

Article

THE DIRECT EFFECT OF EU BILATERAL TRADE AGREEMENTS SUCH AS THE TTIP IN THE LIGHT OF THE JURISPRUDENCE OF THE CJEU.

*Vasil Stoynov**

ABSTRACT

This article addresses one very important aspect of the international agreements concluded by the EU: their direct effect. The possibility for individuals to rely on provisions from a vast number of legally binding treaties directly before national courts is essential for the enforceability and the application of international rules. The issue of the ‘direct effect’ is nowadays even more important, since the EU is in the process of negotiation of the immensely significant and controversial agreement for investment and trade with the US: The Transatlantic Trade Investment Partnership (TTIP). This article will discuss the possible implications of the concept on this particular treaty in the light of the jurisprudence of the CJEU regarding other international agreements – the World Trade Organization (WTO) on one hand, and the various cooperation agreements or conventions on the other – and will offer arguments in favour of the recognition of the direct effect.

Keywords: European Union, TTIP, trade agreements, World Trade Organisation

I. Introduction

In the last fifty years the European Union’s (hereafter: EU or the Union) external policy has evolved significantly in its political, economic, commercial and financial aspects.¹ The Union has been developing its external relations in correspondence with the goals, set out in Article 3 (5) and Article 21 of the Treaty on the European Union (TEU),² and has won recognition as an important global actor due to its

* *The author is a student in the program ‘Master of Business, Competition and Regulatory Law’ at Free University in Berlin. Previously he has graduated Sofia University ‘St. Kliment Ohridsk’.*

¹ B.V. Mooren & R.A. Wessel, *EU External Relations Law: Text, Cases and Materials*, Cambridge: Cambridge University Press 2014, p. 6.

² Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

accession to the World Trade Organization (WTO) and the vast number³ of international treaties concluded thereafter.

Since 2013 considerable attention from the public and academic background has been paid to some very ambitious and far-reaching bilateral agreements: The Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, and the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US. The nature of the agreements and the possible impact on the EU internal market are some of the reasons why their legal consequences should be carefully analysed in the light of the many concerns raised within the intense public debate on the topic.

The current article has the goal to provide interpretation on one of issues involved, namely the possible direct effect of bilateral trade agreements for individuals in the EU. In order to base the argumentation on solid ground, at first the main aspects of the doctrine of 'direct effect' of EU law will be briefly presented. Secondly, the article will evaluate the application of this principle on international agreements from two perspectives: The rejection of direct effect of the WTO treaties and its legal merits, and the recognition of direct effect of other international acts. The outlined arguments will be further applied to the bilateral treaties, and more specifically to TTIP, which – although still not concluded – could be used as an example due to the high level of transparency in the negotiations, and the working papers published by the Commission. In the end, the possible implications of the direct effect will be interpreted and a final suggestion will be provided from a broader perspective.

II. The Doctrine of 'Direct effect' of EU Law

The doctrine of the 'direct effect' is derived from the case law of the Court of Justice of the European Union (CJEU) and its foundations have been laid with the landmark case *Van Gend en Loos*.⁴ In this judgement, after interpreting the spirit, the general scheme and the wording of the Treaty establishing the European Economic Community (EEC), the Court stated that the Community constituted a new, different legal order of international law, which involves not only the member states, but also their nationals. Therefore, the direct protection of the individuals would lose its effectiveness if they are not entitled to invoke the rights arising from the Treaty directly before national courts. The reasoning of the CJEU has been further developed and interpreted liberally⁵ in the case law,⁶ especially with regard to the conditions upon which an individual could invoke the direct effect of the Treaty provision. The criteria could conclusively be summarised as follows: 'a

³ According to the Treaties Office Database of the European External Action Service there are 258 multilateral and 853 bilateral agreements, at: <http://ec.europa.eu/world/agreements/default.home.do> (assessed on 14 April 2016).

⁴ Case 26/62 *Van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR I-3

⁵ D. Chalmers, C. Hadjiemmanuil, G. Monti & A. Tomkins, *European Union Law. Text and materials*, Cambridge: Cambridge university press 2006, p. 368.

⁶ Case 2/74 *Reyners v Belgium* [1974] ECR 631, Case 43/75 *Defrenne v Societe Anonyme Belge de Navigation Aerienne* [1976] ECR 455

Treaty Article will be accorded direct effect provided that it intended to confer rights on individuals and that it is sufficiently clear, precise and unconditional.⁷

Once established, the doctrine of direct effect was applied also to the secondary law of the EU. While there is no space for consideration of the direct effect of the regulations,⁸ the Treaties do not explicitly provide for such effect for other binding legal acts.⁹ Nevertheless, the CJEU recognised such effect both with regards to decisions¹⁰ and directives. The approach of the Court to the latter was much more controversial and complicated due to the legal nature and the purpose of these acts. Without going into further detail, the conclusion from the judgements¹¹ is that directives can be relied upon by individuals directly against the member states if their provisions are sufficiently clear, precise and unconditional and the deadline for their implementation has expired. The scope of the doctrine was further broadened by the notion of indirect effect, which requires that national law should be interpreted in the light of the directives.¹² However, the direct effect was limited only to its ‘vertical’ implications (the possibility for an individual to invoke rights against member state and other bodies under control of the state)¹³ since ‘horizontal’ application, which grants individuals the possibility to seek protection against other individuals, was denied by the Court.¹⁴

In conclusion, the direct effect of EU law can be observed in three dimensions. Firstly, in its broader or ‘objective’ aspect, the direct effect allows for a provision of EU law to be invoked before a national Court. Secondly, according to the narrower or ‘subjective’ interpretation the provisions in primary and secondary law have ‘the capacity to confer rights on individuals which they may enforce before national courts’¹⁵ against the member states or organs of the states¹⁶ if they are clear, precise and unconditional and the additional criteria are met. Lastly, with regard to the application of the directives, the Court has recognised the ‘indirect effect’, under which national courts are obliged to interpret national law in conformity with secondary EU law. All of the implications of the principle of direct effect are serving the idea of a private enforcement of EU law,¹⁷ i.e. the possibility for private

⁷ P. Craig & G. De Burca, *EU law. Text, Cases and Materials*, Oxford: Oxford University Press 2011, p. 188.

