

## IS THE EUROPEAN UNION ALLOWED TO DESTROY THE INTERNATIONAL LEGAL SYSTEM?

Is Germany still a country? Currently the answer - perhaps startling for those who still care about rule of law - is "maybe yes, maybe no". What is undoubted, is that the international legal system is no longer certain in this regard. The problem is, of course, the so-called "European Union", which tends to define itself as an *ad hoc* entity, out of the classifications provided by International Law. Conceived to nullify and overcome the concept of "nation", the European Union, in the age of globalization, necessarily needs to extend such negationism to international law and international organizations as well, since their structures rely upon the concept of "nations".

In such a complex framework, if some basic questions (Is Germany a country?) were put to the Legal Division of the World Trade Organization (WTO), the answers would certainly be equivocal. Because of its historical significance, such issues have emerged constantly since the inception of the WTO in 1994, and have been consistently evaded. Suffice it to recall when, on April 15, 1994, it was necessary to decide whether Germany or the European Community, should sign the Treaty establishing the WTO. Due to their different positions at the table, both did so. Similarly, whenever voting has been required at the WTO since 1995 (eg the decision about the accession of China to the WTO), it is not clear whether the European Community or the German Representative should vote on behalf of the German people and where the corresponding responsibility lies.

On March 15, 2005, the judges of the WTO had to reach a verdict in the DS174R controversy regarding trademarks and geographical indications. In doing so, they considered the same question, but were unable to find a clear answer. "... the European Communities is not a State ... The European Communities is not a country, but this note might not be relevant if all references to a "country" in the relevant agreements can be adequately understood in relation to the European Communities"; Footnote n. 187: *For example, references in the covered agreements to "developing countries", "least-developed countries", "importing country", "exporting country", "third country" and "country of origin"*).

It is clear that whenever the WTO Treaty uses the terms "nation", "national", "country", "domestic" and "member", it is impossible to know definitively whether they refer to Germany or to the European Union.

Both the European Union and Germany appear in the list of Members of the World Trade Organization. Again it is unclear which of the two entities all the typical prerogatives of the WTO Member must be associated with. The problem also arises with reference to another of the essential aspects concerning the status of Germany in international law and in international organizations. Given that the Treaty of the WTO provides that each Member contributes annually to the budget of the Organization, who, between the European Union and Germany, has the duty to pay this mandatory contribution? At least on this front, certainty has been established. The website of the WTO ([https://www.wto.org/english/thewto\\_e/secret\\_e/budget\\_e/budget2020\\_member\\_contribution\\_e.pdf](https://www.wto.org/english/thewto_e/secret_e/budget_e/budget2020_member_contribution_e.pdf)) unequivocally certifies that since 1995, only Germany and never the European Union, has fulfilled this fundamental obligation.

Similarly: what happens when the WTO Treaty signed in Marrakech is amended? Is the German Parliament entitled to ratify the amendment? Here too there is unfortunate additional confusion, exemplified in the case of the first amendment made to the WTO Treaty: the "Trips Amendment", adopted in Geneva in 2005 and aimed at allowing access of life-saving medicines to the poorest nations in the world. The European Union has autonomously transmitted an act ([https://www.wto.org/english/tratop\\_e/trips\\_e/amendment\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/amendment_e.htm)) with which it believes it has fulfilled the obligation of ratification by Germany in its capacity as WTO Member. In this case, therefore, an international agreement was signed and the German Parliament, like any other subject completely external to the matter, was not involved at all. The act sent by the European Union organs ("Instrument of Acceptance") has regard "to the Treaty establishing the European Union" and states that the Acceptance is binding on the Member States of the European Union.

In a second case, relating to the introduction among the WTO Agreements of the "Trade Facilitation Agreement", other anomalies have arisen. In the text of the Trade Facilitation Agreement a footnote appears (footnote n. 1) in which the following is written: "For the purposes of calculation of acceptances under Article X.3 of the WTO Agreement, an instrument of acceptance by the European Union for itself and in respect of its Member States shall be counted as acceptance by a number of Members equal to the number of Member States of the European Union which are Members to the WTO". The footnote leaves room for many doubts about the authority of its aspiration to regulate the "acceptance" process. To come into force, the Agreement and its footnote themselves require that the acceptance process has already been concluded (according to the current rules, obviously).

Other ambiguities arise daily in the functioning of the World Trade Organization within the various WTO Bodies. In order to define the status and prerogatives of the European Union, and therefore of Germany itself, in the WTO legal system, some invoke the European Treaties and the changes introduced in Lisbon.

The German Constitutional Court, in ruling on the status of Germany in the WTO legal system, makes extensive reference (see para 372-376 of Judgment 30 June 2009) to the Lisbon Treaty. The mistake always seems to be the same: that of allowing that EU bodies are entitled to interpret (and distort the foundations of) international law. Those who are not resigned to the dissolution of an international legal system, however, would take the opposite starting point. They would ask the international legal system, irrevocably based on nations, where the prerogatives of the European Union may be compatible and acceptable within the foundations of international law.

Shortly after the establishment of the World Trade Organization, very clear words in this respect were written by lawyer Pierre Pescatore. He immediately identified that in defining the status of the Members of the WTO, no role could be played by the Court of Justice of the European Communities. Instead, such status could be conferred only by international treaties and judges (Pierre Pescatore, "Opinion 1/94 on 'Conclusion' of the WTO Agreement: Is there an Escape from a Programmed Disaster?", *Common Market Law Review* 36, 1999 Kluwer Law International). Indeed, in its Judgment of 30 June 2009, the German Constitutional Court stated (para 376): "However, in so far as the development of the European Union in analogy to a state were to be continued on the basis of the Treaty of Lisbon, which is open to development in this context, this would come into conflict with constitutional foundations".

It is surprising and at the same time worrying, that many continue to fail to address clearly the major issues posed to law by globalization. The principal specific concern is perhaps that many scholars continue to support the "no-global" approach aimed at interpreting international law on the basis of European schemes (see N. Lavranos, "The Communitarization of WTO Dispute Settlement Reports: An Exception to the Rule of Law", *European Foreign Affairs Review* 10: 313–338, 2005, Kluwer Law International), rather than the opposite one (interpreting the European system on the basis of international law).

When it becomes necessary to provide specific and transparent answers to the abovementioned great questions, we will ascertain whether or not, Germany will emerge as a nation. At that point in time, we will also see whether scholars would

still celebrate the European Union as a “unicuum” or rather they will kill the fatted calf to celebrate International law as the return of the prodigal son.

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