeed been around for about 40 years. The question that remains to be answered is whether it has, within the past 40 or so years, been transformed from a theoretical concept put forward by commentators into a binding customary law.

The first occasions this doctrine was put forward by states were the armed interventions of the 1970's.[19] It was the Indian intervention in what is now Bangladesh during the Pakistani repression (which eventually led to Bangladeshi independence), the Tanzanian intervention in Uganda, and the Vietnamese intervention leading to the overthrow of Pol Pot in Cambodia.[20] As summarized by Gray[21] at that time these activities met with condemnations from numerous states, including for instance France and the UK which said that violations of human rights could not justify the use of force.

Also some soft law of the 1970's seems to leave no space for any kind of intervention, regardless of its motivation. The major examples thereof are GA Resolution No. 2625 (*The Friendly Relations*

[18] http://www.responsibilitytoprotect.org/index.php?module=uploads&func=download&fileId=164

[19] For a detailed analysis of this doctrine see C. Gray, International Law and the Use of Force (2004) at 31
[20] Ibid at 31, 32
[21] Ibid at 32 referring to 1979 UNYB 271 at 274

Declaration) and GA Resolution 3314 (*The Definition of Aggression*).

In the *Nicaragua*[22] decision the ICJ also briefly touched upon this matter. Despite a mere brief reference, the court made a strong argument against there existing any such doctrine stating: "In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect."[23]

In the 1990's the doctrine was more or less openly invoked by the UK, USA, and partially also by France (who later reversed its position) during the Safe Havens Campaign. Then came Kosovo. This stage is of particular importance to the current case - not only because of its relative proximity time-wise, but also because it is interesting to see the Russian position back then.

The NATO bombardment of Serbia during the 1999 campaign met with fierce opposition from a number of states including two permanent members of the SC (Russia and PRC). It also met with some fierce condemnation by writers[24] and motivated the writing of hundreds of pages on the topic as such. Krisch has made a comparison of some of these works and concluded that no such right can be asserted to exist.[25] The ICJ, faced with considering the activities of NATO members, notoriously managed to avoid having to address this issue (finding it lacked jurisdiction.)[26] This move of the ICJ can be explained in many ways, but the most likely one is the presumption[27] that the judges went to all this trouble in order not to have to decide that the attacks launched by the NATO member states were in breach of international law.

As suggested above, however, the position of Russia is of particular interest. When the Security Council declined a resolution demanding the cessation of use of force by NATO member states, the Russian Federation condemned this decision, stating that "[t]hose voting against the text place themselves in a situation of lawlessness."[28]

Where does all this leave us? All the above clearly indicates that before 1998 there existed no rule of customary international law embracing the doctrine of humanitarian intervention and which would legitimize the activities of a state acting in protection of human rights. This had remained a theoretical doctrine and had not found its way into positive law. Has this position changed since then? The answer is negative. There is no evidence of either state practice or *opinio juris* to support the contrary conclusion. This leaves one with the only possible conclusion, namely that either there emerged an instant custom (a concept dubious *per se*) - for which there is no indication in the current case, or Russia cannot rely on this doctrine.

[22] The Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. USA). Merits. Judgment of 27 June 1986 http://www.icj-cij.org/docket/files/70/6503.pdf (8/17/2008 9:48 PM)
[23] Ibid at para 268
[24] See i.e. Judge Simma: B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects' 10 EJIL 1999 at 1
[25] N. Krisch, 'Legality, Morality and the Dilemma of Humanitarian Intervention after Kosovo' 13 EJIL 2002 at 323
[26] See the "Legality of Use of Force" group of cases (Serbia and Montenegro v. USA, UK, Spain, Portugal, the Netherlands, Italy, Germany, France, Canada, and Belgium (http://www.icj-cij.org/docket/index.php?p1=3&p2=3) (8/18/2008 8:04 PM)
[27] Although of speculative nature
[28] UN Press Release SC/6659; http://www.un.org/News/Press/docs/1999/19990326.sc6659.html (8/18/2008 7:54 PM)

I.2.3. The Protection of Nationals

Another doctrine that is sometimes invoked and which was indeed mentioned by Russian officials is the "protection of nationals". Russia invoked this doctrine in regard to both its soldiers present in South Ossetia as alleged peacekeepers, as well as in regard to the inhabitants of South Ossetia who had exterritorialy been granted Russian citizenship.

The doctrine of the protection of nationals needs to be understood as one that derives from the right to self defense. The concept behind this idea is that not only does the sovereignty over a territory or political integrity have to be under forceful attack, but also a mere attack or endangerment of a state's nationals permits it to act.

Presuming for the sake of argument, that this doctrine is established, the question that has to be answered is when could this doctrine be invoked? When, and under what conditions could armed self defense be appropriate? The answer rests in the nature of the particular rights of Russian citizens that would be harmed in South Ossetia.

With regard to the local populations of Russian nationality the only circumstances that are comparable to other occasions when self defense has been invoked would be when the population was in a state of having its physical existence endangered. These were the alleged circumstances that Belgium and France[29] claimed when intervening in their former colonies. In other words, the mere fact that the central Georgian government decided to reestablish what it saw as public order and decided to abolish the administration carried out by the rebels could not, in this light, be seen a ground for intervention, unless large scale killing of the members of the administration took place.[30] The reason for this is simple. Provided that the South Ossetians are considered Georgian nationals, there can be no Russian right to the protection of its nationals. Considering them as Russians, on the other hand, Russia cannot claim that they would have political rights[31] in Georgia that she could protect under international law (at that time Russia did not openly question the territorial integrity of Georgia). The only space left for maneuver would thus be to establish that the South Ossetian civilian population of Russian nationality is being targeted by the Georgian military, i.e. that the rule of distinction[32] is not being followed by the Georgian army.

Slightly more complicated is the Russian position in regard to the soldiers of her own nationality. There are generally two groups of soldiers, namely those in Russian uniforms (who had in part been called peacekeepers) and those bearing the uniform of the separatist Ossetian movement.

As regards the Ossetian soldiers, it is irrelevant for the purpose of Russian self-defense what

[29] For instance: 1978 – French Troops in Chad, Belgian Troops in Zaire, French Troops in Mauritania (1977), Gabon (1990) or Central African Republic (1996). For details see: C. Gray, International Law and the Use of Force. (2004), at 75

[30] The Russian claim of Georgian genocide has been discussed above. It could indeed, considering that Russia claims the South Ossetians to be her nationals, be used as the basis for arguing a breach of the prohibition against the use of force as well.

[31] While being aliens.

[32] The rule of distinction is one of the basic pillars of the law of armed conflict (ius in bello). According to this rule, only military targets, regardless whether animate (soldiers) or inanimate (equipment) can be targeted. On details of ius in bello see: A.P.V. Rogers, Law on the battlefield. (20040 at 7; Y. Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict (2007) at 82; L.C. Green, The Contemporary Law of Armed Conflict (2000) at 102

nationality they are. As long as they wear a uniform[33] of a warring party to the Georgian civil war (i.e. South Ossetian uniform) they are legitimate military targets. Russia cannot claim to protect their lives since any such intervention would amount to support of opposition in a civil war, which is illegal under international law.[34]

As regards Russian units in South Ossetia the situation is even more complicated. In fact, with the information available to the writer on the pre-war situation and disputed status of these units, he does not dare do draw a definite conclusion. As far as the writer is informed, the units remained there as part of an early-1990s deal on solving ethnic tension in the region (when a civil war had broken out after the disintegration of the USSR), and were stationed there on the basis of a memorandum of understanding[35] signed between Georgia and Russia. Later on, the Georgian government has been unsuccessfully demanding their withdrawal. There had been no direct UN involvement in this "peacekeeping".[36]

Provided that it is correct that the Russian units remained on the territory of Georgia against the will of the latter state, international law was breached. Although this would not *per se* amount to occupation (as the units seem not to have been exercising the responsibilities of an occupying power, nor did they have to do so on account of the existing *de facto* administration),[37] it would without any doubt breach the sovereignty of Georgia. Georgia would theoretically be entitled to self defense including that which is foreseen as being temporary measures under Art. 51 of the UN Charter. But self defense would have to be necessary and proportionate, which is hardly something that one could say about suddenly attacking military bases that have been in place for a decade and where the activity of the soldiers differed in no way from what it has been like in the past. Also the use of force has to be regarded as being a last option. Nor had any immediate notification to the UN SC has taken place in the relevant period.[38]

On the other hand, it has not been independently confirmed that any attacks by Georgian units on Russian bases actually took place. And even if this were the case, Russia would in its response also be bound by the principles of necessity and proportionality.[39] Moreover, international law

[33] This statement is slightly simplified; on the definition of combatants see in detail: 1907 Hague Convention, Annex – Regulation Respecting the Laws and Customs of War on Land, Art.1; 1977 Geneva Protocol I, Art. 43. Both can be found in: A. Roberts, R. Guelff, Documents on the Laws of War (2002).

[34] On this see the ICJ's Nicaragua case (The Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. USA) Merits. Judgment of 27 June 1986) , para 202.: Both direct and indirect intervention is illegal. See also Gray (supra) at 68.

[35] Which as such is not binding; on memoranda of understanding see in detail: A. Aust, Modern Treaty Law and Practice (2007) at 32

[36] Unlike in the case of Abkhazia where there exists a small mission of observers. (SC Res 858(1993): http://www.undemocracy.com/S-RES-858(1993).pdf (8/24/2008 5:03 PM) See also: http://en.wikipedia.org/wiki/UNOMIG (8/24/2008 5:03 PM) and http://www.undemocracy.com/S-26250/page_6 (8/24/2008 5:04 PM)

[37] See 1907 Hague Convention, Annex – Regulation Respecting the Laws and Customs of War on Land, Art. 42

[38] The situation would differ, should it be proven (as claimed by Georgia) that the war was effectively started by the rebel groups bombarding villages in inner Georgia in co-operation or as part of an action orchestrated from the Kremlin. In such a case, it would be the Russian Federation that would be responsible for an armed attack on Georgia, provided that the level of control over the rebels passed the threshold set by the ICJ in Nicaragua (and provided one could not talk of a mere frontier incident). In such a case, one would have to conclude that Georgia, exercising its self defense would be legitimately entitled to attack any Russian soldiers in the territory. (see also: Nicaragua case, supra, para 195 ff). It needs to be added again that at the time of writing this article there is not enough reliable information for one to be able to make a reliable assessment of the positions of the warring parties and their initial responsibilities in the current conflict. The above theoretical conclusions thus remain only speculations based on possible factual scenaria.

[39] A principle that dates in the theory of international law back to at least 1837 (the Caroline Incident – for details see: http://en.wikipedia.org/wiki/Caroline_Incident (8/24/2008 4:34 PM))

currently recognizes two categories of the use of force, namely an armed attack and a mere frontier incident.[40] The difference between these two categories rests in the intensity of the use of force. The latter definition covers, as its name indicates, small-scale scuffles on borders between two states, or unimportant small scale invasions (breaches of sovereignty) of a neighboring state. The purpose of the latter definition is to exclude small scale incidents from the definition of armed attack and thus limit the ability of the party "under attack" to invoke self defense in order to start a war.[41] Applying the meaning of proportionality, the current situation *per analogiam* corresponds (as to scale) to a border incident (although no borders are involved here). Therefore, the invocation of self-defense is highly problematic.

Having discussed possible sub-categories of protection of nationals in the current conflict, one should return one step back and answer the basic question regarding this category, namely whether the doctrine of protection of nationals is an existing norm of international law.

Some instances of the invocations of this doctrine have been mentioned above in regard to France's and Belgium's post colonial interventions in Africa. Similarly, this doctrine was invoked by the USA in Grenada, Panama, and the Dominican Republic. The common denominator of all these incidents is that these were actions of the world's powers in their respective spheres of influence under the disguise of the protection of nationals. These actions[42] generally met with expressions of condemnation.[43] Then there is a second group of actions in the context of which this doctrine was invoked. These were small scale (extracting) actions aimed at saving nationals of the state conducting the extraction. These were the Entebbe Incident (Operation Thunderbolt)[44] and the attempt to rescue US Hostages in Teheran (Operation Eagle Claw).[45] These actions were generally ignored by states in terms of legal classification.

From the above examples one can draw the following partial conclusion:

In cases of larger scale interventions, the international community tends to condemn the use of force by those intervening. It does not seem to accept any legal justification based on the invocation of the doctrine of the protection of nationals. On the other hand, on the few occasions when force was genuinely used to save several nationals of a particular intervening state, the world public tended to close its eyes before such actions, refraining from condemnation.[46] Both these

[40] See Nicaragua, supra, para 195 ff
[41] After all several large-scale wars were started by pretended armed attacks in the 20th Century; examples being the Second World War (and the alleged Polish attack on Germany) and the Viet-Nam War - the Gulf of Tonkin Incident; see: http://en.wikipedia.org/wiki/Gulf_of_Tonkin_Incident (8/24/2008 11:53 AM)
[42] On comments on various interventions invoking, inter alia, this doctrine, see: G. Evans, M. Sahnoun, et al, The Responsibility to Protect. Research, Bibliography, Background. (2001). Available online at: http://www.idrc.ca/openebooks/963-1/ (8/24/2008 6:02 PM)
[43] For instance the US invasion of Grenada (operation Urgent Fury) was condemned by the UN General Assembly by resolution A/RES/38/7: http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/443/99/IMG/NR044399.pdf (8/24/2008 5:47 PM); Similarly the Activities of the USA in Panama met with condemnation by the Organization of American States (J. Brooke, U.S. Denounced by Nations Touchy About Intervention", 1989 The New York Times, December 21.)and the UN's General Assembly (43 Yearbook of the United Nations (New York 1989), 175); The UN Security Council's Resolution condemning the invasion was stopped by the USA, UK, and France.
[44] http://en.wikipedia.org/wiki/Entebbe_incident (8/24/2008 6:06 PM)
[45] http://en.wikipedia.org/wiki/Operation_Eagle_Claw (8/24/2008 6:06 PM)
[46] For instance in the case of the Entebbe Incident, Uganda was not successful in moving that the UN condemn the Israeli raid as a breach of her sovereignty. See (K. Teltsc, Uganda Bids U.N. Condemn Israel for Airport Raid, 1976 The New York Times. 10 July.

categories have in common the fact that they rule out the existence of a possible doctrine of the protection of nationals as a valid existing customary international law. In the case of the first category, the international community, by its quantitative majority condemns such activities. In the case of the second category, the international community, although not explicitly condemning, seems to adopt a low profile and tolerate the activities. This indicates that there is not *opinio juris communis*, in the international community that would support the existence of such a custom. Russia could therefore not successfully invoke this doctrine.

II. Conclusion

This article's aim has been to analyze the doctrines invoked by the parties to the conflict in attempting to justify their actions. These invocations and statements have been subsumed under existing theoretical concepts of international law and these have been analyzed as to their validity. Based on the statements made (and the little reliable information on actual conducts of the parties available) the following concepts discussed above have proved relevant:

First, the principle of sovereignty within recognized international borders and the duty to refrain from the use of force in international relations was discussed. Based on these principles, leaving aside human rights and the question of the right to self-determination, Georgia was effectively permitted to conduct the operations in South Ossetia without being exposed to an armed action by a neighboring state.

As was further argued, the position of the Russian Federation which *prima facie* breached the prohibition of the use of force pursuant to Art. 2(4) of the UN Charter would have been justifiable only if there existed a doctrine of customary international law (or some other norm of international law) that would provide for an exception.

Several doctrines currently discussed in scholarly writings were therefore discussed. The doctrine of *Responsibility to Protect* proved to be non-existent in terms of a being a binding part of customary international law. Neither *usus longaevus*, nor *opinio juris* can be traced in this regard. The next analyzed doctrine was Humanitarian Intervention. Despite this doctrine having been invoked on several occasions since late 1970's, again, its position must be considered as dubious. The ICJ expressed its view against its existence in the *Nicaragua* case and so did for instance Russia when condemning the NATO attacks on Serbia in 1999. General state practice seems to be rather reserved concerning this doctrine as well. Therefore, this doctrine has not proved to be applicable either.

The last doctrine tested against the current situation was the protection of (a state's own) nationals as a subset of the right to self-defense. Leaving aside any discussion on whether an attack on private (civilian) individuals can be considered as being an attack on a state *per se*,[47] the question

[47] i.e. whether a state could even theoretically invoke self-defense – a question that perhaps goes beyond the theory of positive international law and seeks its answer in rather philosophical questions on the legal personality of a state – statehood, the role of a population in interrelations with a state and on sovereign attributes of a state.

to be answered was whether there existed a recognized doctrine of the protection of individuals. Having looked back in the history of the 20th Century, one comes to the conclusion that the answer must be negative. There existed basically two sets of occasions when this doctrine was invoked by states. The first was when some other interests of a state invoking this doctrine were at stake and the state needed to disguise these. This was the case in relation to the involvement of cold-war powers in their spheres of influence. The second group, represented basically by merely two limited (reported) incidents, was when a group of nationals of the state invoking this doctrine ended up in a highly medially observed state of necessity in regard to their survival and the state decided to act contrary to the will and sovereignty of the state on whose territory this took place. In these cases, the world's public generally closed their eyes, rather than openly supporting any right of such a protection of nationals. Therefore, the existence of all the aspects of an international customary rule of (a right to) the protection of nationals cannot be proven.

The above partial conclusions mean that it could not be proven that (as international law currently stands) that the Russian Federation could successfully invoke any existing doctrine of international law that would legitimize its *prima facie* breach of Art 2(4) of the UN Charter. One therefore has to draw the conclusion that the Russian intervention in the civil conflict in Georgia was in breach of public international law.

Abstract

The writer analyzes the first days of the recent armed conflict in Georgia in terms of *ius ad bello*. The international legal positions of both Georgia and Russia in regard to South Ossetia are tested with the aim of answering the question whether either of the parties broke international law.

The result of the analysis shows that as regards the actions of Georgia in the region, international law was not applicable (except for *ius in bello* regarding internal conflict). The writer explains why the Georgian actions at that time were internal affairs of this state. Similarly, the actions of the Russian Federation in the region are also analyzed. The writer attempts to test their *prima facie* breach of the UN Charter against several doctrines recently discussed in theory, namely the Responsibility to Protect, Humanitarian Intervention, and the Protection of Nationals. The writer subsequently concludes that neither of these doctrines has become part of customary international law which means that the actions of Russia did indeed breach international law.

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As listed in respective footnotes.

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The Dynamics of Regional Trade Agreements and the WTO: the Perspective of Developing Countries

Chanchal Agarwal, Punarva Gera and Saksham Chaturvedi[1]

Prologue: an Appraisal of Regional Trade Agreements

"The last dozen years have seen a proliferation of customs unions and free-trade areas of unforeseen proportions. Such regional arrangements, far from being halfway houses on the road to non-discriminatory and freer trade, may be in direct conflict with those goals."[2]

Regional trade agreements (RTAs) have proliferated since the 1990s, particularly after the completion of the Uruguay Round. Nearly every country in the world now is either participating in or discussing participation in one or more regional agreements. Such agreements have been concluded among high-income countries, low-income countries and more recently, starting with the North American Free Trade Agreement (NAFTA), between high-income and developing countries.[3]

The structure of regional agreements varies, but all have one thing in common: "the objective of reducing barriers to trade between member countries". At their simplest they merely remove tariffs on intrabloc trade in goods, but many go beyond that to cover non-tariff barriers and to extend liberalization to trade and investment. On the whole, the newer agreements tend to have deeper coverage, extending into areas of domestic disciplines beyond the exchange of tariff concessions.[4]

As of December 2007 a total number of 386 RTAs were notified to the GATT/WTO of which 197 are currently in force. Out of the total, 138 RTAs cover trade in goods, 47 cover trade in services, and the remaining 12 are accessions to existing RTAs, involving either goods or services.

The Messy Economics of FTAS: Tracing the Genesis

The relevance of EIAs has continued to grow in 2007, currently representing 25 per cent of total notifications of RTAs.[5] Their significance is likely to increase further in the future if we consider that approximately 70 percent of the RTAs being negotiated contain provisions on trade in services.

Of the total number of RTAs notified to the GATT/WTO up to December 2007, 124 agreements were notified during the GATT years and 262 during the WTO years, corresponding to an annual average RTA notification rate of twenty for the WTO years compared to less than three during the four and half decades of the GATT.

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[2] Keneth Dam. Lecturer, Faculty of Law, Victoria University of Wellington.

[3] White House, Office of the Press Secretary, "President Bush Presses for Peace in the Middle East," Remarks by the president in commencement address at the University of South Carolina, May 9, 2003, www.whitehouse.gov/news/releases/ 2003/05/iraq/20030509-11.html.

[4] Bhattacharya, B. and Dasgupta. 2000. Intrasubregional and Intersubregional Cooperation for Enhanced Trade and Investment Flows in the Context of Development of South Asia and Islamic Republic of Iran. Paper for ESCAP policy meeting.

