

GIVING DIRECT EFFECT TO WORLD TRADE ORGANISATION (WTO) LAW: A CASE FOR AND AGAINST

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ABSTRACT

The law of the World Trade Organization (WTO) is silent as to whether or not it can be directly invoked in domestic borders. While scholars have argued in favor of the denial of the law, albeit not in its entirety, other academicians have identified the unfairness and injustice that this denial may cause as it may, among other things, deny some individuals some rights. On a flipped side, it appears that the silence of the WTO law on this issue is deliberate, and it may be assumed that the option of direct effect is left open where the need calls. It, therefore, becomes a cause of concern for the curious minds the implications of this denial in later years as the major trade, frontiers such as the USA, China, Canada, Japan etc. has denied the WTO law direct effect. This article describes what the situation has been over the years, particularly before and after GATT'97. It notes the difference between the WTO law and other international agreements in this regard; the inconsistency of the reaction of the Court of Justice of the European Union (CJEU) and the reasons the courts may want to give direct effect to WTO law. Essentially, it points out the pros and cons of giving direct effect to WTO law.

Keywords: Direct effect, World Trade Organization law, GATT, Trade, Court of Justice of the European Union (CJEU)

BACKGROUND

There is so much curiosity among scholars and researchers as to why direct effect has not been given to World Trade Organization (WTO) law in domestic legal borders. While some have argued in favor of direct effect, others have argued against it. It has also been said that direct effect is not denied to the whole WTO law, but the significant trading members have neglected its possibility. The position became crystal clear when the proposal for direct effect was not given credence in Switzerland during the Uruguay Round.ⁱ The Scholars have argued that the continued denial of direct effect to the General Agreement on Tariffs and Trade 1994(GATT 1994) not only proves that the European Community (EC) has protectionist motives but also that it is unconcerned with individual rights.ⁱⁱThe European Court Justice (ECJ) has denied direct effect previously to GATT provisions as it posited they were not considered capable of creating rights of which concerned parties may avail themselves.ⁱⁱⁱ It should be noteworthy that the WTO agreement includes the GATT'94 preceding the text of the original GATT 1947.^{iv}The study dwells more on its relevance in the European Community where so much attention is given to the doctrine than anywhere in the world. First, the doctrine of direct effect should be concisely understood.

DOCTRINE OF DIRECT EFFECT

This doctrine, as explained by a writer, used to mean that a private person in a state (or Union, respectively) may base a claim in, and be granted relief from, the domestic Courts of that state against another private person or the state based on the state's obligations under an international treaty.^vDirect effect brings about the empowerment of three actors: the administration, private actors, and the Courts. Direct effect has a fundamental impact on constitutional power relations among domestic actors, private and public.

In *Van Gue and Loos*,^{vi} the Court of Justice of the European Union (CJEU) pronounced this principle. The Court ruled that Art.12 of the EEC Treaty should be interpreted "as producing direct effects and creating individual rights." In that case, *Van Gend en Loos* Company imported a number of chemicals from Netherlands and Germany. The company was charged with an import duty. This (the import duty) was allegedly increased since the EEC Treaty came into force contrary to Article 12. The company appealed against the payment before the Dutch

Tariefcommissie, Article 12, was raised in the argument, and two questions were pointed out to the ECJ under Article 177 EC. The first was “whether Article 12 of the EEC Treaty has direct application within the territory of a Member State. Belgian, Germany, and the Netherland government submitted observations. The ECJ made its position known, therefore. It stated among other things, that the general scheme and the wording of the Treaty, Article 12, must be interpreted as producing direct effects and creating individual rights and obligations which national Courts must protect.^{vii}The conditions for direct effect were after that highlighted, albeit been updated via recent cases.

A rule will have directly applied if it is sufficiently clear, does not depend on implementation by Member States, if there is unconditional prohibition, and if legal persons can directly invoke the treaty.^{viii}

In *International Fruit Company*^{ix} it was held that the EC was bound by GATT. The Court also stated:

“Before invalidity can be relied upon before a national Court that provision of international law must also be capable of conferring rights on citizens of the Community which they can invoke before the Courts”^x

