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Judicial Enforcement of WTO Rules before the Court of Justice of the European Union

I Introduction

The judicial enforceability of the 1947 General Agreement on Tariffs and Trade (GATT) and its successor World Trade Organization (WTO) rules has never been an easy issue under EU law. While the formal status of international treaties entered into by the EU (forming an integral part of the EU legal order) was pronounced early on,[1] the direct legal enforceability of such agreements, and in particular the GATT/WTO rules, has attracted a great number of disputes before the Court of Justice of the European Union (CJEU).

The present paper seeks to provide an overview of the various turns that the case law of the CJEU has taken in adjudicating what effect provisions of the GATT/WTO rules have in the EU legal order. In this vein, the paper will examine whether such provisions have direct effect and, if so, whether the annulment of EU acts conflicting with GATT/WTO provisions can be sought. It will be shown how the Court initially refused the direct enforceability of GATT rules, then conditionally allowed the review of EU measures in the light of GATT/WTO rules and finally turned back to its point of departure and ruled out a review of the legality of EU measures under GATT/WTO rules.

II Initial Rejection

Not long after the doctrine of direct effect of EU law was laid down by the CJEU, the issue of whether provisions of the GATT may produce such effects surfaced. In the *International Fruit Company case,*[2] a Dutch court asked the CJEU whether the validity of EU law also refers to its validity under international law, and if so, whether the particular EU Regulations – which laid down, by way of protective measures, restrictions on the importation of apples from third countries — were invalid as being contrary to Article XI of the General Agreement on Tariffs and

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[1] C-181/73 *Hageman* [1974] ECR 449.

[2] C-21–24/72 *International Fruit Company* [1972] ECR 1219.

Trade (GATT). In essence, the national court sought to invoke GATT provisions to challenge the validity of EU legislation.

In its ruling, the Court pronounced that in order to find any EU measure incompatible with a provision of international law, the EU must be bound by that provision. As the EU has assumed the powers previously exercised by the Member States in relation to the GATT, the latter's provisions are binding on the EU. The Court then proceeded to examine whether provisions of the GATT were capable of conferring rights on individuals, which they can invoke before national courts, i.e. whether GATT provisions have direct effect. With regard to this proposition, the Court examined the general scheme and terms of the GATT and concluded that GATT provisions are 'not capable of conferring on citizens of the Community rights which they can invoke before the courts.'[3] The Court's principal reason for arriving at this conclusion was that the agreement is in principle characterised by great flexibility, where negotiations were undertaken on the basis of 'reciprocal and mutually advantageous arrangement'. This is particularly reflected in the possibility of derogation, in the measures to be taken when confronted with exceptional difficulties, in the settlement of disputes and ultimately in the power of withdrawal.

In the Court's view, the flexible nature of the agreement did not meet the criteria of being sufficiently precise and unconditional in nature, as required for a provision to produce direct effect under EU law.

As has been pointed out, the Court was reluctant to allow GATT provisions to produce direct effect as this would have entailed a challenge to the legality of EU legislation.[4] This lies in stark contrast to other cases where the direct enforceability of international agreements concluded by the EU resulted in the extension of the scope of EU rules. In these instances, and most notably in the ever cited *Kupferberg case,* the Court was much more willing to grant direct effect to the provision of the given international agreement.[5]

One important aspect of the *International Fruit Company* ruling needs to be pointed out, however. In its reasoning, the Court did not make a clear distinction between the capability of GATT provisions to produce direct effect and the validity of EU legislation which were violating such provisions. The Court thus did not separate the issue of whether individuals may invoke rights contained in GATT provisions before national authorities from the other question of whether individuals may seek the review of EU law based on GATT provisions. Moreover, from the structure of reasoning employed in *International Fruit Company* it appears that the Court, at that stage, saw direct effect as a precondition of the review of legality. That is to say that, unless the provisions of the international agreement at stake had direct effect, the Court would not enter into the substantive review of the challenged EU act based on that international agreement. As will be shown below, in subsequent cases the Court has moved away from this stance.

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[3] Ibid para 27.

[4] Bebr, 'International Agreements Concluded by the Community and their Possible Direct Effect: From International; Fruit to Kupferberg' (1983) 20 CMLRev 35.

[5] To this effect see the rulings in case 104/81 *Kupferberg* [1982] ECR 3641 in relation to the EU-Portugal free trade agreement, and C-469/93 *Chiquita Italia SpA* [1995] ECR I–4533 concerning the Lomé Convention.