[5] Brenton, Paul and Mirian Manchin. 2002. Making EU Trade Agreements Work: The Role of Rules of Origin. Centre for European Policy Studies working document no. 183, March.

Also significant is the fact that of the RTAs notified to the GATT, only thirty one remain in force today, reflecting in most cases the evolution over time of the agreements themselves, as they were superseded by new ones between the same signatories (most often with deeper integration), or by their consolidation into wider groupings.

RTAs appear to be changing established patterns of trade both in terms of choice of partners and the regimes governing such trade. RTA dynamics over the last fifteen years point to an increase in North-South RTAs and their gradual replacement of long established non-reciprocal systems of preferences, and more recently to an increasing number of South-South RTAs, a development that appears to be tied to the emergence of several major RTA hubs in the developing world.[6]

The major clusters of RTAs are North-South and South-South RTAs, each accounting for 37 percent of the total number of notified RTAs in goods.

These agreements are therefore the backbone of today's RTAs proliferation and are likely to remain so if we consider that 97 percent of the RTAs in the making fall under these two categories.

These developments are significant in a number of ways. With respect to the North-South cluster, the forging of such agreements implies, for most developing country partners, foregoing non-reciprocal systems of preferences under schemes like the Generalised System of Preferences and other unilateral initiatives covered by WTO provisions applying to RTAs.

Regardless of the motivations, the point is that, through RTAs, the nature of North-South trade relations appears to be evolving towards a framework of reciprocity with relatively ambitious scope in trade policy coverage. In this respect it is interesting to note that approximately half of the notified North-South RTAs provide for the liberalization of trade in services and most of the others foresee the negotiation of a services chapter in the future.[7]

Another significant development is the rapid emergence of a South-South cluster of RTAs which is substantially different from the early agreements falling under this category.[8] The latter typically consisted of plurilateral integration initiatives at the regional level, often with limited trade coverage (i.e. partial scope agreements); most RTA groupings in Africa and Latin America can be placed here.

Recent RTAs, however, suggest a departure from past practice, with the emergence of comprehensive agreements (several RTAs include a services chapter), often on a bilateral basis and in several cases not geographical bound-RTAs such as Republic of Korea-Chile, India-Singapore, and Chile-China are good examples.

The trade policy scope of these agreements and the fact that several of them have been notified under Article XXIV of the GATT 1994 (and Article V of the GATS where it applies) points to a growing interests in South-South trade a readiness by some

[6] Crawford, Jo-Ann and Roberto V Fiorentino. 2005 paper, No. 8, WTO secretariat, Geneva.

[7] Hoekman, B. and M. Olarreaga. 2002. Eliminating Excessive Tariffs in the QUAD and on Exports of LDC's. World Bank Economic Review 16(1), 1–21.

[8] Krishna, K. and Anne Kruger. 1995. Implementing Free Trade Areas: Rules of Origin and Hidden Protection. NBER working papers 4983. Cambridge, USA.

of these countries to commit to comprehensive trade liberalization, albeit on a gradual basis and with a selected number of partners.[9]

Also related to these clusters is the emergence of several RTA hubs. While in Europe and North America these are well established (i.e. the EC and the US), in other continents, and especially in the Asia-Pacific region, the competition of RTA 'shopping' appears to be wide open.

A third trend which is closely related to the geopolitics of RTAs is the increasing number of cross-regional agreements. These represent the most distinctive feature of the current proliferation of RTAs since they suggest a shift from the traditional concept of regional integration among neighbouring countries-a core element of previous RTAs waves-to preferential partnerships driven by strategic political and economic considerations that are to a large extent unrelated to regional dynamics. While 44% of the RTAs notified and in force are cross-regional, this figure increases to 67 percent for the agreements signed and under negotiation.[10]

The trend towards cross-regional RTAs raises some interesting questions and makes us ponder to what extent the premise of RTA formation among 'natural' trading partners still applies.[11] RTAs have traditionally been agreed among geographically contiguous countries with already well-established trading patterns; prime examples include the NAFTA, the EC and EFTA, ASEAN.[12] SAFTA. UEMOA, SADC and SACU in sub-Saharan African, and CARICOM, CACM and MERCOSUR in South and Central America and the Caribbean.

All of these as well as most of the other existing regional groupings, have their origins in former waves of regionalism and to this day efforts are ongoing to deepen and strengthen intra-regional integration.[13]

Thus, cross-regional RTAs could be seen as a drive to look further afield once more local regional prospects have been exhausted. However, the sharp increase in the number of cross-regional RTAs may also indicate a shift from regional priorities due to frustration in several cases at the slow pace of existing regional integration initiatives.

A number of agreements now also cover the services sector. With virtually all World Trade Organization (WTO) members being partners in at least one RTA, these agreements have become by far the most important exception to the most-favored nation (MFN) principle. Moreover, as the number of RTAs multiplies, networks of overlapping agreements may generate intricate webs of discriminatory treatment thereby leading to complex regulatory structures for the conduct of a growing share of world trade.

[9] Laird, Sam and Jo-Ann Crawford. 1999. RTAs and the WTO. Nottingham, UK: Centre for Research in Economic Development and International Trade, University of Nottingham.
[10] Lloyd, P. J. 2002. New Regionalism and New Bilateralism in the Asia Pacific.Australia, University of Melbourne, Institute of Southeast Asian Studies.
[11] Rajan, R., R. Sen and R. Siregar. 2002b. Singapore and FTA Agreements. Singapore: Institute of Southeast Asian Studies.
[12] Rajan, S. & R. Sen. 2002a. Singapore's New Commercial Trade Strategy: The Pros and Cons of Bilateralism. Discussion Paper 0202. Adelaide: Centre of International Studies, Adelaide University.
[13] The Asian RTAs were especially ineffective. The two largest economies in the South Asian Association for Regional Cooperation (SAARC), India and Pakistan, withheld MFN treatment from one another. The Economic Cooperation Organization (ECO) was in abeyance while Iran was at war with Iraq. Most empirical studies find minimal effects on trade for SAARC or ECO, and even for the Association of Southeast Asian Nations (ASEAN), which was the least moribund of the Asian RTAs.

The issue of Regionalism versus Multilateralism has generated a vast debate on whether the immediate consequences of regionalism for the economic welfare of the integrating partners encourage or discourage evolution towards globally freer trade.[14]

However, most analysts, including the WTO Secretariat, have concluded that on the whole, regional agreements have made a positive contribution to the liberalization of world trade. Keeping in view the other large number of important issues regarding transparency of WTO rules on RTAs, the Doha Development Agenda (DDA) has included the issue of RTA as an area for negotiation in paragraph 29 of the Ministerial Declaration.[15] WTO members agreed to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applicable to RTAs. They also agreed that the "negotiations shall take into account the developmental aspects of RTAs."

The economic logic for this is that particularly for the developing countries, the ability to adjust to greater competition in the domestic markets or to take full advantage of additional market access opportunities can be constrained by their individual level of development.[16]

This leads us to the need for examining the flexibilities available during the transitional or implementation period of RTAs, taking into account the needs of developing countries in a properly focused and appropriate manner so as to support their greater integration into the multilateral trading system. The basic objective of the present paper is to analyze the issues under the Doha Development Agenda with regard to RTAs.

RTA'S: an Exception to MFN

"The best free-trade agreements allow a large and competitive foreign producer to displace domestic producers in a large and protected domestic market, thus delivering lower prices and higher real incomes to workers and families."

Notwithstanding the importance placed on the MFN principle, the GATT/WTO system has long provided for various exceptions to the application of this core concept. For example, the GATT Enabling Clause provides a legal basis for developed countries to give differential and more favorable treatment to developing countries than they give to other developed countries.[17] In the absence of the Enabling Clause, developed countries would not be permitted to give more favorable access to developing countries because of their obligation under MFN to treat all members equally.[18]

[14] Wonnacott, R. J. 1996. Trade and Investment in a Hub-and-Spoke System versus a Free Trade Area. World Economy 19(3), 237–52.
[15] Alesina, Alberto, and Enrico Spolaore (2005): War, Peace, and the Size of Countries, Journal of Public Economics 89, 1333-54.
[16] Anderson, James, and Eric van Wincoop (2003): Gravity with Gravitas: A Solution to the Border Problem, American Economic Review 93(1), 170-92.

[17] The Enabling Clause, more formally known as the "Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries", was adopted under GATT in 1979. The Enabling Clause is exercised primarily through the Generalized System of Preferences ("GSP"), under which developed countries can offer preferential market access (such as zero or very low tariff rates) to developing countries even when such access is non-reciprocal and is not extended to all developing countries. In addition, the Enabling Clause provides the legal basis for developing countries to enter into regional arrangements amongst themselves that do not rise to the level of comprehensiveness of an FTA, and for the Global System of Trade Preferences ("GSTP") under which various developing countries grant each other trade concessions that are not extended to the WTO membership at large. See generally, WTO Trade and Development Committee, Work on Special and Differential Provisions, available online at www.wto.org (last accessed 1 November 2009).
[18] Meredith Kolsky Lewis, "The Free Trade Agreement Paradox", 21 NZULR 554; www.westlaw.com

For purposes of this article, the most important exceptions to the MFN rule are Article XXIV of the GATT and Article V of the GATS, which allow for the creation of customs unions and free-trade areas. The GATT required a provision such as Article XXIV so that the European Economic Community ("EEC"), which was simultaneously being negotiated, could exist in a manner that would be consistent with the new international trading regime.[19] As a customs union, the EEC violated the MFN principle by imposing duties on goods imported from non-EEC members but not on goods imported from countries within the EEC.[20] It was thus necessary for the GATT to provide an exception to the MFN requirement for customs unions and FTAs. Article XXIV permits countries to apply tariffs on a discriminatory basis by favouring their FTA partners with lower rates than other members--so long as the conditions of that Article are satisfied. Article XXIV requires 1) that an FTA or customs union reduce or remove barriers on "substantially all" trade between the parties to the agreement,[21] and 2) that the "duties and other regulations of commerce" applied by FTA members to WTO members outside the FTA "shall not be higher or more restrictive" after the FTA comes into effect than previously.[22]

Customs unions and FTAs were envisioned as MFN exceptions that would be utilised only occasionally, and faithful to the purposes behind Article XXIV.[23] Instead, while customs unions have been relatively unusual,[24] FTAs have proliferated, and the agreements that have arisen by and large have not satisfied the requirements and purposes of Article XXIV. The WTO mechanism for ensuring that FTAs comply with Article XXIV has also been largely ineffective.[25] As a result, there has been increasing criticism of FTAs and concern about their impact on the ability of the multilateral WTO system to continue to move forward with further trade liberalisation.

The consensus seems to be that FTAs are at best of mixed benefit, and at worst a serious problem.[26] Yet FTAs have been proliferating for several years now. Of the 170 notified agreements in force as of early 2005, forty-three were notified in the period January 2004 to February 2005 alone.[27] The WTO has been notified of twenty more agreements in the

[19] S M Cone III, "The Promotion of Free-Trade Areas Viewed in Terms of Most-Favored Nation Treatment and 'Imperial Preference'" (2005) 26 Mich J Int'l L 563, 567. Customs unions entail the members dropping tariffs between themselves to zero and the setting of a common external tariff. In contrast, free trade agreements only affect tariffs between the signatories, but each signatory maintains its own tariff scheme for countries not party to the FTA.

[20] When Art XXIV was drafted in 1947, it only provided for customs unions; language providing for "free-trade areas" was added later.

[21] GATT, Art XXIV: 8.

[22] Ibid, Art XXIV:5(b). The applicable provision for customs unions provides that duties and regulations "shall not on the whole be higher or more restrictive than the general incidence" prior to the creation of the customs union. Also ibid, Art XXIV:5(a): this provision has sparked a number of interpretation problems. See Z Hafez, "Weak Discipline: GATT Article XXIV and the Emerging WTO Jurisprudence on RTAs" (2003) 79 ND L Rev 879, 894-895. GATS, Art V contains provisions that differ slightly from those of GATT, Art XXIV.

[23] Report by the Consultative Board to the Director-General Supachai Panitchpakdi, The Future of the WTO: Addressing Institutional Challenges in the New Millenium (2004) 21, available online at <www.wto.org>.

[24] As of 31 January, 2002 there were 162 FTAs in force; of these, only 13 were customs unions. Of the remainder, 115 were FTAs, 19 were agreements notified under the Enabling Clause, and 15 under Art V of GATS: WTO Committee on Regional Trade Agreements, Basic Information on Regional Trade Agreements.

[25] See for example Report by the Consultative Board to the Director-General Supachai Panitchpakdi, The Future of the WTO: Addressing Institutional Challenges in the New Millenium (2004) 21, available online at <www.wto.org>

[26] For a more theoretical analysis of whether FTAs are a complement or an alternative to multilateral Search Term Begin trade Search Term End liberalisation, see N N Tiny, "Regionalism and the Search Term Begin WTO: Search Term End Mutual Accommodation at the Global Search Term Begin Trading Search Term End System" (2005) 11 Int'l TL Rev 126.

[27] J Crawford and R V Fiorentino, The Changing Landscape of Regional Search Term Begin Trade Agreements Search Term End (2005) 1, available online at <www.wto.org> (last accessed 29 October 2009).

process of being ratified and seventy others under negotiations.[28] Although some WTO members have more actively pursued FTAs than others, the trend is all but universal. In fact there is only a single WTO member--Mongolia--that is not involved in any sort of FTA.[29] So even though the WTO is believed to be the best way to achieve trade liberalisation, WTO members are flocking to FTAs, which are seen as second best.

WTO Provisions and RTAs

"Negotiating FTAs, or at least retaining the option to do so, can send a signal to other WTO members that, if they are unwilling to negotiate seriously to reduce trade barriers, we retain the right to find bilateral and regional partners who will".

Non discrimination among trading partners who are contracting parties/members of GATT/WTO is the foundation of GATT/WTO. Article I, on most-favored nation (MFN) treatment, requires that members of the WTO (Contracting Parties in GATT terminology) shall extend unconditionally to all other members any advantage, favor, privilege or community affecting customs duties, charges, rules and procedures that they give to members. Yet GATT/WTO articles permitted exceptions to the MFN treatment for customs unions (CUs) and free trade areas (FTAs).

There are basically three means by which WTO members can form RTAs:

One is by conforming to provisions of Article XXIV, which remained essentially unchanged between the inception of GATT in 1947 and 1994, when the Uruguay Round Agreement (URA) was signed. The URA merely clarified, but did not change, the provisions of Article XXIV. Paragraphs 4 to 10 of Article XXIV of GATT (as clarified in the Understanding on the Interpretation of Article XXIV of GATT 1994) provide for the formation and operation of customs unions and free trade areas covering trade in goods. Basically, two criteria were laid down in Article XXIV for a CU or FTA to be waived from MFN obligations: first, "substantially all trade" among members of a CU or FTA must be free, and second, postunion (or post-FTA) barriers on trade with non-members must not on the whole be more restrictive than those that members had prior to their forming a CU or FTA.[30]

The second route open to RTAs among developing countries is the Enabling Clause of the Tokyo Round Agreement invoked in 1979. The Enabling Clause talks about "differential and more favorable treatment, reciprocity and fuller participation of developing countries." In particular, its paragraph 2(c) permits preferential arrangements among developing countries in goods trade. Under this provision, developing countries have exchanged partial tariff preferences within arrangements such

[28] When an FTA is negotiated among Search Term Begin WTO Search Term End members, the parties are supposed to notify the Search Term Begin WTO Search Term End of the Search Term Begin agreement Search Term End by submitting documentation to the Committee on Regional Search Term Begin Trade Agreements Search Term End ("CRTA"). The CRTA will be discussed in more detail in part III. There are additional FTAs that have not followed the notification process, and it is difficult to track the exact number of such Search Term Begin agreements Search Term End . Z Hafez, "Weak Discipline: GATT Article XXIV and the Emerging Search Term Begin WTO Search Term End Jurisprudence on RTAs" (2003) 79 ND L Rev 879, 916.

[29] J Crawford and R V Fiorentino, The Changing Landscape of Regional Search Term Begin Trade Agreements Search Term End (2005) 1, available online at <www.wto.org> (last accessed 2 November 2009).

[30] World Trade Organization, "Regional Trade Agreements: Facts and Figures," www.wto.org/english/ tratop_e/ region_e/reg fac_e.htm.

as the ASEAN Preferential Trading Area (AFTA) and South Asian Free Trading Area (SAFTA).

Para 2(c) says:

"Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of nontariff measures, on products imported from one another".

The third route is Article V of the General Agreement on Trade in Services (GATS), which governs the conclusion of RTAs in the area of trade in services, for both developed and developing countries.

RTA Issues of Interest to Developing Countries: the Case of India

A. India's stand

India is a marginal player in the global trade scenario. Its share in global trade is below one percent. India is also not a part of any RTA that has substantial influence on world trade. As a part of the integration process with the world, signing of the Bangkok Agreement (signed by Bangladesh, India, Republic of Korea, Lao People's Democratic Republic, Philippines, and Thailand) in 1975 was the first initiative. The agreement failed to go a long way in achieving its objective of trade expansion.[31]

Recent developments like proposals of accession of the People's Republic of China to the Bangkok Agreement have given rise to new expectations. India's second initiative on this front is the SAARC free trade agreement (SAFTA) with Bangladesh, Bhutan, Maldives, Nepal, and Pakistan which came into full effect in 2006. Due to political tension between India and Pakistan and also for reasons like the very limited export basket Bangladesh, Maldives and Nepal have to offer to the comparatively larger economies like India, Pakistan, and Sri Lanka, India has not achieved much from this regional arrangement. India is also a part of Bangladesh, India, Myanmar, Sri Lanka, Thailand Economic Cooperation (BIMST-EC), with the other member countries being Bangladesh, Myanmar, Sri Lanka, and Thailand. India also entered into a bilateral free trade agreement with Sri Lanka in 2000 and more recently with Thailand in 2004 and negotiated a comprehensive economic cooperation agreement (CECA) with Singapore and ASEAN in 2005.[32] Total SAFTA[33] and BIMST-EC trade constitute about 1.5 percent and 2–3 percent of total world trade, respectively.

This implies that about 96 percent of India's trade is outside the preferential zone. More than half of this 96 percent is with countries that are part of one or more RTAs. For instance, NAFTA and EU constitute 50 percent of India's exports, 10 percent goes to ASEAN, and another 10 percent to Japan and South Asia. Therefore on the whole, 70 percent of India's trade is with countries that are part of strong and well established RTAs. So, with India being part of only SAFTA, the Bangkok Agreement, and BIMST-EC, the country needs to

[31] Kumar, Nagesh. 2001. India's Trade in 2020: A Mapping of Relevant Factors. Research and Information Systems for Developing Countries discussion Paper 10-2001. Paper prepared for the committee on Vision 2020 for India, Planning Commission, Government of India.

[32] India is also currently negotiating RTAs with Brazil, PRC, Chile, MERCOSUR, and SACU including an EPA with Japan.

[33] India is the major country in SAFTA. India's share in the world is 0.8 percent and the rest of the countries put together make up for another 0.7 percent.

take a strong view on whether its interest would lie in seeking tighter discipline in WTO on RTAs.

Within the GATT and the WTO, the examination of specific RTAs has been plagued by disagreement about the interpretation of certain elements of the rules relating to RTAs as well as by certain procedural aspects. In practice, the Committee on Regional Trading Agreements (CRTA) of the WTO has also not been able to resolve many of the systemic issues.

The WTO Secretariat has prepared a synoptic paper on procedural and systemic issues,[34] which summarizes on a factual basis the discussion that has already taken place on RTAs and highlights the issues. On the goods side, probably the most important single issue relates to the interpretation of the term "substantially all the trade," which relates to the requirement that "duties and other restrictive regulations of commerce are eliminated on substantially all the trade between the constituent territories" as defined in GATT Article XXIV:8. This is particularly relevant for those agreements where the coverage of agriculture is currently limited, for example, many of the RTAs formed by European countries.

A few RTAs have eliminated all duties on agricultural goods, but in general agricultural trade, even on a preferential basis, remains subject to exceptions. Average agricultural preferential tariffs remain high and concessions on agricultural products granted by RTA partners tend to be parsimonious in nature. The debate on "substantially all the trade" has centered on two possible interpretations, which are not mutually exclusive.

The first, a quantitative approach, favors the definition of a statistical benchmark, such as a certain percentage of trade between the parties. The second, a qualitative approach, would require that no sector (or at least no major sector) be excluded from intra-RTA trade liberalization.

For India too, agriculture is a sensitive sector. But whether India would like to grant concessions on agricultural products will depend much on the partner country's export basket and India's export competitiveness. But perhaps it is logical for India to go with the second option, i.e., a qualitative approach and where necessary use of the positive list approach in granting concessions on agricultural products, as is done in the majority of RTAs.