⁸ The wording of Art. 288, para. 2 Consolidated Version of the Treaty on European Union [2008] OJ

C115/13 (TFEU) is clear and explicit

⁹ Art. 288, para. 4 TFEU and Art. 288, para. 3 TFEU regarding the Directives

¹⁰ Case 9/70 *Franz Grad v. Finanzamt Traunstein* [1970] ECR 825

¹¹ Case 41/74 *Van Duyn v Home Office* [1975] ECR 1337, Case 148/78 *Pubblico Ministero v Tullio Ratti* [1979] ECR 1629, Case 8/81 *Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53

¹² Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891

¹³ See Case 188/89 *Foster and Others v British Gas plc* [1990] ECR-I 3313, Case 91/92 *Dori v Recreb Srl* [1994] ECR I- 3325, Case 246-249/94 *Cooperativa Agricola Zootechnica* [1994] ECR-I 4373

¹⁴ Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723

¹⁵ Craig, De Burca 2011, supra note 7, p. 188.

¹⁶ T.P. Kennedy, D. Cahill & V. Power, *European Law*, Oxford: Oxford University Press 2008, p. 79.

¹⁷ Craig & De Burca 2011, supra note 7, p. 181.

parties to bring actions before national courts in order to protect their interests against violations and unlawful application.

III. Direct Effect of International Agreements Concluded by the EU

According to Article 216 (2) of the Treaty on the Functioning of the European Union (TFEU), international agreements concluded by the EU, are binding both to the EU institutions and the member states. Before the provision was introduced by the Treaty of Lisbon, the case law of the CJEU had already supported the view that international agreements, without distinction of their multilateral or bilateral character, form an integral part of EU law since their entry into force.¹⁸ In that regard, the approach of the EU towards international law can be considered as monist.¹⁹ However, binding effect and direct effect are concepts with different legal consequences and the Court has also applied a different approach to international agreements.

III.1. Rejection of the Direct Effect of the WTO Agreements.

The WTO is an international organisation, which provides a common international network for conducting trade relations between its members within the specific areas of competence.²⁰ It was established on 1 January 1995 as a successor of the General Agreement on Tariffs and Trade (GATT) and this is also the date of the accession of the EU (at that point still European Community). All member states are also members of the WTO, however in the negotiations and the conclusion of the agreements they are represented by the EU, in the presence of the Commission. From an international law point of view, the WTO agreements have multilateral nature and are legally divisible.²¹

Yet the CJEU has been rejecting the possibility of direct effect of these multilateral international treaties since the period of GATT. In *International Fruit Company*²² the Court dealt with the possibility for a measure taken by the EU institutions to be rendered invalid as being contrary to a rule of international law and in particular of Article XI of GATT. According to the Court, before such invalidity can be considered, the provisions of international law must be capable of conferring rights to citizens, which they can invoke before national courts.²³ After an analysis of the spirit, general scheme and terms of GATT the Court concluded that the rule in question does not directly confer rights to individuals.²⁴ The grounds for that

¹⁸ Case 181/73 *Haegeman v Belgium* [1974] ECR 449, at 5.

¹⁹ K. Lenaerts & P.V. Nuffel, *Constitutional Law of the European Union*, London: Sween & Maxwell 1999, p. 14-067.

²⁰ Art. II, para. 1 of the Agreement establishing the World Trade Organization, at: https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm (assessed on 14 April 2016).

²¹ T. Gazzini, 'The Legal Nature of WTO Obligations and the Consequences of their Violation', *The European Journal of International Law* 2006-17, pp. 727.

²² Case 21-24/72 *International Fruit Company v. Produktschap voor Groenten en Fruit* [1972] ECR 1219.

²³ Case 21-24/72 *International Fruit Company v. Produktschap voor Groenten en Fruit* [1972] ECR 1219, at 8.

²⁴ *Ibid*, at 27.

decision were the great flexibility of the provisions of the General agreements and, in particular, those conferring the possibility of derogation,²⁵ as well as the authorisation of the members to suspend the application of obligations and to withdraw from the agreement.²⁶ This conclusion was consistently supported in the case law following the decision.²⁷

The doctrine of the Court on the private enforcement of GATT faced some criticism,²⁸ mainly because similar international agreements have been granted direct effect. Few examples in that regard are the Free Trade Area Agreement between the EEC and Portugal from 22 June 1972 which eliminated all tariffs and other barriers to trade between the two parties²⁹ and the Yaoundé Convention of Association between the EEC and the African States and Madagascar from 20 July 1963 which provides for progressive abolition of custom duties and charges having equivalent effect between the Associated States.³⁰ Nevertheless, there are some doctrinal reasons which justify the more favourable approach of the Court to the external agreements, such as their relation to the creation and development of the single market, as well as the 'extraterritorial' or the 'anticipated' solidarity between the parties which created higher forms of integration in comparison to the GATT.³¹

However, the rejection of the direct effect of GATT was not of absolute nature. In Case *Nakajima* the Court considered the invalidity of the EC Anti-dumping regulation in the light of the Anti-dumping Code, which is part of the GATT and concluded that an individual can challenge the EU measure in case it is adopted in accordance with and specifically refers to an existing international obligation.³²

The Court's position on the direct effect remained unchanged after the establishment of the WTO which, from a broader perspective, decreased the 'great level of flexibility' of the GATT - the main argument in *International Fruit Company*. The WTO has a clear organisational structure with a permanent framework. An 'Agreement on Safeguard measures' was introduced with the purpose to clarify the condition upon which a member can protect a specific domestic industry, and a reformed and more effective Dispute Settlement procedure was developed. Although the Agreement establishing the WTO significantly improved the transparency, stability and the binding effect of the provisions, the Court again rejected the possibility for direct effect in *Portugal v Council*.³³ In this case, the Portuguese government challenged a Council Decision on the conclusion of agreements on market access with India and Pakistan as

²⁵ Ibid, at 21.

