II.42 Direct Effect of International Agreements

Concept

A norm of international law is directly effective when it can be invoked by a private party in proceedings before domestic authorities. The norm does not need to be properly implemented by an act of parliament; it applies per se in domestic law. Direct effect can have a twofold purpose: (1) a treaty norm, which is granted direct effect, might allow individuals to derive rights therefrom; and/or (2) it might serve as a basis to challenge the legality of an existing (conflicting) domestic legal act. 'Direct effect' is often used synonymously with 'self-executing effect' and 'direct applicability'.

The issue of direct effect is of practical relevance in cases in which international law has not been properly implemented in domestic law (no implementation, wrongful implementation), i.e., when there is a conflict between international law and domestic law. In such cases, private parties depend on international law to be applied directly. A forceful instrument to avoid a conflict between international law and domestic law is the principle of consistent interpretation. According to this principle, domestic law has to be interpreted, as far as possible, in a manner that is consistent with international law.[1] Interpreting domestic law in light of international law is sometimes labelled 'indirect effect' of international law.

Criteria

International treaties may explicitly provide that their rights and obligations have direct effect. This is done, however, only in exceptional cases; Article XX(2) of the World Trade Organization (WTO) Agreement on Government Procurement, which prescribes judicial review on the basis of that agreement, is often referred to as an example to this effect. Normally, treaties do not explicitly oblige parties to impose direct effect in their domestic legal systems as a matter of treaty law.

Therefore, the decision to grant or to deny direct effect is essentially left to the States themselves. They can do so by settling the matter explicitly in constitutional or statutory law. Such a clear-cut solution can be found, e.g., in the US with respect to WTO law and the North American Free Trade Agreement (NAFTA) (see below). Normally, parliaments do not deal with the matter and leave it, instead, to the (constitutional) courts to decide on the issue of direct effect of treaty law. In most countries, the courts have decided to grant direct effect or not along the following lines:

1. The treaty norm must be part of the law of the land. This is typically the case in States which adhere to the theory of monism, i.e., in States in which international law is automatically valid, without the need to be transformed into domestic law by an act of parliament.
2. The nature and the logic of the treaty in its entirety must not preclude direct effect.
3. The treaty norm must be, as regards its content, appropriate to be applied by an agency or a court ('justiciability'). It must be sufficiently precise and unconditional in order to be directly effective. Norms of a programmatic nature, which need further work on the international level or by national or regional legislation, cannot be directly effective.

In cases of direct effect of a treaty norm, the question arises as to who is entitled to invoke the norm directly. International economic law traditionally aims at securing market access rights for foreign products and investment. As a corollary, direct effect might be granted to persons seeking market access (foreign competitors, importers). As international economic law increasingly transgresses the purpose of securing market access and instead seeks to provide level playing fields and even to harmonize the law, one might argue that the policy of excluding domestic beneficiaries should be left behind. Henceforth, directly effective treaty norms might also be applied in purely domestic contexts. Rules on public procurement, such as the WTO Agreement on Government Procurement, are examples of the point. They oblige domestic authorities to examine the lawfulness of tender procedures and allocation irrespective of the nationality/seat of the persons/companies affected.

[1] See, e.g., Case *Dior*, C-300/98 and C-392/98, EU:C:2000:688, para 47, for the EU; *Murray v The Charming Betsy*, 6 US [2 Cranch] 64 [1804], for the US.

Arguments in favour and against direct effect

Given the impact of international economic law, there are policy arguments in favour of, and against, direct effect. In essence, it boils down to the issue of separation of powers among the branches of government and, in particular, the proper role of courts in external trade relations.[2]

The prime argument in favour of granting treaty norms direct effect relies on the principles of good faith and *pacta sunt servanda* (see Article 26 of the Vienna Convention on the Law of Treaties (VCLT)). Granting direct effect is a powerful instrument to ensure the effective and efficient enforcement of treaties. It reinforces the rule of law, in particular from the perspective of individuals. Moreover, granting direct effect has, in monist countries, a long tradition; it has ever since been applied, so to speak, by default. Against this background, there is a presumption that direct effect should also apply in international economic relations. Domestic courts are generally well equipped, and possess the institutional sensitivity, to interpret and apply international trade law. They might grant constitutional law primacy over international law; they also might apply the principle of *lex posterior derogat legi priori* for secondary law to prevail over international law in exceptional cases. What is more, market access rights are generally accompanied by safeguard clauses and provisions (exceptions) which enable States, under certain circumstances, to adopt trade-restrictive measures; it is thus ensured that legitimate policy interests other than trade liberalization are appropriately taken into account. Lastly, granting direct effect reinforces the power of courts vis-à-vis the political branches of government, mainly to the benefit of consumers, importers and foreign producers and at the expense of protectionist interests.