Another issue deals with "the general incidence of duties," which are not on the whole to be higher or more restrictive against third parties upon the formation of a customs union (Article XXIV: 5). This issue has been largely clarified with the 1994 Understanding, which specifies that the evaluation of the general incidence of the duties and other regulations of commerce applicable before and after the formation of the customs union shall be based upon an overall assessment of weighted average tariff rates, for which the applied rates shall be used.

If it were desired to ensure that even static trade diversion were avoided, this could be also achieved by requiring that the MFN rates also be reduced to

[34] document TN/RL/W/8/Rev.1

a level that would prevent or minimize trade diversion. In relation to "other regulations of commerce (ORCs)" (Article XXIV: 5) and "other restrictive regulations of commerce (ORRCs)" (Article XXIV: 8), the systemic debate also runs up against the issue of the definition and measurement of non-tariff barriers.

The only exceptions concern quantitative restrictions that satisfy GATT provisions (e.g., agriculture, balance of payments, and health or safety considerations). "Regulations of commerce" is an expression that has been used in the GATT legal texts only in connection with RTAs. No definition of the term is provided. Some Members have argued that what is important is not whether some specific measures fall under the umbrella of ORRCs, but rather if their application among RTA parties leads to a restriction on the trade of third parties.

The question that concerns India is whether safeguards and anti-dumping measures are considered as ORCCs. Moreover, should consideration of ORCs and ORCCs be different in fully implemented RTAs and interim agreements? SAFTA has encouraged tariff concessions, but significant non-tariff trade barriers remain in place. Anti-dumping investigations continue to be a major barrier to trade in the South Asian sub region. Also, in terms of measurement of non-tariff barriers, it needs to be clarified, for example, what methodology should be used to aggregate commitments on domestic supports and export subsidies.

There are no explicit WTO disciplines on the use of preferential rules of origin. The rules of origin can multiply distortions as overlapping FTAs have begun to form. Origin rules should be justified to prevent products from non-parties to an RTA gaining preferential access to the market through the party, which maintains the lowest external import restriction (i.e., to avoid "trade deflection").

There are different interpretations on whether or not RTA origin rules constitute ORCs. There have been arguments for and against. However, most member countries of the WTO believe that RTA rules of origin definitely constitute an ORC. Most countries in the world agree that a case by case examination of the preferential rules of origin in RTAs is needed. That would clearly indicate whether these rules had restrictive effects on the trade vis-à-vis third parties. The meaning of certain aspects of Article V of the GATS has also been raised.

The basic provision is that an "economic integration agreement," the term used in the GATS for an RTA covering trade in services, should have "substantial sectoral coverage," understood in terms of the number of defined sectors used in GATS schedules of commitments, volume of trade affected, and modes of supply.

This coverage is to be achieved through the elimination of existing discriminatory measures and the prohibition of new or more discriminatory measures. For the purposes of evaluation, account may be taken of the contribution of such an RTA to a wider process of economic integration or trade liberalization among the Members. Some flexibility

is allowed for such agreements involving developing countries.

Many countries including India agree that unavailability of detailed trade data in services makes it difficult to arrive at a percentage-type test for quantitatively measuring "substantially all discrimination."

One important issue deals with RTAs established under the Enabling Clause, i.e., RTAs in the area of trade in goods between developing countries. As Laird (1999) writes, an RTA formed under the Enabling Clause need not cover substantially all the trade; does not require duty elimination; has no fixed timetable for implementation; and is not subject to periodic reporting requirements.

The only main obligations of parties to such an RTA are to notify the agreement or its modification to the WTO Committee on Trade and Development, to furnish information deemed appropriate, and afford the opportunity for prompt consultations with respect to any difficulty or matter that may arise. India is unlikely to oppose this point and would not like to touch the enabling clause while flagging other issues in the negotiating group. Another point that would be of concern to many developing economies including India is the unclear issues related to transition periods. When it is said that any interim agreement shall include a plan for the formation of a customs union or an FTA, it is not clarified as to what should constitute a "reasonable length of time." When should interim agreements fulfill the requirements spelled out in paragraphs 5 and 8 of Article XXIV? As noted by Laird (1999), the developed countries tend to have wider trade coverage and generally apply their commitments over a stricter time frame than their partners.

There is no explicit provision for such asymmetrical application of the WTO rules, although this would seem consistent with the principle of special and differential treatment for developing countries. Developing countries have also voiced their concern with other countries on the issue for elaborating disciplines aimed at ensuring that third parties are compensated for the possible negative effects brought by the creation or enlargement of an RTA.

Finally, regarding the notification requirements (paragraph 7) it has been observed by India that clarification with respect to contents of notification is required. Ambiguous notification requirements do not obligate members to provide substantial information. Therefore sufficient information should be provided by the RTA members to build up a strong database to help all members. Since India is not a member of any RTA that has a strong influence on world trade, India will stand to lose because of trade diverting effects of any RTAs and the new formations where it is not involved. The Indian textile sector, for instance, has been badly affected because the US gives preferential treatment and duty free access to textile products from Mexico under NAFTA. The question of what should be India's general stand on RTAs is difficult to arrive at. For this India will have to look at whether or not RTAs promote global welfare, i.e., it has to analyze the extent of trade diversion due to RTAs and its impact on Indian exports.

However, all India's present agreements with the regional partners have opened the markets for Indian goods in the countries concerned. All these agreements constitute unilateral tariff reduction except the India-Sri Lanka FTA. India's overall trade balance with SAFTA is positive. The share of India's exports in South Asian countries has increased from 2.73 to 6.2% over the period 1990 to 2006.[35] Hence its existing and recent initiatives in regional/ bilateral trade liberalization may help to divert some trade of the countries concerned from their other trading partners in favor of India given their supply capabilities, and therefore may be beneficial to India.

B. Other Glaring Issues in RTAS Involving Countries at Various Stages of Development

Some of the other problematic issues in respect of RTAs are

(i) use of tariff peaks[36] by developed countries,

(ii) equivalence notion under the Sanitary and Phytosanitary Measures (SPS) Agreement not being extended on a MFN basis,

(iii) rules of origin problem, and

(iv) nonreciprocal tariff concessions.

Some of these issues are also quite important as far as the trade diversion aspect of RTAs is concerned.

These issues are dealt with here briefly one by one.

(i) Use of Tariff Peaks by Developed Countries

After the implementation of the Uruguay Round, and the consequent tariffication of non-tariff protection in agriculture, dispersion in tariff rates did not fall substantially, and even increased in some instances. Especially in the case of agriculture, protection was lowered mostly on the items already characterized by relatively low barriers, while the tariffication procedures did little to reduce protection on highly protected goods such as dairy, meat, and sugar. Overall, the phenomenon of tariff peaks seems to have been aggravated.[37]

Although the average tariff rates in the industrialized countries are low, they have high peak tariffs for certain products, some of which are of export interest to many developing countries. In certain Quad markets (EU and Japan, especially) MFN tariff peaks in some processed agriculture and food categories can be so high as to displace completely exports from developing countries in the absence of any preferential regime. As can be seen from Table 2, in Canada and the United States, tariff peaks are concentrated in textiles and clothing; in the EU and Japan, they are concentrated in agriculture and food products.[38]

Preferences granted by the Quad are of a cascading nature: countries with FTAs get the best treatment, followed by least developed countries (LDCs) and other developing countries. The US

[35] www.commerce.nic.in
[36] In a tariff schedule, a single tariff or a small group of tariffs that are particularly high, often defined as greater than three times the average nominal tariff.
[37] Bhagwati, Jagdish, and Arvind Panagariya (1996): The Economics of Preferential Trade Agreements (American Enterprise Institute Press, Washington DC).
[38] Crawford, Jo-Ann, and Roberto Fiorentino (2005): The Changing Landscape of Regional Trade Agreements, WTO Discussion Paper No.8, World Trade Organization, Geneva.

grants preferences to the members of the Andean Pact, Caribbean Community, and to Mexico under NAFTA. Two different groups of LDC countries are constructed in the EU case: LDCs that are not African, Caribbean, and Pacific group members, and LDCs that are. For Canada, the developing countries are grouped into several categories: those benefiting from LDC, GSP (Generalized System of Preferences), and Mexico and Chile, which benefit from FTA status. Finally, for Japan, developing countries are divided into GSP beneficiaries and LDC beneficiaries.

On average, the preferential schemes are quite generous, but are much less generous for tariff peak products. Preference margins on tariff peak items for GSP beneficiaries are only 9 percent in Canada, 18 percent in Japan, and 23 percent in the US16. For LDCs the margins fall to 25 percent in Canada, and 30 percent in the US and Japan.

The EU by contrast has a 50 percent margin for GSP beneficiaries and 70 percent margin for LDCs in tariff peak items. It is said that tariff peaks in Japan affect about US$500 million in LDC exports to the world and those in the EU affect about US$800 million.

Indian exports such as textiles and garments as well as agricultural commodities can be greatly affected by the prevalence of tariff peaks. Market access for these products could be facilitated by our ability to secure reduction in these tariffs in the industrialized countries through future tariff negotiations in the WTO framework. The phasing out by all countries of tariff peaks and escalation (tariffs rising with the degree of processing of imports) is critical to the development dimension of the current round of multilateral trade negotiations, and could best be achieved through formula approaches that ensure deep across-the-board reductions.[39]

Hence the issue of tariff peaks and tariff escalation should be addressed very carefully, since this holds back export-led growth and leads to greater trade diversification in countries that are not members of any significant RTA and the developing countries in general. Moreover, the higher the MFN rates of a developed country, the greater the leverage strength it will enjoy in terms of asking for special privilege from the developing countries, particularly in any of the North-South RTA formations.

III Effects of RTA

1. Trade diverting rather than trade promoting

One argument, first raised in 1950 by the noted economist Jacob Viner, cautions that arrangements such as customs unions and FTAs can be trade diverting rather than trade promoting.[40] Trade diversion occurs when an FTA has the effect of enhancing the exports of an FTA member at the expense of imports that were previously purchased from a country or countries not party to the FTA.

2. Hinders multilateral progress in the forum of the WTO

They divert attention and resources away from multilateral liberalisation efforts under the WTO

[39] Johnson, Harry (1965): An Economic Theory of Protectionism, Tariff Bargaining and the Formation of Customs Unions, *Journal of Political Economy* 73, 256-83.
[40] Jacob Viner, The Customs Union Issue (1950) 44.

framework.[41] As countries direct their efforts to negotiating FTAs, they may lack the drive--or for that matter the staff--to simultaneously work towards multilateral progress in the forum of the WTO. As was stated in a recent WTO report, "the diversion of skilled and experienced negotiating resources into [FTAs] especially for developing nations and probably for rich countries also--is too great to permit adequate focus on the multilateral stage." This problem is particularly acute for least developed and developing countries that may only have enough staff to engage in one trade negotiation at a time. If the entire government negotiating team is working on achieving an FTA, there is simply no staff available to push for progress in the WTO forum.[42]

3. Complexity and cost associated in execution of FTA'S rules

Such rules are necessary to determine which goods qualify for the preferential FTA tariff rate and which do not. Applicable tariffs may vary significantly based on whether or not the country of origin for a given import is an FTA partner. This determination is straightforward for goods produced solely in one country from materials originating in that country. The situation becomes significantly more complex, however, when cotton from one country is woven in another, cut into garments in a third, and finished with appliqués in a fourth. Different countries have different ways of determining the country of origin. The so-called rules of origin problem is further complicated by the existence of FTAs with different rules of origin criteria. Country "A" may have different criteria under its FTA with "B" than it does under its FTA with "C". Jagdish Bhagwati has likened the tangle of overlapping obligations and alignments to a "spaghetti bowl" that "clutters up trade with discrimination depending on the 'nationality' of a good".[43] In addition to the clutter, there is significant expense involved in administering rules of origin in FTAs.

4. Protection of labour rights and environment: a disguise

To the extent that FTAs are used to import into the free trade realm requirements that increase rather than decrease trade barriers, such FTAs are clearly undermining the multilateral process of attempting to liberalize trade.[44] The introduction of environmental and labour requirements that are expensive to satisfy will have the additional undesirable effect of removing some of the comparative advantage previously enjoyed by poorer countries.

5. Basic principles of WTO i.e. MFN principles lost

Furthermore, because FTAs are preferential in nature--giving more beneficial trade access to those in the agreement than to those excluded from it--some warn that as FTAs proliferate, the core GATT and WTO principle of MFN has been

[41] Search Term Begin WTO, Search Term End "Advisory Report Calls for Search Term Begin WTO Search Term End Push to End Tariffs to Counter Search Term Begin Trade Search Term End Preferences Threat" (2005) 22 ITR 71.
[42] Meredith Kolsky Lewis, "The Free Trade Agreement Paradox", 21 NZULR 554; www.westlaw.com

[43] J Bhagwati, "US Search Term Begin Trade Search Term End Policy: The Infatuation with Free Search Term Begin Trade Search Term End Areas" in Jagdish Bhagwati and Anne O Krueger (eds.), The Dangerous Drift to Preferential Search Term Begin Trade Agreements Search Term End (1995) 2-3.
[44]

eroded to the point that it can be more accurately characterized as LFN, or least-favored nation.[45] A startling illustration of this phenomenon is the fact that the European Union ("EU")[46] has so many preferential arrangements that only nine WTO member countries fail to qualify for treatment more favorable than MFN. All other WTO members have some sort of preferential access to EU markets above and beyond the applicable MFN access.[47]

Epilogue

Suggestions and summations

This all suggests the need for the WTO to impose conditions that will change the incentive structure for countries, so that there is either a prohibition on, or a clear disincentive from, entering into FTAs that are not true to the purpose of Article XXIV. The WTO must remove the option--even if countries still desire it--of going the bilateral route when it is at the expense of the multilateral process. And to the extent countries disregard any new regulations designed to prevent FTAs that greatly undermine the WTO system, they will do so at the peril of having to defend their agreement before the Dispute Settlement Body. If Article XXIV is clarified and strengthened, presumably more cases would be brought challenging certain FTAs as being GATT-inconsistent. The key is to change the rules such that countries no longer perceive choosing FTAs over the multilateral system as being in their best interest.

This isn't to say that the WTO membership should repeal Article XXIV, or that FTAs should no longer be permitted. FTAs are clearly here to stay. However, the WTO can and should change the way FTAs are reviewed, so that the FTAs that are entered into are those that have the greatest potential for spurring on the multilateral process, and not those that, by virtue of excluding sensitive sectors or adding trade-dampening clauses, will hinder the process of multilateral trade liberalization.

The GATT examined FTAs and customs unions through what was called the working party review system. However, due to continuous disregard of the FTA's by the 'working party review system', which found majority of agreements to be not in conformity with the Article XXIV. As a result of dissatisfaction with the ad hoc system, WTO members agreed at the 1996 Singapore Ministerial Meeting to replace the working party review system with the CRTA.[48] The terms of reference for the CRTA included examining new agreements, assessing systemic implications of FTAs, and making recommendations to the General Council. Unfortunately, the parties have still been unable to reach agreement as to the proper interpretation of Article XXIV, and as such have been unable to

[45] P Sutherland, "The Doha Development Agenda: Political Challenges to the World Trading System--A Cosmopolitan Perspective" (2005) 8 J Int'l Econ L 363, 366 ("the reality is that one of the central pillars of the WTO-- most-favoured nation (MFN) treatment--has been undermined to the point that it may become meaningless.").

[46] The European Economic Community was renamed the European Community and incorporated into the European Union in 1992 pursuant to the Maastricht Treaty (Treaty on European Union (EU), 7 February 1992, 1992 O.J. (C 191) 1, 31 I.L.M. 253). The European Union is a WTO member, as are its twenty-five constituent countries. This article refers to the European Economic Community or EEC when discussing events preceding the creation of the European Union, and otherwise to the European Union or EU.

[47] Meredith Kolsky Lewis, "The Free Trade Agreement Paradox", 21 NZULR 554; www.westlaw.com

[48] WTO, Decision of the General Council of 6 February 1996 (WT/L/127, Geneva, 7 February 1996). James H. Mathis, Regional Trade Agreements in the GATT/WTO: Article XXIV and the Internal Trade Requirement (2002) 131.

reach consensus about a single free trade agreement.[49]

Because over a hundred FTAs have come into effect even without working party or CRTA approval, members have realised that the CRTA has no real teeth. In light of these considerations, what can and should individual countries do to act in their best interests, yet avoid undermining the WTO? The ultimate solution to the spaghetti bowl effect and these other inefficiencies would of course be for all countries to reduce all tariffs to zero. If and when this occurs, FTAs will become largely redundant except for the value they provide in increasing linkages in areas not covered by the WTO. Even a removal of tariffs on manufactured goods would be beneficial, as it would remove the current problem of inconsistent practices in determining rules of origin.[50]

In sum, countries are flocking to suboptimal FTAs at the expense of the multilateral system. This dynamic must change and soon as it is undermining the ability and the will of WTO members to do the hard work necessary to lower trade barriers on a multilateral basis.

[49] Ibid.
[50] C Barfield et al, "The Multilateral System and Free Trade Agreements: What's the Strategy?" (2003) 37 Int'l L 805.

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An Analysis of the Impact of the Economic Crisis on the European Union's Competition Policy

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This analysis of the impact of the economic crisis on the EU's competition policy is intended to show what the protection of competition against cartels and abuses of dominant position carried out by the European Commission had to go through from the second half of 2008 up to the end of 2009. Under the influence of economic problems of global proportions, quite naturally attempts at less systemic and more frequent interventions into national economies occurred and the level of tolerance towards potentially anti-competitive behaviors was tested. The EU´s antitrust had to face this pressure and at the same time to show that it did not stand in the way of economic recovery, but on the contrary that the competition policy is one of the tools that can drive economies of EU members onto a course which leads to revival. The first part outlines in general the impact of the economic crisis on market competition. In the second part, it is shown that even before the outbreak of the financial and economic crisis EU competition policy, while going through a process of modernization, had already had to face a negative, inherently anti-liberal reaction. The central, third, part is devoted to an analysis of how policy-makers in charge of competition policy managed their portfolio in 2008-2009, when they had to face the consequences of the economic crisis. The final summary offers a reflection on the tendencies of further development of EU antitrust in the post-crisis period.

1. Economic crisis and economic competition

The economic crisis is testing the rules of antitrust and the will to enforce them. In times of recession enterprises as creators of jobs, tax revenues and an active trade balance get into existential difficulties. Their troubles directly affect voters, as well as national budgets, thereby creating a strong demand for help to survive in difficult times.[2] This demand is directed, in short, to a greater ex-ante activity of states in favor of vulnerable firms and sectors (state aid of various kinds, initiating, facilitating and permitting rescue mergers and takeovers). At the same time there is a demand for greater ex-post state passivity towards firms and their market behavior (tolerance for rescue cartels and for anti-competitive excesses of "national champions" in troubles). This could be the brief and general summary of the impact of economic crisis on competition policy.

The history of the oldest of the modern systems of protection of competition, i.e. of the enforcement of

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[2] The survey of views of EU citizens from September 2009: Eurobarometer survey showed, for example, that Europeans considered the freedoms of the EU Single market (and thus the free competition as an inherent part of them) to be only the tenth important priority for the future development of the EU (13% of votes). While they placed the healthy economic development as No. 1 priority (33%), social and health issues as No. 2 (26%) and such value as solidarity with poorer regions to the 7th place (18%). Nevertheless as much as 63% of respondents of the same survey agreed that "free competition is the best guarantee of economic prosperity", but for example in France it was only 48%, while 40% disagreed and 12% did not have any opinion on that issue. (Bruzzone, Prosperetti, 2009, p. 77)

the Sherman Act from 1890 in the U.S. shows that "the Great Depression and war usually led to a substantial limitation in antitrust enforcement, and regardless of the ruling majority." (Crane, 2009, p. 18-19) Whether the administration has been in the hands of supporters of a lesser (Republicans) or greater (Democrats) presence of the state in the national economy, the unpopularity of the protection of competition in tough times always took its toll. In the name of "stabilization", which has always been accustomed to being the first and key objective in the eyes of those who have been directly threatened by the crisis and also of those who have accepted the task of guiding the country's economy out of troubles, there have been growing calls for averting chaos in economic and social spheres resulting from chain bankruptcies of firms. In order to halt the fall in prices and to enable companies to earn enough profit to survive in the market, measures were to be taken which competition theory and the practice of normal times would rule out of consideration because of their being seen as anti-competitive.

Competition policy in the broad sense operates in four areas of activity of state and businesses and all of them in crisis times come under pressure. Briefly the following areas and their ongoing competitive processes are considered.

1. As expected the said pressure is the strongest in the area of **state aid to competitors**. "In autumn 2008, the outburst of the economic and financial crisis was followed by widespread calls for a suspension of the application of EU state aid policy so as to allow member States more room for maneuver in managing the crisis." (Bruzzone, Properetti, 2009, p. 73) Politicians simply feel it to be their duty to rescue, by financial injections in particular, those firms that are "too big" or "too systemic" to become bankrupt (banks, large employers), or those that did not get into trouble through their own fault (small and medium-sized businesses affected by secondary insolvency, or by the interruption of supplier-customer relations).

