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# Direct Application of World Trade Organization Rules

## By European Court of Justice in European Union Law

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***Abstract*—In this article, I will focus on how European Union (EU) can deal with World Trade Organization (WTO) rules. Can EU directly apply WTO rules? This is my concern. In the chapter One, I will give the general introduction of basic knowledge and background of EU, the European Court of Justice (ECJ) and the concept of "direct effect" and "direct application". In the chapter Two, it is mainly about the legal states of GATT 1947 and WTO rules in EU legal order, through the case law of ECJ.Chapter Three is the discussing about the points for ECJ to deny direct effect of the WTO agreements and the real reason for rejection; from this part we can know the argument of ECJ.Chapter Four is legal arguments of the direct application of WTO rules by ECJ in EU law and the possibility direct application of WTO rules by ECJ in EU law. After the analysis and giving the arguments that ECJ should grant direct effect of WTO rules in EU law and therefore ECJ should direct apply WTO rules in its cases.Final part is the conclusion.**

***Keywords*—Direct applicability of WTO rules; Direct effect of WTO rules; The European Court of Justice; EU law**

### I. INTRODUCTION

Among these global organizations, WTO plays the most important role.

However, at the same time, the countries in the same region union together to create some regional organization for coordinating the regional economic cooperation, and among them, EU, NAFTA, ESCAP, especially EU has already achieve much and it will achieve more in the future.

Particularly, EU is not a country, but more than a country, it is not a simple regional organization, but more functional and powerful than the normal regional organization. The concept of EU legal order is that EU law is the sovereign law above all of the member states. So, now the problem is how to deal with the conflict between globalization and regionalization? By another word, what is the relationship between WTO and EU? In this article, I will focus on how EU can deal with WTO rules. Can EU directly apply WTO rules by ECJ? Based on legal arguments of the direct application of WTO rules by ECJ in EU law and considering the possibility direct application of WTO rules by ECJ in EU law, ECJ should grant direct effect of WTO rules in EU law and therefore ECJ should direct apply WTO rules in its cases. In addition, I have some suggestions for the approach of direct effect of WTO rules by ECJ in EU law.

In this article, I will focus on how the ECJ can deal with WTO rules.

Through legal arguments of the direct application of WTO rules by ECJ in EU law and considering the possibility direct application of WTO rules by ECJ in EU law, I support that ECJ should grant direct effect of WTO rules in EU law and therefore ECJ should direct apply WTO rules in its cases.

I have some suggestions for the approach of direct effect of WTO rules by ECJ in EU law.

### II. DIRECT APPLICATION OF WTO RULES

#### A. *Current Status and Attitude for ECJ on Direct Effect of the WTO Rules*

*1) The attitude and case study of ECJ to Treat international agreements*

*a) The attitude of ECJ to treat international agreements:* EU is a supranational and intergovernmental union, and it makes the ECJ much different from the national court. Its main task is to examine the legality of EU and ensure the uniform interpretation and application of EU law.

With respect to direct applicability, Josephine Steiner & Lorna Woods said, "With the passing of this Act all Community law became, in the language of international law, directly applicable , that is , applicable as part of our own internal system." .[1]From here, we can understand the concept of direct applicability, that is, to apply the international law as a part of the country's own internal system. Another word, the provisions of international law can be capable of application by national courts.

However, direct effect is different, direct effect means grant the international law as the same legal status as the domestic law. The doctrine of direct effect in ECJ is focus on creating the legal rights for individuals (EU citizens) enforceable before national courts.[2]

In this respect, the Community legal order is different from international treaties. Because international law is agreements

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between government and do not create rights for citizens enforceable before national courts. Therefore, I use the term “direct application” rather than “direct effect” to clarify that I am focus on the rights and obligations of the Member States rather than individuals[1]. However, through direct application of WTO rules by ECJ also can indirectly affect the rights of individuals.

Although ECJ use them interchangeably, direct effect and direct applicable are similar but there are different[2]. The relationship may describe as follows: “Not all provisions of directly applicable international law are capable of direct effect ……Direct applicability is a necessary precondition for direct effects.” [3] The reason I need to talk about direct effect is that ECJ use ‘direct effect’ to grant the provision of EU law as the legal resource and sovereign law by the cases. If ECJ can direct apply WTO rules as it direct applies Community law before national courts, then that is the compliancy with non-discrimination principle of EU law.

*2) Case study of the attitude of ECJ to treat international agreements:* ECJ developed “direct effect” of the treaties articles by cases. The concept of “direct effect” started with the case “Van Gend en Loos v. Nederlandse Adminisreatie der Belatingen (1963).” [3] In this case, a private firm sought to invoke Community law against Dutch customs authorities in proceedings before a Dutch tribunal. In addition, the Dutch tribunals asked ECJ whether Article 12 of the EEC Treaty has an internal effect or not. ECJ held that Article 12 was directly effective: “The wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation. Moreover, this obligation is not qualified by any reservation o the part of States, which would make its implementation conditional upon a positive measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effect in the legal relationship between Member states and their subjects.” [4]This case establishes the theory basis of direct effect.

