

**NON-DIRECT EFFECT
OF WTO LAW
WHAT DOES
IT MEAN FOR THE
LEGAL POSITION OF
INDIVIDUALS WITHIN
THE EU
LEGAL SYSTEM**

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1. Introduction

The European Union (EU) has played an important role, after World War II, by developing an international trading system. Among the international agreements that the EU has signed, the World Trade Organization (WTO) law is relatively relevant, especially given the question whether it has direct effect in the EU's legal system.¹ The issue of the direct functioning of WTO law in the EU legal system has kept the discussion going on for decades. Just as H el ene Ruiz Fabri has mentioned in her article international law does not carry direct effect in its DNA and direct effect of international treaties is not generally and proportionally widespread, several rulings of the European Court of Justice (CJEU/ ECJ/ Court) have shown us that WTO law, formerly known as the General Agreement on Tariffs and Trade (GATT), does not require direct effect in the EU legal system.² These rulings of the CJEU seem, with regard to the direct effect of WTO law, not surprising, given the consistent case law of the CJEU which states that WTO law does not have direct effect within the EU legal system. Following the verdict of the Court concerning the non-direct effect of the WTO law in the EU legal system, the question can be asked what this verdict means for individuals. The meaning of "individual", in this mini thesis, is 'an actor participating in the market and pursuing his, her or its self-interests. Such actors can be natural persons, business corporations, partnerships, cooperatives or legal persons. They operate as producers, consumers, service providers, exporters or a combination thereof'.³ In the case where a WTO member does not comply with the WTO rules and is targeted by trade sanctions, the individuals who in practice, bear the burden of these sanctions, are deprived of any recourse within the EU legal system. This may be considered unfair because both the protection and direct representation of the individual seems to be scarce.⁴

¹ Xavier Groussot, 'The direct effect of GATT/WTO law in the EC legal order' (LL.M. thesis, University of Lund 2008)

² H el ene Ruiz Fabri, 'Is there a case - legally and politically - for direct effect of WTO obligations?' [2014] 1 EJIL <<http://www.ejil.org/pdfs/25/1/2458.pdf>> accessed 12 October 2017

³ Steve Charnovitz, 'The WTO and the rights of the individual' [2001] <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=282021> accessed 1st November 2017

⁴ *ibid.*



The question that will be answered within this mini thesis is what the consequences are for the legal position of individuals when the European Court clearly indicates that the door for direct functioning of WTO law in the EU's legal system remains closed.

1.1 Main research question

As mentioned above, the main research question shall be:

Given the non-direct effect of WTO law in the EU's legal system, to what extent are the rights of individuals legally protected when WTO law is violated by one of the Member States of the EU?

The research question is descriptive. It seeks to describe what is going on concerning the right of individuals within the EU legal system when a WTO law is violated by one of the Member States of the EU.

1.2 Sub-questions

1. What is the meaning of the non-direct effect of WTO law within the EU legal system?

This sub question is descriptive as it tries to answer the implication of the non-direct effect of WTO law in the EU legal system.

2. In what way are the rights of individuals legally protected in case one of the Member States of the EU violates WTO law?

This sub question is also descriptive as it tries to answer which rights exist on international level when one of the Member States of the EU violates WTO law.

1.3 Method

The method chosen for this thesis is an analysis of a substantial number of cases with regard to the non-direct effect of WTO law in the EU legal system. The jurisprudence of the Court has been a main source of law within the field; therefore it will make up the major part of this thesis. Due to the limited size of this mini thesis, a few important rulings will be selected that are relevant to answer the main research question.



1.4 Structure

Chapter 2 will give a background of the relationship between the EU legal system and the WTO law. Subsequently some cases will be discussed on the arising of direct effect, the direct effects of international law in the EU legal system and the direct effects of WTO law in the EU legal system. In chapter 3 various cases will be discussed on how the rights of individuals are protected on international level. Finally, the concluding part in chapter 4 will subsequently handle a review of the academic discussion of non-direct effect of WTO law on individuals in the EU legal system.



2. The function of WTO law in the EU legal system

In the globalized world of the twenty-first century, international treaties have become important regulatory instruments. Instead of acting unilaterally, many States realise that the regulation of international trade requires a multilateral approach. In order to facilitate international regulation, many legal orders, including the EU legal system, have opened-up to the international law and adopted a monist position. This means that, within Monist States or the EU legal system, international law will directly apply as if it were domestic law.⁵ Not all international treaties will be directly effective, even if it is a monist legal order.⁶ In the following section, an analysis will be conducted determining what place the WTO law takes within the EU legal order.