While these politicians may actually save the current system (e.g. prevent the financial system collapse that would affect all sectors), they necessarily at the same time distort the market to the detriment of those firms that remained healthy and that would have to face the pressure from "government-doped" competitors. In parallel, they create momentum for protectionist measures, since state aid in a globalized economy is economically stimulating without specific local regards, while the fiscal burden remains on a specific local budget.[3] Any call for a preference for domestic production, however, fuels a spiral of reactive measures by other national governments and poses a threat of the disintegration of markets and trade on a regional or global scale. For the European Union (hereinafter "EU"), such competition of national governments concerning the largest and fastest support to local companies may lead to the disintegration of the Single Market. In September 2009 the former EU Commissioner for the Single Market and then for competition, Mario Monti

[3] This one-sided burden on the state budget together with only diffused positive effects led the famous Nobel laureate economist Paul Krugman to the defense of protectionism as the second best - of course always short-term - solution to a recession. Naturally, the best but non-available solution would have been a globally coordinated response to the crisis. (Krugman, 2009).

warned of this danger: "The global financial crisis has inflicted such damage to free-market principles that it risks undermining the core function of Brussels and triggering the disintegration of the European Union." (Monti, 2009).

In the EU the state aid agenda falls eminently within the competence of the European Commission (hereinafter the "EC") and its Directorate General for Competition (hereinafter the "DG Competition"). State aid that distorts competition within the Single Market is prohibited by the primary law of the EU (formerly Article 87 EC Treaty, now 107 of the Treaty on the Functioning of the EU), with a few strictly defined exceptions, which must be approved by the EC. Nothing more than a glance at its official website, the part dedicated to "Competition policy and economic recovery - Tackling the economic crisis" is needed to testify that the monitoring of state aid is a priority amid the current economic problems and that it has to be subjected to temporarily softened standards of state aid assessment and approval (the so-called *Temporary framework*).[4]

2. In the field of **concentrations**, i.e. mergers between competitors, politicians in a time of crisis push at rescuing the companies threatened by bankruptcy through facilitating their sale to other companies (or at least through easier and more accelerated approval of such sales), preferably to domestic ones. Economic crisis may attenuate spontaneous activity in mergers and acquisitions, as both sides of a potential transaction question the quality of the assets of the other party and in parallel expect their price to fall further. At the same time, however, so-called rescue takeovers (sometimes even by the State) are initiated that would have been in normal times economically unattractive and in competitive terms (due to a change in the market structure in favor of the purchaser) held unacceptable.

Such developments have occurred during the past year, particularly in the banking sector. A concrete example of "failing firm defense"[5] in the current crisis was the takeover of the bank HBOS (Halifax Bank of Scotland) by Lloyds Bank in Britain in late 2008 and the beginning of 2009. Despite a warning issued by the UK Competition Authority (the Office of Fair Trading), there was a government intervention "in the public interest" that resulted in a banking group with 135,000 employees and nearly one-third (i.e. by far the largest) share of the UK mortgage market (Belfast Telegraph, Jan 1, 2009). In the opinion of observers, however, there are now in Great Britain "two sick banks instead of one" and all that happened only because of the fact that the takeover remained solely in the hands of the British administration and did not fall within the competence of the EC, which would have had hardly approved it given its negative impact on competition.[6] (Lyons, 2009 p. 16)

[4] It is communication, explanation and summary of the measures taken by the European Commission, respectively. by its Directorate General for Competition posted on the official website of DG Competition http://ec.europa.eu/competition/recovery/index.html

[5] Defense of companies in economic difficulties or shortly Failing Firm Defense, should be an acceptable reason to clear a rescue merger both in the EU competition law as well as in national competition law of Member States, however always subjected to the meeting of conditions guaranteeing the minimization of impact on the competitive structure of the market concerned.

[6] Jurisdiction over assessment of anti-competitive effects of a merger or a takeover within the EU Single Market is governed by the so-called "two thirds rule" saying that if two thirds of the merging firms´ turnovers are made on the same national market, than the national competition

The European Commission officially refused to make any changes to the existing rules of scrutiny of notified concentrations, enshrined in the Council Regulation (EC) No 139/2004 of January 2004, although it admitted its regard for "rapidly evolving market conditions". This concession, however, meant more flexibility in procedural matters (speeded-up decision-making) never any substantive change in the principles of mergers´ control. Therefore, in this area, unlike in the control of state aid, the EU did not adopt any temporary measures. The Commission expressed its readiness to clear the failing firm rescue takeovers, provided all legal conditions were met. However it excluded the possibility of completing, even if only temporarily, these conditions of competitive assessment by any public interest implication, for example, by the public interest to stabilize the financial sector or to save jobs. The Commission's representatives repeatedly stressed to the Member States that the possibility given to the latter by Article 21, paragraph 4 of the Regulation to apply their criteria of public safety or media pluralism to the merger controlled by the Commission allows them only not to authorize the merger, which the EC has approved and not vice versa. Any national permissiveness toward rescue takeovers banned by the Commission is illegal even in times of crisis and EU is not going to change anything on it. (Lowe, 2009, p. 16-17)

3. Yet the crisis has also an impact on antitrust policy in the strict (or narrow) sense, i.e. on the **fight against cartels** and abuses of a dominant position. In the case of prohibited agreements between competitors - cartels – there are in times of economic downturn attempts at collusion aimed at avoiding further price reductions, or of luring competitor's clients by prices cuts and also of agreements on the coordinated reduction of production capacities concluded with the same intent - to stop the fall in prices. The U.S. and Europe experienced in the 1930s a period of state-controlled rescue cartels and these so-called crisis cartels emerged in the EU also later – in the period after the oil shock of 1973 and also in the 90s in the cattle sector after the outbreak of the BSE disease (the so-called "mad cow" crisis). (Grayston, 2009) Government has always had the tendency to tolerate or even encourage such crisis cartels because they provide in the short term for the desired political-economic effect: they avert bankruptcies and the loss of jobs.[7]

It should be noted that Europe (not the EU) has it encoded inside it a tradition of antitrust that there are "good and bad" cartels, i.e. those which moderate the impact of the crisis, without being unduly exploitative against the consumer and can therefore be tolerated (excluded from ban, and even protected by the State) and those cartels that competitors have secretly negotiated with, their sole aim being to increase their profits. For historical examples is not necessary to go too far, in pre-war Czechoslovakia the Act on Cartels and Private Monopolies (No 141, Coll. from the 12 of July 1933) prohibited only the cartels threatening

authority there is competent to scrutinize it and not the European Commission.

[7] This tendency of governments in times of crisis is acknowledged even by the official bodies - see for example the Office for Protection of Competition Infolist No. 3 / 2009 Soutěžní politika a hospodářská krize (Competition policy and economic crisis) at www.compet.cz

the public interest, i.e. disproportionately increasing prices, while it did not touch export cartels and it even effectively protected "good cartels" duly entered into a register kept by the State Statistical Office.[8] (Švanda, Vrána, 2008, p. 48-50). Although it has been empirically demonstrated that these crisis cartels have everywhere in the world survived the crisis itself and even prolonged it by preventing the natural restructuring of cartelized industries, the tendencies leading towards their establishment and towards their tolerance on the side of the state are clearly present also in the 21st century. The occurrence of such tendencies was publicly confirmed in Spring 2009 by the then President of the Czech Office for Protection of Competition, Martin Pecina, and some of them will be illustrated below.[9]

4. Given the above stated facts, especially regarding the cases of crisis state aids and rescue mergers, it is only logical that the crisis cannot avoid the battlefield in the contest against **dominance and monopolization abuses.** Economic recession strengthens the self-preservation instincts of companies and those who can afford more to exploit the consumer or force weaker players out of the market and close the market for themselves naturally tend to try for something like that (Lyons, 2009, p. 22). The largest companies in the sector are as a rule also large employers, suppliers and customers, as well as taxpayers, and governments show considerable tolerance towards them even outside periods of crisis. If suddenly these "national champions" become crises-threatened or face the danger of a sanction for their abuse of a dominant position, politicians are often "blind and deaf" or at least behave extremely resourcefully, if they are not in power to prevent a penalty being inflicted by an independent competition authority.[10]

Particularly in the EU, where private enforcement of competition law is underdeveloped and injured competitors or consumers very rarely defend their interests through actions against dominant companies, it is almost exclusively up to competition authorities (namely the European Commission and national authorities) to stop any anti-competitive conduct of market leaders. There exists a difference here when compared to the U.S., where the ratio of antitrust actions brought by private parties and state institutions was estimated at 10:1. This also means that even a neo-liberal presidential administration can not effectively protect American "national champions" against antitrust charges and sanctions for abuse (Crane, 2009, p. 17). If, however, European competition

[8] It is noteworthy that regime of the quoted law made it even more difficult for companies to leave the registered cartels by imposing very strict exit terms. These reported "good" cartels were considered to be "economic marriages"- the basis for a functional economy. On the contrary, the companies staying aside of cartels, the so-called outsiders, were at the time viewed almost as "blackmailers" with negative influence on the national economy. (Švanda, M., Vrána, F. (2008), p. 48-50)

[9] Representatives of competition authorities has repeatedly stressed during the current crisis that the so-called anti-crisis cartels prolonged the pre-war recession in the U.S. for up to 7 years. They admitted on the other hand to be constantly faced with initiatives and pressures that are geared specifically to the creation of such cartels. In detail see Lyons, 2009, Grayston, 2009. M. Pecina, in an interview from March 2009, said: "There is a risk that there will be state-organized cartels. This means that some States will address the crisis of their industry by exhortation of businesses to do unauthorized things ... Especially and traditionally in countries such as France, Italy or Spain this threat is real."(Pecina, 2009).

[10] An example of such tendencies among politicians could be the Slovak Republic's Act on Strategic enterprises approved in November 2099 with effect till the end of 2010. One of the publicly discussed motivations for its acceptance was the rescue by expropriation of Chemical works Novaky (NCHZ), a strategic business and employer for Slovakia, burdened with a fine of EUR 19.6 million by the European Commission for participation in a cartel, which precipitated his fall into bankruptcy. See details in Pravda (daily), 26 of November 2009.

authorities succumb to the efforts of politicians in excusing the ailing health of key businesses afflicted by troubles they have to face during a crisis, open and undistorted competition would be at serious risk. Whether and how well the European Commission has passed this test will also be shown below.

The prevailing focus in recent speeches and initiatives of representatives of competition authorities, as well as of analysts and commentators, on the topic of competition policy in the current crisis has been given to the first two areas, i.e. to the control of state aid and of concentrations. It is quite natural that in the areas where the state power intervenes *ex-ante*, there is the greatest scope for political intervention. Politicians can plan and by their decisions initiate assistance to companies in difficulty, or facilitate their emergency mergers. They may try to pre-arrange the consent of competition authorities (in certain, statutorily determined cases, exclusively of the European Commission) with such plans. They may also try to support their intentions by arguments as well as by political pressure on EU institutions and may even risk a legal dispute because of ignoring the opinion of a competition authority.

Conversely, in cases of ex-post inflicted sanctions for cartels and abuses of dominant position any influence of the current crisis is less conspicuous and therefore less well described. In cases highlighted by the media and therefore politically important ones in this area of antitrust, economic competition has usually already been, or currently is, threatened, i.e. significantly distorted to the detriment of competitors and consumers. Politicians here run behind events that they have not initiated. They can therefore hardly pre-arrange anything in advance with the Commission. Any ex-post initiative by the State or politicians developed after exposure of a prospective offender or offenders carries a risk of conflict of competencies, an onus of preventing the free exercise of justice and also of a negative reaction by harmed market participants. Therefore, the emergency interventions in this area are rare even in the time of crisis and antitrust literature devotes much less attention to this issue.

For this reason, the following text (particularly in Part 3), will focus solely on these less discussed effects of an economic crisis on antitrust in the strict sense, i.e. on the distortion of competition, which the EU law prohibits by Articles 101 and 102 of the Treaty on the Functioning of the EU, which means respectively cartels and abuses of dominant position. Emphasis will be placed on how the EU, between 2008 and 2009, struggled with the cartels and abuses of dominant position and in parallel with the pressure on their tolerance because of a difficult economic situation.

2. EU antitrust on the eve of the economic crisis

The sharp onset of the global financial and economic crisis during the second half of 2008 found EU competition law at a crucial moment in its modern development. On one side, the efforts initiated by the Commission to found all antitrust decisions on a sound micro-economic analysis (the so-called effect-based approach) had reached their

peak and looked for further expansion that would lead to more convergence between EU and US antitrust (or in a certain sense to the EU approaching the US standard heavily influenced for almost three decades already by the Chicago (or later post-Chicago) School of economics and competition law).[11] Even the briefest excursion into the history of EU antitrust under the last two EU Commissioners for Competition, Mario Monti, in 1999-2004, and Neelie Kroes in 2005-2009, indicates a major effort to transform not only the application rules, but the whole application doctrine of the EU competition policy and law (however without prejudice to its substantive legal foundations).

On the other side, however, there had already occurred in 2007 a strong political response to this trend, incarnated notably by the French President, Nicolas Sarkozy, and his pressure to withdraw "free and undistorted competition" from the list of the aims of European integration contained in the draft of the EU Lisbon Treaty. The crisis with all the pressures described above, then caught the EU competition policy and law at the very moment when it had to face an anti-liberal wave within the EU. The credo of this wave was expressed rhetorically by N. Sarkozy at the EU summit in Brussels in June 2007 when he designated the European protection of "competition for competition" as a misguided ideology, even a dogma. "What has it done for Europe?... Only fewer and fewer people voting in European elections, fewer and fewer of those who believe in Europe."[12] His opposition was not focused exclusively on specific developments in EU competition policy and law, it was a more general rejection of the fact that since the 1990s, modernization has become synonymous with deregulation as "any positive reform should bring about the greatest release of market forces." (Cunningham, 2009, p. 17)

The most visible manifestation of the Commission's efforts to reform the EU's antitrust, the so-called modernization of competition law was implemented primarily by Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty which led to the involvement of national competition authorities and courts in the enforcement of EU competition law (decentralization), as well as to the elimination of any ex-ante official assessment of the proposed practices of competitors and of exemptions officially granted to them.[13] If this new

[11] U.S. Antitrust came under the dominant influence of the Chicago School in the 80-ies of the 20th century. This school, based on a neo-liberal interpretation of the so-called perfect competition model, refused any State care of the market structure (typical for the then traditional doctrine of competition) and advocated the focus on outcome of competition process. This outcome should be calculated in microeconomic terms as the benefit for overall well-being (total welfare) produced by a more efficient market behavior of competitors. State intervention in free markets should be strictly limited and is justifiable only if leads to greater allocative efficiency than the market itself is able to ensure. Maximal restraint in enforcing competition law is therefore recommended. As classics of Chicago school are viewed Robert A. Posner (and his work Antitrust Law, 1976) and Robert H. Bork (The Antitrust Paradox, 1978). Post-Chicago School in the 90-ies, then took a less dogmatic approach, based on empirical studies, and opted for more interventions against competitors offending the rules, but in theoretical foundations of the paradigm it did not change anything substantial.

[12] An authentic statement uttered by Mr Sarkozy at the EU summit held on June 21-22, 2007 in Brussels, quoted by EUractive.com, Brussels, June 27, 2007 "Brussels plays down EU Treaty Competition Fears". This anti-liberal attack on the role of competition policy in the EU attracted attention of the entire European political elite, as evidenced by reactions in major media, see e.g. Charter, D. in The Times, June 22, 2007, Gow, D. in The Guardian, June 25, 2007, Petite, M. in The Financial Times, June 27, 2007, Giavazzi, F. in The Financial Times, June 29 , 2007, Monti, M. in answers to Reuters, July 22, 2007.

[13] To find more about the modernization of EU competition law see for instance Regulation 1/2003: a modernised application of EC competition rules in Competition Policy Newsletter 2003/1

system - in which the Commission maintained its central role but, however, no longer made all enforcement decisions – was to work correctly, it was necessary to put competitive analysis on a solid and unified methodological basis and to give a single objective to all decision-making. Only in this way could EU competition policy and law remain consistent under the new conditions (changed also by the increased number of Member States from 15 to 27). An analytical foundation has been provided by modern microeconomics and higher efficiency producing consumer welfare has become a principle target of antitrust. These aspects have to be the only accepted feature of functioning competition, or of its distortion if denied. Such an "economization" of antitrust has naturally blended with the broader market-liberalization wave, which has led to greater respect for spontaneous self-organization of markets and to the "effect-based approach" taking into account the quantifiable impact of any act on the market and its players.

This concept of antitrust distanced the EU competition policy and law from its original Ordo-liberal base, which in the spirit of the German Freiburg school of economics and economic policy advocated the protection of a fragmented (polyopolistic) market structure, since this was understood as being a guarantee of economic freedoms within the meaning of the independence of entrepreneurial decision making.[14] Analysts and commentators have called the efforts of the European Commission EK a shift in competition paradigm "from rivalry to efficiency", "from fairness to welfare", "from form to consequence" or also "from Freiburg to Chicago", "from legal normativism to economic pragmatism".[15] These labels consistently expressed the fact of a lesser stress on per se prohibitions based on an ideological concept of competition, and of greater reliance on specific, quantifiable effects of competitors´ behavior for society in general and consumers in particular. And these efforts were generally welcomed as being well-founded (based on solid economics), and as usefully narrowing the wider and therefore more easily politically manipulable range of goals pursued in earlier times in competitive decisions (not only the freedom to compete, but also competitiveness, employment, environmental protection, etc.). The shift itself is well documented particularly in the declarations of representatives of the European Commission (the DG Competition) as well as in the Commission's guidelines and notices.[16] To a somewhat lesser

(http://ec.europa.eu/competition/publications/cpn/2003_1_3.pdf) and on its implications for the application of competition law in the Czech Republic se Petr, 2008.

[14] For details on the Ordo-liberal school of Freiburg school and its theoretical foundations and its impact on the postwar doctrine of competition in Germany and then in the EU see Krabec, 2006.

[15] History of development and of the changing paradigm of competition policy in the European Union is described for instance in Weitbrecht, 2008 or Smejkal, 2009.

[16] It is a historical fact that the Competition Commissioner in the years 1989-1993, Leon Brittan, was still rejecting any convergence of EU and U.S. antitrust based on Chicago School "ideology", however his already mentioned successor, M. Monti, declared unambiguously in 2001 in Washington: "… today after almost fifty years of application and development of antitrust rules in Europe, we can confidently say that we share the same goals and pursue the same results on both sides of the Atlantic: namely to ensure effective competition between enterprises, by conducting a competition policy which is based on sound economics and which has the protection of consumer interest as its primary concern. " (Monti, 2001b) In one of the most important EC documents on modernization of the EC competition law (Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty, Official Journal C 101, 27.04.2004, p. 97-118), the very of "General remarks" read: " The objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. "(paragraph 13). "Economisation" of EU competition law had also an impact on composition of the staff of the Directorate General for Competition of the European Commission: while in the first half of the 90-ies still dominated by lawyers over

degree, this shift occurred in competition case decisions, especially since the European Court of Justice and the Tribunal of First Instance (now The General Court) remained, in a series of decisions from the end of the decade, faithful to the traditional interpretation, i.e. to that one based on the older, Ordo-liberal in its spirit, jurisprudence.[17]

These developments in the field of competition policy, hand in hand with the opening of formerly state-monopoly sectors to Single Market freedoms, has provoked the above described response from France, and like-minded countries, especially of the southern wing of the EU. The Commission was described as being a "nest of Anglo-Saxon liberalism" and the rejection of "free and undistorted competition" has become "a rallying cry" of those who refused to accept that the new version of the basic agreement contained in the Article I-3 (Objectives of the Union) the wording:[18] "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and an internal market where competition is free and undistorted."(Thornhill, 2007). At least formally free competition was in the end "rescued" by the reaction of the more liberal, northern wing of the EU and to the Lisbon Treaty was added the Protocol on the Single Market and Competition, by which the importance of protecting competition to achieve the priority objective of the EU, which is the functioning Single Market, was underlined. More important, however, was this demonstration of the political disunity of EU leaders as to what the competition has to serve, whether the fruits of competition as such, i.e., higher efficiency and consumer welfare, or some other objectives of economic policy. The latter can range from socio-economic well-being based on the maintenance of high employment, secured by large domestic employers who need to be protected and promoted against global competition and occasionally also against global crisis.