Then the concept of “direct effect” was extend to positive obligation in the case of “Alfons Lütticke GmbH v Commission (1966)”, where it was held that a positive obligation could have direct effect once the time limit for implementation has expired[4].

In the case of “Reyners v Belgium(1974)”, it set out the criteria for a provision of EU law to have direct effect: (A) the provision must be clear and unambiguous ;(B) it must be unconditional ;(C) its operation must not be dependent on further action being taken by the Community or national authorities [5].

There are still a lot of cases that are related to “direct effect” before ECJ. Above three cases are very important for the basis of concept of “direct effect”. In the case of “Van Gend en Loos v. Nederlandse Adminisreatie der Belatingen (1963”) ECJ held that EC treaty as a special international agreement which concluded that EC and Member States of EC should have direct effect in the national courts of Member States. In this case, there was no any words mention the direct effect of other international agreements between EC and other non-Member States.

The attitude of ECJ about other international agreements indicated in the case of “R. & V. Haegeman Sprl v. Belgium, (1974)[6] ”and “Kupferberg (1982)”[7]. In the case of “R. & V. Haegeman Sprl v. Belgium, (1974), the court held that, based on Article 177(new 234) of EC Treaty, “acts of institutions” would include international Agreements entered into by the Community. This is the first time that ECJ mentioned about the direct effect of other international agreements.

Article 177(new 234) of EC Treaty provides that:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) The interpretation of this Treaty;

(b) The validity and interpretation of acts of the institutions of the Community;

(c) The interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

In the case of “Kupferberg (1982)”, the court held that, provisions of international agreements concluded by( or binding on ) the EC are part of EU law and may in appropriate circumvent, be invoked before national courts as giving rise to enforceable rights for individuals.[5] It means that ECJ recognized the direct effect of the provisions of international agreements if EC was a party of these agreements. From this respect, ECJ should grant direct effect to GATT 1994 because the European Union has been a WTO member since 1 January 1995, but in fact, ECJ deny granting the direct effect to WTO agreements in EU law.

## B. The Legal Status of WTO Agreements in European Union

*1) The negative attitude of European Community after creating of WTO*

In a much discussed and often-criticized case, ECJ has always denied direct effect to provisions of the GATT 1947. ECJ refuses to grant direct effect for GATT 1947 because ECJ held that GATT 1947 lacks of flexibility[8]. According to the analysis in this Article below, we can see that WTO is far less flexible than GATT1947.

[1] In addition, because WTO/GATT is the agreement between the member states, it cannot directly protect the rights for individuals. However, through direct application of WTO rules by ECJ also can indirect effect the rights of individuals, once the citizens ask the government for the suit.

[2] As this book mentions, “the terms ‘direct applicability” and ‘direct effect ‘have been used interchangeably by ECJ, yet they are separate concepts.” , <European Union Law> (translation), Wuhan University Press, 2003, first edition,P50

[3] Case26/62, Van Gend en Loos v. Nederlandse Adminisreatie der Belatingen [1963] ECR1

[4] Case 48/85 , Alfons Lütticke GmbH v Commission [1966],ECR19

[5] Case 2/74, Reyners v Belgium[1974], ECR 631

[6] Case 181/73 , R. & V.Haegeman Sprl v. Belgium ,[1974],ECR 449

[7] Case 104/81 Hauptzollamt Mainz v C.A. Kupferberg & Cie KG [1982] ECR 3641

[8] This is the holding of ECJ in the case of “the International Fruit Company v. Produktschap Voor Groenten en Fruit, [1972], ECR 1219

However, the fundamental changes after creating of WTO still did not change the negative attitude of European Community, the ECJ continuously denied the direct effect, but has showed the possibility those specific WTO agreements provisions may be recognized as having direct effect on a case-by case basis.

After European Community signed the final act of Uruguay Round Negotiation, it still needs ratification according to procedure of EC treaty[9]. Therefore, the Commission submitted the proposal for the conclusion of the results of the Uruguay Round, in the familiar format of a decision sui generis the Council asked to approve the WTO Agreement.[6] In this proposal, European Commission mentioned about direct effect of WTO agreements, European Commission stated that because WTO agreements are intergovernmental agreements, it should not be possible for individuals to invoke these provisions of WTO agreements and its Annexes directly before national or Community courts and tribunals. [7]

Later European Commission explained the reason in the explanatory memorandum that it was clear that the US and many other partner States in the WTO would exclude such direct effect explicitly. An important disequilibrium would arise in the possibilities of enforcement of the provisions of the WTO Agreement as between the Community and its partner States if direct effect does not explicitly excluded in the Community act of the conclusion of the results of the Round. [8]From here, we can see clearly that European Community want to reject the direct effect of WTO agreements and its Annexes.

According to the legislation procedure of EU law, European Commission submitted the proposal to European Parliament, and after it made the decision, it sends the reaction to European Council. In this case, the European Parliament consent it without much modification[10] and submit to European Council.

As the response of this proposal, on 22 December 1994, European Council made the decision of 94/800/EC (concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994)), in the preface of this decision, European Council stated that :

"…Whereas, by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts, …"[11]

In this decision, European Council explicitly refused the direct effect of WTO agreement.