2.1 Origin of the principle of direct effect of EU law

In the EU legal system, direct effect can be explained as the principle whereby (EU) law may, if appropriately framed, confer rights upon individuals, these rights are bound to be recognized and enforced by the national Courts of Member States of the EU. The question whether EU law has direct effect in domestic legal orders has been centralised by the CJEU in their groundbreaking judgement called the ‘Van Gend en Loos’ case.⁷ In this case the Court established that provisions of the European Economic Community (EEC) Treaty were capable of creating legal rights that could be enforced by both natural and legal persons in the national Courts of the Community's Member States. Once a regulatory agreement has thus been considered by the CJEU to unfold direct effect, it will thus be directly effective within the European, as well as the national, legal orders. The so-called principle of direct effect is undoubtedly one of the most important legal effects employed within the EU legal system, especially with regard to the protection of rights of individuals.⁸ The question which can be asked when analyzing the direct effect of international law is: ‘May an individual use the provisions of an international agreement, such as the WTO, before the CJEU to invalidate actions or laws of EU institutions?’

⁵ Robert Schutze, *European Union Law* (2nd edn, Cambridge University press 2015) 109

⁶ *ibid* 110.

⁷ Case 26/62 Van Gend en Loos [1963] ECR

⁸ Schutze (n 5) 110.



2.2 Direct effect of international law within the EU legal system

The Court has devised a two stage test to answer the question whether an international treaty has direct effect within the EU legal system:

In the first stage, it examines whether the agreement as a whole is capable of containing directly effective provisions. The signatory parties to the agreement may already have positively settled this issue themselves.⁹ If this is not the case, the Court will employ a policy test that analyses the nature, purpose, spirit or general scheme of the agreement.¹⁰ This evaluation is inherently political and the first part of the analysis is essentially a political question. The conditions for the direct effect of external EU law in this regard differ from the analysis of direct effect in the internal sphere because internal law is automatically presumed to be capable of direct effects. Whenever the political hurdle has been taken, the Court will turn to examine the direct effect of a specific provision of the agreement. The second stage of the test constitutes a classic direct effect analysis. Individual provisions must represent a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measures.¹¹ While the second stage of the test is thus identical to that for internal legislation, the actual results can vary. Identically worded provisions in internal and external legislation may not necessarily be given the same effects.¹²

Does this two stage test of the Court answer the question whether an international treaty has direct effect in the EU legal system also apply for WTO law?

2.3 Direct effect of WTO law within the EU legal system

In the past, the European Courts have generally been favourably disposed towards the direct effect of EU agreements, and thus created an atmosphere of general receptiveness to international law. The classic exception to this constitutional rule is the WTO agreement. The EU is a member of the WTO, and as such formally bound

⁹ Case 104/81 Hauptzollant Mainz v. Kupferberg [1982] ECR 03641

¹⁰ Case 21-24/72 International Fruit Company v. Produktschap voor Groenten en Fruit [1972] ECR 1219

¹¹ Case 12/86 Demirel v. Stadt Schwabisch Gmund [1987] ECR 3719

¹² Schutze (n 5) 110.



by its constituent agreements. Yet the CJEU have persistently denied the WTO agreement a safe passage through the first part of the direct effects test.¹³

The most prominent example of provisions of the General Agreements on Tariffs and Trade 1947 (GATT 47) not being directly applicable within an EU legal system is the recent line of the CJEU decisions in the Bananas case.¹⁴ By referring to the judgement in *International Fruit Company* as well as later judgements that had upheld the established stance on direct effects, the Court concluded in this case that individuals could not invoke provisions of the GATT 47 in a Court to challenge the lawfulness of a Community act. In reaching their conclusion, the Court echoed earlier statements and referred to the flexibility of its provisions and the possibility of derogation as grounds for denying direct effect. The main point of interest in this case is not the reaffirmation of the jurisprudence from *International Fruit Company*, but the unwillingness of the Court to extend the direct effect requirement from individuals, to actions brought by Member States.

2.4 Summary

The question whether EU law has direct effect in domestic legal orders has been centralised by the CJEU in the ‘*Van Gend en Loos*’ case. The principle of direct effect is undoubtedly one of the most important legal effects employed within the EU legal system for the protection of individual rights. The Court has devised a two stage test to answer the question whether an international treaty has direct effects in the EU legal system. When it comes to the question whether WTO law has direct effect within the EU legal system and what this mean for the rights of individuals, the Court referred to the Bananas case in which the Court concluded that individuals could not invoke provisions of the GATT 47 in a Court to challenge the lawfulness of a Community act.

¹³ Schutze (n 5) 111.

¹⁴ Case C-280/93 *Germany v. Council* [1994] ECR I-4973



3. Individual involvement on the International level

WTO agreements consist of a system of obligations and rights for Member States. These do not apply directly to individuals. Nonetheless, the WTO does reach into the Member State to guarantee rights to individuals.¹⁵ The CJEU recognized two scenarios in which GATT/WTO law could be used to review the lawfulness of EU acts. These are the so-called Fediol and Nakajima exceptions.¹⁶ A general principle of 'state responsibility for non-compliance with EU law' has been developed by the CJEU in the Francovich case.¹⁷

3.1 Fediol

A regulation within the Fediol case determined that producers are permitted to complain about illicit commercial practices of third-party countries to the Commission.¹⁸ In this case the ruling of the CJEU concerned the situation where an act of secondary EU law explicitly refers to specific provisions of the WTO, then the CJEU is obligated to assess the legality of the secondary EU law towards the WTO rules.