This concept basically means subjecting the protection of competition policy to government policies, especially those of industrial development and of employment. The declaration made by Henri Guiano, a special adviser to French President, tells us a lot in this respect: "If we have a religiously dogmatic vision of competition, we will plunge the European economy into a totally inferior position compared with other countries." (Le Journal de Dimanche, December 10, 2007). And more than just political declarations and symbolic acts have followed, as shown by (especially but not exclusively) the French government, which for example set up the Fund for Strategic Investments, which has an annual budget of two billion Euros for

economists in the ratio 7:1, a decade later, this ratio was 2:1 and the key position in addition to the Director-General (from 2002 to 2009 occupied by an economist, Philip Lowe) has become the post of Chief economist. (Abbot, 2005; Wigger, 2006)

[17] A controversy about ideas underpinning the decision-making of EU Courts was provoked for instance by the ruling of the Court of First Instance (now the General Court) in the case T-201/04 Microsoft v. Commission in 2007, where the interest in a fragmented (polyopolistic) market structure prevailed over reactions of majority of satisfied consumers who did not feel harmed by having Windows Media Player tied to the Windows operating system. Similarly, in the cases C-468/06 and C-478/06 Sot. Lélos kai Sia EE v GlaxoSmithKline AEVE in 2008 the Court declared unacceptable the hindering of parallel trade by a dominant manufacturer of a drug concerned, even though the economic effect of such a trade was clearly beneficial to wholesalers rather than to patients and economically damaging for the company that had invested in research and drug testing. In 2009, in the case C-202/07 France Telecom Wanadoo Interactive, the Court did not require as necessary the proof that the predatory pricing policy of a dominant competitor would subsequently lead to an exploitation of consumers by substantially increased prices (so-called recoupment of losses), although the neo-liberal U.S. antitrust prohibits predatory pricing by a dominant company only on the basis of such evidence.

[18] See the EU document CIG 87/2/04 REV 2, Brussels October 29, 2004, p. 10

investment priorities in support of national priorities in economic and industrial policy.[19]

It is therefore obvious that even before the current financial and economic crisis EU competition policy began to be "penalized" for the prominent position it had acquired at the turn of the century and also for its commitment to ideological semi-convergence with U.S. antitrust.[20] The Commission defended it, of course, as evidenced by the remarks of Competition Commissioner N. Kroes and his Director General, P. Lowe during the years 2007-2008.[21] Also the impact on decision-making in European antitrust has not been visible at all in practice. This has also been due to the fact that proceedings for infringement of EU competition law is always a matter lasting several years and the final decisions of EU courts usually come quite long after the Commission's verdict, which means very often five or more years after the discovery of misconduct.[22] Today's events in the markets would likely be reflected in enforceable antitrust decisions of EU institutions only when the current recession is entirely over.

Current developments are, however, leveraging the above described anti-liberal tendencies that work against the Commission's policy in the competition field, because "in Europe, the U.S. and elsewhere, the crisis has generated much debate about the reliance on market forces to provide the best outcome for consumers and the economy as a whole." (van Rompuy, 2009). In the words of those who never wanted the free competition of liberals: "The Fall of unregulated financial markets will perhaps be the fatal blow to the current economic liberalism". (Chavagneux, 2009). There was, after all an agreement between the leaders of France (N. Sarkozy) and Germany (A. Merkel) at the conference, "New World, New Capitalism," in January 2009 in Paris that even after the current crisis is over there would be no return to laissez-faire economic policy. (International Herald Tribune, January 9, 2009). Such a position of key European powers, if it were to materialize in practice, would mean the loss of political support for the current EU competition policy. Even if the existing legal framework of competition in the EU is maintained, without political support it could hardly sustain its pro-liberal trend of interpretation and would face difficulties in pushing through a sufficiently unified approach for all competition authorities towards cases of potential distortion of competition through the current decentralized

[19] Strategic Investment Fund (half owned by the French State and public financial institution Caisse de Dépots) has the task to invest annually in French companies and projects in order, among other goals, to prevent their hostile takeover from abroad (e.g. in the case of the company Areva in the nuclear energy sector), to ensure recovery of formerly strong French brands (such as Pechiney in metal processing) and to strengthen domestic competitors facing global competitive pressures (e.g. Daily Motion in information services). How such a policy distorts the market environment and denies the principles of free competition, was highlighted for instance by The Economist, December 30, 2009.

[20] The thriving of competition policy and law in the optimistic years of liberal (so-called Washington) consensus can be illustrated by the fact that before 1990 just over ten of the most developed countries had their own antitrust legislation, while after 2000 this number exceeded one hundred, and now even former major non-market economies, Russia and China, have laws on the protection of competition. In the EU this prestigious role of competition protection was manifested by, among other things, the draft of Constitutional Treaty for Europe, that "promoted" it to the level of goals of European integration, or in the words of the then Competition Commissioner M. Monti, made of the competition the "fifth freedom of the Single market." (Monti, 2004)

[21] A complete overview and content of these performances, see the official website of DG Competition European Commission http://ec.europa.eu/competition/speeches/

[22] Regarding manifestations of such influences over the competitive decision-making it should be stressed that any political pressure on the EC would probably cause a non-opening of certain cases, rather than producing a biased solution of those cases that have already been disclosed and addressed by the EC. Such unopened cases will leave no trace in EU materials as no investigation would take place and thus nobody would even be able to argue the existence of breach of competition law (that has been brushed aside after political interventions).

system of implementation in member states. "The Commission is not strong enough to defend the single market single-handedly." (Taylor, 2009)

3. Defense of free competition in a time of crisis

The fact that the protection of competition, conducted by the EU has come, at a time of economic crisis, under pressure, has repeatedly been recognized even in the highest places. The Head of the Directorate General for Competition of the European Commission, Philip Lowe, in his speeches and articles has in particular several times said: "*There has been pressure on us to set aside the competition rules, both the state aid rules and antitrust and merger rules in general…*" (Lowe, 2009b, 2009e). In the same spirit, some representatives of national competition authorities have spoken out, such as for instance the President of the Czech Office, M. Pecina, who in March 2009 spoke of the "encouraging of crisis cartels by certain governments or regions, which sometimes occurs". In particular he ascribed such tendencies to France, Italy and Spain.[23] (Pecina, 2009, 2009b). These trends were also described by independent analysts and commentators: "Many industries in distress have already requested greater tolerance towards cartels, abuses of dominant positions and other anti-competitive practices and, as the social impact of recession unfolds, political pressure to retrench competition enforcement is expected to intensify." (van Rompuy, 2009). "The financial and economic crisis has emphasized that, at EU level at least, competition decisions are made on a tripod of three analytical perspectives: regulatory/legal reasoning; economic analysis; and increasingly importantly, the elephant in the corner that nobody dares mention: political pressure." (The European Antitrust Review, 2010, Sec. 2: EU Substantive Areas, Public Affairs). Competition policy, both economically and legally developed and anchored enough thanks to decades of developments remains, according to the prevailing opinion of commentators, "politically fragile and thus vulnerable to crude, populist, deeply-flawed claims that it is an unnecessary luxury in times recession." (Lyons, 2009).

In times of crisis, as already indicated above, there occurs a naturally grown demand for a firm and active political leadership, capable of decisive action.[24] Logically, such a demand is more easily met by a measure initiated and coordinated ex-ante by central political power holders (government, presidential administration) rather than by an independent supervisory body, mostly an ex-post operating authority, whose paramount task is to prosecute past violations. The first and greatest threat that the Commission has had to cope with

[23] In the same spirit the Chairman of the Dutch Competition Authority intervened in early 2009 before the business and warned businessmen against attempts to overcome the crisis by illegal cartels on sectoral or regional level. He expressed the fear that instead of from large institutionalized international cartels, the danger may rather come from smaller local agreements (Grayston, 2009).

[24] Reactions in this regard were provoked inside the EU by an article in the The New York Times (A Continent Adrift) written by an influential commentator, a Nobel laureate in economics, Paul Krugman (Krugman, 2009b). To his assertion that Europe could not respond effectively to the crisis because it lacks leadership and is thus either too much integrated economically or not enough integrated politically to deal with existing challenges, the EU Competition Commissioner, Neelie Kroes, reacted in March 2009 in Washington, in a speech at the Atlantic Council meeting: "We are not adrift. Europe already has the medium-term and long-term policy settings right: an efficient single market that fosters equality of opportunities rather than outcomes." (Kroes, 2009 g). Although in her address, N. Kroes rather defended the active role of the EC at large, in different other speeches of the same period, she clearly connected an active role of the European Commission with the need not to leave developments on the EU markets on auto-pilot.

was the loss of political support for and the marginalization of competition policy as such. The Commission has had to show that even in times of crisis such law and policy are not a luxury without useful purpose, but rather an essential part of the mainstream anti-crisis measures. In the words of Competition Commissioner N. Kroes: the protection of competition "is not part of the problem, but rather part of the solution." (Kroes, 2009h). The Commission, therefore, tried - as representatives of its DG Competition persistently repeated in most of their remarks at the end of 2008 and in 2009 - to promote public awareness of three key political messages:

a) Not protectionism, but competition is the most reliable way out of recession.

b) Pragmatically applied protection of competition brings real effects for ordinary consumers.

c) A substantive and institutional legal basis for the protection of competition is good enough to manage effectively the current challenges associated with the crisis.

It is undoubtedly an intelligent mix, which is self confident enough to attack (against protectionism, for the rapid way out from the crisis) and to defend at the same time (against changes in the legal and institutional basis for the protection of competition), while relying on the trust and support of those whose sentiments create political demand (ordinary consumers - voters). Thus it builds a coherent image of a well founded, pro-active and beneficial to the public EU policy, which only by a tragic mistake could be sacrificed as a part of solving the crisis.

Ad a) Competition vs. protectionism

The question of "free competition or protectionism?" reflects in essence a general philosophical battle that representatives of the EU competition agenda have been waging for quite a long time. It has only became more pressing now when far from marginal politicians have heralded the end of economic liberalism and the return to an active industrial policy. Declarations of the French Prime Minister F. Fillon that the crisis has changed the ideological landscape of Europe and the role of states as the saviors of capitalism have confirmed the value of French dirigisme, have had to be rebutted by the Competition Commissioner, N. Kroes. He has emphasized that the rescue of vulnerable firms used to be most effective when it was based on growth of productivity and competitiveness generated by competitive pressures (Kroes, 2008b). While the Commissioner was really extremely active in this respect,[25] the fact that she stood against national protectionism was not surprising, nor new. Moreover, the ideological conflict between state dirigisme and free market competition goes far beyond the scope

[25] On the topic, which could collectively be labeled "competition as a way out of crisis", N. Kroes delivered from September 2008 until the end of December 2009 more than fifteen strategically tuned speeches that are eloquent already by their titles - according to the official website of the European Commission Competition CR http: / / ec.europa.eu / competition / speeches / index_speeches_by_the_commissioner.html): In Defense of competition policy (Brussels, Oct 13, 2008), Avoiding the protectionist trap (Paris, Jan 8, 2009), Competition Policy in the heart of economic recovery (Paris, March 13, 2009), Competition, the crises and the road to recovery (Toronto, March 30, 2009), Did government interventions help in the crisis? (London, June 30, 2009), Commission enforcement of competition policy and the need for a competitive solution to the crisis (Dublin, July 17, 2009), Why we need competitive markets (Delhi, Nov 16, 2009), etc.

of competition law and policy (as well as this paper). Considerably more interesting, however, is how leaders of the European Commission complemented and adjusted their traditional defense of the benefits of free competition for competitiveness, growth, employment and social welfare in order to escape the charge that promoting free competition equals advocating complete deregulation and total laissez-faire.

The Commission's representatives have began to declare in their speeches strongly and more frequently than before the importance of regulation and ex-ante measures as being the necessary and equal partner of classical, ex-post applied, antitrust. N. Kroes has repeatedly stated that the free markets (in which the Commission "still believes") may be not left on auto-pilot and even: "While I have been a lifelong capitalist, I could never accept that laissez faire is a good solution for a society." (Kroes, 2009 g; 2009h). She openly subscribed to pragmatism, which understands the importance of softening of the crisis impact on people, without softening the rules, which does not accept the culture of "nothing is impossible" and which considers unregulated competition to be a "naive metaphor for anarchy." (Kroes, 2009h, 2009n). Absolute freedom from rules and regulations is not permissible for countries and their national champions and the same applies to all market actors, usual proponents of laissez-faire. Even believing that free and competitive markets offer equal opportunities for all, it does not mean according to Kroes that these markets do not need government intervention to ensure better regulation. However the latter should always "be done in a way that preserves the dynamism and innovation that comes from free competition." (Kroes, 2009a).

It is also worth noting that N. Kroes had already in her speech at a conference on "New capitalism" in January 2009 (Kroes 2009) employed a remarkably compromisory vocabulary, mixing neo-liberal and Ordo-liberal terms, and even returning to the programming equipment of the Commission those concepts, that had been gradually abandoned at the time of the modernizing efforts of EU competition policy and law. Her statement that "the concern for social justice should not lead us to deprive citizens of the freedom and benefits that come from flexible markets.... But it should lead us to carefully design our social institutions so that everybody can truly participate in the economy on equal terms," can much more easily be interpreted from the standpoint of Ordo-liberalism (freedom, equal conditions of participation, institutional framework) than neo-liberalism (emphasis on the fruits of flexible markets only). Her Director General, P. Lowe, put it even more openly in September 2009 when he declared that markets need not only a guardian (i.e. ex-post competition oversight) but also a regulator (ex-ante applied and enforced rules). Summarizing the lessons learned from the current crisis he stated: "But what is maybe important for us to recognize is that competition law is not always the best solution to every competition problem. One thing the crisis has served to highlight is the importance of good regulation and the need to expand our sphere of influence beyond the narrow confines of our specialist field. " (Lowe, 2009b).

It is a strikingly different terminology than that of the liberal-reformist vocabulary of pre-crisis declarations, which were full of terms like "re-consideration of standards" or "policy shift" toward efficiency and consumer welfare as the "new guiding principles" of competition policy (Lowe, 2007). If we consider that, from the perspective of the neo-liberal Chicago School, all ex-ante regulation is essentially equivalent to socio-economic engineering and the State should reduce its interventions in markets to an indispensable minimum, it is clear that this new concept of the EU competition policy as being the sum of ex-ante regulation and ex-post application of competition law has significantly drifted away from neo-liberal inspiration sources.[26] In April 2009, N. Kroes dedicated the entire speech to an "interface" between regulation and competition law. Among other things she subscribed to a "very close relationship" of the two methods of state power interference with markets and directly quoted examples from sectors of finance, energy and telecommunications. She called for the finding of the right balance between the regulation and protection of competition, so that the regulation remains pro-competitive and allows the protection of competition to complement it in areas where, notwithstanding the rules in force, infringements occur (Kroes, 2009j).

[26] The preferred definition of competition of one of the founders of the Chicago School, Robert Bork, reads that it is such "a state in which consumer welfare cannot be increased by moving to an alternative state of affairs through a judicial decree." That says that good competition is the one into which the State does not need to intervene. (Black, 2005, p. 4). However in the current EC concept an ex-ante regulation of markets carried out in conformity with competition principles is a necessary prerequisite for the right competition.

We can hardly argue that this is just a verbal exercise, a mere lip-service to the currently criticized inadequate regulation of financial markets. It looks more like a strategic shift in emphasis foreshadowing future concept of antitrust in the EU. Both its the leaders, N. Kroes and P. Lowe, in their statements after the outbreak of crisis began to present very consistently as the desirable competition policy an equal mix of ex-ante regulation (consisting of the symbiosis between sectoral policies and basic requirements of the protection of competition) and of the classic ex-post antitrust intervention (based on the economic analysis of the actual or potential impact of competitors´ behavior, i.e. the above mentioned effect-based approach). The very sense of their speeches can be summarily interpreted as follows. Protectionism remains unacceptable; protectionism, however, is not the same as regulatory intervention in the free play of market forces, just as the protection of competition is not the same as limitless deregulation and promotion of competition above all the values of modern society. Competition policy is a carefully balanced mix of regulation and competition law.

The Commission was thus clever enough to put its concept of the protection of competition outside, or even beyond the eternal debate about more or less involvement of the State inside the economy. It promoted this protection into a principle, which may take the form of a clear rule of law (ex-post prohibition of certain behavior of competitors) as well as an inner quality of the active ex-ante regulation of markets by a government and its sectoral policies. N. Kroes even identified the

Commission's role in the current crisis as being not that of a guardian engaged in insuring respect for the rules, but an "enabler", who in collaboration with other institutions and policies makes it possible to find methods of assistance, intervention and regulation that are in conformity with competition. (Kroes, 2009o). Future competition policy strategy of the Commission, formulated under crisis, consists therefore not so much in guarding an undistorted competition, in the sense of the Chicago School, against all possible manifestations of dirigisme and protectionism. It would rather be a competition-compatible regulation at EU level (known already from the telecommunications and energy sectors) targeted against attempts by national governments to forge an egoistic way out of the crisis or similar attempts to find an egoistic solution to problems resulting from economic globalization.[27]

Ad b) Competition favoring consumers

In respect of consumers the Commission and its Directorate General for Competition in particular did not have to innovate under the influence of crises, because - as already pointed out above - consumer welfare as the goal and objective of protecting competition had been consistently emphasized at least since 2000. The so-called Consumer Liaison Office has operated within the DG Competition since 2003, then in a new form since 2008. The five-year term of N. Kroes at the head of the Competition Commissariat is especially appreciated for the emphasis she has put on the importance of antitrust for the consumer. Many of her speeches delivered after the outbreak of the crisis were dedicated to the subject of competition and consumers (e.g. *Consumer welfare - more than a slogan* (Kroes, 2009p), *The crisis and beyond: For a stronger, cleaner and fairer economy* (Kroes, 2009k), *Collective redress – delivering justice for victims* (Kroes, 2009d) etc.), and the word "consumers" was not missing apparently in any of her major declarations. The impact of her efforts was a bit diminished at the very end by the fact that her top project in this field, the proposal for a directive allowing the collective actions of private entities (i.e. in particular consumers as victims of anti-competitive behavior) for damages, was withdrawn from the legislative process in October 2009 by the Commission's President. The reason, reportedly, was that the new regime would be "excessively burdensome on business without sufficient counterbalancing benefits for consumers." (Amory B., Amato F. 2009).

P. Lowe quoted in defense of the competition policy of the Commission the figure of 11 billion euro that corresponded according to official estimates to the cost savings for European consumers in 2008 alone thanks to the strict enforcement of competition law. In the same vein he strongly rejected any negative impact of market competition on employment or on ordinary citizens: "There is absolutely no evidence to suggest that

[27] Philip Lowe (Director-General, DG Competition) stated on the symbiosis of ex-ante regulation and ex-post protection in November 2009: It is not a question of saying that that government could never intervene in company behavior should it be necessary further a public policy objective, but rather of working with government to ensure that where government does intervene, its action is as pro-competitive as possible." Policy regulation and protection of competition are, according to Lowe, parallel tools and their correct ratio must be checked on case by case basis. Their correct combination could prevent that (as in the case of certain banks), some market players became "too big to fail" or "too systemic to fail" as it is now so often argued, in cases where a government wants to help or to tolerate something to such a company (Lowe, 2009c).

more competition leads to net employment losses." (Lowe, 2009e, p. 5). It is just in emphasizing an extremely positive link between the protection of competition and consumer welfare, and in engaging consumers in this process (including the facilitation of private actions against violators of competition) that many analysts see today the surest way to maintain anti-trust in the political limelight. B. van Rompuy in his commentary How to preserve trust anti-trust (October 2009) recommended to the European Commission to go further and always consistently prove damages caused to consumers in its competition decisions, to overcome the current understanding of the term "consumer" in EU competition law as a buyer (i.e. including business-customers) and narrow it unambiguously down to individual end-users of goods or services. And last but not least, he recommended neither giving up nor scaling down efforts to promote private enforcement of competition law, particularly through actions for damages filed by consumers (van Rompuy, 2009).

There is simply no doubt that the European Commission is well aware of the importance of consumers´ support and that the issue of consumer welfare - against which no relevant part of the political mainstream can seriously – has been consistently advocated by the Commission long before the current crisis occurred. As said by N. Kroes: "After five years of hard work, building on that of Mario Monti and Karel Van Miert, we can see the fingerprints of consumer welfare over everything in the Commission's competition system. But complacency is not an option - don't let the fingerprints be wiped away. Consumers are the easiest people to ignore in a market with many powerful and organised actors… But in difficult economic times, consumers need robust competition more than ever… Such policies do not always have an immediate dividend, but they are better for consumers than allowing governments to bribe companies to keep or create jobs. They are better than allowing companies to cut corners and break competition rules at the expense of consumers." (Kroes, 2009p).

Ad c) Pragmatism without touching the principles and institutions

Already in Autumn 2008 P. Lowe in the programming paper stressed that although the ultimate goal of the Commission's interventions remains consumer welfare, this concept" should also be interpreted dynamically in the sense of the effects of any structure or conduct on price, choice, quality and innovation in the short and long term." He admitted, however, that these effects often "are difficult to quantify and the only way to protect consumer welfare in the longer term is by safeguarding the process or dynamic of competition on the markets. In this sense, there is convergence between the German and Anglo-Saxon antitrust traditions." (Lowe, 2008, p. 6). In practice, this means an emphasis on ex-ante defined rules whenever a generalization of accumulated experience permits and a clear definition of the method of ad hoc assessments wherever past experience is ambiguous.