However, how is about the opinion from ECJ? Within the EC, the Commission had requested the ECJ under the procedure of Article 228(6) of EC Treaty to confirm the exclusive competence of the EC to conclude the WTO Agreement, which had negotiated within the framework of the Uruguay Round.[9] According to Article 228 (new Article 300), we know that ECJ can give the advisory opinions on an agreement between the European Union and third countries or international organizations[12], obviously WTO agreement is belong to this category. Therefore, ECJ' opinion in one sense can affect the result of the direct effect of WTO agreements. As a matter of fact, ECJ's reaction was hardly a surprise. On the European side, the WTO could only conclude as a mixed agreement. The European Court of Justice (ECJ) ruled on 15 November 1994[13]:

(1) The Community has sole competence, pursuant to Article 113 of the EC Treaty (ECT), to conclude the multilateral agreements on trade in goods.

(2) The Community and its Member States are jointly competent to conclude GATS.

(3) The Community and its Member States are jointly competent to conclude TRIPS.

ECJ just made a conclusion that The Community and its Member State are Joint Competences for the Conclusion of the WTO, did not mention about the direct effect of WTO agreements.

However, ECJ cannot avoid this question, it still need to face the challenge. Next part is the case law of ECJ about the direct effect of WTO agreements.

*2) Case law of ECJ about the direct effect of WTO agreements*

After EC joined WTO, there were several cases that ECJ asked for judgment about the position of WTO agreements in EC legal order.

In most of the cases[14], ECJ just use the words "…a question on the interpretation of Article …"[15] to avoid the question that whether WTO agreements have direct effect or not.

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[9] See Paragraph 3 of Article 133 ( new Article 300 ) of EC treaty : "Where agreements with one or more States or international organizations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Community policies and rules."

[10] It means European Parliament also insists the opinion of refusing direct effect of WTO agreements.

[11] Dec. 94/800/EC, OJ 1994 L 336/1

[12] See Paragraph 6 of Article 228 ( new Article 300 ) of EC Treaty: "The European Parliament, the Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article 48 of the Treaty on European Union."

[13] Dec. 94/800/EC, OJ 1994 L 336/1.

[14] See these cases:

1. Case C - 53/ 96 , Hermès international v. FHT Marketing Choice BV, [1998] ECR I -3603
2. Case C-183/95 Aftish BV v Rijksdienst voor de keuring van Vee en Vlees,[1 997]ECR I-4315
3. Joint cases C 364/ 95 and C - 365/ 95 ,T.Port GmbH & Co. v Hauptzollamt Hamburg-Jonas, [1998 ] ECR I - 1023)
4. Case C - 100/ 96 ,Queen v. Ministry of Agriculture , Fisheries and Food ,ex parte British Agrochemicals Association Ltd[1999] ECR I-1499

In 1999, in the case of "Portuguese Republic v Council, [1999] [16]," as the first time, ECJ stated the question that whether WTO agreements have the direct effect or not.

The fact of this case is, in February 1996, the Council of the European Union made a decision of the European Union to conclude Memoranda of Understanding with India and Pakistan on market access for textile products [17]. These Memoranda were negotiated and concluded following the end of the Uruguay Round of negotiations, in the context of continuing WTO textile market access, Portugal thought that this decision would bring the disbennifit for the textile industry, so Portugal challenged this decision of the Council. Portugal claimed that the Memoranda as being inconsistent with the 1994 General Agreement on Tariffs and Trade (GATT 1994)[18], the Agreement on Textiles and Clothing,[10] and the Agreement on Import Licensing Procedures,[11] therefore Portugal think this decision should be unlawful.

Most significantly, the ECJ held that Portugal could not rely on the provisions of the WTO Agreement. That is to say, the WTO Agreements do not have direct effect within the EC legal order.

There are several reasons that were given by ECJ in the judgment of this case. Firstly, they were not among the rules that could be used to challenge the legality of EC measures, as it hold that "regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions. "[19].

Secondly, ECJ stated a new reason for refusing direct effect of WTO agreements, which is the principle of reciprocity, as analyzed in its judgment of this case, "45. However, the lack of reciprocity that regard on the part of the Community's trading partner, in relation to the WTO agreements which based on `reciprocal and mutually advantageous arrangements' and which must ipso facto be distinguished from agreements concluded by the Community, referred to in paragraph 42 of the present judgment, may lead to disuniform application of the WTO rules.[20]"

Reciprocity has two relevant aspects: first, by refusing to accord internal direct effect to the WTO agreements, the Court is reciprocating the comparable refusal by other major trading states, especially the United States and Japan, and second, rather than being normative in character, the WTO agreements are reciprocal arrangements of mutual convenience in an ongoing and evolving trade bazaar. Since neither the United States nor Japan applies the WTO agreements directly, the Court seems inclined to protect the EC from any economic and political disadvantage resulting from judicial review of EC acts in the light of WTO provisions. When an international issue arises regarding the application of the agreement, the party's negotiators will be neither subject to be second-guessed by their own courts nor bound by prior interpretations. However, as long as the courts of the principal trading parties refuse to accord internal enforceability to the WTO agreements unless there is reciprocity, the consequence will be a permanent exclusion of international trade law from domestic jurisprudence.[12]

Thirdly, ECJ hold, "39 However, Article 22(2) provides that if the member concerned fails to fulfil its obligation to implement the said recommendations and rulings within a reasonable period of time, it is, if so requested, and on the expiry of a reasonable period at the latest, to enter into negotiations with any party having invoked the dispute settlement procedures, with a view to finding mutually acceptable compensation.

