A Review of Carsten Nowak / Wolfram Cremer (Eds.), *Individualrechtsschutz in der EG und der WTO*

[Individual Legal Protection in the EC and WTO], Baden-Baden: Nomos, 2002, 239 pp., Euro 44,-.

By Malcolm MacLaren

"*The Community constitutes a new legal order* [...] *for the benefit of which the states have limited their sovereign rights* [...] *and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of the Member States, Community law therefore imposes obligations on individuals but is also intended to confer on them rights which become part of their legal heritage.*"[1]

A. Great Expectations

This year marks the fortieth anniversary of the decision of European Court of Justice (ECJ) in *van Gend & Loos*. This decision announced the direct effect doctrine, which provides that selected provisions of the Rome treaty establishing the European Community (EC) may be regarded as rules governing natural and legal persons in national law. The ECJ thereby set in motion a jurisprudential revolution. The direct effect doctrine has led to what is today a highly-developed, comprehensive system of legal protection for private parties within the EC, whose concern for effectiveness has attained constitutional status. This system of legal protection has in turn been the strongest single force behind the realisation of the common European project.

The collection of essays here reviewed is a testament to the sophistication of this system of legal protection. Eight of the ten essays seek to explain the central and decentral legal protection afforded natural and legal persons in the EC, while two undertake the same task as regards the World Trade Organisation (WTO). Taken as a whole, the essays fulfil their task with considerable, if varying, success. Theorists and practitioners in this field will be pleased by the wealth of information and de-

[1] Case 26/62, *N. V. Algemene Transp. And Expeditie Onderneming van Gend & Loos v. Nederslandse administratie der belastingen*, 1963 E.C.R. 1, 12.

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tailed analysis offered. Those who come from other fields hoping to gain a broader perspective on the subject will, however, be let down. Indeed, the specialised nature of the collection will serve to reinforce the prevalent impression of the esotericism of EC law. This is regrettable, because the significance of the EC's system of individual legal protection should be set in a larger context and should, like the system itself, be widely accessible.

B. Judged on its own terms

The preceding valuation of *Individualrechtsschutz in der EG und der WTO* may seem unfairly subjective, a function of disappointed personal expectations. To some degree it is that: the reviewer would have conceived of this recent project of the *Institut für Integrationsforschung des Europa-Kollegs Hamburg* (Institute for Integration Research at the European College in Hamburg) differently. (I shall return to this point later in the review.) The critique is, however, also partly induced by the self-stated objectives of the collection. The prefaces promise an intensive, interdisciplinary (political and economic as well as legal) study of theoretical and practical issues concerning individual legal protection in the EC and WTO based on new developments and fundamental concerns.[2] In particular, the Director of the Institute and the Co-editors seek to address the growing importance of ensuring effective individual legal protection in the related national, supranational and international settings.[3]

The Director of the Institute and the Co-editors' first stated objective is only partially realised. The issues addressed are indeed theoretical and practical, and they are intensively studied. They are not, however, addressed in a co-ordinated or balanced fashion. Despite the fact that the collection is based on lectures delivered at a symposium devoted to the theme (in Hamburg, January 2001), the collection does not hang together well. Moreover, the promise of an interdisciplinary approach goes unfulfilled: this collection is written by lawyers for lawyers. It is likely for this reason that the essays fail to realise their second stated objective, that of examining the changing meaning of individual legal protection in the EC and WTO. Without the benefit of the insights offered by political science and economics, the discussion remains too technical and narrowly focussed.

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2 Carsten Nowak / Wolfram Cremer (Eds.), *Individualrechtsschutz in der EG und der WTO*, Baden-Baden: Nomos, 2002, p. 5. [Hereinafter "Individualrechtsschutz"]

3 Ibid., p. 7.

C. No more than the Sum of its Parts

Gert Nicolaysen explicitly recognises at the outset of his introductory essay ("*Rechtsgemeinschaft, Gemeinschaftsgerichtsbarkeit und Individuum*" – community under the rule of law, Community jurisdiction and the individual) that it is incumbent upon him to set the conceptual stage for the discussions to follow. Nonetheless, he does not address the meaning of the wide-ranging legalisation of politics and economics in the EC, a degree of legalisation that is unprecedented and unrivalled in an international organisation. Nicolaysen shows more – though still passing - interest in questions subsequent, namely acceptance problems relating to Community legal decisions, legitimacy problems of Community jurisdiction and the ability of the Community courts to fulfil their functions in the aftermath of the Nice reforms.

Due to its shortcomings as an introduction, the essays that follow Nicolaysen's lack a conceptual context, especially those in the first part of the collection (entitled "*Zentraler und dezentraler Individualrechtsschutz in der EG*" – central and decentral individual legal protection in the EC). Wolfgang Cremer, it is true, carefully positions his essay[4] relative to the others in the first part. He could not, however, have made up for the preceding shortcoming in the less than twenty pages allotted to him even if he had sought to. Cremer's scholarly responsibility, namely to summarise the possibilities under Community law for individuals to seek protection before Community courts against Community measures, is ambitious enough in itself. Much to his credit, he manages it but nothing more. Cremer sets out clearly the abiding principles and the (then) recent judicial decisions relating to EC Article 230 IV (former Art. 173 IV), in particular as the European courts have boldly expanded their jurisdiction regarding the type of acts and applicants for judicial review.