²⁶ Ibid, at 25.

²⁷ Case C 280/93 *Germany v. Commission* [1993] ECR I 4973

²⁸ J.K. Kees, *The European Court of Justice and the GATT dilemma : public interest versus individual rights?*, Beuningen : Nexed Editions Academic Publishers 1996

²⁹ Case 104/81 *Hauptzollamt Mainz v Kupferberg & Cie* [1982] ECR 3641, at 27.

³⁰ Case 87/75 *Bresciani v Amministrazione delle finanze dello Stato* [1976] ECR 129, at 26.

³¹ B. Judson, "The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting", *European Journal of International Law* 1998-9, pp. 631.

³² Case 69/89 *Nakajima v. Council* [1989] ECR I 2069, at 28-31.

³³ Case C 268/94 *Portuguese Republic v Council of the European Union* [1999] ECR I 6177, at 34-46.

incompatible with the WTO Agreement on Textile and Clothing. The Court introduced several important arguments to support its findings.

Firstly, it contended that the WTO Agreements ‘do not determine the appropriate legal means of ensuring that they are applied in good faith in the legal order of the contracting parties’.³⁴ That conclusion is based on the interpretation of Article 22 of the Dispute Settlement Understanding, which provides for members to negotiate compensation in cases where recommendations and rulings of the dispute settlement body are not implemented within a reasonable period of time. This option is considered as inconsistent with the eventual authority of national courts to misapply internal legislation contrary to the panel reports.³⁵

Secondly, the Court raised the issue of the lack of reciprocity in the implementation of the agreement, due to the fact that some of the parties to the agreement recognise the direct application while some do not. This ‘may lead to dis-uniform application of the WTO rules’.³⁶

Lastly, the conditions for the exception established in *Nakajima* were not found to be met, therefore the Court excluded the last possibility to review the legality of the Council Regulation in the light of the WTO Agreement.

The judgement in *Portugal v Council* attracted substantial criticism against the arguments of the Court, and more precisely the alleged lack of unconditional obligation stemming from the Dispute Settlement Decisions³⁷ and the lack of reciprocity on the other members of the Agreement.³⁸ Moreover, the Opinion of Advocate General Saggio accepted the possibility of a member state to bring an action against an act of the Council based on inconsistency with the WTO Agreement.³⁹ Contrary to the conclusions of the Court, in the Dispute Settlement Mechanism and in other provisions of WTO, the Advocate General found no grounds for the rejection of their direct application in the EU.

Although the deliberations in *Portugal v Council* raise some doubts, the case law on the direct effect of the WTO remained in consistency with the judgement.⁴⁰ Additional arguments in support of the position of the Court can be derived also from the explicit wording of the final recital in the preamble to Decision 94/800 for accession to the WTO⁴¹ (which according to the Opinion of AG Saggio is simply a

³⁴ Ibid, at 41.

³⁵ Ibid, at 40.

³⁶ Ibid, at 56.

³⁷ Ibid, at 45.

³⁸ S. Griller, ‘Judicial Enforceability of the WTO Law in the European Union. Annotation to Case 268/94, Portugal v. Council’, *Journal of International Economic Law* 2000, pp. 455.

³⁹ Opinion of Advocate General Saggio, delivered on 25.02.1999, OJ 1996 L 153, p. 24

⁴⁰ Joined Cases C 27/00 and C 122/00 *Omega air and others* [2002] ECR I 2569, at 93, Case C-307/99 *OGT Fruchthandelsgesellschaft* [2001] ECR I 3159, at 24, Case C 93/02 P *Biret International v Council* [2003] ECR I 10535, at 52.

⁴¹ ‘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’ in Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, with regard to matters within its

policy statement and cannot affect the jurisdiction) and from the position of the Panel of the WTO in a dispute settlement procedure between the EC and the US.⁴² This states that ‘neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect’. However, in a footnote remark to the text, the panel did not exclude the potential possibility for a member to imply its internal constitutional principles and to give rights to individuals in the future.⁴³

Since the subject matter of *Portugal v Council* is an action brought by a member state, it should be considered how this case affects the possibility for individuals to rely directly on provisions of international law before national courts. It can be argued *a fortiori* that if the Court excludes the possibility for a member state to challenge the legality of an EU measure in the light of WTO law, the direct effect should also be denied for individuals. Furthermore, the reasoning of the Court encompasses both the review of legality of rules of domestic law⁴⁴ and the ‘direct application’ of WTO rules.⁴⁵ Therefore a conclusion can be drawn that the judgement in *Portugal v Council*, although not specifically dealing with this question, precludes individuals from the right to invoke WTO law directly before a national court.⁴⁶

Lastly, there are two theoretical ‘escape routes’⁴⁷ from the rejection of the direct effect. The first one is the obligation of the Court to also interpret secondary EU legislation in the light of incorporated international law.⁴⁸ The second one is the *Nakajima*⁴⁹ doctrine, applied in cases when WTO law is ‘somehow already incorporated in Community law’⁵⁰ by explicit reference to precise and concrete provision of the agreement. However, these examples are interpreted very narrowly and could merely play the role of exceptions.

competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) [Official Journal L 336 of 23.12.1994]

⁴² Panel Report United States - Sections 301-310 of the Trade Act of 1974 adopted 22 December 1999, WT/DS152/R, at 7.72.