40 Consequently, to require the judicial organs to refrain from applying the rules of domestic law which are inconsistent with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 of that memorandum of entering into negotiated arrangements even on a temporary basis." [21]

Finally, ECJ stated that this judgment is in accord with the decision of 94/800/EC (concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994)[22].

*3) The explanation of ECJ to deny direct effect of the WTO agreements*

According to two typical cases of ECJ, "Eruchthandelsgesellschaft mbH Chemnitz v. Commission, [1999]" [23] and "P Atlanta v European Community, [1999]" [24], we can see the basic attitude of ECJ about the direct effect of WTO rules:they didn't have direct effect.

[15] See the judgment of ECJ in the case of "Hermès international v. FHT Marketing Choice BV, [1998]", in this case , ECJ emphasized of its jurisdiction of interpretation of Article 50 of TRIPS, as it stated, "…29. It follows that the Court has, in any event, jurisdiction to interpret Article 50 of the TRIPS Agreement."

[16] See Case C - 149/ 96 , Portuguese Republic v Council ,[1999], CER I- 8395

[17] 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 O.J. (L 153) 47.

[18] General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1154 (1994)

[19] See Case C - 149/ 96 , *Portuguese Republic v Council ,[1999*], CER I- 8395.

[20] See Case C - 149/ 96 , *Portuguese Republic v Council ,[1999*], CER I- 8395, paragraph 45.

[21] See Case C - 149/ 96 , Portuguese Republic v Council ,[1999], CER I- 8395, paragraph 39, 40.

[22] See Case C - 149/ 96 , Portuguese Republic v Council ,[1999], CER I- 8395, paragraph 7: "7 Following the signature of those measures the Council adopted Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations."

[23] Case T - 254/ 97 Eruchthandelsgesellschaft mbH Chemnitz v Commission, [1999]3 C. M. L. R. 508

[24] Case C-104/97, P Atlanta v European Community, [1999] ECR I-6983

*a) Reciprocity:* Since WTO has been created, it has been the most powerful argument of EJ to deny direct effect of the WTO agreements, because the nature of WTO is the reciprocity and negotiation for the member states of WTO, in the opinion of ECJ, the measure of deal with WTO rules needs to be equal and balance.

In the case of "Portuguese Republic v Council, [1999] , one of the argument of ECJ is that if ECJ recognize the direct effect of WTO agreements, it is lack of reciprocity . Because Unites states and Japan does not recognize the direct effect of WTO agreements, if ECJ do so, then it will be the obligations of ECJ and other countries are unequal and imbalance. As analyzed in its judgment of this case, "45. However the lack of reciprocity regarding on the part of the Community's trading partner in relation to the WTO agreements which are based on `reciprocal and mutually advantageous arrangements' and which must ipso facto be distinguished from agreements concluded by the Community, referred to in paragraph 42 of the present judgment, may lead to disuniform application of the WTO rules. "[25]

In ECJ's opinion, if the ECJ grant the direct effect of WTO agreements, the resulting lack of reciprocity regarding judicial control in the EC's trading partners could lead to an imbalance in the application of the WTO rules. If the EC judicature directly assumed the role of ensuring that the EC complies with the WTO agreements, EC legislative and executive organs would deprive of the scope for maneuver enjoyed by their counterparts in the EC's trading partners. The ECJ observed that this interpretation corresponds to the final recital in the preamble to the EC Council's 1994 decision concerning the conclusion of the WTO agreements, according to which, by their very nature, the WTO agreements are not susceptible directly invoked in EC or national courts.[26]

From here, we can see in ECJ's opinion only if all of other countries agree to grant direct effect of WTO agreements, then ECJ will consider doing the same.

*b) Negotiable nature of WTO agreements:* ECJ stated that, as indicated in the preamble of the Marrakesh Agreement Establishing the WTO and the agreements annexed thereto are, like GATT 1947, still founded on the principle of negotiations. ECJ believed that, although the provisions of WTO have changed much, in the sense of the purpose and subject matter as a whole there is no substantial different between WTO and GATT 1947.[27] In the aspect of safeguard, for GATT 1947 ECJ argued that the great flexibility of the provision of GATT 1947, especially the measure of safeguard which is provided in the Article 19 of GATT 1947, from the nature and constructer of GATT 1947. After WTO was created, the situation has already substantial changed. However, this time ECJ still believed that WTO agreement still have the flexibility which ECJ cannot accept, and ECJ use a new word to describe it : negotiable, it think that WTO agreements are the tools for negotiation rather than judicial judgment. ECJ argued that in the Article 4 of "agreements of safeguard", WTO law gives the authority of determination of "serious injury" to "competent authorities" [28]. Then the member states have the broad will to determine whether it is necessary and what measures to remedy the injury.

Once ECJ consider WTO agreements as negotiable rules, there is no compulsory implement power to act as a law. This is the deep reason for the argument of ECJ from its side.