The prime argument against direct effect relies on the States' prerogative to keep control over the impact of international trade rules within their domestic legal systems. The political branches of government, in particular parliaments, are keen on having the last word on the effect of treaty obligations; if need be, they are ready to deliberately deviate from treaty obligations. This might be even more so as international trade regulation is no longer limited to address market access and related questions but encompasses the regulation of conditions of competition; it increasingly touches upon policy affairs which have traditionally been dealt with by parliaments. Furthermore, the democratic legitimacy of treaty law in the field of international economic law is still in its infancy as the system operates on an intergovernmental basis and with package deals; the WTO is an example of the point. Democratically elected parliaments, NGOs, and the wider public have no direct access to rule-making. Therefore, States may remain reluctant to grant direct effect as long as basic deficits on the international level are not remedied. Lastly, a State might be less inclined to grant direct effect if (an)other State(s) do not follow suit; such an understanding is based on the theory of mercantilism, advising States not to open up their markets unless they are granted similar advantages on a reciprocal basis. In France, e.g., direct effect of a treaty is conditional upon its application by the other party (see Article 55 of the French constitution).

Practice of selected States and regional blocs

A look at the practice of selected States and regional blocs reveals a mixed picture. In many States and regional blocs, multilateral treaties in international economic law, such as the WTO agreements, are not granted direct effect. This holds true for both the US and the EU. The former bars direct effect by explicit statutory legislation implementing the WTO agreements (Uruguay Round Agreements Act of 1994, 19 USC §3512[a–c] [1999]). In the latter, the European Court of Justice (ECJ) constantly held that the General Agreement on Tariffs and Trade (GATT 1947) could not be granted direct effect, and it has been continuing this line also vis-à-vis WTO law.[3] The prime rationales in favour of this mercantilist approach adhered to by the ECJ are the fact that the WTO agreements accord considerable importance to

[2] See, for the following arguments, Thomas Cottier and Krista Nadakavukaren Schefer, 120–122.

[3] See, e.g., Case *International Fruit Company*, 21-24/72, EU:C:1972:115, paras 19/20–28; Case *Portugal/Council*, C-149/96, EU:C:1999:574, paras 35–52; Case *Monsanto Technology*, C-428/08, EU:C:2010:402, para 71; Case *Ikea Wholesale*, C-351/04, EU:C:2007:547, paras 27–35, with respect to constellations in which direct effect is exceptionally granted.

negotiation between the parties and the lack of reciprocity. Most other WTO Members have adopted a similarly defensive approach. It is commonly held that, e.g., in Canada, China, India, Japan and South Africa, WTO rules are not considered to be ripe to be applied per se before domestic authorities. This holds true not only for WTO rules as such but also for WTO Panel and Appellate Body reports which are not granted direct effect either. There seem to be only a few States which do grant direct effect to WTO rules; this holds true, e.g., for Costa Rica.

The situation looks different with respect to bilateral free trade agreements. Treaties of friendship, commerce and navigation (FCN treaties) have traditionally been considered to be directly applicable before domestic courts of various States.[4] In a similar vein, the ECJ has acknowledged on various occasions that free trade agreements and association agreements between the EU and third States as well as the Lomé Convention with ACP countries (African, Caribbean and Pacific Group of States) can be directly applicable.[5] In contrast, NAFTA is not granted direct effect in the US, courtesy of an explicit exclusion in the implementing legislation (NAFTA Implementation Act of 1993, 19 USC §3312). Similarly, rights and obligations agreed under MERCOSUR (Mercado Común del Sur) are not considered to be directly applicable.

Assessment

The issue of whether rules of international economic law apply per se or not is highly relevant, and equally complex. The practical impact of such rules in proceedings before domestic authorities depends on commonly agreed or individually defined policies to grant or deny direct effect. As treaty provisions to this effect are exceptional, States have developed their own strategies in deciding the matter, depending on their attitude towards international law in general, the role which their courts play vis-à-vis the other branches of government in external trade matters, the influence which domestic interest groups are able to enunciate, and, possibly, the willingness of their major trading partners to do likewise. Multilateral trade rules, in particular WTO law, are often considered not to be directly applicable; this is the case, in particular, in the US and the EU. In contrast, direct effect is more generously granted when bilateral trade agreements are at stake.

Given the potential impact of trade rules on our daily lives, there are valid arguments both in favour and against direct effect. Much of the debate has taken place, so far, in the context of politically sensitive cases, and many scholars tend to generally refute direct effect of trade rules. However, it is arguably not a matter of assessing direct effect for all trade agreements and rules alike but to identify, on a case-by-case basis and in a given factual context, those norms which might be suitable for the province of courts. Against this background, it is doubtful whether the categorical exclusion of certain treaties from direct effect as a whole, such as the WTO agreements, is appropriate.

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[4] See, e.g., *McKesson HBOC Incorporated v Iran*, 271 F.3d 1101 (DC Cir. 2001), 2001, US Court of Appeals (DC Circuit).

[5] See, e.g., Case *Kupferberg*, 104/81, EU:C:1982:362, para 22; Case *Chiquita Italia*, C-469/93, EU:C:1995:435, paras 32–37; Case *Opel Austria*, T-115/94, EU:T:1997:3, paras 100–102; Case *Sinutenkov*, C-265/03, EU:C:2005:213, paras 20–29.