The pragmatic combination of German and Anglo-Saxon traditions of anti-trust (in other words, of the Freiburg Ordo-liberal school and the neo-liberal

Chicago school, or today rather the post-Chicago school) looks like a concession compared with the spirit of what the European Commission proclaimed in the pre-crisis period of modernization and "economization" of European antitrust (see Section 2). It is however more the return to the approach that was traditional for the EU for a longer period or more precisely to a moderate innovation of this approach consisting in the application of an effect-based analysis (i.e. strict evaluation of the economic effects of competitors´ behavior) without abandoning the traditional focus on the protection of the freedom to compete in a framework given by law (i.e. the credo of the German Ordo-liberalism) and not forgetting to support the integration of European markets (the credo of European integration and the fight against national protectionism). By returning to these more traditional, and in the eyes of critics of "Anglo-Saxon liberalism" also less provocative platform, the European Commission could protect the legal basis of the protection of competition in the EU against any attempts to change it (not so much its wording, rather its interpretation and application). And at the same time the Commission could reject any attempts at protectionism and dirigisme as being harmful not only for competition, but also for integration as a whole, as the latter is naturally promoted by existing competition policy.

A kind of mantra of the public speeches of N. Kroes, and P. Lowe, after the outbreak of the economic crisis became the assurance that principles "are not negotiable" and any potential flexibility is possible in matters of procedure, i.e. mainly in the speed of decision making (which is far more essential for state aid and merger issues, than for antitrust in the narrow sense). Against possible crisis-cartels both have been repeating over and over: we "cannot relax the enforcement of competition principles", "we can not compromise with the cartels", "the so-called Crisis cartels are not justified even in times of crisis", "against cartels, zero tolerance", "no changes and no compromises on cartels". P. Lowe even pointed out that if firms seek to fulfill the conditions laid down in Article 81, paragraph 3 (possible exemption from the cartel prohibition), the Commission will "view any argument related to the economic crisis with considerable skepticism" and it is therefore unlikely that it could agree to any justification of price fixing or output limiting cartel. (Lowe, 2009a). In short, in all its official declarations the Commission has rejected the slightest softening of the pre-crisis standards in assessing the cartels. The legal basis provided by Article 81 TEC (now Article 101 of TFEU) is sufficiently elastic to allow in parallel both the transition to an effect-based approach and the traditional monitoring of economic freedom as well as the continuing integration of the markets. In practice, this is more or less the way that the EU competition policy has worked so far, and the Commission wants to keep it the same henceforward, regardless of the difficulties and pressures caused by the crisis.

With regard to the handling of the abuse of dominant position cases, the European Commission has continued with the review of the application of the rules of Article 82 TEC, which was launched already in late 2005 by the so-called Staff Discussion paper. The outcome of this

process became in February 2009 the Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009 / C 45/02). This can be understood as being the fruit of pragmatic efforts to “economize” the application of Article 82 (now Article 102 TFEU), i.e. the continuation of a long-term trend, regardless of the impact of economic crisis. N. Kroes stated that it is the abandonment of the formal approach, i.e. a departure from punishing the behavior of a competitor for formal reasons and a move towards promoting an effect-based approach, which better reflects damage to benefit brought by the competitor’s behavior to the consumer (Kroes, 2009). The assessment of exclusionary practices of dominant companies should, according to the European Commission, mirror the standards of evaluation of the impact of cartels on competition and consumers. It means that besides producing the traditional evidence of the restriction of competition by, for instance, the exclusion of competitive rivalry from a substantial part of the market, there will be provided the opportunity for a dominant company to prove that its conduct was objectively necessary, that its behavior led to significantly higher efficiency, which outweighed its anti-competitive effects on consumers. The Commission will then assess whether the conduct was necessary and proportionate to the objective pursued by the dominant company and – if appropriate - not to sanction the behavior that would be justified (see Part D, paragraph 28 of the EC Communication). Although this approach can result in a certain indulgence on the Commission’s side, this is part of the targeted shift "from the form towards the effect" or "from normativity to pragmatism" (as described in Section 2), rather than a concession to political pressures pushing for leniency towards national champions.

Moreover, it is important to emphasize that the "new priorities" of the European Commission in the application of Article 82 EC are very logical and are the desirable harmonization of approaches to the application of the two antitrust articles of the Treaty. What is traditionally allowed by Article 81, paragraph 3 (now Art 101, paragraph 3 TFEU) in the cartel-combating area (i.e. the conditions under which it is possible to exclude a competitors´ agreement from the prohibition since its pro-competitive effects outweigh the anti-competitive),[28] should now, thanks to changes in the Commission’s application doctrine, be available also to a company suspected of abuse of its market dominance. In practice, this approach, identical for cartel cases, as well as for the so-called exclusionary practices of dominant undertakings, can be described as being a two-stage test of any potentially anti-competitive practices. Firstly, its compliance with free competition within the EU Single Market is to be assessed, as the competition should never be excluded from a significant part of it (rather Ordo-liberal part of the test). Secondly, the

[28] In brief: agreements between competitors that restrict competition are by virtue of Article 81, paragraphs 1 and 2 of TEC (now 101 par 1 and 2 TFEU) forbidden and invalid. However, Article 81, paragraph 3 (now 101, paragraph 3) makes it possible for such an agreement to escape prohibition if it meets all four conditions provided by this paragraph. The agreement must not eliminate competition from a substantial part of the market, must include only limitations proportionate to its purpose, which must be higher overall efficiency, while its benefits must be fairly shared with consumers.

economic analysis of its impact on growth and innovation should be assessed, i.e. the resulting efficiency and above all consumer welfare (a rather neo-liberal part of the test). And it is very likely that the criteria for judging the outcome of this two-phase test will - given the above described change of accents due to crisis pressures, but also due to all the long established tradition of EU anti-trust – be more elastic and more political than neo-liberal hardliners would like to see. Given the newly declared emphasis on ex-ante regulation we can therefore expect a mix of traditional Ordo-liberal approaches (including per se prohibitions), and neo-liberal economics, inspired by the cost-benefit analysis of the effects of competition, i.e. of its impact on efficiency and consumer welfare. In other words, there would be no clear shift of the EU antitrust towards the American-style rule of reason (as it has been sometimes predicted in the pre-crisis period), where the counterparties are allowed to convince a judge by what some call the "battle of reports" (Bejček, 2006 p. 751). Equally unlikely, however, is also the opposite extreme: the subjection of competition policy to industrial or development policies. The result is not that much of a concession or a sacrifice made by the Commission as it is a synthesis of existing approaches, suitably corresponding to modern requirements, as well as reflecting the concept of antitrust forged by all EU history.

The Commission's intransigence over the principles of antitrust, so much highlighted in official speeches, was confirmed by the recent sanction policy, when in the crisis years 2008-2009 fines were imposed at yet unprecedented rate. In November 2008, the Commission first broke the previous record amount of fines for cartels, when an international, hard-core and prolonged cartel of flat glass producers was fined 1.38 billion euro. Its European participant, the French company Cie de Saint Gobain SA, had to cope with the largest part of it, i.e. at that time the highest ever fine imposed on one company: 896 million euro (EC IP/08/1685, 2008). The company concerned reacted by calling such a penalty "excessive" or "substantially higher than expected." (Bloomberg.com, Dec 11th, 2008). Six months later, in May 2009, the Commission sanctioned the dominant manufacturer of computer chips, the company Intel, for an abuse of its position: total fine 1.06 billion euro. The penalty for a single competitor overcame for the first time the psychological one billion euro threshold (EC IP/09/745, 2009). Analysts welcomed that the Commission had demonstrated the credibility of its proclamations, however some MEPs openly criticized the fines, stating that they "are inappropriate in the current economic environment, because they endanger the viability of companies and may have negative effects on the growth and jobs agenda." (BBC News, 13 5th 2009; Amory B., Amato, F., 2009). P. Lowe, on behalf of the European Commission, immediately after the imposition of the fine Intel rejected any "crisis discounts" in fines.[29] Although he admitted that the Commission may consider when determining the fine whether its amount might not compromise the economic survival of a company or significantly degrade a competitor's assets. Nevertheless he

[29] Commissioner N. Kroes at the press conference on the Intel decision even joked that the slogan of "Sponsors of tomorrow" should be changed to "Sponsors of the European Taxpayer". (BBC News May 13 2009)

stressed that even in times of crisis, the Commission will not grant any fine reduction automatically, but only after extremely careful consideration of the situation. (Lowe, 2009a)

It is more than likely that in its intransigence the Commission will be upheld by EU courts, i.e. by the General Court and in the second stage by the European Court of Justice (ECJ), as the judicial bodies responsible for the review of contested penalty decisions of the Commission. This can be concluded not only from the fact that these Courts are considerably more immune to momentary political and ideological influences than the College of Commissioners that approves the competition decisions on behalf of the Commission. There is a significant decision of the ECJ, the “Irish beef" case (C-209/07), adopted in November 2008. Although the events from the beginning of the millennium were judged there, by its nature it was a decision on a classic anti-crisis cartel. Ten beef producers in Ireland, representing about 93% of the national market for that commodity, created the Beef Industry Development Society (BIDS), whose sole task was to achieve a coordinated reduction in production capacity of the sector. Some members of BIDS had to leave the market for at least for two years and the remaining producers had to pay them financial compensation. Reduction of the excessive production capacity was even recommended in a study sponsored by the Irish governmental grant . The ECJ's preliminary ruling on the submission by the Irish Supreme Court held that since the intention of the competitors was clearly anti-competitive, the real impact analysis and other circumstances were not necessary to establish the infringement of Article 81, paragraph 1 of the Treaty (prohibition of cartels). Although the ECJ did not rule out the possibility that competitors may in such cases try to demonstrate the positive effects of their agreement and so avoid the prohibition under Article 81, paragraph 3 of the Treaty, judges had no doubt that such an agreement was an anti-competitive agreement by its nature.[30] It follows the ECJ's is not at all going to accept easily any rescue or crisis cartels organized to save a sector in trouble. The ECJ has remained, regardless of the current crisis, faithful to its own earlier case law according to which the fact that the industry is in crisis does not mean that competitors can enter into agreements that restrict competition and rely on immunity from Article 81, paragraph 1 (see e.g. decision in the case T-145/89 Commission v Baustahlgewebe, or Whish, 2005, p. 577).

This uniform and essentially successful defense of EU antitrust against calls for its more tolerant application does not mean that the Commission does not have to face all kinds of barely visible outside pressures. It may for example be significant, that the Director-General P. Lowe at the end of 2008 and also at the end of 2009 published important articles in defense of the institutional set up of EU competition policy, in whose center stands the Commission, which concentrates in itself the role of investigator, prosecutor and judge. This is a sensitive issues for quite a few politicians and commentators either for theoretical (separation

[30] Full text of the decision by the ECJ, see the official site of EUR-LEX: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0209:EN:HTML

of powers to ensure fair law enforcement) or entirely pragmatic (weakening of an over-assertive Commission) reasons (Lowe, 2008, 2009d). P. Lowe admitted that the European Commission "is sometimes criticized" for the institutional arrangement itself, which according to some does not guarantee adequately the rights of companies under investigation (Lowe, 2009d). Improvements to the Commission's work is naturally an acceptable requirement as it has to remain in the forefront of competition policy and law developments and so it corresponds to the permanent priorities of its DG Competition. Any major change in the current antitrust enforcement model, however, according to Mr Lowe, has to be rejected, since it is a model has "been repeatedly tested in court and found to be fair and legally sound." (Lowe, 2009d). Again, one can see there is a pragmatic approach that offers flexibility without changing the principles and the legal basis.

4. EU Antitrust - lessons from the crisis

In overviews dating from the end of 2009, associated not only with the evaluation of the finishing calendar year, but also of the terminating mandates of Neelie Kroes and Philip Lowe at the forefront of European anti-trust, it was generally admitted that the Commission under their leadership has successfully counteracted all the attempts aimed at the reduction of established standards of competition law and its application. They have "successfully held the line, effectively making the case that antitrust is not a barrier to recovery, but rather, an essential instrument in building that recovery." (Riley, 2009). Also the above made analysis suggests that the EC under the leadership of those personalities showed the necessary agility, firmness and flexibility and thank to them the EU competition policy in 2008-2009 gave the overall impression of operability, steadiness and understanding.

Although the main "battles" were fought out of a classic antitrust in the narrow sense and took place mainly in the fields of the control of state aid and of concentrations, the financial and economic crisis brought about an interesting development also in the fight against cartels and abuse of dominant position. While the European Commission did not - at least as far as can be seen from the outside – have to face open pressure in specific cases (on the contrary, in this period the Commission displayed a principled firmness in penalizing violations against Articles 81 and 82 of the Treaty), it was however undoubtedly exposed to an atmosphere challenging its application practice in antitrust. Its capacity to persevere with the established trend was under test. As shown, there were challenges targeted at both the general as well as individual and specific assumptions and principles of antitrust - from the liberal concept of the role of state in the economy, across calls for leniency on cartel behavior and on dominant competitors conduct in a time of crisis, up to the criticism of the level of fines imposed for violations of antitrust law.

The Commission, thanks to its proactive approach appropriately took up the initiative and instead of mere defense of antitrust, it transformed this policy and law into a necessary part of the new regulatory

architecture in the EU markets. Its concept of action in the coming period can be summarized in the formula "competition policy = ex-ante regulation + competition law". The Commission successfully rebutted the criticism that it was joining free competition with deregulation of markets and attempts to blame liberal trends at the turn of the millennium (which also included the modernization of EU anti-trust) as having played the primary role in provoking the current financial and economic crisis. By not insisting on the exclusivity of an independent ex-post interventions in favor of an unrestricted competition the Commission has also managed to extend the reach of it's antitrust into the preparation and implementation of sectoral policies. Thanks to this the Commission has ensured the presence of competitive aspects in the search for standards to frame markets in many sectors.

By the beginning of 2010 it was of course still primarily a change of accents, of the content and style of communications..It was not a complete novelty on the one hand and on the other hand, it was unlikely that a practical symbiosis of ex-ante and ex post measures to guard the markets would emerge quickly and easily. Politicians promoting the ex-ante regulatory and pro-development measures will in the future keep promoting industrial, social or environmental priorities far from conformity with free and unrestricted competition. If the analysis above pointed out France on several occasions as the generator of such efforts, it is the fact that questionable decisions from the competitive point of view have been recently taken by many European governments - in Germany, Italy, Ireland, Slovakia to name just a few. (Neruda, 2009b)

The final lay out of a post-crisis EU competition policy will be a result of a synthesis of ex-ante regulation and ex post competition law enforcement. In terms of paradigm or ideological background it will be (as numerous speeches and documents produced by the Commission in pre-crisis period have suggested) a combination of German (Ordo-liberal) and Anglo-Saxon (neo-liberal) schools of economics and competition. A slightly poetic paraphrase that, however, basically corresponds to reality would be that the spiral development came through thesis and antithesis to synthesis, which is a compromise between the core elements of both schools of thought. The EU needs such a compromise, not only to protect competition survival during the crisis, but also to regain its currently dwindling political support. And finally, it is needed in order to meet the "new" objective of antitrust, which is attaining higher efficiency in serving consumer welfare, but also to maintain its "old" goal, i.e. the protection of economic freedom and of the progressive integration of national markets. Especially the latter objectives of antitrust are topical at the time that attempts are being made to push through protectionist measures at national level. It is not without interest that parallel signals coming from behind the Atlantic, after the arrival of President Obama and his administration to power in the U.S., confirm this tendency towards synthesis as a trend of antitrust policies in the Western world. In Washington, after two terms of neo-conservative administration the "antitrust is back in vogue" and analysts expect the final

confirmation of the theory that the U.S. antitrust is genetically the "double helix", i.e. the symbiosis of Harvard (very much like German Ordo-liberalism protecting the market structure) and the neo-liberal Chicago school of antitrust. (Crane, 2009).

The current financial and economic crisis has probably played a role of an accelerator of tendencies, which - as shown above - occurred within the EU before its outbreak. It was a reaction to the neo-liberal trend of recent years, which itself was a response to previous older developments. This trend, however, pulled the EU competition policy (or rather its vocabulary and programming documents instead of its practice) out of a balanced compromise, which has been politically and socially acceptable for the decisive majority of Europeans. The development of competition policy and law, and their inherent conflict between a neutral guard and an active regulator is obviously not over. Indeed we can be certain that it will continue. This is after all one of the manifestations of conflict already discovered in legal regulation by Plato and Aristotle when they wrote about non-instrumental and instrumental rules and regulations of society, about *universitas* and *societas,* or *nomos* and *thesis*, in other words, about the necessity to keep an eye on uniform rules of the game and at the same time to direct the human community towards the "good life" (Letwin, 2005). The true liberals and supporters of minimum state interference in the economy will continue to berate inefficient social engineering, and the supporters of social-market economy or the "Rhineland model of capitalism" will continue to warn of deregulation and laissez-faire, which lead to anti-social anarchy. The European Commission's competition policy will continue to absorb both, with occasional fluctuations on this or that side.

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Deconstructing Vermont's 'Current Use' Land Tax Program

David B. Brown[1]

"The purpose of this subchapter is to encourage and assist the maintenance of Vermont's productive agricultural and forest land; to encourage and assist in their conservation and preservation for future productive use and for the protection of natural ecological systems; to prevent the acceleration conversion of these lands to more intensive use by the pressure of property taxation at values incompatible with the productive capacity of the land; to achieve more equitable taxation for the undeveloped lands; to encourage and assist in the preservation and enhancement of Vermont's scenic natural resources; and to enable the citizens of Vermont to plan its orderly growth in the face of increasing development pressures in the interests of the public health, safety and welfare." (32 V.S.A. Sec. 3751)

Introduction

I heard the drowning hum of the chain saws from the trees being felled at my neighbor's place about 1/4 mile down the road. I asked a friend (a former property appraiser, known as a lister in Vermont) about it and he mentioned that the property was in the current use program. I asked how the current use program worked and he said that anyone with a forest management plan and at least 25 acres of contiguous forest land could participate, and that their property would be taxed at a lower rate. "So the State comes in and cuts timber in exchange for cheaper property taxes?" Well, no the Sate doesn't cut the timber, the property owner is responsible for having the timber cut. "OK, but the State keeps the profits, right?" No, the property owner keeps the profits. "Well, what does the State get?" Nothing.

As it turns out 'nothing' is a at least a bit of an exaggeration; in fact the trade off is that the land is not being developed - at least so long as the property owner chooses to remain in the program. But whether the land would be more likely not to be developed absent the program is the question that simply put seems all but impossible to objectively quantify. (In other words, is the tax subsidy merely a windfall or a proper incentive?) Nevertheless, it is taken as an article of faith that at least to some degree the current use program slows development and parcelization of the land which would have otherwise occurred in the program's absence.

The conversation continued: "Let me get this straight, my neighbor disturbs my peace with the racket[2] of logging his property, sells his timber, keeps the profits, and for this he pays less taxes on his property then me?" Well, right, but, hey, you could join up too-though only owning a little over 27 acres you probably won't save all that much on

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[2] I should say at the outset that the noise level of the chain saws and this whole introductory setting has been slightly exaggerated by way of making a point. I should also add that these particular neighbors, like all my neighbors in Halifax, are as desirable as anyone could hope for, and that far from being a source of irritation, they are a source of support and comfort. But for this one indulgence, the rest of this thesis strives for objectivity and accuracy.

your taxes, and it's probably not worth the hassle, not to mention the fact that insofar as I understand it you're not all that eager to log your land in the first place.

Background and Development

It is only fair, then, to admit that I started my review of Vermont's current use program with a fair amount of skepticism.[3] Much to my surprise I discovered that the Vermont current use appraisal (hereinafter 'current use') program wasn't some strange Vermont or regional anomaly - all 50 American states[4] have their own versions of the program, and they've persevered and in many cases expanded in the face of a fair amount of skepticism and doubt all along the way.[5] Despite initial misgivings, I would come to support the principle of current use, if not precisely the current Vermont iteration of this widespread and evidently popular tax incentive program.

