DIRECT EFFECT OF INTERNATIONAL AGREEMENTS IN THE EU LEGAL ORDER: DOES IT DEPEND ON THE EXISTENCE OF AN INTERNATIONAL DISPUTE SETTLEMENT MECHANISM?

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1. Introduction

Direct effect has been and still is the object of much doctrinal controversy. It is a fascinating notion that seems to challenge the well-established paradigms of dualism and monism and to frustrate every attempt to construe a general theory capable of explaining the variety of phenomena that are commonly listed under the heading of direct effect.\(^1\) A variety of questions arise in connection to the notion of direct effect in the EU legal order.\(^2\)

The purpose of this paper is nonetheless to focus on a very specific question – whether the existence of dispute settlement mechanisms at

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\(^1\) A. Nollkaemper, ‘The Direct Effect of Public International Law’, in J.M. Prinssen and A. Schrauwen (Eds.), Direct Effect. Rethinking a Classic of EC Legal Doctrine, Groningen: Europa Law Publishing, 2002, p. 180, concludes his analysis stating that direct effect is better viewed as “a *sui generis* concept that characterizes legal effects of norms that straddle the threshold of two legal systems and that indeed qualifies the relevance of that threshold”.

\(^2\) They regard for example the conditions for recognising direct effect (see in particular D. Petrovic, *L’effet direct des accords internationaux de la Communauté européenne: à la recherche d’un concept*, Paris: PUF, 2000; T. Eijsbouts, ‘Direct Effect, the Test and the Terms’, in J.M. Prinssen and A. Schrauwen (Eds.), Direct Effect. Rethinking a Classic of EC Legal Doctrine, Groningen: Europa Law Publishing, 2002, pp. 237–249); the precise scope of the notion of direct effect, in particular when compared to other notions that can be confused with direct effect, such as direct applicability (see for different views on this aspect J.A. Winter, ‘Direct Applicability and Direct Effect – Two Distinct and Different Concepts in Community Law’, in *Common Market Law Review*, 1972, p. 425 ff.; P. Eleftheriadis, ‘The Direct Effect of Community Law: Conceptual Issues’, in *Yearbook of European Law*, 1996, p. 205 ff.); whether the notion of direct effect applied by the ECJ to EU law is the same as that applied to international law (see *infra* note 26); the existence of a unifying concept of direct effect in the EU legal order (see *infra* note 29); whether the concept of direct effect is laid down by international law or is determined by the domestic legal order (see, in general, J. Verhoeven, ‘La notion d”’applicabilité directe” du droit international’, in *Revue belge de droit international*, 1980, p. 243 ff.; P.-J. Kuijper, ‘Epilogue: Symbiosis?’, in J.M. Prinssen and A. Schrauwen (Eds.), Direct Effect. Rethinking a Classic of EC Legal Doctrine, Groningen: Europa Law Publishing, 2002, pp. 253–267); and the list could be much longer.
the international level can play a role in the recognition by the ECJ of direct effect to international agreements binding on the EU. From the standpoint of international law, dispute settlement systems are in principle neutral and can either militate in favour or against direct effect. The existence of an international dispute settlement system undoubtedly corresponds to the intention of the parties to render treaty provisions enforceable at the international level. Thus, it is understandable that they can be taken into account in the determination of direct effect. But their existence does not necessarily mean that individuals must be recognized the right to enforce international obligations before domestic courts.

It is undeniable, however, that dispute settlement mechanisms and direct effect do have a common feature. They serve the same purpose of securing compliance with international primary obligations. The establishment of a dispute settlement mechanism at the international level can be seen as a guarantee for the enforcement of the international agreement. Then naturally, the question may arise as to whether these two different systems of compliance are mutually exclusive or complementary. If execution is secured at the international level, would that render direct effect useless? Alternatively, does the existence of a dispute settlement mechanism at the international level imply that

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3 A narrow definition of direct effect will be adopted, focusing on whether international rules can confer rights or obligations upon individuals that domestic courts should enforce. Accordingly, other legal effects will not be taken into account. In particular, the present paper will not discuss the question of judicial review of EU acts in light of international law, except for those cases in which direct effect of international rules is a pre-requisite for judicial review by the ECJ. On the various types of effects that have been included in the notion of direct effect, see S. Prechal, 'Does Direct Effect still Matter?', in *Common Market Law Review*, 2000, p. 1047 ff.

4 J. Groux, 'L’invocabilité en justice’ des accords internationaux des Communautés européennes’, in *Revue trimestrielle de droit européen*, 1983, p. 203 ff., at 225, affirms: “La jurisprudence des tribunaux nationaux qui admettent que les dispositions d’accords internationaux sont susceptibles de produire des effets directs dans l’ordre interne, s’est développée, à notre connaissance, en dehors de toute référence à l’existence ou à l’absence de juridictions ou autres organes de caractère international, habilités à trancher les litiges concernant l’exécution des mêmes accords”.

5 Similarly, direct effect has been conceived of by the ECJ as a “guarantee against infringement” thus rendering compliance with EEC Treaty effective. In *Van Gend & Loos* the Court stated: “the vigilance of individuals concerned to protect their right amounts to an effective supervision in addition to the supervision entrusted by articles 169 and 170 to the diligence of the Commission and of the Member States” (ECJ, Case 26/62 *Van Gend en Loos v. Nederlanse Administratie Der Belastingen* [1963] ECR 1, para. 24 (emphasis added)).