*c) WTO agreement does not provide specific rule how to implement the obligations in the member states:* One of the arguments that the ECJ claimed was whether the WTO agreements, interpreted in light of their subject matter and purpose, themselves specify the appropriate legal means of ensuring that they applied in good faith in the legal orders of the contracting parties. The ECJ answered in the negative, pointing out that although the WTO agreements differ significantly from the provisions of the GATT 1947, the system resulting from the agreements nevertheless accords considerable importance to negotiation between the parties. The ECJ refers to Article 22(2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). It provides that if member state fails to fulfill its obligation to implement the recommendations and rules of the Dispute Settlement Body the member state has to enter into negotiation with any party having invoked the dispute settlement procedures with a view to find mutually acceptable compensation. Based on this argument, ECJ reach the conclusion that, WTO agreements, according to the subject matter and purpose, does not specify the appropriate legal means of ensuring that they applied in good faith in the legal orders of the contracting parties.[29]

In a sense, this argument of ECJ is very similar to the argument that ECJ made in the rejection of direct effect of GATT 1947, because in the opinion of ECJ, both of them doesn't give the exact provision that how to implement these law.

*4) The real and deep reasons for ECJ to deny direct effect of the WTO agreements:* As the goalkeeper of European Union, ECJ not only need to as a role of judicial institution, more important is how to protect the interests of EU and balance the interests and powers of EU institutions. For these kinds of considerations, ECJ has to use its power to give the judgments

[25] See Case C - 149/ 96 , Portuguese Republic v Council ,[1999], CER I- 8395, paragraph 45 of the ECJ judgement.

[26] See Case C - 149/ 96 , Portuguese Republic v Council ,[1999], CER I- 8395.

[27] See Case C - 149/ 96 , Portuguese Republic v Council ,[1999], CER I- 8395.

[28] See Article 4 , paragraph 2(a) of "agreements of safeguard" of WTO agreement in the Uruguay round:"In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment."

[29] See Case C - 149/ 96 , Portuguese Republic v Council ,[1999], CER I- 8395

to carry out its role. These are the real and deep reasons for ECJ deny direct effect of the WTO agreements as follows.

*a) Political consideration rather than judicial consideration:* From ECJ judgment in the case of "Portuguese Republic v Council, [1999]", we can see that ECJ believed that "the relations of international trade should be ruled by politics policy other than law", [13]and the purpose for ECJ to make this decision is that ECJ attempt to leave the space for the political institution of European Community.

Although the opinion of ECJ is negative, it is unavoidable for ECJ, because ECJ has to consider the interests of European Community.

As ECJ stated in the case of "Parliament v. Council (Chernobyl), [1990]"[30], "as a refusal to address Parliament's demand to modify the whole institutional balance created by the Treaties and thus indirectly as a careful decision on the part of the Court to avoid overstepping its role by deciding a politically delicate question in a way which contradicts the SEA." Although this view comes from the ECJ, it seems that the weight that political considerations may have played in the Court's first decision.

Why ECJ grant direct effect to most of other international agreements, which concluded between EC and non-member states, but WTO agreement is the exception? Because for WTO agreements, ECJ is afraid that if it grant the direct effect to WTO agreements, the political institutions of EC will lose their power of autonomy, but for other international agreements , there is no this problem.

As one article describes, "many of the ECJ's judges have described their legal philosophy in terms explicitly connected to a broader political context, explicitly justifying their relatively "activist" stance with reference to the relative stagnation of the Community's political decision making process. Such considerations cannot be written into the opinions themselves, but the ECJ and its academic oracles can continue to explain those opinions in ways that provide for a coherent and predictable case law once broad external political conditions and historical trends are taken into account." [14]

*b) The challenge of ECJ's supremacy jurisdiction above whole EU member states:* As we know, the result of granting direct effect of WTO agreements in EU law is that the individuals or member states can invoke WTO agreements before the member states' national courts or the ECJ to challenge the legitimacy of EU law. However, this is what ECJ do not want to face, because ECJ wants to keep EU law as the highest level in the whole EU member states rather than WTO law.

Article 234 of EC treaty explicitly provides the supremacy jurisdiction of ECJ:

"The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) The interpretation of this Treaty;

(b) The validity and interpretation of acts of the institutions of the Community and of the ECB;

(c) The interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice."

Through Article 234 of EC treaty, EU law permitted the ECJ to address Member States' infringement, enlarging the scope of the ECJ's power and undermining Member States' sovereignty. [15]

ECJ have already granted direct effect to EC law, it means the private parties can invoke EC law in the national courts of Member States of EU. In fact, this is the most important way to achieve the ECJ's supremacy jurisdiction above whole EU member states. Therefore, ECJ do not want to see the private parties invoke WTO agreements before member states' national courts or ECJ.

*c) Integral economic interests of European Common Market:* For the deep reason for ECJ to deny direct effect of the WTO agreements, there is not only political consideration as I already analyzed above, but also economic consideration for ECJ.