III Conditional Allowance

In the *Nakajima case,*[6] the applicants claimed that the Basic Regulation on anti-dumping[7] adopted by the EU at the time was unlawful for being in breach of the Anti-Dumping Code adopted under GATT. In their submissions, they sought a declaration of illegality, without relying on the direct effect of the relevant provision of the Code. It was on this occasion that the Court clarified its stance and drew a distinction between the two issues, of whether a provision of an international trade agreement has direct effect and how this related to the possibility of relying on such an agreement to challenge the allegedly incompatible EU legislation. The Court thus proceeded to review the compatibility of the Basic Regulation with the Anti-Dumping Code and found no conflict in the particular case. The more general outcome of the *Nakajima case*, however, was that direct effect was no longer considered as a precondition for reviewing EU legislation in the light of an international trade agreement, in this occasion an agreement adopted in the framework of the GATT, to which the EU was itself a party.

This is the approach that was followed in the *Germany v Council case,*[8] where Germany sought the annulment of the Banana Regulation,[9] among other claims, for its alleged incompatibility with GATT provisions. In its judgement, the Court expressly denied that the provisions of the GATT could have direct effect and cited its holding of the *International Fruit Company case.* Yet despite the absence of this, it followed the path set in the *Nakajima case* and went on to examine the compatibility of EU legislation with that of the GATT, thereby established the criteria within which it is willing to exercise such review. According to this, the Court would only review the lawfulness of EU legislation under the GATT provisions if the reviewed EU act had intended to implement a particular GATT obligation or if the EU act expressly referred to such specific provisions of the GATT. In the *Germany v Council case* the Court found that the Banana Regulation in question neither intended to implement a particular obligation arising under the GATT nor expressly referred to any specific provision of GATT. The Court therefore dismissed the annulment action. The criteria set out in *Germany v Council,* namely, that EU anti-dumping legislation can be reviewed under GATT rules, was followed in the *Petrotub case*[10] where the Court did annul EU legislation for its incompatibility with the GATT Anti-Dumping Code.

In the subsequent case law, however, it is quite easy to see the erosion of the stance taken by the Court in its *Nakajima/Germany v Council* rulings. In the *Ikea Wholesale* case[11] the Court

[6] C-69/89 *Nakajima v Council* [1991] ECR 2069.
[7] Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community [1988] OJ L209/1.
[8] C-280/90 *Germany v Commission* [1994] ECR I–4873.
[9] Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas [1993] OJ L47/1.
[10] C-76/00 *Petrotub* [2003] ECR I–79.
[11] C-351/04 *Ikea Wholesale* [2007] ECR I–7723.

refused to review EU anti-dumping legislation in the light of the WTO Anti-dumping Agreement. The argumentation was that although previous EU legislation did reflect the intent to comply with the Anti-Dumping Agreement, the subsequent EU legislation – contested in the present case – lacked any such intention while at the same time overwriting any previous intention to this effect. Through this step, the Court essentially opened the door for the EU to exempt itself from the WTO Anti-dumping Agreement with subsequent legislation, even if previous EU legislation intended to comply with WTO rules. This conclusion was unexpected for two main reasons. First, as the references show, the judgment was rendered at a time when the WTO regime was replacing the old GATT scheme and was being celebrated for offering a more effective means of enforcement and dispute settlement. Given this very significant shift which the new regime was intending to introduce, a more permissive judicial stance towards WTO rules was expected. Second, it was under this new regime that a recommendation was made by the Dispute Settlement Body (DSB) of the WTO finding the disputed EU legislation cited in the *Ikea Wholesale case* to be in conflict with the Anti-dumping Agreement. It was thus against both the Anti-dumping Agreement and the concrete finding of the DSB that the Court excluded the reviewability of EU legislation, simply claiming that the said legislative act did not intend to give effect to any of the specific obligations of the WTO rule. This approach was confirmed in the *FIAMM case,*[12] where the Court did not review the contested EU act, stating that it was not intended to implement any particular obligation under the WTO rules.

While refusing to review the compliance of EU legislation under GATT/WTO rules in the absence of express intent to implementi specific obligations thereof, even if previous EU legislation did express such an intent or where non-compliance was already established by the WTO DSB, the Court did not overrule its initial holding in the *Nakajima* and *Germany v Council cases.* In other words, in principle EU legislation was still open to review under GATT/WTO rules and such a legality review was not conditional on the issue of whether GATT/WTO provisions had direct effect.

