Transcending the Nation-State?
Private Parties and the Enforcement of International Trade Law

Stefan Ohlhoff and Hannes Schloemann

I. Introduction
II. Participation of Non-State Actors in International Judicial Proceedings
III. Private Parties and the Enforcement of International Trade Rules within the WTO Framework
   1. Amicus Curiae Briefs
      a. Panels
      b. Appellate Body
      c. Briefs as Part of Member Submissions
   2. Member Representation by Private Counsels and Other Private Sector Representatives
   3. Conclusion
IV. The (Supra-)National Level
   1. Direct Effect? International Trade Law within the EC
      a. Overview: The ECJ’s present position on WTO law
         aa. Consistent Interpretation
         bb. Incorporation by Reference
         cc. Act of Transformation
      c. After 1995: Same Result, (slightly) different Reasons
   2. Administrative Mechanisms for Private Parties
   3. Conclusion
V. Concluding Remarks

675

J.A. Frowein and R. Wolfrum (eds.),
I. Introduction

International trade law is public international law. Trade agreements such as the WTO Agreement and the range of agreements concluded under its umbrella, namely the GATT 1994, the GATS (General Agreement on Trade in Services) and the TRIPs Agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights) are public international law treaties. The subjects of public international law are states, not private parties — the classical schism of public international law, the dichotomy of the spheres of national law, where private parties are subjects and agents of the law, and international law, where states and their organisations are (nearly) the sole members of the so-called international community. Is it different for international trade law? Could it, should it be different?

Quite naturally, since the law's subjects are states, its substance concerns first and foremost state actions and state omissions, such as tariffs, technical barriers to trade and subsidies. Yet, quite different from many, though by no means all other areas of public international law, the state actions and omissions regulated by international trade rules concern directly and primarily private persons. It is their economic activity that is affected by those actions or omissions, or trade regulation measures. The constraints that international trade law puts on states thus directly benefit, or concern, private parties.

International trade law shares this characteristic with human rights law. It is not surprising that Petersmann, among others, keeps pointing to its function to protect individuals from unjustified state interference.1 There is, however, an arguably significant difference between the two subjects. While human rights law is intended to protect the individual primarily because of his or her human nature and inherent, inalienable dignity, international trade law protects individual economic activity primarily based on the belief that free trade furthers economic and political gains for the societies and states involved. Individual activity is thus protected not for its own sake but because it serves a greater good. Of course one may contest both the correctness of these

---