As we know, the initial purpose of the establishment of EC is establishing European Common Market. The first glimpse of a European union began in 1951, when six war-ravaged states, Italy, Germany, France, the Netherlands, and Luxembourg united to promote peace and economic progress.[16] They joined in creating the European Coal and Steel Community in 1951[31], the first of many treaties solidifying the partnership among the depressed nations. These European countries' main purpose for uniting was to rejuvenate their economies. They realized that this would accomplish through integration and not competition with each other. The goal of creating the European Coal and Steel Community further reached through subsequent treaties such as the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM), whose main goal was to establish a common market and integrated economic policies. [17][18]Therefore, in the decades following, a number of treaties enacted that would further unite the European countries in the political and economic realm.

It is much cleared that European common market aims at the integral economic interests of European Community; it means European common market just wants to promote the free trade among Member states of European Community, rather than the free trade among all over the world. In another word, it just wants to make Member states of European Community to be equal and get benefits from the trade among

[30] Case C-70/88 Parliament v. Council (Chernobyl)[1990], E.C.R. I-2041, I-2073

[31] Treaty Instituting the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140

Member states of European Community, so it is still the barrier for other countries, which are outside of European Community.

Subsequently, the EU law had to protect the European internal order of Economic, which made by the European common market, with its legal means .However, WTO rules aim at the order of the world economic, which means the free trade all over the world and break the barriers of trade. Therefore, ECJ is afraid that if it grants the direct effect to WTO rules in EU law, WTO rules may try to change the European internal order of Economic, which is harmful to the economic interests of European Community.

*C. Legal Arguments of the Direct Application of WTO Rules by ECJ in EU Law and the Approach of Direct Application of WTO Rules by ECJ in EU Law*

*1) Legal arguments of the direct application of WTO rules by ECJ in EU law:* The persuasive arguments to support my opinion that why ECJ should grant direct effect to WTO agreements are as follows.

*a) It is the requirement of non-discrimination principle of EU law, because ECJ granted direct effect to most of the international agreements that EC concluded:* The non-discrimination principle of EU law described in the Article 12 of EC treaty: "Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination."[32]

Through this article, we can see that the "any discrimination on grounds of nationality shall be prohibited," which means there should be no discrimination no matter which nationality of the parties are. These parties, which achieved these international agreements with European Community, are different countries, so based on the non-discrimination principle of EU law these international agreements should be treat equally and justly. As a conclusion, we can say that WTO agreements should gain the same or similar treatment as other international agreements that European Community concluded.

In the Article 300 of EC treaty, it said like this, "7. Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States."[33]This article should consider as the basis of the principle of direct effect. However, this provision is not so clear about whether the agreements conclude by European Community are the internal part of EU law or not.

Later, in its case law, ECJ had the comment about the standard to be direct effect for international agreements in EU law.

In the case of "Kupferberg (1982)", the ECJ analyzed Article 21 of the Free Trade Area with Portugal. Kupferberg invoked this agreement as a private party. The ECJ verified whether "the nature" or "the structure" of the agreement "may prevent a trader from relying on the provisions of the said Agreement before a court in the Community."[34]

Later in the case of "Demirel", ECJ stated the standard as follows: "A provision in an agreement concluded by the Community with non-member countries must be regarded as being applied directly when regard being had to its wording and the purpose and nature of the agreement itself. The provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure." [35] It means there are two steps for the inquiry, firstly, ECJ will check the purpose and nature of the provision, secondly, wording should contains a clear and precise obligation.

ECJ granted direct effect to most of the international agreements that EC concluded under that method of the test, it means they pass two steps. ECJ has declared that the following bilateral international agreements may have direct effect:

1) In the case of "Bresciani [1976]"[36], ECJ granted effect directly to a provision of the Yaoundé Convention of 1963. (Concretely, it is the Paragraph 1 of Article 2 of the Yaoundé Convention of 1963)

2) In the case of "Pabst [1982]"[37], ECJ granted direct effect to Article 53 of the European Community — Greece Association Agreement.

3) In the "Kupferberg (1982)"[38] case as I mentioned above, ECJ granted direct effect to Article 53 of the European Community —Greece Free Trade Agreement.

4) In the case of "Sevince (1990)"[39], ECJ granted direct effect to some clause of the European Community —Turkey Association Agreement.

5) In the case of "Kziber (1991)"[40], ECJ granted effect directly to the European Community Cooperation Agreement with Morocco. (Paragraph 1 of Article 41)

6) In the case of "Anastasiou (1994)"[41], ECJ granted effect directly to the EEC-Cyprus Association Agreement. (Paragraph 1 of Article 41)

We can see that most of the international agreements can pass these two steps and have the direct effect in EU law.

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[32] See Article 12 of the Treaty establishing the European Community.

[33] See paragraph 7 of Article 300 of the Treaty establishing the European Community.

[34] Case 104/81 Hauptzollamt Mainz v C.A. Kupferberg & Cie KG [1982] ECR 3641.

[35] Case 12/86, Demirel v. Stadt Schwäbisch Gmünd [1987], E.C.R. 3747, 3752.

[36] See Case 87/75, Bresciani v. Amministrazione delle Finanze, [1976], E.C.R. 129

[37] Case 17/81, Pabst & Richarz KG v. Hauptzollamt Oldenbourg , [1982], ECR 1331

[38] Case 104/81 Hauptzollamt Mainz v C.A. Kupferberg & Cie KG [1982] ECR 3641.