The Commission's lack of prosecution was argued by a concerned producer in the case in which an Argentinean producer was incorrect. This concern was justly due to Argentina having violated several GATT provisions. According to the ECJ the GATT law did not have direct effect. However the action would be permissible on the basis of this violation because the regulation itself refers to the GATT law explicitly.¹⁹

3.2 Nakajima

A litigant in the Nakajima case argued that the ECJ's regulation for anti-dumping did not comply with the measures for anti-dumping found in the GATT. According to the Court this regulation was expressly adopted to comply with WTO obligations on behalf of the EU. Therefore the legality of the regulation could be examined with

¹⁵ Charnovitz (n 3)

¹⁶ John Errico, 'The WTO in the EU: Unwinding the knot' (2011) Cornell International Law Journal, <<http://www.lawschool.cornell.edu/research/ILJ/upload/Errico-final.pdf>> accessed 2 November 2017

¹⁷ EurWORK, 'State liability' (European Foundation for the Improvement of Living and Working Conditions, 4 May 2011) <<https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/state-liability>> accessed 2 November 2017

¹⁸ Case 70/87 Fediol v. Commission [1989] ECR 1781

¹⁹ Errico (n 16)



regard to WTO obligations. The fundamental conclusion in the ruling is that community legislation can be reviewed against the GATT/WTO provisions it intends to implement, an exception known as the Nakajima principle or the transposition exception. The ruling is then often put in conjunction with the Fediol case, and its clear reference exception, to formulate the principle of implementation or indirect effect of WTO law.²⁰

3.3 Francovich

The CJEU held that the Italian government had breached its obligations in the Francovich case.²¹ The resulting loss from the breach had to be compensated by the government, because they were liable. This so called principle of ‘state liability derives from the fact that EU Member States are responsible for the creation and above all for the implementation and enforcement of EU law’.²²

According to the Court the damages individuals suffer by a lack of implementation of directives by Member State should be made presentable before national courts to establish state liability.²³

3.4 Summary

Even though acknowledging the lack of direct effect, as confirmed by earlier case law, the Court found in the Fediol and Nakajima cases that individuals could not be denied to rely on provisions of the GATT when these provisions formed part of the rules of international law to which the disputed Community regulation referred. In the Francovich case the CJEU decided that the Member State is held responsible to pay compensation to individuals if they lacked implementation of directives.

²⁰ Case C-69/89 Nakajima v. Council [1991] ECR 2069

²¹ Norbert Horn, Richard M. Buxbaum, *International Trade Law and the GATT/WTO Dispute Settlement System* (Kluwer Law International, The Hague – London – Boston 1999) 585

²² EuroWORK (n 17)

²³ Case C-6/90 Francovich [1991] ECR I- 5357



4. Conclusion

As mentioned above, an answer will be given on the following research question:

Given the non-direct effect of WTO law in the EU's legal system, to what extent are the rights of individuals legally protected when WTO law is violated by one of the Member States of the EU?

Referring to the Bananas case, individuals have, traditionally, no judicial influence on international level. They could only act on a national level whilst the playing field of the international level was reserved only for States and international organizations. Review of the legality of EU law on the basis of WTO law has been continually denied by the CJEU, which resulted in denying damages to individuals even when it has been explicitly declared that EU's behavior are inconsistent with WTO obligations. However two rare exceptions to this concept exist, which have been mentioned in the Nakajima and Fediol cases.²⁴

WTO members must fulfill their WTO obligations and perform according to WTO law. This obligation is fundamental and cannot be replaced by an obligation to pay compensation when the State fails to live up to its duties or even by allowing retaliation on the international level. Therefore national courts, offer the best guarantee of protection of interest and rights of individuals, thus making the entire WTO system more effective. In the Francovic case the CJEU has developed the principle that Member States are responsible vis-à-vis the individual for non-fulfilment of obligations under EU law. It would add considerably to the efficiency of WTO law if national courts could develop a similar approach for international obligations under WTO law. This would benefit individuals who try to claim compensation from their own government if it has not acted in accordance with WTO law.²⁵

However, it may also be argued that governments could provide better and more effective protection of individual rights when in the process of negotiation. At the end the final responsibility for the conclusion of agreements such as the WTO agreements lies in the hands of the respective legislators giving their consent via the final process of ratification.²⁶

²⁴ Errico (n 16)

²⁵ Horn, Buxbaum (n 21) 580

²⁶ ibid 585.



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