⁴³ ‘The fact that WTO institutions have not to date construed any obligations as producing direct effect does not necessarily preclude that in the legal system of any given Member, following internal constitutional principles, some obligations will be found to give rights to individuals. Our statement of fact does not prejudice any decisions by national courts on this issue.’

⁴⁴ Case C 268/94 *Portuguese Republic v Council of the European Union* [1999] ECR I 6177, at 43.

⁴⁵ Case C 268/94 *Portuguese Republic v Council of the European Union* [1999] ECR I 6177, at 44.

⁴⁶ S. Griller 2000, note 38, p. 469.

⁴⁷ H.R. Fabri, ‘Is There a Case - Legally and Politically - for Direct Effect of WTO Obligations’, *The European Journal of International Law* 2014-25, pp. 158.

⁴⁸ Case C 70/94 *Fritz Werner Industrie-Ausrüstungen GmbH v. Federal Republic of Germany* [1995] ECR I 3189, at 23/

⁴⁹ Applied also after the establishment of WTO in Case 70/87 *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v. Commission of the European Communities* [1989] ECR 1781, at 22.

⁵⁰ J. Klabbers, ‘International Law in Community Law: The Law and Politics of Direct Effect’, *Yearbook of European Law* 2001-21, pp. 263.

III.3. Direct Effect of Other International Agreements of the EU

The approach of the Court towards WTO agreements and the consistent line of argumentation against the possible direct effect is rather an exception in comparison to other international agreements, concluded by the EU,⁵¹ where such effect was granted more readily.⁵² Many examples could be quoted where CJEU ruled that an individual could rely on a provision of international agreements directly before a national court and the Court's reasoning in such cases is worth closer examination.

In Case 416/96 *Nour Eddline El-Yassini*, the Court ruled that a provision of the EEC-Morocco Cooperation Agreement precluding a host member state from refusing to extend the residence permit of a Moroccan national under certain conditions had direct effect.⁵³ Case 265/03 *Igor Simutenkov* dealt with the possible direct effect of a provision of the Communities-Russia Partnership Agreement from 1997, which prohibits employment discrimination on grounds of nationality against Russian workers. The Court again found that individuals to whom that provision applies are entitled to rely on it before the courts of the member states.⁵⁴ The issue in Case 162/96 *A. Racke v. Hauptzollamt Mainz* concerned an action against a Council regulation in the light of its inconsistency with the Cooperation Agreement between EEC and Yugoslavia. Although the Court did not find any grounds for invalidity of the EU measures, it nevertheless accepted the possibility for an individual to challenge its legality on grounds of the rights derived from the international agreement.⁵⁵ Another example is the Lome Convention on international taxation, which in Case 469/93 *Chiquita Italia* was admitted as being capable to confer rights on individuals which they may invoke before national courts in order to challenge the application of conflicting national provisions.⁵⁶

All the judgements mentioned above were delivered within the preliminary ruling procedure before the ECJ and illustrate a continuous line of acceptance of the direct effect of international agreements. The cases serve not only as examples for the different approach of the Court in comparison with the GATT and WTO, but also establish a comprehensive test for the assessment of binding international agreements with regard to their possible direct effect. After analysing the case law,⁵⁷

⁵¹ J. Jackson, 'Direct Effect of Treaties in the US and the EU, the Case of the WTO: Some Perceptions and Proposals' in A. Arnulf, P. Eeckhout and T. Tridimas (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs*, Oxford: Oxford Scholarship Online 2008, p. 377.

⁵² M. Bronkers, 'From 'direct effect' to 'muted dialogue'', *Oxford University Press* 2008-11, pp. 894.

⁵³ Case C 416/96 *Nour Eddline El-Yassini v. Secretary of State for the Home Department* [1999] ECR I 1209, at 32.

⁵⁴ Case C 265/03 *Igor Simutenkov v Ministerio de Educación y Cultura Real Federación Española de Fútbol* [2005] ECR I 2579, at 29.

⁵⁵ Case C 162/96 *A. Racke GmbH & Co. v. Hauptzollamt Mainz* [1998] ECR I 3655, at 51.

⁵⁶ Case C 469/93 *Amministrazione delle Finanze dello Stato v Chiquita Italia SpA* [1995] ECR I 4533, at 37.

⁵⁷ Case C 308/06, *The Queen on the application of International Association of Independent Tanker Owners (Intertanko), International Association of Dry Cargo Shipowners (Intercargo), Greek Shipping Co-operation Committee, Lloyd's Register,*

two interpretative criteria⁵⁸ could be outlined, which are in fact very similar to those in *Van Gend en Loos*. The first part of the test addresses the spirit, structure and nature of the agreement and the second part considers whether the wording of the provision is sufficiently clear, precise and unconditional.

With regard to the first part of the test, it should be pointed out that the spirit, the broad logic and the nature of the international legal act are to be interpreted in order to evaluate whether it is intended to confer rights on individuals.⁵⁹ More precisely, the Court analyses the aim of the agreement by taking into account the purpose explicitly stated in the text⁶⁰ as well as the intention of the parties,⁶¹ derived from the preamble or from the more general interpretation of the text. Another aspect of the legal nature is also the reciprocity in the implementation of the agreements,⁶² that is the existence of legal instruments that guarantee full commitment of the parties and equal application of the provisions. Namely this aspect was one of the main concerns of the CJEU when the possibility of direct effect of the WTO agreement was rejected.

The second part of the test requires that the wording of the provision which the individual intends to rely on contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.⁶³ The provision should therefore have a 'self-executing character'⁶⁴ which is not affected by the fact that a national authority has discretion in issuing authorisation under certain criteria.⁶⁵ In a number of cases the provisions found to have direct effect included obligations for the parties to an agreement to apply a

International Salvage Union v Secretary of State for Transport [2008] ECR I 4057, at 45; Case C 344/04, *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v. Department for Transport* [2006] ECR I 403, at 39; Case C 366/10 *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change* [2011] ECR I 13755, at 53-54.