[39] See Case C-192/89, S.Z. Sevince v. Staatssecretaris van Justitie, 1990 ECR 346

[40] Case C-18/90, Office National de l'Emploi v. Bahia Kziber, 1991 ECR 199.

[41] Case C-432/92 The Queen v Minister of Agriculture, Fisheries and Food, ex parte SP Anastasiou (Pissouri) Ltd and Others [1994], ECR I-3087

However, GATT 1947 and WTO agreements are never even pass the first step, which means ECJ believe that purpose and nature of the provision of GATT 1947 and WTO agreements cannot make them direct applicable.

The WTO agreements (GATT1994) are not significantly different in nature and structure from the other international agreements to which the ECJ has granted direct effect. Therefore, it is inconsistent to deny direct effect to the WTO agreements (GATT1994). [19]

It is obvious that the different treatment between other international agreements EC concluded and WTO agreements which concluded by EC is against the non-discrimination principle of EU law.

In a word, based on non-discrimination principle of EU law, WTO agreements should grant direct effect in EU law, as ECJ did to most of international agreements that European Community concluded.

*b) Denying direct effect of WTO agreements is harmful to the European Community:* Even ECJ believe that denying direct effect of WTO agreements is good for European Community, but in fact, it harms the European Community by continuing to deny direct effect of WTO agreements. Scholar Kuilwijk concludes that to deny direct effect of WTO agreements harms to the Community. Because the true reason that the political institutions do not want to have their hands tied is that they wish to retain the freedom to confer special favors on specific industries, not because they are convinced that they are capable of better serving the public interest by retaining such freedom. [20]He believed that the real reason of denying direct effect of WTO agreements is the interests of the European political institutions. They have their special interest in some special industry, but granting direct effect of WTO agreements will make all of the industries face the competitions and challenges from other countries all over the world, which may induce the interests and benefits of those special industries.

The lack of enforcement of the WTO obligations in EU law allows the Community institutions acting arbitrarily in the context of foreign trade policy, particularly allows the Community institutions to adopt protectionist trade policies, which result in welfare losses for the Community as a whole and unjustly harm individuals.

Contrary, granting direct effect to the WTO agreements would force the Community to adopt a rule-based liberal economic foreign trade policy, which would maximize the economic welfare of the Community, because it will consider and adopt all of the industries rather than some special industry.

Moreover, denying direct effect of WTO agreements also makes the member states of European Community loss the benefits when they have international trade with non-member states of European Community because they cannot use the rights that WTO agreements provide in the agreements to take the suit before ECJ and their national courts to protect the rights.

Thus, ECJ should grant direct effect to the GATT 94 (WTO agreements) in order to provide the “divine guidance . . . needed to attain economic paradise.” [21] It is beneficial for the European Community and the member states.

*c) Granting direct effect of WTO agreements is necessary to protect individual rights in EU:* Granting direct effect is not only beneficial to the European Community and the member states, but also a necessary way to protect the rights for the EU individuals, especially EU citizens, which is one of EC’s missions. Here EU individuals means European private parties, which inducing the EU citizens and judicial persons.

In the EC treaty, Part Two is “Citizenship of The Union”, it attempt to protect the rights of EU citizens [42], it means protecting the rights of EU citizens is one mission of EU law.

However, we can see that the measure that ECJ denied direct effect is unconcerned with individual rights. By the rejection of direct effect of WTO agreements, the private parties have no rights to invoke WTO agreements to protect their interests in the international trade. In this sense, it is injustice for the private parties in EU.

According to the GATT 1947 preamble, the members agreed to the formation of

“Reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce”. The principles of reciprocity and nondiscrimination are operationalized by means of the Most Favoured Nation (MFN) and the National Treatment (NT) requirements of GATT 1947 Articles 1 and 3. Substantial reductions in tariffs and other trade barriers achieved through the periodic rounds of negotiation required by Article 28 bis and recorded in binding schedules under Article 2. Finally, WTO Agreement Article 2(1) provides a “common institutional framework” for the management of trade and commercial relations among the GATT members. Thus, the Uruguay Round Agreements created the structure necessary to facilitate and operate a liberalizing multilateral world-trading regime.

Given the GATT 47’s purposes, the ECJ’s critics have complained that denying direct effect both prevented the Community from obtaining the full economic welfare benefits possible under the agreement and denied individuals the protection of the fundamental rights provided by the agreement. [22]

In the area of foreign trade policy, the way that ECJ denied direct effect of WTO agreements was an attempt to leave the European Community the maximum flexibility to make the foreign trade policy rather than under the supervision of WTO agreements. Therefore, ECJ considered so much in the political interests that it failed to make an acceptable balance between protection of individual rights and protection of the political interests. Thus, Granting direct effect of WTO agreements is

[42] See Part Two “Citizenship of The Union” of the EC treaty , Article 17- 22

necessary not only beneficial to the economics interests of European Community but also it would produce welfare benefits for individuals in the European Community and it is helpful for protecting the individual rights of both of the European Community consumers and traders.