The ECJ created a connection between the fact that individuals may rely on some specific provisions of this agreement in national Courts, and the possibility of invoking an international agreement for the review of the veracity of a Community act.^{xi} Consequently and interestingly, it became apparent that the ECJ is not ready to review the validity of such an act unless the agreement is capable of conferring rights on individuals. The Court, in its reasoning held that because GAIT 47 'is based on principles of negotiations undertaken grounds of "reciprocity and mutually advantageous arrangements,"^{xii}[and] is characterized by the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties, and the settlement of conflicts between the contracting parties', it did not provide individuals with rights which could be invoked in national Courts. The council in an argument made by the Council in on whether one of the

parties could rely on some provisions of the GATT Anti-Dumping Code in an action for annulment,^{xiii} stated thus

'Although the GATT and the GATT Anti-Dumping Code are binding on the Community under the rules of international law, they do not confer rights on individuals which can be relied on before the Court in proceedings under Article 173 EEC Treaty'.^{xiv}

It is apposite to state that there are two types of direct effect. Vertical direct effect means that the legislation can be enforced against the state or emanation of a state before a national Court. In contrast, horizontal direct effect explains that the legislation can be enforced before a national Court against individuals.

WHY THE DENIAL?

The Court of Justice of the European Union (CJEU) has been empowered to determine matters within its jurisdiction. It has consistently held that the purports of WTO agreements have not aligned with the requirements of direct effect. When the *International Fruit Case*^{xv} was up for determination, the CJEU declared the denial of direct effect based on the flexibility of GATT as it provided that parties could unilaterally derogate from their already assumed obligations. The Court stated:

GATT, according to its preamble, is based on the principle of negotiations undertaken on the basis of 'reciprocal and mutually advantageous arrangements' is characterized by the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties^{xvi}

The Court then held that since parties who have contracted to GATT 1947 may withdraw from their obligations, direct effect may not be granted to such agreements. The flexibility of GATT has, therefore, always been one of the reasons. The ECJ identified the flexibility of the GATT 47, especially Article 19 safeguard clauses, which allowed contracting parties to suspend

GATT 47 concessions in response to increased imports that cause or threaten serious injury to domestic producers', among its reasons for denying direct effect^{xvii} However, writers have argued that ECJ's treatment of the GATT 47 safeguard clauses connects GATT law for GATT practice and they are different.^{xviii} They have also pointed out that safeguard clauses were somehow rigid, thereby leading contracting parties to adopt grey area trade measures such as voluntary export restraints (VER) and orderly marketing agreements (OMA)^{xix} *Kuilwtijk* while arguing this further stated that since

“There is new agreement on Safeguards, that there is no longer any excuse for denying direct effect for the GATT 94 because it now 'explicitly prohibits grey area trade restrictions and forms a true example of the new firm commitment to adherence to the law, subscribed to by the Community’^{xx}

As impressive as this seems, it is glaring from the cases where the ECJ considered other international agreements that the safeguard clauses in those agreements essentially differed from those found in the GATT 47 and the GATT 94.^{xxi} For instance, in *Hauptzollamt Mainz v. Kupferberg*, the Court stated that:

“Safeguard clauses in the Portugal Free Trade Agreement applied 'only in specific circumstances and as a general rule after consideration within the joint commission before both parties.’^{xxii}

Also, in *SZSevnice*, the Court agreed with Advocate General Dannon's claim that the safeguards in the Turkish Association Agreement could be invoked only in cases where there was a threat of 'disturbances on the employment market which might seriously taunt the standard of living or level of employment in a particular region, branch of activity or occupation.’^{xxiii}

The above means that the Court saw the importance of the safeguards in the other international agreements that were applicable only after political consultation with the other treaty party, and also that they could be used in specific circumstances.^{xxiv} It will be interesting to note that none of these restrictions was found in the GATT 47 or GATT 94. GATT 47 only required that the contracting parties affected by the safeguard measures should be notified before their

implementation in order to give them ample opportunities to ask for consultation overcompensation.^{xxv} Agreement on Safeguards now mandates notification of the GATT Committee on Safeguards when initiating an investigation, making a finding of injury, or imposing a safeguard measure.^{xxvi} However, nothing in the GATT 94 allowed the members of the Committee on Safeguards to prevent the implementation of a safeguard measure by another member.^{xxvii} Thus, just like Judson identified, GATT 94 safeguards can be used without the same level of prior consultation as required by the other international agreements.^{xxviii}

It is apposite to note that since the CJEU has been empowered to determine if the WTO agreement can confer rights on private individuals^{xxix} and, of course, has held in the negative,^{xxx} it has denied the WTO law a direct effect. The Court consistently held that the nature of WTO law has to be carefully assessed, and even though the EC is bound by it, its nature does not guarantee the effectiveness of direct effect.