⁵⁸ F. Martines, 'Direct Effect of International Agreements of the European Union' *The European Journal of International Law* 2014-25, pp. 138.

⁵⁹ Such intention was denied by the CJEU in Case C308/06 *Intertanko* at 64.

⁶⁰ Case C 265/03 *Igor Simutenkov v Ministerio de Educación y Cultura Real Federación Española de Fútbol* [2005] ECR I 2579 at 27; Case C 416/96 *Nour Eddline El-Yassini v. Secretary of State for the Home Department* [1999] ECR I 1209 at 29.

⁶¹ Case C 469/93 *Amministrazione delle Finanze dello Stato v Chiquita Italia SpA* [1995] ECR I 4533 at 53; Case C 344/04, *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v. Department for Transport* [2006] ECR I 403 at 41; Case C 63/99 *The Queen and Secretary of State for the Home Department v. Wieslaw Gloszczuk et Elzbieta Gloszczuk* [2001] ECR I 6369.

⁶² Case 104/81 *Hauptzollamt Mainz v Kupferberg & Cie* [1982] ECR 3641 at 18.

⁶³ Case C 213/03 *Syndicat professionnel coordination des pêcheurs de l'étang de Berre et de la région v. Électricité de France (EDF)* [2004] ECR I 7357 at 39.

⁶⁴ F. Martines 2014, supra note 58, p. 138.

⁶⁵ Case C 213/03 *Syndicat professionnel coordination des pêcheurs de l'étang de Berre et de la région v. Électricité de France (EDF)* [2004] ECR I 7357 at 42.

non-discriminatory approach.⁶⁶ However, there are also instances where the claimants derived specific material rights from the international agreement.⁶⁷

A conclusion can be drawn from the cited case law that the Court applied the double test, both in procedures of challenging the validity of secondary legislation and in cases where individuals derived rights from international law against a member state or an EU institution. It follows that the concept of direct effect of international agreements encompasses the broader as well as the narrower definition of the general principle of EU law. This situation is criticized in the academic field since it involves also the question of supremacy of international law over the secondary EU legislation.⁶⁸ Therefore it is suggested that the double test should be applied only to the narrow, 'subjective' interpretation of the direct effect: when an individual seeks to invoke rights from international agreement directly before a national court. The other implication of the principle which allows for individuals to challenge the validity of EU secondary law should be subject to a more generous test that examines only the complete and unconditional character of the international rule as a benchmark for the compatibility of the EU measure.

The case law on the direct effect of international agreements is not as clear and consistent as the system of application of the principle in the EU law, therefore a thorough analysis of the concept involves primarily a consideration of its general purpose. Indeed, as stated in *Van Gend en Loos*, the effective protection of the rights of individuals requires that they are entitled to directly invoke their rights before a court, i.e. the private enforcement is recognised as a supplement to the enforcement through state institutions. In the case of the direct effect of international agreements two types of protection can be outlined: an 'active' protection whereby the individual relies on certain provision of international law which grants him rights,⁶⁹ and a 'passive' protection whereby the individual's interests are affected by an EU secondary measure and it challenges the validity of the measure because certain provision of international law protect its particular interests.⁷⁰ Regardless of the type of legal action and the procedure followed, the result in both scenarios is the same: an individual is entitled to seek protection of the rights granted by a concrete, unconditional and precise provision of international agreement, binding to the EU. Although formally the outcome of both applications is different (in case of 'passive' protection the Court rules on the validity of EU law), from the perspective of protection of individual's rights the approach of the CJEU is equally serving the very purpose of the concept of direct effect. On the other hand, both steps of the test are necessary to be applied since they guarantee a fairly objective analysis of the provisions and establish a

⁶⁶ Case C 171/01 *Wählergruppe Gemeinsam v. Wählergruppe 'NBZ - Neue Bewegung für die Zukunft* [2003] ECR I 4301 at 57; Case C 162/00 *Nordrhein-Westfalen v. Beata Pokrzepowicz-Meyer*, [2002] ECR I 1049 at 21.

⁶⁷ e.g. the prohibition to discharge certain substances into a saltwater marsh in Case 213/03 *Syndicat professionnel coordination des pêcheurs de l'étang de Berre et de la région v. Électricité de France (EDF)* [2004] ECR I 7357

⁶⁸ F. Martines 2014, supra note 58, p. 138.

⁶⁹ Case C 416/96 *Nour Eddline El-Yassini v. Secretary of State for the Home Department* [1999] ECR I 1209.

⁷⁰ Case C 366/10 *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change* [2011] ECR I-13755, at 84.

benchmark for consistent interpretation of international law. Therefore, the criteria of the Court should be accepted as a starting point in the assessment of all types of individual's claims based on international agreements.

IV. Direct Effect of EU Bilateral Trade Agreements such as TTIP

All the above mentioned examples concern various international agreements, but the question of the possible direct effect of EU bilateral trade agreements has not been answered yet in settled case law. However, an evaluation of the issue should be conducted within the scope of the doctrine of the direct effect of EU law and the argumentation, adapted so far by the CJEU.

One preliminary reference is worth reiteration in the beginning of this chapter. The contracting parties to an international agreement are free to explicitly provide for direct effect,⁷¹ respectively for a lack of such,⁷² and only in such situation the question will have an absolute and definite answer.⁷³ Therefore, this paper will elaborate on the issue only in the light of the absence of such provision and will use as an example the very topical bilateral trade agreement TTIP.

IV.1. Characteristics of Bilateral Trade Agreements

The bilateral trade agreements usually are concluded between states in order to facilitate trade and investments in their commercial relationships by eliminating tariffs, quotas, export restraints and other trade barriers, harmonising the regulatory standards and more generally speaking, by liberalising the trade.