Current use programs vary in detail from state to state, but all have in common the goal of constraining the parcelization or 'overdevelopment' of certain land deemed by the various state governments to be worthy of subsidization. In a nutshell the programs single out certain lands - agricultural and/or forestry and/or open space and/or other types of land, and tax the specified land at a preferred – i.e. lower-rate designed to reflect, as the name implies, the 'current use' of the land rather than the "fair value" tax rate reflecting the highest price a potential buyer would be willing to pay for the land for developmental or other purpose, which is the customary method of evaluating ad valorem property taxes on land.[6]

Maryland started the first current use program in 1956.[7] This initial program was limited to agricultural land and simply read: "Lands which are actively devoted to farm or agricultural use shall be assessed on the basis of such use, and shall not be assessed as if subdivided or on any other basis."[8] Given the steady growth of suburban sprawl at the expense of agricultural and open space land some 60 years later - at least in and around the Washington, D.C./Baltimore greater metropolitan region - Maryland would hardly seem to serve as the ideal poster child for the current use program. But what state has managed to slow down suburban sprawl in major metropolitan regions via current use or otherwise?[9]

Current use programs for the most part didn't take off in a big way until the 1960's and 1970's. This reflects the stirrings of the national environmental

[3] Although arguably revealing a bias, I would argue that a healthy degree of skepticism is just the right starting point to evaluate a government program.
[4] Sandra A. Hoffman, Symposium: Environmental Law: More Than Just a Passing Fad: Note: Farmland and Open Space Preservation in Michigan: An Empirical Analysis, 19 U. Mich. J. L. Reform 1107, 1107, (Summer, 1986).
[5] Joan M. Youngman, Taxing and Untaxing Land: Current Use Assessment of Farmland, tax analysts special report, State Tax Notes, Lincoln Institute of Land Policy, September 5, 2005, p.727.
[6] Valuating the current use of property is more complicated than it might sound. Many property owners, in Vermont own property primarily for personal enjoyment, not as farmers or foresters as such. For some of these estate landowners it is arguable that the land in its current undeveloped state represents its fair market value, or something very close to it - as there are parts of the state facing little development pressure beyond that of second home buyers who might be interested in restoration. Nevertheless, if said property owners are in the current use program their land would be valuated by a complicated formula capitalizing the potential profits from the land as forestry land.
[7] The law was declared unconstitutional by the Maryland Court, but almost immediately the state constitution was amended to include verbatim the law that had previously been overturned.
[8] Joan M. Youngman, Taxing and Untaxing the Land: Current Use Assessment of Farmland, tax analyst special report, State Tax Notes, Lincoln Institute of Land Policy, September 5, 2005, p. 727.
[9] "When the development value of land reaches a certain point, Current Use stops making a difference." Will Linder, A Tale of Two States: What Vermont Conservationists Can Learn From New Hampshire, Natural Resources Council, Inc. Fall 2008.

movement that followed the environmental toxic catastrophe in Love Canal, the Cuyahoga River running through Cleveland actually catching on fire, and decades of relentless suburbanization and arguable overdevelopment in general. In Vermont, the completion of the Interstate highway system, years after it was completed in most of the rest of the nation, brought fears of rapid development and homogenization, and in reaction a host of environmental laws, arguably including a somewhat delayed current use program resulted.

Enthusiasm for current use programs arguably increased in the 1980's due in part to the widely perceived financial crises facing the American family farm at that time, and, more particularly and regionally, in response in part to the sale of sizeable chunks of previously logged commercial and recreational forest lands to private developers.[10]

Interestingly, as pointed out by Janet Malme of the renowned Lincoln Institute of Land Policy, the concept of preferential tax treatment did not begin with contemporary late twentieth century crop of current use statutes: "The earliest programs to link property tax relief with land use policies were adopted in the 19th century in recognition that ad valorem taxation discouraged the long-term investment required for forest retention and management … These…programs generally exempted forest land and/or timber from property taxation. Reforestation tax laws were enacted in a number of states in the first half of [the twentieth century] to promote regeneration of forests which had been extensively cut over or burned over Preferential tax treatment was often combined with requirements for forest management, restrictions on cutting,[11] and long term contracts."[12]

According to another expert in the field, commenting on the coalition to protect the northern forest during the late 19th century: "The political drive to protect the mountains came primarily from downstate New York and southern New England. The combined efforts of wealthy visitors, certain residents and downstream businesses whose livelihoods and recreational interests were threatened by the destruction of the forest produced major changes in public land use policies."[13]

The particularized interest of the forest industry continues with contemporary current use legislation in many heavily forested states. Following a series of substantial commercial forest sales for private development purposes in the 1980's, Congress authorized the Northern Forest Lands Council (NFLC), a regional study composed of an assortment of forest experts appointed by the various Governors dedicated to maintaining the 'traditional patterns of land ownership in the

[10] Robert W. Malmsheimer, William R. Bentley and Donald W. Floyd, The Implementation of the Northern Forest Land Council's Recommendations: An Analysis Six Years Later, The North East State Foresters Association, Concord, New Hampshire, November 7, 2000, pp.7,8.

[11] Although current use forest management plans would, of course, restrict cutting, just like the 19th century forest management plans, it is interesting to note that broadly speaking the 19th century plans were designed to address overcutting, while current use forest management plans arguably appear to have been designed to address undercutting. Such is not to say that the state will never take action against a current use participant for clear cutting in violation of a forest management plan. See, Joseph C. Jones and Anne J. Jones v. Dept of Forests, Parks and Recreation, 857 A.2d 271 (2004).

[12] Janet Malme, Preferential Property Tax Treatment of Land, Lincoln Institute of Land Policy, 1993, 5,6.

[13] Stephen D. Blackmer, Of Wilderness and Commerce: A Historical Overview of the Northern Forest: An Essay on Preservation and Conservation, 19 Vermont Law Review 263, 268 (1995).

Northern Forest"[14] which consisted of the 26 million acres of contiguous forest land in Maine, New Hampshire, Vermont and New York. The study was comprehensive and lasted form 1989 to 1994, and resulted in a 178 page report with 37 recommendations with technical appendix's reaching to the several thousands of pages.

Despite the historical focus on the forestry industry, the current crop of current use legislation stemmed principally from concern over loss of farm land to suburbanization, the farm on the edge of an expanding metropolitan region being the prototypical conceptual impetus for current use. [15] Should the farm be taxed at its full 'fair value' say, the worth of the property to a developer who wants to put up a shopping mall on the land, or should the farmer have the opportunity to enlist in a current use program that will allow him or her to commit to keeping the farm and be taxed at a rate reflecting not its potential worth if developed, but reflecting its economic worth as it is currently being used- a rate more affordable and arguably fairer to the farmer, intended to encourage the farmer to retain the farm, rather than to be pressured in part by high property tax valuations into selling out to development? Unfortunately, however, it has become widely recognized that current use programs have demonstrated little empirical success in preventing the selling of farm land in the face of severe suburban developmental pressure. [16]

Ineffectiveness in this realm is not to say that there is no rationale left for maintaining current use. Malme, for one, has a firm grasp that the 'real' goals of current use include more than just putting the breaks on development. "What seems clear…is that preferential property tax programs for agricultural and forest lands were devised to address multifaceted concerns of various and distinct constituencies."[17]

Some states to this day limit their current use programs to farm land; others have expanded far afield. In Vermont the non-agricultural component of the current use program is limited to forest lands; a number of other states have so-called open space provisions. Maine[18] has four components: 1) agriculture, 2) forestry, 3) open space,[19] and, most recently, a 4) waterfront property component.

The desire to subsidize farmers is fairly easy to understand and not particularly controversial – certainly at least in a state like Vermont that has experienced steady deterioration of its emotionally-

[14] See fn. 9 at 7.
[15] See fn. 11 at 1-3.
[16] See, Sandra A. Hoffman, Symposium: Environmental Law: More Than Just a Passing Fad: Note: Farmland and Open Space Preservation in Michigan: An Empirical Analysis, 19 U. Mich. J. L. Reform 1107 (Summer 1986).

[17] See fn. 11 at 6.The breadth of constituencies is demonstrated by the following list of supporters for the passage of the original Vermont current use program. Known as The Fair Tax and Equal Education Coalition of 1978 it consisted of the Green Mountain Chapter of the Society of American Foresters, the Vermont Association of Planning and Development Agencies, the Vermont Association of Snow Travelers, the Vermont Farm Bureau, the Vermont Federation of Teachers, the Vermont League of Cities and Towns, the Vermont League of Women Voters, the Vermont Maple Makers Association, the Vermont National Resources Council, the Vermont School of Director's Association, the Vermont Timberland Owner's Association, and Vermont Tree Farm Committee.
[18] http://maine.gov/revneue/forms/property/pubs/bull21text.htm
[19] The open space program has alternative methods of evaluating the land; one alternative simply takes the usual market value assessment and reduces it by 20%. On top of this base saving which really requires nothing but an application, a participant in the open space program can receive an additional 25% savings for allowing limited 'public access.' On top of this is a potential extra 30% savings for what amounts to a conservation easement permanently protecting the open space, and finally there is a 'forever wild' component which can create another 20% savings for qualifying conservation easements that meet further restrictions. Thus potential property tax savings can run as high as 95%. Phone interview with Nichole Stenberg of Maine's Property Tax Division held on April 16, 2008.

laden dairy and farming sector for many decades.[20] Said deterioration surely remains the case despite the relative recent prosperity of commodity farmers in the nation's midsection stemming in part from ethanol subsidies. Certainly there are those that don't need help, corporate farms, wealthy hobbyists and the like, but they would seem to be the exception to the rule. For those owning non-agricultural land (i.e. forested land) this assumption of economic hardship and constant challenge in the modern world is far less compelling.[21]

It's fair to say that Vermont's current use program originally had, and arguably still has, three significantly independent, yet related purposes: It's intended 1) to protect open space/reduce development; 2) to support land based jobs (timber, agriculture); and 3) to reflect an overall reasonable and fair tax scheme. But does that make it primarily a subsidy for traditional forms of employment (agriculture and forestry), or is it a primarily a means (an incentive) of protecting the land, or is it some clever combination of the two? Or by being a combination of the two purposes, does it actually fall short on both accounts? Is it more symbolic than substantive, and if so, is it not an expensive form of symbolism? Is current use a sort of failsafe insurance policy against runaway development - though arguably not actually needed[22] throughout most of the state - a matter of being better safe than sorry?

Maybe it's principally a matter of fairness that open land in principal should not be highly taxed,[23] or some might argue not taxed at all.[24] Maybe it really is an environmentalist step toward the type of principals first elucidated in the seminal treatise "Should Trees Have Standing?"[25] Or in the case of current use is such a claim overreaching - basically a sophist gesture given that the private land enrolled in the program is, as the term 'landowner' implies, land owned, controlled, and, to the degrees allowed under current use, exploited by human beings. Over the years the Vermont legislature has not hesitated to tweak the current use tax appraisal program with some degree of regularity.[26] Although broadly speaking the program has remained much the same, it has steadily

[20] Nevertheless, those that have examined the results of agricultural components of current use have tended to find mixed results at best. Most agree that a subsidized farm rarely stands up to strong development pressure of an expanding suburbanization and may even lead to a counter-productive leap frog style of development-a case in which development actually goes further into rural areas than it would have likely gone absent current use. See, generally Sandra A. Hoffman, Symposium: Environmental Law: More Than Just a Passing Fad: Note: Farmland And Open Space Preservation in Michigan: An Empirical Analysis, 19 U. Mich. J.L. Reform 1107, (Summer 1986).

[21] For many Vermonters there forested land is arguably simply an appurtenance that adds enjoyment, prestige, and value to their estates, but does not otherwise convert them a priori into foresters in any meaningful sense of the word –even if they do acquire a forest management program in order to comply with the formalistic requirements of Vermont' current use program.

[22] While there is doubtlessly pressure for parcelization in and around certain towns that are experiencing growth, it could reasonably be argued that in many parts of Vermont there is a countervailing pressure to consolidate land ownership.

[23] Robert W. Malmsheimer, William R. Bentley and Donald W. Floyd, The Implementation of the Northern Forest Land Council's Recommendations: An Analysis Six Years Later, North East State Foresters Association, Concord, New Hampshire, (Nov. 7, 2000) p.19.

[24] One op-ed writer went so far as to suggest that "Vermont should be paying forest land owners and farmers to keep their land open-paying us more than a reduction in taxes but actually paying for what you're getting." i.e. internalizing positive externalities. Alter Jeffries, Current Use program changes will hurt farmers, The Sunday Rutland Herald, Nov. 25, 2007.

[25] An inspirational environmental tract from 1972, originally published in the Southern California Law Review. Christopher D. Stone, Should Trees have standing? And Other Essays on Law, Morals, & the Environment, Twenty-fifth Anniversary Ed., Oxford University Press (1966).

[26] Ultimately as a result of a recent legislative review, legislation once again amending the current use program was passed in 2008 which among other things 1) made a number of administrative changes intending to lesson paperwork and otherwise streamline the program; 2) increased the flexibility to enroll ecologically sensitive areas in the forestry component of current use(though still under the umbrella of the forest management plan with all the restrictions that this implies; and 3) agreed to pursue a current use educational and promotional program. S. 311 (2008).

expanded in scope so that by 2006 the non-agricultural component covered 1.5 million acres of private forest land, approximately 40 percent of the private forest land in the state.[27]

Despite, and, perhaps, even in part, because of the steady expansion of the program, one can't help but wonder if the current use program is not one of those government responses started up in a panic only to find that it has developed a dedicated middle class constituency and become so entrenched that it is now be all but impossible to kill off or even significantly amend, whether or not it efficiently serves its purpose/s. Is it possible that all 50 states are just pandering to a popular program that is all perception with no concrete basis in reality?

Might it be comparable to, say, the near panic experienced by a myriad of state legislators throughout the United States in the 1980s over a national crime wave perceived to have included a disproportionate number of young people, vied to outdo each other in coming up with ever-more draconian measures, centered for the most part around the legal fiction that children as young as ten years old might better be prosecuted before the state criminal courts rather than assisted in the family courts where these issues were historically and properly addressed?[28] Or might it be compared to the panic over an impending drug epidemic in the 1960's that made the state of Vermont borrow verbatim -as is too often the case - a draconian New York State law that established the legal presumption that drugs found in a car, ipso facto, belong to each and every person who happened to be in that car at the time?[29]

To the extent that current use can be said to be reducing or slowing pareclization of the land one might compare it with the former Bush Administration's war on terrorism, which in major part claims to be working as evidenced by the fact that there has not been another attack on American soil since 911. In the same vein one might have a look around the state of Vermont and reach the conclusion that because for the most part the state remains largely pastoral and in particular retains an abundance of re-forested land that the current use program must be fulfilling its task. The issue in both instances, of course, is whether and/or to what extent there is actually a causal relationship between the specified state action and the apparent result.

What about the 'cost' of the program? Even to the degree the current use program works does it deliver value? As current use expert Janet Malme posits: "Reliance on preferential taxation may prevent the use of other more direct and cost-effective measures, and incur expenditures which could be spent more productively."[30] Or as environmental tax expert Janet Milne puts it: "[D]o current use programs effectively maintain current ownership and use pattern on a long term basis?

[27] Deb Brighton, David Brynn, Glen Rogers, Martha Sullivan, Brendan Weiner, Review and Analysis of Use Value Appraisal Program, Oct. 2007 at 5.
[28] Some states are just now starting to reverse these measures, belatedly coming to the realization that they had overreacted. See, Avi Salzman, Redefining Juvenile Crimes, New York Times, April 2, 2006.
[29] 18 V.S.A. Section 4221 (b).Vermont and New York are the only two states with such a presumption, and New York's courts have constrained the impact of its law.
[30] Janet Malme, Preferential Property Tax Treatment of Land, Lincoln Institute of Land Policy, 1993, p. 4.

[A]re they cost effective from a public perspective given limited public resources?"[31]

Or as still another commentator reminds us the "ultimate goal of [any tax incentive program]is to provide a benefit to the public, not a benefit to a taxpayer,' further warning that "incentive programs [such as current use] divert public resources from other programs that might be more suited to encouraging comprehensive conservation."[32] In 2006 the current use program 'cost' some 35 million[33] in lost revenues - the revenues that would have been paid in property taxes absent current use minus the rather negligible penalty payments paid back to the state for developing property enrolled in the program.[34]

Perhaps the Vermont current use program as it exists today is best analogized to the federal farm bill, which has arguably over the years catered to a particularized powerful segment of the farming community. Just as many today criticize the farm bill for limiting itself for the most part to serving the interests of wealthy corporate farmers who raise a handful of commodities while shortchanging a myriad of legitimate farming interests, the current use program can be legitimately criticized for limiting itself to protecting only agricultural and certain forested land. It's arguably time for Vermont to catch up to other states that are expanding current use and taking it to its logical conclusion to protect undeveloped land as broadly, cost effectively, and efficiently as possible.

Standards

Yet despite the above-expressed mountain of skepticism and misgivings based in large measure on a belief that current use – for whatever reason - has too often received only cursory scrutiny,[35] rather than the tough, close scrutiny all costly government programs require, I came to conclude that the principle of lowered land taxes on non-developed land is, in fact, legitimate and even important not only because it just instinctively seem fair, but because common sense dictates that reduced taxes might assist landowners – especially those of limited means-to hold on to their land rather than to sell it for development. To the degree that current use is the 'current' means of expressing this policy, I support it. Such is not to say that I enthusiastically support the Vermont current use program in its 'current' iteration, or don't think it can be substantially improved upon.

A more exacting assessment of current use includes some measure of whether it is 1) administratively straight forward 2) cost effective; 3) fair; and 4) that it 'works" efficiently on at least a common sense theoretical level, if not an empirically easily demonstrable level. The Vermont program as it exists today passes muster only in being administratively straight forward and relatively easy to operate. To the extent that non-developed land is taxed at a lower rate than developed land, current use has the 'fairness' issue

[31] Janet Milne, Timber Taxes, 19 Vermont Law Journal 423, 444 (1995).
[32] Julia Lemense Huff, Protecting Ecosystems Using Conservation Tax Incentives: How Much Bang to We Get for the Buck?, 11 Mo. Envtl. L. & Pol'y 138, 154-155 (2004).
[33] A newspaper article estimates 45 million for 2008. Candice Page, Vt. Tax relief program will protect natural areas, The Burlington Free Press, Nov. 17, 2008.
[34] See fn 26 at 58.
[35] Too often the measurement for current use has been if its not flagrantly broken, it's probably working.

half right. But it would be fairer still if it would 'means test' the reduction in taxes so that it is less of a regressive benefit, and in doing this the program becomes more cost effective and narrowly tailored and efficient at the same time.[36]

Recommendations

More broadly speaking, based on the specific observations made above, I draw the following conclusions which inform my recommendations: 1) Middle class Vermont landowners whether farmers, foresters, or simply people who enjoy owning open land should all share equally in the benefits of the current use program; 2) that the preferred tax benefit should be targeted on those who need it most; and that in doing so farmers should be better able to afford to farm; foresters should be better able to affordably and sustainably log their land; and, in contrast to what exists under the current use program today, all other landowners, who may consider themselves neither famers nor foresters, should similarly be assisted by current use to be able to better afford to steward their open non-developed land in the manner they see fit.

My recommendations, then, for what Vermont's current use program should become, offered more as an approach rather than as a precise prescription, include the following: 1) all contiguous non-developed land of 25 acres or more should be eligible for Vermont's current use program. Open space can be as ecologically valuable as forested land or farmed land. Non-developed land deserves protection no matter what form that non-developed land takes;[37] 2) the current use program should be means tested.[38] This is not to deny a benefit to the wealthy just for the sake of class warfare. It is first to make the program more efficient by focusing benefits on those who will most likely actually be influenced by a subsidy, and secondly, to be fair to the public at large by making the program as cost effective as possible;[39] 3) the forest management program should be made optional[40] as is the case in the neighboring state of New Hampshire.[41]

Additionally, there are steps to serve the environmental goal of discouraging over-development, that lay outside of the current use program itself. For one, the Vermont land gains tax,

[36] The states of Wisconsin, Michigan and New York all utilize some form of means testing.

[37] Vermont should consider implementing a series of sliding scale tax breaks similar to that imposed by Maine with their open space program.

[38] Means testing is a method of tailoring tax benefits to the more financially needy. It would be employed in the current use program similarly to the way it is employed for homeowners in many states in what's commonly referred to as circuit breakers, See Clifford H. Goodall, Property Tax: A primer & Modest Proposal for Maine, 57 ME L Rev. 585, 604 (2005), or in Vermont's case what's known as the 'homestead property income sensitivity adjustment program.' As the name implies those of limited income are able to take a property tax adjustment in their income taxes on their home. Means testing under current use would simply expand this concept to include land surrounding the homestead. Means testing can be used as a progressive taxation alternative replacing yield tax valuations otherwise used in current use programs, or it could be used in a more nuanced form to supplement yield tax or other current use valuation methods.

[39] http://www.farmlandinfo.org/documents/29479/DA_8-06pdf.

[40] It is arguable that certain landowning estate owners are simply not predisposed to logging their woods. "Sociological research reveals that farmers tend to hold strong utilitarian attitudes towards nature and attribute significant resource extraction to land. They are concerned with the productivity and profitability of nature as well the way of life their working lands provide. In addition to [such people] there are a growing number of recreational users who own primary homes and vacation residences on coastal land, forested acreage and open ranges. These individuals show a stronger ideological orientation towards appreciating and experiencing, rather than utilizing, land resources." Stephanie Sterns, Encouraging Conservation of Private Lands: A Behavioral Analysis of Financial Incentives, 48 Ari. L. Rev. 542 (2006).

