Legal Issues of Economic Integration 27(3): 213–215, 2000.

Reconsidering the Direct Effect of International Law in the EU Legal Order

From The Board

The renaming of this journal from 'Legal Issues of European Integration' into 'Legal Issues of Economic Integration', as from the first issue of this volume, reflects the acknowledgement that European (economic) law is increasingly interwoven with a larger body of international (economic) law. This theme continues to provide a rich research agenda and will inspire the contents of forthcoming issues of this journal

The starting point in determining the relationship between European law and international law remains simple. Public international law in principle is binding on the Community. Under certain conditions it is an integral part of the Community legal order and moreover, then prevails over secondary Community legislation. The European Court of Justice has recognized as much – also in the area of international economic law. Indeed, in its recent caselaw the Court of Justice has shown a remarkable deference to public international law. In *Racke* (Case C-162/96), the Court accepted that an individual could ask the Court to examine the validity of decision suspending a trade Regulation under the relevant (customary) rules of international law pertaining to suspension of treaties. It implicitly accepted that if public international law would not allow it, the decision would have to be struck down. And in *Gencor* (Case T-102/96), the Court examined the extra-territorial exercise of Commission powers in the area of competition against unwritten international law rules on the allocation of jurisdiction. It implicitly accepted that if public international law would not allow it, the Court would disallow the exercise of Commission powers in the area of competition.

These cases raise many questions that require further thought. These concern in particular the relevance of the direct-effect doctrine to judicial application of rules of customary international law and the criteria under which individuals could invoke such rules (see the article by P.J. Kuijper in LIEI 1998/1). The judgments also may be critiqued for their rather loose treatment of the concept of customary law and the rather thin supporting evidence that underlies the Court's findings on the rules of customary law of treaties and jurisdiction. Such questions and critiques inevitably emerge during attempts to reconcile two legal orders that are rapidly evolving. They translate easily into a fruitful line of research to which this journal will provide a venue.

Even more intriguing continues to be the relationship between EU law and one specific area of public international law: the law of the WTO. The number

of publications that have addressed the various angles of this problematique is massive, yet these have not exhausted the research agenda.

Two positions have emerged: one that critiques the case-law of the Court that denies direct effect and one that support that case-law, be it often on other grounds than those held by the court.

On the one hand, there is growing support for a rule-based critique on the judicial policy of the Court. E.U. Petersmann has noted that more than 100 legal acts of the EC institutions on the development, implementation, and further modification of the EC's import regime for bananas persistently ignored the requirements of GATT/WTO law. They also ignored the requirement of EC law that international agreements shall be binding on the institutions of the Community and on Member States. National courts and the EC Court of Justice, when faced with many complaints against the manifest illegality of the import restrictions on bananas refused to provide relief. The fact that formally international law is supreme over EC law has therefore been viewed as immaterial, as the ECJ and national courts considered GATT/WTO law to lack direct effect.

According to this position, the absence of direct effect is to be deplored for a variety of reasons. One, plainly, is its destructive effect on the effectiveness of the law. A related concern is that the explosive growth of international WTO litigation brings financial and political costs that may be mitigated if courts are allowed to act as a check on the executive and legislative powers. And then there are systematic concerns. The refusal by courts to provide relief for violations of WTO law both reflects and strengthens the view, among others expressed by Judith Bello in the *American Journal for International Law* (90 AJIL 416 (1996)), that WTO law is not binding. The acceptance of the court's abstention is a reflection of the same legal culture that considers it legitimate for states to choose to comply with the law or not, as long as they pay compensation. Legislative and judicial policy that denies direct effect to WTO law sustains that culture and seems increasingly difficult to reconcile with a genuine belief in WTO law as a rule-based system.

On the other hand, these arguments continue to be opposed by the critics of direct effect. These unite under an agenda that seeks to preclude the courts from interfering in a separation of powers that requires deference to policy-makers. It also seeks to prevent rules of doubtful democratic legitimacy from entering the national systems directly through the courts, in particular in areas that essentially are distributive in nature. Both latter problems are put sharply into focus by the recent litigation in the United States on the implementation of the WTO Appellate Body's ruling in the *shrimp-turtle case*. Petitioned by environmental groups that sought to enforce US conservation law at the cost of compliance with the Appellate Body's ruling, the US Court of International Trade blocked the US Government's efforts at compliance, without being able even to consider the possibility of directly

applying WTO law over US law. The motive of the group to keep WTO law out of domestic law here is as important as the fact that due to a lack of domestic effect the US law could trump the ruling of the Appellate Body.

It will be intriguing to see how these fundamental and not easily reconcilable concerns translate in the judicial practice of the European and (to a lesser extent) national courts. What is clear is that the somewhat shallow reasoning of the EC Court as evidenced, for instance, in *Portugal* v. *Council*, in the long term does not appear to be sustainable. The arguments that deny effect of WTO law in the European legal order continue to be based on reciprocity and the possibility to opt temporarily for compensation rather than specific restitution. As has often been said before, these arguments are hardly compelling. Apart from the influence of the considerations mentioned above, this reasoning needs urgent rethinking in view of the fact that it uses a right for states to choose a remedy to deny rights of individuals (that logically would be determined apart from questions of interstate remedies). Moreover, one also needs more closely to consider the effect of the emerging case law and doctrine on liability. It might be argued that even when direct effect is excluded, liability for breach of international (WTO) law may ensue (see opinion of AG Lenz in Case C-469/93). If that were to be upheld, there is much to be said for allowing courts a role at earlier stages to minimize damage (see also the article by Philip Gasparon in *European Journal of International Law* (1999), p. 605).

Against this background, one can observe that while the fundamental arguments opposing full direct effect may continue to lead the court to deny the full effect of WTO law in the European legal order, the underlying reasoning and justification for this approach are in need of a reconsideration. This is the objective for a research agenda relevant for international (economic) law at large.

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