The features of this type of agreement show similarities to the WTO agreements in regard to their high level of integration, the broad scope that includes the most important aspects of trade: custom duties, goods, services, technical requirements et cetera, and the investor-state dispute settlement procedures which complement the application of the treaty. On the other hand, the nature of bilateral trade agreements closely resembles more traditional international cooperation or association agreements, since they are concluded between two parties and also cover subjects that are not directly linked to trade, such as sustainable development or public safety.

It is important to note that the nature of an international agreement by itself does not affect its possibility to produce direct effect.⁷⁴ In that sense the type of the partnership established by the parties to the bilateral trade agreement or the

⁷¹ e.g. Art. 54, para. 1 of the Convention on the settlement of investment disputes between states and nationals of other states (ICSID)

⁷² e.g. Art. 14.16. of the negotiated text on the Comprehensive Economic and Trade Agreement (CETA) between EU and Canada at: http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf (assessed on 14 April 2016). The text is not yet binding.

⁷³ Case 104/81 *Hauptzollamt Mainz v Kupferberg & Cie* [1982] ECR 3641 at 17.

⁷⁴ Case C 265/03 *Igor Simutenkov v Ministerio de Educación y Cultura Real Federación Española de Fútbol* [2005] ECR I 2579, at 28.

possible future development of their relationship is irrelevant in the assessment of the principle.

IV.2. Spirit, Structure and Nature of the Agreement

As with other international agreements, TTIP should also be submitted to the double test in order to evaluate its capacity to produce direct effect. As per the first part of the test, the following aspects must be taken into account.

Firstly, the aim of TTIP can be derived from the documents adopted before the start of the official negotiations on the agreement. On 23 May 2013 the EU Parliament adopted a Resolution⁷⁵ authorising the Commission to start negotiations for an agreement which ‘support the creation of high-quality jobs for European workers, directly benefit European consumers, open up new opportunities for EU companies, in particular small and medium-sized enterprises (SMEs), to sell goods and provide services in the US’. As a next step and in accordance with the procedure for concluding an international agreement set out in Article 218 TFEU, the Foreign Affairs Council (Trade) issued Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America.⁷⁶ According to para. 3 of the Directive, the Agreement ‘shall provide for the reciprocal liberalisation of trade in goods and services as well as rules on trade-related issues, with a high level of ambition going beyond existing WTO commitments’. Furthermore, in para. 7 the objective of the Agreement is stated as an increase of ‘trade and investment between the EU and the US by realising the untapped potential of a truly transatlantic market place, generating new economic opportunities for the creation of jobs and growth through increased market access and greater regulatory compatibility and setting the path for global standards’.

The cited documents clearly demonstrate the will of the Union to conclude a comprehensive international agreement that reaches an intensive integration of the EU and US markets and acceleration of trade relationships. In order to achieve this goal, the agreement is intended to directly offer EU citizens and entrepreneurs more possibilities for economic profit, and to also provide guarantees for their rights especially with regard to labour, consumer protection and environment. It follows that the rights and ‘opportunities’ that the individuals would enjoy after the entry into force of the agreement are a significantly important aspect of the development of trade between the parties.

It is true that the text of the Directives and the Resolution can be used only as an indication of the intention of the EU and is not legally binding. However, the stage

⁷⁵ European Parliament resolution on EU trade and investment negotiations with the United States of America (2013/2558(RSP) B7-0187/2013 at: <http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2013-0187&language=EN> (assessed on 14 April 2016).

⁷⁶ Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America (EC 11103/13) at: <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf> (assessed on 14 April 2016).

in the negotiating process does not allow us to analyse other documents, therefore the objectives set out by the Council and the Parliament are the most valid source for interpretation. Furthermore, it can be reasonably expected that the Commission will negotiate the general provisions of agreement within the scope of the given mandate and will affirm the goals outlined therein. Therefore, it could be concluded that the TTIP is initially intended to confer rights to individuals.

Secondly, the issue with the reciprocity between the parties must be evaluated. One of the key questions is whether the agreement is applied to the same extent and with the same intensity by each party - that is to say whether the provisions are equally binding. The recognition by the courts of one of the parties of the direct application of the agreement, or the reservation from this principle, does not in itself constitute a lack of reciprocity in implementation.⁷⁷ With regard to TTIP, the reciprocal nature is indicated in para. 3⁷⁸ and 4⁷⁹ of the Directives for the negotiation, but its application will eventually depend on the final provisions of the agreement, and more precisely on the systems of derogations and safeguard clauses. Such clauses are to be found in the EU's proposal for the text on trade in services, investment and e-commerce,⁸⁰ such as Article 5-24 on the competitive safeguards on major suppliers or Article 5-33 on the safeguards for the protection of privacy and fundamental rights with regard to the transfer of personal data. Those rules entitle the parties to introduce safeguard measures on equal basis, therefore, if the final provisions correspond to the reciprocal nature of the enforcement that is outlined in the proposals, this aspect of the general nature, spirit and structure of the agreement would also satisfy the first part of the test.

Another very important issue which is likely to influence the direct effect of bilateral international agreements such as TTIP is the government-government dispute settlement. This instrument aims to avoid and settle any dispute between the parties concerning the interpretation and application of the agreement. The procedure is very similar to the dispute settlement rules of WTO, especially with regards to the possibility of the parties to negotiate the temporary compensation in case of non-compliance.⁸¹ This legal option was one of the main arguments of the CJEU to reject the direct effect of WTO and should be carefully assessed, especially in light of the criticism against the jurisprudence. The fact that the parties would have the possibility to reach an agreement on a mutually acceptable compensation does not affect the mandatory force of the dispute settlement. Only the nature and size of the compensation are conditional on the will of the parties, not the enforcement of the panel's decision and the obligation to comply.⁸² Therefore, the argument of the

⁷⁷ Case 104/81 *Hauptzollamt Mainz v Kupferberg & Cie* [1982] ECR 3641, at 18.