Furthermore, in a number of parallel cases the Court did emphasise that secondary EU law must, to the extent possible, be interpreted consistently with international agreements concluded by the EU, especially where the specific EU legislation is to give effect to such an agreement. The obligation of harmonious interpretation was repeatedly cited by the Court in cases where the international agreement adopted under the auspices of the GATT/WTO and EU measures implementing those were at stake.[13] It must be said that the requirement to interpret implementing EU law consistently with concluded international agreements is not a vigorous means of giving force to such agreements and is certainly not on par with the direct enforceability by individuals. At a minimum, what it provides is a standpoint on where treaty conform solutions are preferred.

[12] C-120-121/06 *FIAMM* [2008] ECR I–6513.

[13] In relation to the International Dairy Agreement see C-61/94 *Germany v Council* [1996] ECR I–4006, with regard to TRIPS 53/96 *Hermes International* [1998] ECR I–3603, C-392/98 *Dior* [2000] ECR I–11307.

IV Stark Reluctance

It was in the *Portugal v Council case*[14] where the Court restated its approach and addressed head-on the issue of the direct enforceability of GATT/WTO rules within EU law. In the case, Portugal sought the annulment of a 1996 Council decision[15] on the conclusion of an agreement between the EU and Pakistan and the EU and India on market access for textile products. Among other arguments, Portugal claimed that the Agreement was in breach of the fundamental principles of the WTO and the rules of the Agreement on Textiles and Clothing and the Agreement on Import Licensing. In its submission Portugal duly cited the *Germany* v *Council* case, arguing that the compatibility of EU measures with GATT/WTO rules is to be distinguished from the issue of direct effect. It went on by pointing out that the Court itself had ruled that where the adoption of the measures implementing obligations assumed within the context of the GATT is at stake, or where an EU measure refers expressly to specific provisions of the GATT/WTO, the legality of EU measures must be reviewed in the light of those GATT/WTO rules.[16]

In its ruling, the Court arrived at the conclusion that, due to the structure and nature of WTO rules, including the cited Agreements, these rules cannot, in principle, be the basis upon which the legality of measures adopted by the EU can be reviewed. Thus, with one bold yet unambiguous move, the Court ruled out even the possibility that EU legislation could even eventually be reviewed in the light of WTO rules. To justify its holding, the Court provided a particularly detailed view of the WTO rules.

The point of departure for the Court was obviously to reiterate that EU institutions are free to enter into international agreement under public international law. The EU, in concluding international agreements, is also free to decide what effect the provisions of a specific agreement are to have on its internal legal order, with the Court only ruling on this matter if the issue was not settled by the agreement itself. In this way, the Court reaffirmed its *Kupferberg* ruling, and upheld the possibility of international agreements being directly enforceable in the EU legal order.

Turning to the WTO Agreements, the Court admitted that the 1994 WTO regime did indeed significantly differ from that of the 1947 GATT, especially as regards the system of safeguards and the mechanism for resolving disputes. It maintained, however, that the system resulting from the WTO Agreements nevertheless accords considerable importance to negotiation between the parties. The Court first examined the enforcement mechanism set forth by the new regime, where the withdrawal of measures incompatible with the WTO are prescribed for the contracting parties, but there lies the possibility to provide temporary compensation

[14] C-149/96 *Portugal v Council* [1999] ECR I–8395.

[15] Council Decision 96/386/EC of 26 February 1996 concerning the conclusion of Memoranda of Understanding between the European Community and the Islamic Republic of Pakistan and between the European Community and the Republic of India on arrangements in the area of market access for textile products [1996] OJ L153/47.

[16] C-149/96 *Portugal v Council* [1999] ECR I–8395 para 27.

should withdrawal of such measures be impracticable. The Court also took into account the leeway left to parties failing to implement the recommendations of the dispute settlement body, and to enter into negotiations with a view to finding mutually acceptable compensation. In the Court's assessment, the WTO rules themselves did not determine the appropriate legal means of enforcement and left ample room to manoeuvre for the contracting parties in this regard. According to the Court it was exactly this margin, in terms of negotiating and finding mutually acceptable compensation, that would be lost had EU law itself prescribed the direct enforceability of WTO rules over conflicting EU measures. In the Court's view, the WTO was still founded on 'mutually advantageous negotiations' and lacked precise legal obligations, as was the case with the 1947 GATT. The Court went on to compare the WTO regime to the international trade agreements entered into by the EU with third countries. In the Court's view, the latter may be asymmetric regarding the respective obligations of the parties; however, there is a legal guarantee as to the enforcement of such obligations.[17] The Court left no doubt in its view that it is not the lack of reciprocity in obligations but the lack of reciprocity in their enforcement that puts the WTO regime in a different light. Ultimately, it is for this reason that the Court does not afford the direct enforceability of WTO rules within the EU legal order, otherwise a situation would arise whereby the parties to the WTO would continue to enjoy a large degree of flexibility in enforcing its obligations arising while the EU would not benefit from the same flexibility.[18]