Another reason for denying direct effect is the controversial issue of reciprocity.^{xxxi} This stems from the political economy doctrine. It states that; if obligations are reciprocal between the contracting parties, there is a need for the parties to give similar effects to the provisions to maintain the balance between the parties in the light of the concluded agreement. The use of reciprocity is particularly important under the GATT. It is considered to be characterized by ‘negotiations driven by the spirit of intergovernmental reciprocity.’^{xxxii} Reciprocity was a concern because the most important commercial partners of the Community did not allow their domestic Courts to review the legality of their legislation according to WTO law state parties are yet to give direct effect to WTO law.^{xxxiii}

In the case of *Kupferberg*, the Court concluded that the absence of direct effect in the legal Systems of other contracting parties did not necessarily constitute a lack of reciprocity with effect for the EC’s implementation of the agreement,^{xxxiv} however in *Portugal v. Council*, the ECJ noted that the absence of reciprocity as to direct effect would lead to an imbalance in WTO obligations.^{xxxv} The ECJ also mentioned that giving direct effect unilaterally would be detrimental to the E.U.’s interests and that none of the E.U.’s major trading partners gave WTO direct effect.^{xxxvi} In relevance, A.G. Tesouro notes that:

“In the absence of reciprocity, to recognize that the provisions in question have direct effect would place Community traders in a disadvantage compared with their foreign competitors.

While the latter would be able to invoke provisions in their favor directly before the Courts of the Member States, Community traders would be unable to do likewise in the States that refused to recognize that the provisions of the WTO agreement may have direct effect^{xxxvii}

In this case, the CJEU recognized that there have been some changes and innovations as regarding the WTO law, but the changes are not sufficient grounds to grant direct effect to it.^{xxxviii}

It is worthy of note that there have been arguments that ECJ has granted direct effect to some other international agreements and that GATT 94 is not different in nature and structure from these other international agreements. It would force the Community to adopt a rule-based liberal economic foreign trade policy which would maximize the economic welfare of the Community.^{xxxix} In *Nakajima*, the applicant challenged a regulation imposing definitive anti-dumping duties on dot-matrix printers in Japan and submitted grounds for the annulment of the definitive regulation wherewith lack of direct effect of GATT anti-dumping code.^{xl} The ECJ dismissed this pleading on the lack of direct effect of the GATT Anti-Dumping Code because the applicant was not invoking the direct effect but rather the compatibility of an EC measure with an international agreement that it was intended to implement.^{xli} The ECJ further held that there is no such incompatibility. The most important part of the judgment referred to the possibility of invoking provisions of GATT in a direct action before the ECJ.

Also, as regards dispute settlement mechanism which uses the lack of direct effect to help resolve disputes.^{xlii} This, authors have argued, allows members to settle a dispute by means of a negotiated agreement prior to a formal ruling on the validity of trade measures^{xliii} and that it is useful because it allows member-to-member trade-offs and cross-sectorial bargaining over concessions which would not occur if the dispute were resolved by means of a panel report or by national Courts applying GATT 94 law, thus, direct effect may inhibit the operation of the GATT 94 by denying the members some of the flexibility contained in the DSU^{xliv}

Finally, on this note arguments have arisen that direct effect may deprive the Community of rights which it possesses under the GATT 94 after the issuance of an adverse panel report.^{xlv} A Court ruling by means of direct effect would mandate specific performance as the only remedy

for all GATT 94 violations and deny the Community the ability to offer compensation as a remedy for such violations.^{xlvi}

Over time, it has been observed that the CJEU has been inconsistent with its reaction towards international agreements.^{xlvii}

GIVING DIRECT EFFECT TO WTO LAW: ARGUMENTS IN SUPPORT

Some authors have argued that determining whether it will be necessary to give direct effect to WTO/GATT law depends on the level and type of binding force that is desired.^{xlviii}

It is important to mention that the status of the WTO rules within Member States' domestic and regional laws is different from country to country^{xliv} but generally there is no direct effect; thus, a person may be able to institute a legal action against another person or a state based on WTO provision.¹ This absence of direct effect seriously restricts the reach of any tax-related trade rules, coupled with its consequential individual or company's inability to enforce their tax treaty rights in a national Court.^{li}

Writers have pointed out that the United States would have rejected the Uruguay Round if WTO law had been required to be accorded direct effect.^{lii} They have also argued that once we think of direct effect in terms of preferences, rather than in abstract theory it becomes strange for a scholar to insist on direct effect when political institutions have spoken so clearly otherwise.^{liiii} However, there are some reasons why direct effect should be given to WTO law.