⁷⁸ 'The Agreement shall provide for the reciprocal liberalisation of trade in goods and services as well as rules on trade-related issues, with a high level of ambition going beyond existing WTO commitments'.

⁷⁹ 'The obligations of the Agreement shall be binding on all levels of government'.

⁸⁰ EU's proposal for a text on trade in services, investment and e-commerce at: http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153669.pdf (assessed on 14 April 2016).

⁸¹ Art. 13 of the European Union's initial proposal for legal text on "Dispute Settlement (Government to Government)" at: http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153032.pdf (assessed on 14 April 2016).

⁸² Griller 2000, *supra* note 38, p. 453.

Court against the direct effect of WTO in *Portugal v. Council*, which is based on judicial enforceability, should be reconsidered in the first step of the double test on TTIP. The government-government dispute settlement procedure should not be observed as a sign for the lack of reciprocity or for the conditionality of the agreement.

When considering the nature, spirit and structure of an extensive bilateral international agreement such as the TTIP, a conclusion can be drawn that the intention of the parties to liberalise trade and to integrate the markets includes the possibilities that the agreement offers to individuals; that is their specific rights and interests as the beneficiaries from the development of the trade relationship. Therefore, it can be argued in the light of the aim and the objective of TTIP, as well as its reciprocal nature and the enforcement of the dispute settlement procedure, that the agreement intends to bestow rights to individuals which can be directly invoked before a national court.

IV.3. The Clear, Precise and Unconditional Wording of the Provisions

The second part of the test could hardly be examined since only the EU textual proposals are officially published,⁸³ and it is likely for their wording to be altered. Nevertheless, for the purpose of this article few of the proposed provisions could be interpreted in the light of the criteria of the CJEU in order to evaluate their possible direct effect.

The TTIP would consist of 24 chapters, grouped in 3 parts: Market access, Regulatory cooperation and Rules. It is reasonable to expect that Part 1 – *Market access*, and more specifically the chapter on *Trade in Goods and Customs Duties* would likely include most of the provisions directly concerning individuals, but no official proposal of text has been published so far.⁸⁴ However, in the Chapter *Trade in Services, Investment and E-Commerce* an example of clear, precise and unconditional provision can be found in Article 6-7 *Unsolicited direct marketing communications*, para. 3,⁸⁵ which confers the right to natural and legal persons to send marketing communications directly to consumers whose contact details were collected lawfully.

Another example of provision that satisfies the test is in Part 2 *Regulatory Cooperation*, Article 6 *Stakeholder Consultations*,⁸⁶ which deals with the right for natural or legal persons to provide inputs through the public consultation process during the preparation of regulatory acts at central level.

⁸³ At: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230#market-access> (assessed on 14 April 2016).

⁸⁴ all official documents on the TTIP are published at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230#market-access> (assessed on 14 April 2016).

⁸⁵ European Union's proposal for services, investment and e-commerce text in TTIP. http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153669.pdf (assessed on 14 April 2016).

⁸⁶ European Union's proposal for legal text on "Regulatory Cooperation" in TTIP. http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153403.pdf (assessed on 14 April 2016).

Finally, there are some provisions which regulate very sensitive areas for the consumers (such as sanitary measures on imported products), however they are formulated as only imposing obligations on the parties to the agreements and not conferring any rights on individuals,⁸⁷ therefore they would not pass the second part of the test.

In conclusion it could be argued, that if the double test is applied on the textual proposal of the Commission on TTIP, many of the provisions would not be able to fulfil the criteria since they govern solely the relationship between the US and the EU with regard to coordination and regulation. Nevertheless, there is no ground for general exclusion of the direct effect of TTIP, since the wording of some texts would allow for them to be invoked directly by individuals before national courts.

Since the CJEU didn't draw a line between the two types of direct application (challenging the legality of EU secondary legislation and claiming rights against the state) and accepted both of them under the conditions of the double test, it can be argued that TTIP can also offer individuals both possibilities. This conclusion also takes into account the scenario where the entry into force of the agreement could lead to various legal actions and adoption of legislation on EU and national level in response to the trade liberalisation. In such situation it is essential to guarantee all types of protection for the rights and interests of the individuals both when they are subject to new rules inconsistent with the agreement and when they are precluded from exercising the possibilities stemming from TTIP.

V. Possible Implications of the Recognition of Direct Effect to TTIP

So far a strict legal interpretation on the issue of the possible direct effect of bilateral trade agreement such as TTIP was introduced. However, it is worth also considering a broader and more general perspective on the question.

A cornerstone for the argumentation in favour or against the direct effect of TTIP is the investor - state dispute settlement - which is introduced in Part 3: *Rules*, Chapter: *Investment protection*.⁸⁸ This instrument allows investors to claim a breach of the rules for investment protection directly against the parties (US, EU or a member state) before a specially designed tribunal. Such institute is generally no exception for bilateral investment treaties.⁸⁹ Without going into further details about the procedure, it could be argued that if investors in the US and EU are granted with a tool for direct and efficient protection of their rights, then the possible direct

⁸⁷ European Union's initial proposal for legal text on 'Sanitary and Phytosanitary Measures (SPS)' in TTIP, Part 2, Chapter 'Sanitary and Phytosanitary Measures (SPS)', Article 9 'Equivalence' http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153026.pdf (assessed on 14 April 2016).

⁸⁸ European Union's proposal for Investment Protection and Resolution of Investment Disputes http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf (assessed on 14 April 2016).