This understanding of the otherwise celebrated 1994 WTO regime and the denial of direct enforceability of WTO rules, including the recommendations of its Dispute Settlement Body, has received much criticism from legal practitioners and from academia.[19] Even today, fifteen years after the judgment, the Court's stark reluctance to give direct effect to WTO rules within the EU legal order is considered to be an unsettled issue.[20] In the quest to understand the Court's rationale in *Portugal v Council,* many agree that this is to be found in the realm of the political rather than in the legal. While sentiments may differ in evaluating the underlying judicial policy, there is agreement that, by avoiding full enforcement of GATT/WTO rules within the EU legal order, the Court provided ample room to manoeuvre for the EU vis-à-vis the implementation of its own economic policies and measures in a manner this is not legally constrained by GATT/WTO rules.

[17] Para 42.
[18] Para 45.
[19] Summarized e.g. by Mendez, M 'The Legal Effect of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques' (2010) 21 EJIL 83–104, p. 95.
[20] Eckout P., 'The International Legal Order: Black holes, fifty shades of grey, or extending *Van Gend en Loos*?' in 50th anniversary of the judgment in Van Gend en Loos Court of Justice of the European Union Conference Proceedings, Luxembourg, 13 May 2013, at 175.

V Aftermath of Portugal v Council

In parallel with the voices being heard in academic writing, legal practitioners are also tireless in seeking to overturn, or at least refine, the scope of the Court's *Portugal v Council* holding. To date, they have met with no success. The Court has adamantly stuck to its stance of not allowing rules of the WTO or other international agreements adopted within its framework to be directly enforceable.[21] Arguments trying to reinvigorate the *Nakajima/Germany v Council* ruling,[22] or seeking to exempt GATT/WTO rules as treaties concluded prior to the EU treaties,[23] or opting for damages actions instead of annulment actions,[24] or citing references to the principle of pacta sunt servanda[25] have all failed.

This notable disparity between WTO rules being clearly denied direct enforceability in the EU legal order, in contrast to other international agreements entered into by the EU, did not last long, however. In the *Intertanko case,*[26] where EU legislation was reviewed under the UN Convention of the Law of the Sea and the related Marine Pollution Convention, the Court made the bold and rather unexpected move to extrapolate its restrictive GATT/WTO approach and deny the direct effect of those instruments within EU law. The Court reached the same conclusion in the *Ioannis Katsivardas case,*[27] in which the provisions of the Cooperation Agreement between the EU and the countries party to the Cartagena Agreement were found to have no direct effect. It thus seems that, rather than opting for a more lax stance regarding the direct enforceability of GATT/WTO rules, the Court has moved to interpret other international agreements in the same restrictive manner.

VI Conclusion

The saga of the enforceability of GATT/WTO rules under EU law remains to be continued.[28] The more widespread and more effective WTO dispute-resolution becomes, the more awkward it will be for GATT/WTO rules not to enjoy direct enforceability in the EU legal order, for individuals not to be able to rely on GATT/WTO rules, and EU legislation by and large remaining intact from challenge. The sole, and much repeated, principle to which the Court seems to stick to is the obligation to interpret EU secondary law in a harmonious manner with GATT/WTO rules, which is obviously a less painful undertaking, while at least assuring a treaty conform interpretation of EU law.

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21 C-307/99 *OGT* [2001] ECR I–3159., re TRIPS see C-392/98 *Dior* [2000] ECR I–11307., re the Technical Barriers To Trade see C-27 and 122/00 ex parte *Omega Air Ltd* [2002] ECR I–2569.
22 T-18/99 *Cordis* [2001] ECR II–913.
23 T-2/99 *T.Port* [2001] ECR II–2093.
24 T-30/99 *Bocchi Food Trade International* [2001] ECR II–00943.
25 T-383/00 *Beamglow Ltd* [2005] ECR II–5459.
26 C-308/06 *Intertanko* [2008] ECR I–4057.
27 C-160/09 *Ioannis Katsivardas v Ipourgos Ikonomikon* [2010] ECR I–4591.
28 C-135/10 *Società Consortile Fonografici v Marco Del Corso* ECLI:EU:C:2012:140.