One of the arguments that have been canvassed in giving effect to WTO law is the need to protect individual rights.^{liv} Writers have also advocated that besides from being a powerful tool to render WTO rules effective and efficient, direct effect stimulates good negotiations. This is because, on the international level, inadequate rules need to be altered. Also, it reinforces the global trading system because private actors are granted rights to balance protectionist producer interests predominant in national regulations.^{lv}

Giving direct effect to WTO reduces the power of domination.^{lvi} Direct effect reinforces the role of Courts of law. It, therefore, acts as a check on protectionist interests and balances the system.^{lvii} The doctrine is not absolute. It includes the primacy of constitutional law, and other exceptions to the supremacy of international law, nuanced judicial approaches and judicial restraint doctrines. Since Courts have learned to deal with domestic economic regulation, they should also learn to do so with international regulation.

Furthermore, the WTO rules are ratified upon approval by parliament upon negotiation by accountable government.^{lviii} They are not inherently different from domestic rules. The rules are negotiated by consensus, meaning that smaller countries can block unacceptable propositions. The power and influence of lobbies are no different in the process of rule-making domestically or internationally.^{lix}

Relevant to also note the protection of trade rules will become available to individuals who cannot make their voices heard internationally due to the increasing awareness of WTO law. Also, Courts have judicial tools to ensure that only legitimate claims decided by a Court to further social harmony, regardless of the costs of the judicial system.^{lx}

Also, WTO rules are sufficiently precise to be given direct effect, and the concept does not exude denying direct effect of programmatic rules. WTO offers a system of principles and exceptions which is capable of balancing diverging interests.^{lxi}

In line with the submission of authors for Russia, it is believed that if direct effect is given to the WTO law within states, individuals will be opportune to invoke WTO law in national Courts to either invalidate inconsistent domestic regulations or to recover damages.^{lxii} Also, giving WTO law direct effect would give various national Courts a greater role in the government system.^{lxiii} As against the opinions of many critics, the power and influence of lobbies is no different in the process of rule-making domestically or internationally.

This may be needful as the writers have emphasized that the trade system promoted by the WTO is composed mostly of individual economic operators and therefore, it is through improved conditions for these private operators that Members benefit from WTO

disciplines.^{lxiv} Without direct effect, scholars have argued, WTO has binding force, though this binding force may not be complete.

The late Jan Tumlir, a scholar of international commercial law looks at the direct effect of trade treaties as a weapon against inherently protectionist tendencies in domestic law systems. He sets forth the idea of “constitutionality” international trade principles, elevating the rights of an individual to trade freely with foreigners to the level of a fundamental human right. To prevent the erosion of a state’s sovereignty, he suggests granting individuals the right to invoke treaty provisions in front of their domestic Courts.^{lxv} Allowing for standing in this way would be available to those citizens harmed by protectionist national policies put into effect by other national interest groups. Thus, direct effect widely defined “helps to correct the asymmetric in the political process.”^{lxvi} Professor Petersmann also supported this position when he stated that WTO’s reciprocal trade rules must be available to individuals to ensure that governments adhere to their international obligations of non-discrimination and liberalized access to their markets.^{lxvii}

CONCLUSION

It is glaring that the CJEU has constantly denied the direct effect of WTO law for political reasons. In as much as it is impressive that the CJEU exercises caution in its interpretation of laws, it may still be possible for the Court to take another look at the situation. If considered deeply, it is apparent that the rights of the individuals are connected with the WTO law, as such, there may be need to eventually extend the scope of applicability of WTO law to individuals.

ENDNOTES

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- ^{viii} This has been updated by subsequent cases. The rule must contain a clear obligation on the Member States (MS), its content has to be applicable by a Court , it must be unconditional, Member States must not have discretion in the implementation of the obligation and there must be no further act by either EC/MS; Petersmann, *European and International Constitutional Law: Time for Promoting ‘Cosmopolitan Democracy’ in the WTO*, in *The EU and the WTO-Legal and Constitutional Issues*, De Búrca, G & Scott, J. (eds.) (Hart Publishing, Oxford, 2003) p. 239
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