*d) Reciprocity is not the problem:* ECJ argued that Granting direct effect to WTO agreements is lack of reciprocity in its cases, such as in the case of "Portuguese Republic v Council [1999]". USA used "super 301" to deny direct effect of WTO agreements in its domestic law, and Japan also didn't grant direct effect of WTO agreements to its domestic law.

However, this is not the problem. In fact, reciprocity is one of the considerations of the member states who attempt to accede to WTO. It means member states of WTO should give the favor to each other and achieve "double-win". Therefore, if ECJ grants direct effect of WTO agreements to EU law, it can prevent the protectionist trade policies. As a result , the free trade policy may give the favor to the foreign companies, which are not belong to the member states of European Community, then the foreign companies may get the equal states to the EU individuals. In this sense, the foreign countries, which are the foreign companies belong to, should also give the same or similar treatments to the EU private parties.

By granting direct effect of WTO agreements in EU law, the European Community can make the rule-based liberal economic foreign trade policy and get the welfare from the WTO free trade policy.

Even for GATT 1947, some scholar argued that, it was improper for the Court to use the lack of absolute reciprocity in the GATT 1947 as a reason for denying direct effect because unilaterally granting direct effect would have ensured that at least the Community strictly adhered to its GATT 47 obligations. The critics have claimed that this would be beneficial because it would have prevented the Community institutions from acting arbitrarily in the context of foreign trade policy. [23]

Unlike GATT 1947, new WTO agreements contain numerous precise and unconditional norms that create a binding rule-based system of international trade regulation subject to a compulsory dispute settlement mechanism.[43] It makes WTO agreements can be applicable.

On the other hand, reciprocity also need someone do it first. If ECJ do it first, it may give other countries some experience and encouragement. After ECJ Grants direct effect to WTO agreements, based on the principles of reciprocity and nondiscrimination that explicitly provides in the WTO agreement. That is Most Favored Nation (MFN) and the National Treatment (NT) requirements, other member states of WTO agreements have to consider whether they need grant direct effect to WTO agreements to get the benefits of WTO free trade policy and keep the balance in the international trade or not.

[43] See Opinion of Advocate General Antonio Saggio (Feb. 25, 1999), Case C-149/96, and Portuguese Republic v. Council (Nov. 23, 1999).

*2) The approach of direct application of WTO rules by ECJ in EU law:* Based on my analysis above, we can see the importance of direct application of WTO rules by ECJ in EU law. It is more helpful for economic development of both EU and the world by granting direct effect to WTO agreements to EU law.

*a) ECJ has already opened the door a little, why not bigger?* As we know, recently the attitude of ECJ to treat WTO agreements has a little changed.

We start from GATT 1947. In the case of "Federation de l'industrie de l'huilerie de la CEE (Fediol) v. Commission [1989]"and case "Nakajima All Precision Co., Ltd v, Council [1991]", there are two exceptions of non-direct effect of GATT 1947 in EU; it means that ECJ grants direct effect to special situations in the case law.

In the case of "Fediol [1989]", ECJ can interpret and invoke the provisions of GATT1947, to ensure the whether some given commercial custom violate the provisions of GATT1947 or not.

In the "Nakajima [1991]"case, ECJ made the conclusion that if the EC law intended to implement the particular obligation of GATT provision, then ECJ will check the lawfulness of EC law from the rules of GATT.

For WTO rules, through the "Biret" case[44], it implied that the door of ECJ opens a little: specific WTO law provisions may recognize as having direct effect on a case-by case basis. In this case, through recognition of DSB decisions, ECJ grants the direct effect to specific WTO law provisions.

"It is important that the ECJ does so without insisting--as it has done in its previous judgments concerning the effect of WTO law in the EC legal order-- on reciprocity, that is without requiring whether any other of the EC's major trading partners would allow such damage claims. In addition, a recent judgment of the ECJ seems to indicate that the Nakajima line of case law according to what the ECJ or the CFI review the legality of an EC act. In case, the EC intends to implement a particular obligation entered into within the framework of the WTO will play an essential role in case which are currently pending before the ECJ and CFI." [24]

*b) The possible way for direct application of WTO rules by ECJ in EU law:* The ECJ can still hold that direct effect does exist after a panel and WTO Appeals Body ruling. This would allow individuals and Member States to enforce the Community's GATT 1994 obligations as determined by the WTO, while preventing them from denying the Community of its rights under the agreement.

Thus, ECJ would be responsible for ensuring that the Community does either alter its law, or provide compensation if permissible, after the WTO ruled that the Community was in violation of GATT 1994 Agreement.

After ECJ grants direct effect to WTO agreements, based on the MFN and non-discrimination principle of WTO

[44] Case T-174/00, Biret International SA v Council of the European Union [2002], ECR II -17 and Case T-210/00, Establishments Biret et Cie. SA v Council of the European Union [2001],ECR II-47.

agreements, other member states of WTO have to adhere to this method.

MFN principle: that is, the combination of reciprocity and MFN provides an incentive for the exporters in any given member to lobby their government for further tariff reductions on imports. The exporters have an incentive to do this because they know that any reductions in their domestic import tariffs will match on a reciprocal basis by not just some, but all the other members. Thus, exporters harnessed as a trade liberalizing lobbying force to counteract the protectionist lobbying of domestic import-competing firms. [25]

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