[41] The percentage of timber in 1970 in Vermont and New Hampshire and the amount of money in the timber industry has remained rather consistent pro rata from 1970 to recent times. In fact, according to some calculations it is New Hampshire, without a forest management plan requirement in its current use program that has come out ahead. See Philip Bryce, *The Economic Importance and Wood Flows from New Hampshire's Forests,* 2007, North East State Foresters Association; Steven Sinclair, *The Economic Importance and Wood Flows from Vermont's Forests 2007*, North East State Foresters Association.

in essence a capital gains tax on short term land acquisitions and sales designed to discourage land speculation, can be increased, which would have the substantial added benefit of padding the state coffers rather than further depleting them.

Secondly, Vermont's Act 250, an environmental bill that balances the economic and environmental impact of any and all commercial development on all development of ten acres or more, should be strengthened rather than weakened as it has in recent years.

Thirdly conservation zoning districts should be made part and parcel of every zoning plan in each municipality of Vermont, and finally, property taxes generally and taxes on land in particular should be held in check. All of the above would arguably lesson the very need for the current use tax subsidy program in the first place; at the very least they better supplement the current use program in sending a coherent and consistent legislative environmental message regarding land.

Conclusion

Current use programs exist -in one form or another- in all 50 states. All current use programs encourage 'preferred' landowners to hold on to their land through reduced property taxes. In this simple sentence the three interrelated parts of current use are revealed: 1) an environmental bill to slow development; 2) a jobs bill to support the 'working landscape,' 3) a property tax bill to promote fairness.

In deconstructing Vermont's current use program, it would seem that from inception to date Vermont's current use program has been principally a jobs bill wrapped in environmental and tax fairness language. If the principal two changes of means testing current use and expanding current use to include all non-developed property were incorporated as suggested in this article, current use would not only become a better environmental bill, it would become simultaneously fairer and more cost effective too, and all this would occur without doing significant harm to the jobs bill aspect of the program.

It's time for Vermont to catch up with other states that have recently passed it by and are expanding the current use program and taking it to its logical conclusion to protect all undeveloped land as broadly, efficiently, and cost effectively as possible. In effect, all non-developed Vermont land should be considered 'preferred' land.

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A Study in the Effectiveness of Law: the Problem of the Weak Enforcement of Law in Central and Eastern European Countries. Case-Studies: National Minorities in Macedonia and the Ombudsman in Albania

Pietro Andrea Podda, Livia Bulka and Miranda Tairi[1]

INTRODUCTION

This paper examines the problems connected with the relatively weak enforcement of law in Central and Eastern European Countries (CEECs). These are basically those countries which experienced a state-regulated economy from immediately following World War II down to the years 1989-1991. After the collapse of the socialist system, these particular countries have been confronted with the urgent need of establishing legal systems more appropriate to the needs of democratic states and a market-regulated economy. Their previous legal codes and guidelines have proven not to be suitable for this purpose. Therefore, policy-makers and legal consultants, these latter provided often by international organizations and agencies of various sorts (i.e. EU, EBRD, OECD, IMF) , have implemented/suggested fundamental modifications to the legal regulation of a quite extensive set of activities> These range from defining the relationship between the citizen and the State (so as to shift the former legal system, previously centered upon the primacy of a dominant party, towards one thought to protect and guarantee the respect of democratic principles) to business law (in this latter case, the challenge has been to introduce regulations aimed at allowing and protecting private property rights and private entrepreneurial activity, which were previously, in the main, officially banned). This radical transformation can easily be identified with what North (1990, 2005) considers to be a revolution in the evolution of legal rules devised to regulate human cohabitation within a community (state). The reconversion of the legal system into one more suited to deal with the needs of a market-regulated democratic society has been at times quite difficult. However, it can be argued that most CEECs have been able to introduce a set of legal rules devised to sanction the importance of: 1) democratic principles, 2) the freedom, limits, as well as conditions of private entrepreneurial activities (including the right/limitations of multi-national companies to operate in the various countries) and 3) property rights, intended as being the right to acquire, use and transfer an asset, as well as restrict others from using it.

However, the bare introduction of legal rules and principles of the sort described above does not yet suffice to enable us to identify a specific country as being a place where the principles whose importance is recognized in the legal codes, including their constitutions, are respected de facto. This is because there exists another dimension which has acquired relevance and which appears

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to be of a major importance in CEECs: the degree to which law is afforded respect by the local population as well as by public authorities, including also the courts. This dimension can be termed the enforcement of law or legal effectiveness. The enforcement of law has given rise to serious concerns on the side of international observers, foreign actors operating in CEECs as well as local citizens whose rights, despite being recognized by existing laws, have not necessarily found protection.

The issue mentioned in the last paragraph has led the last generation(s) of scholars to study and assess not just the capacity of CEECs to modify/update their legal codes and constitutions in a way which conforms with the standards of a democratic and market-regulated community, but also the effective respect of these rules, as well as the extent to which transgressors of these rules are actually brought to justice and eventually sanctioned. These latter possibilities do not have to be taken for granted at all if one looks at the anecdotal evidence collected by researchers as well as at the indicators developed by international agencies such as for example the World Bank or the European Bank of Reconstruction and Development (EBRD). One can of course argue that even in Western Europe there exists considerable room for improvement in relation to the enforcement of law. An extreme example might be considered the well-known problems relating to the administration of law caused by the mafia in Italy which are not necessarily less severe than those denounced in many CEECs, at least in those where the enforcement of law is better guaranteed. However, the standards of the enforcement of law in CEECs are still definitely lower than in the area commonly referred to as Western Europe (Kaufmann et al., 2007).

This paper discusses the issues introduced here. The first section provides a general background, the second focuses on two case-studies.

An Overview on Law Effectiveness in CEEC´s: History and Culture Matter

At first, it must be pointed out how the levels of law enforcement or, perhaps more accurately, of the lack of law enforcement, tend to differ dramatically across CEECs. This is a fact which Western theoretical as well as empirical literature has often failed to fully appreciate. CEECs have often been portrayed as an area where existing legal regulations are frequently not respected (Murrell, 2001). Nonetheless, another stream of literature has taken into account fundamental differences in terms of institutional development in the various countries in the area, including in particular with regard tothe enforcement of law. On the basis of this difference, certain scholars (Podda and Tsagdis, 2006, 2007; Fabry and Zeghni, 2006) have divided CEECs into categories. The most efficient have been traditionally considered those CEECs located in Central Europe, which have given origin to the so called Visegrad Group. These countries are the Czech Republic, Hungary, Poland and Slovakia. This latter is considered to play the role of the outsider so far as the effectiveness of its law enforcement is concerned. These four countries have been influenced by Austro-Hungarian administrative traditions, which were on

the main considered as a symbol of efficiency. It is probable that the strength of these administrative traditions, despite being seriously curbed during the socialist period, still persists because of the principle of path-dependency. The principle of path-dependency, as highlighted by North (1990), postulates that, among other things, administrative standards are quite resistant to change and are subject to a certain inertia. Hence, this rule has often been quoted to explain the comparatively higher standards of institutional efficiency found in the Visegrad area. Also the area of the Baltic states (Lithuania, Latvia, Estonia) has traditionally been considered as being quite advanced, in terms of CEECs averages, in the manner with which it has been catching up with the standards of institutional efficiency, including in relation to the enforcement of law.

On the other side, the area of South-Eastern European /Balkan countries (Romania, Bulgaria, the former Yugoslav Republics, Albania) seems to have encountered higher constraints than in the previously mentioned countries as far as raising the standards of law enforcement are concerned. It must be added that in these particular countries there continue to exist concerns in respect of other elements of their institutional setting such as for example corruption and the quality of the existing regulations. As in the case of the Visegrad Group countries, the historical background of this group of countries has often been referred to when attempting to account for their delay in reaching acceptable institutional standards. The Ottoman Empire, which encompassed also those territories which now form these countries, was characterised by high levels of corruption (Gallagher, 2003), which is normally strongly positively correlated with low standards of law enforcement (Kennedy King, 2003). The standards of institutional efficiency in this group of former Ottoman countries are likely to be low because historical administrative legacies are hard to rectify even in the long-term (North, 1990; Hofstede, 2001). Nevertheless, it is probable that the process of accession to the European Union, and the consequent role of watchdog played by EU bodies during and after the accession process, may have contributed to a relative improvement in administrative practices.

A third group of countries whose institutional levels of efficiency have been, in the main, labelled as low is the area of former Soviet Republics (excluding, as already mentioned, the three Baltic Republics). Russia, Ukraine, Belarus and Moldova (and also the non European former Soviet Republics). These have been portrayed by western researchers as places where existing law, even when formally updated according to western models, is poorly enforced. In particular, the possibility of recourse to the courts in order to ensure the enforcement of contracts is seriously curtailed (Buck, 2003; Marcikovskaja et.al., 2003). The presence and strength of criminal organisations as well as the high levels of corruption among court officials have been presented as being elements which explain the fact that law has remained a dead letter in many cases. Van Brookyn (2003) has explained this constraint, placing it within a historical perspective. The authority of the formal central government on the remote provinces of the Tsarist Empire was difficult to establish. Bribery has

traditionally been held an effective way of "purchasing" the benevolence of Tsarist officials in charge of executing laws, which were often far from fair towards the peasants or citizens of the Empire living far from the centres of power, namely St Petersburg and Moscow. Moreover, the hardship entailed by the inhospitable living conditions typical of many parts of the former Soviet Union have had as a consequence the sacralization of personal contacts among friends, relatives and acquaintances in general. The necessity to survive in extremely unfavourable natural environments has led to considering factors like loyalty to close persons as being more important than the respect of law. We should not forget that the western legal system, especially in relation to business law, has been devised in order to facilitate and protect the smooth running of impersonal (business) transactions (North, 1981). In the course of centuries, the rising complexity of interactive processes has resulted in a system based on impersonal relations. This has required the introduction of a set of formal regulations suitable to remedy the lack of reciprocal trust embedded in personalized transactions, which means exchanges among actors linked by long-term dated contacts. This is the reason why the western legal system, and in particular business law, is quite precise in the abstract regulation of details, relying on presuppositions like the fact that actors will not overcome eventual disputes relying on a consolidated relationship.

On the contrary, there are countries where running impersonalized economic transactions is more difficult. This is because economic activities are seen as parts of general human activities and inserted in a framework of behaviors based on trust, personal contact and acquaintance. In these areas, the importance of the clan or of the group of contacts acquires major importance. Detailed formal contracts may be seen as being a manifestation of distrust and are in any case often not taken as seriously as in western countries. Aside from business law, also administrative laws are often taken as being a formality which does not necessarily command respect. As implied by Van Brokyn (2003) it is the charisma of the leader which invites respect, not the formal law itself. A further element explaining the survival of certain illegal traditions is that bribes and favors have often represented a way to obtain goods and services which, in official markets, are in short supply. Moreover, these types of "gifts" are useful tools when it comes to accelerating otherwise cumbersome administrative practices and turning around unreasonable constraints set by the formal legal system.

It may already have been understood that contracts and administrative precepts are not easily enforced in a system characterized by high levels of corruption and loyalty to the group more than to the law. All in all, history and culture underpin a vicious (vicious from the point of view of western observers and commentators) circle which does not encourage respect for law, neither from citizens nor from the officials in charge of ensuring its enforcement. In such a context, foreigners may find themselves unprotected against the traps of the local environment. This is a constraint well known to scholars, with various authors describing the

problems that a capricious enforcement of law have created for western economic actors operating in many CEECs (Bevan et. al., 2004; Podda and Tsagdis, 2006, 2007).

Apart from business law, the problem of a weak respect for the existing laws also touches other areas. It must be said that, according to various western international organizations, former Soviet Republics in primis but also Balkan countries have presented several limitations in their capacity to guarantee the respect of those political and civil rights still formally guaranteed in their constitutions (Kaufmann et. Al., 2007; www.freedomhouse.org). Moreover, the enforcement of minority rights has also left room for concerns in some CEECs which, despite having formally ratified international conventions, have not necessarily been able to enforce them. In particular, this has happened in those multi-national states where the cohabitation of several nations within one state has historically been very complicated. In the particular case of the former Yugoslav Republics, ethnic fragmentation has had tragic outcomes whose consequences did not automatically end with the cease-fire of the various military confrontations which have ravaged this territory.

In the case of minority rights, the probable reason for the difficulty in their enforcement lies in the feeling of mutual resentment which envenoms the relationships among various nationalities present in the area. These problems become more acute when one of these particular nationalities is the dominant one, in terms of size and economic strength, in a particular country. The treatment reserved to the other nationalities is not necessarily consistent with the standards requested by those same laws passed\ratified at a formal level. A further legal area where a discrepancy between formal law and its effective enforcement is visible is that of administrative law. Also in this case, there has often been a clash between the introduction of rules and precepts and their effective enforcement.

Case Studies: National Minority Rights in Macedonia and the Ombudsman in Albania

Two case-studies are presented here. They are chosen from among countries which are normally considered to be the most problematic in terms of their capacity to enforce the law (Kaufmann et.al., 2007). The Yugoslav Republics and Albania do not belong to that group of CEECs more advanced in the process of moving towards Western institutional standards. Therefore they should provide interesting material in order to study the problems related to the effectiveness of law. The two cases are the respect of national minority rights in Macedonia and the Ombudsman in Albania. Each will be dealt with separately.

National minorities in Macedonia

The Former Yugoslavian Republic of Macedonia (FYROM) is a multi-ethnic country with 2,022,547 inhabitants. Macedonia's population is composed of 64.18% Macedonians, 25.17% Albanians, 3.85% Turks, 2.66% Roma, 1.78% Serbs, 0.84% Bosniaks, 0.48% Vlachs, 1.04% other.[2] Albanians constitute the majority of the population in the western part of Macedonia, where Turks and other

[2] State Statistical Office, Republic of Macedonia, Census of Population and Dwellings in the Republic of Macedonia , 2002, p. 171-174

nationalities can be also found. Other national minorities are spread around the country. The relationship of the Macedonian majority to other national minorities has always involved ethnic tensions, especially in connection with the numerous Albanians.

The Macedonian Government has ratified a number of international legal instruments designed to protect national minorities. This has happened also as a result of the process of integrating international organizations, since Macedonia co-operates with organizations such as the UN, OSCE, the Council of Europe, UNESCO, the EU, etc.

First of all, being a UN member, Macedonia must respect the UN Charter, the Universal Declaration of Human Rights, the International Convention for Civil and Political Rights, the International Convention for the Elimination of all Forms of Racial Discrimination, and the Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Language Minorities. Macedonia is also a participating state in the Organization for Security and Cooperation in Europe (OCSE), whose members are requested to comply with various provisions relating to national minorities. As a member of the Council of Europe, Macedonia has ratified the European Convention for Human Rights and Basic Freedoms, as well as the Framework Convention for the Protection of National Minorities. Moreover, as of 2008 Macedonia is an official candidate for EU membership, which considers national minority rights protection as an important prerequisite for accession.

An important internal legal instruments intended to protect national minorities is the so called Ohrid Framework Agreement (OFA) of 2001, which was introduced to stop a civil war between ethnic Macedonians and ethnic Albanians with Macedonian citizenship. The OFA focused particularly on three areas, namely (1) on reorganizing the composition of local government so as to improve the level of representation of national minorities, (2) on elevating the status of the Albanian language throughout the country, also recognizing a previously not recognized Albanian university, and (3) on amending the definition of the country in the constitution from „the nation-state of Macedonians“ to the „multiethnic civil state composed of the citizens of Macedonia“.[3]

In November 2001 the parliament adopted 15 amendments to the 1991 Constitution aimed at conferring rights on national minorities. In particular, Amendment V of the OFA has changed Article 7 of the Constitution, so that all languages which are spoken by more than 20% of the population can be used as official languages (this threshold is actually fulfilled only by Albanian, though Turkish and Bosnian have also become official languages in some municipalities). Additional stipulations of the OFA have amended Article 19 of the Constitution as well so to enhance the status of those religious organizations other than the Orthodox Church. The OFA also aims at increasing the number of members of national

[3] Hot spot: North America and Europe, by Joseph Russell Rudolph, 2008, p. 119

minorities employed in public administration. Overall, the OFA, through its various provisions, intends to improve the situation of national minorities.

However, in spite of the introduction of the OFA and of the amendments to the Constitution, there are still strong signals suggesting these laws are not really enforced. In its report of November 2008 the European Commission has highlighted continued discrimination against national minorities.[4] Firstly, the EU Commission mentions the cultural rights of national minorities and the use of languages. The High Commissioner on National Minorities has stated that although "the law provides a clear and coherent legal framework and meets international standards" it does not protect sufficiently the smaller national minorities, as the law is applicable only to the Albanian language. The European Commission also points out the fact that smaller national minorities still do not have adequate facilities for education in their mother tongue.[5] In particular, Turkish students of high schools have no books in Turkish, and the paradox lies on the fact that the Ministry of Education and Science cannot resolve this issue because there are no Turkish experts in the Ministry.[6] Moreover, there are still problems with the adequate representation of national minorities, especially with the Turkish minority. In addition, Albanian municipalities have been prevented from showing their flag, despite the fact that the use of national symbols in front of the local public buildings is explicitly guaranteed by the OFA.

On the basis of the examples indicated above, the European Commission has concluded that the „effective implementation of the Ohrid Framework Agreement needs to move forward, through a consensual approach and a spirit of compromise. More efforts are needed to address the concerns of the smaller ethnic minorities."[7]

The Ombudsman in Albania

The Ombudsman (called the Peoples´ Advocate in Albania) is an extra-judicial institution, in charge of redressing wrongdoing of the public administration towards citizens. As specified in the Albanian Constitution, "The People's Advocate defends the rights, freedoms and lawful interests of individuals from unlawful or improper actions or failures to act of the organs of public administration."[8] The People's Advocate should operate on the basis of the principles of disinterestedness, confidentiality, professionalism and independence for the protection of people's rights and freedoms. It protects national citizens, residents, refugees and persons within the territory of Republic of Albania. The right to make a complaint to the People's Advocate against public administration behavior is available to any individual, group of individuals and non-governmental organizations.[9] The relationship

[4] Commission of the European Communities, COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THEEUROPEAN PARLIAMENT, Enlargement Strategy and Main Challenges 2008-2009, p. 38
[5] Progress Report on the Former Yugoslav Republic of Macedonia, the European Commission, Brussels, November 2008, SEC(2008) 2695, p. 20
[6] Shadow Report on Framework Convention for the Protection of National Minorities, prepared by the Association of Democratic Initiatives, p. 121
[7] Progress Report on the Former Yugoslav Republic of Macedonia, the European Commission, Brussels, November 2008, SEC(2008) 2695, p. 21
[8] Ibid.
[9] See Art.12, first paragraph of Law nr. 8454, date 04.02.1999 for the "People's Advocate"

with the Parliament is an important element of its activity. The People's Advocate has to present an annual report of its activity, but on the other hand it has also the right to be heard by the Parliament in discussing cases it considers important. A fundamental feature of the Albanian Ombudsman is its independence from the government.[10] Moreover, besides the protection of rights of citizens, the Ombudsman develops what is called the culture of good-governance, which means good administration, transparence and accountability.[11] The procedure of case-processing includes investigations of the administrative organs, research of information and confidential documents and inspections.

The creation of the Ombudsman is a symbol of progress in the transformation of Albanian institutions and in the continuation of the reform path. However, in this case too, there is a gap between the prescriptions of the law and their enforcement. A well-known case is that of the infrastructural project of Zogu i Zi, Tirana.[12] The Administrative Authority blocked some construction activities and fined the company which was carrying the work out, because of missing authorizations. However, the decisions resulting in the suspension of its working activities as well as the imposition of the fine were taken after the expiry of a term the Authority should have respected, on the basis of Art.14 of Law nr.7696 on "Administrative infraction". Hence, the act of suspension should have been automatically invalid. The Ombudsman acted on its own initiative and recommended that the rights of the company be respected. Nonetheless, the Administrative Authority involved did not respect the recommendation at all, also because of strong interference by political authorities. Besides this specific case, the participant observation carried out by one of the authors of this paper confirms that there is a remarkable degree of negligence on the part of administrative bodies when it comes to collaboration with the Ombudsman (see Bulka, 2010). It is therefore the case that the national legal principles governing the relations between the Albanian Ombudsman and the administrative organs are often not respected de facto.

Conclusion

Enforcement of law is still a problem in the area of CEECs, especially for those countries located in the Balkan area and in the former Soviet Republics, whereas the situation in the Central European CEECs is relatively more encouraging. It appears to be of the utmost importance that the situation is redressed, since the introduction of modern legal regulations is a necessary but not sufficient step to carry on with necessary reforms. This is because these laws must also be enforced *de facto.*

[10] Art. 60 (2) of the Albanian Constitution
[11] The People's Advocate in Albania, Publication of the People's Advocate institution, second publication, 2003, p.9
[12] See Official website of the People's Advocate/ Archive/2005 Recommendations/ 21.11.2005 Recommendation.