⁸⁹ Ch. Tams, 'Ships that pass in the night: Die Debatte über TTIP und die Schiedsgerichtsbarkeit' at: <http://www.verfassungsblog.de/ships-pass-night-die-debatte-ueber-ttip-und-die-schiedsgerichtsbarkeit/#.Vkn3R7erTVQ> (assessed on 14 April 2016).

effect for the individuals should also be recognised. Otherwise the former will be put in more favourable position contrary to the principles of equal treatment and rule of law. This issue can be observed also from the perspective of reciprocity between the beneficiaries of the agreement. In that regard, even if the relationship on government level is considered as equally balanced, the different effect of the provisions for investors and other private parties would jeopardise the reciprocal nature of TTIP.

On the other hand, possible negative implications of the direct effect could arise from the inconsistent application of the agreement by different courts and the dynamic interpretation, which would result in lack of democratic legitimacy and procedural constraints.⁹⁰ However, this cannot be regarded as a serious threat since the application within the EU is expected to be effectively consolidated in line with the jurisprudence of the CJEU.

Another concern is whether the national courts in the US and EU have the capacity to provide authentic and competent interpretation of such an ambitious and comprehensive international agreement as TTIP. Although some authors⁹¹ consider that domestic courts have the capability to apply international rules, the reality of the different tradition, background and preparation of the judges in the EU and US might prove this opinion wrong.

Finally, a more political argument could also be raised against the direct effect. If the EU negotiates direct applicability of the provisions of TTIP, it would be very unlikely to deny such effect to future bilateral trade agreements with some of the important trade partners as the countries from the BRICS association⁹² for example. A different approach to the issue would prove the Union as an inconsistent international trade actor, which could have negative implications for long term trade relations.

VI. Conclusion

Up to this point, the article analysed the arguments of the CJEU both when rejecting and confirming the direct effect of international agreements of the EU. Applying those arguments to the assessment of bilateral trade and investment treaties as TTIP the following conclusion can be drawn.

TTIP reveals similar characteristics to the bilateral cooperation or association agreements, concluded by the EU with countries in the process of accession to the EU or neighbouring states. However, TTIP has a much broader scope and aims at much higher integration between the EU and US markets which, along with the

⁹⁰ D. Thym, 'The Missing Link: Direct Effect, CETA/TTIP and Investor-State-Dispute Settlement', at: <http://www.verfassungsblog.de/en/verhinderte-rechtsanwendung-deutscher-gerichte-ceta-ttip-und-investor-staat-streitigkeiten/> (assessed on 14 April 2016).

⁹¹ M. Bronckers 'Is Investor-State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts? An EU View on Bilateral Trade Agreements', *Journal of International Economic Law* 2015-3, p. 655.

⁹² Brazil, Russia, India, China and South Africa.

investor-state and government-government dispute settlement mechanisms, reaches the level of very complex international agreements such as the WTO treaties.

A strict legal analysis shows that TTIP can pass both aspects of the double test on direct applicability of international agreements, established by the ECJ. The nature, aim and objective of the treaty show an intention by the parties to offer the individuals many new opportunities and possibilities for commercial activity. At the same time the agreement is not serving primarily as a negotiation platform and its reciprocity and binding power are higher in compare to WTO. As per the second step of the test, a look on the textual proposals by the EU allows for a reasonable expectation that there will be provisions which are sufficiently clear, precise and unconditional and which confer specific rights to individuals.

On the other hand, there are some political grounds against the direct effect, which possibly have led to the clear rejection of the principle in CETA. It is therefore in the hands of the competent EU institutions either to explicitly deny such effect to the agreements, or to leave the interpretation on the matter to the CJEU. Considering the expected tremendous impact of the TTIP on the EU economics, but also on the social and cultural environment in Europe, this decision is of critical importance.

By weighing the arguments on the direct effect of the agreement, it should not be forgotten that the Commission would conclude the TTIP on behalf of the EU not only as a political and economic entity, but also as a 'union among the peoples of Europe'.⁹³ The sovereignty of the democratic Union implies not only the competence for the exercise of powers, but also the responsibility towards the citizens.⁹⁴ Therefore namely the interests of the people of Europe should be the first priority in the negotiations.

These interests however do not cover only economical profit, but also social, cultural, and environmental values. Any international agreement of the EU thus should accord to the broad expectations and the high standards of the European citizens. Although the EU bodies and mainly the Commission recognise the concerns of the society about TTIP and show willingness to address them, the question of the level of protection of the rights is still open.

As the CJEU highlighted in *Van Gend en Loos*, the supervision of the institutions should be supplemented by the 'vigilance of individuals concerned to protect their rights'⁹⁵ in order for the legal guarantees to be fully effective. Therefore, if the EU truly intends to provide for the highest possible level of protection of the interests of the citizens and companies, it should leave the individuals the possibility to

⁹³ Art. 1, para. 2 of Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

⁹⁴ A. v. Bogdandy, 'Chancen und Gefahren einer Konstitutionalisierung der WTO - Verfassungsrechtliche Dimensionen der WTO im Vergleich mit der EU' *Walter Hallstein Institut für Europäisches Verfassungsrecht*, Vortrag an der Humbolt-Universität zu Berlin (26 June 2002), at: <http://www.whi-berlin.eu/documents/bogdandy.pdf> (assessed on 14 April 2016).

⁹⁵ Case 26/62 *Van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR I-3

challenge secondary EU legislation when it contradicts provisions of TTIP or to invoke and claim rights conferred to them by clear and unconditional rules.

This conclusion corresponds with the spirit and the traditions of EU law, and is no threat to the application of the agreement, since there is a continuous and coherent line of case law of the CJEU, establishing clear, comprehensive and flexible conditions for the direct effect of provisions of international law. In the end, if the issue of the direct effect could be summarised in two possible approaches - explicit rejection or acceptance under certain strictly applied criteria - the latter should be given advantage as the one closer to the principles and values set out in the Treaty on the European Union.