Carsten Nowak's subsequent essay displays the same expository strengths as Cremer's – a systematic approach, detailed presentation, even-handed criticism - but without the latter's tight focus. It was apparently intended that Nowak's essay would complement his Co-editor's discussion of central individual legal protection in the EC with a discussion of the decentral equivalent.[5] Instead, Nowak's essay takes on both topics by examining the relationship between the two levels from the perspective of effective legal protection. Nowak also pre-empts thereby some of Hans-Georg Kamann's subsequent contribution concerning the legal protection of

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4 „*Individualrechtsschutz gegen Rechtsakte der Gemeinschaft: Grundlagen und neuere Entwicklungen*", (individual legal protection against legal acts of the Community: basic principles and recent developments), Ibid., p. 27ff.

5 Ibid., p. 28.

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complainants in EC state aid control.[6] Though undeniably impressive in its individual breadth and depth, Nowak's essay disturbs the overall structure of the collection. "*Zentraler und dezentraler Individualrechtsschutz in der Lichte des gemeinschaftsrechtlichen Rechtsgrundsatzes effektiven Rechtsschutzes*" (central and decentral individual legal protection in view of the Community legal maxim of effective legal protection) is more favourably considered a free-standing contribution than a part of a larger whole.

D. Seeing the Forest or the Trees?

Paradoxically, the two essays that follow, though not symposium contributions, fit the collection's intended structure better than Nowak's, by offering case studies of principles and rules set out earlier. For his part, Christian Calliess contributes a thought-provoking essay about changing individual legal protection in Germany.[7] In the high traditions of comparative, reform-oriented legal scholarship, Calliess considers the potential for incorporation of European standards of review and standing into German law of administrative procedure. One might not be so ready as he to reinterpret the relevant German provisions in light of national basic rights and supranational standards (in particular those to be found in environmental law). Nonetheless, it is hard to object to Calliess' critique of the current emphasis in German law of administrative procedure on subjective rights rather than objective control of the legality of the impugned act, which emphasis limits access to the courts.

Sebastian Heselhaus' case study of the individual legal protection afforded in the EC approval process in biotech law[8] is similarly well-conceived. Heselhaus chooses a specific issue, the approval of genetically modified organisms, that holds particular promise for thematic insight, as its regulation has led to a "Palette"[9] of proce-

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6 „*Verfahrensrechtlicher und gerichtlicher Individualrechtsschutz im EG-Beihilfekontrollrecht aus der Sicht der Praxis*" (procedural and judicial individual legal protection in EC state aid control law from a practice perspective), Ibid., p. 161ff.

7 „*Der deutsche Individualrechtsschutz im Wandel – Gemeinschaftsrechtliche Vorgaben und Möglichkeiten ihrer Rezeption im Verwaltungsprozeßrecht*" (German individual legal protection in flux – Community measures and the possibilities of their adoption in administrative process law), Ibid., p. 81ff.

8 „*Individualrechtsschutz in Genehmigungsverfahren der Europäischen Gemeinschaft im Recht der Biotechnologie*" (individual legal protection in Approval Processes of the European Community in Biotechnology Law), Ibid., p. 103ff.

9 Ibid., p. 103.

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dural solutions on both the central and decentral levels, through judicial courts and administrative controls, with supranational, transnational and national effects. Unfortunately, Heselhaus' case study is not as well-executed as Calliess'. He does describe the administrative protection afforded to an applicant at great length and in considerable detail by means of a thorough investigation of secondary legislation. He does not, however, propose a corrective to the shortcomings in effective legal protection on the central level that he documents. (In particular, he shies away from engaging the questions of how administrative co-operation in the EC should be reformed and what the corresponding legislative competencies of the Community are.[10]) The problem of the demonstrated incoherence in the current arrangement is left to legal policymakers to address.

E. Taking a somewhat broader Perspective

The second part of the collection is devoted to the complex relationship between administrative procedural and judicial legal protection in the EC. Each of the three essays in this part are written by practitioners, thereby realising one of the abovementioned goals of the collection. Hanns Peter Nehl's considers the basic values that inform the relationship,[11] while Kamann and Georg M. Berrisch[12] focus on state aid and antidumping law, respectively. The second part may also be counted a relative success for its cohesiveness: Nehl's essay convincingly defines the terms of the discussion that are then applied by Kamann and Berrisch in two specific areas of EC law.

Nehl focuses on the tension between the goals of ensuring legal guarantees (the so-called protecting function) and rationality and efficiency (the 'serving function') in administrative procedure or more abstractly put, on the related trade-off between individual and collective interests. He concludes that for a community to remain under the rule of law, the individual legal protection in administrative procedure must be increased as the scope and freedom of executive discretion is increased due to technological and economic developments. Adaptation involves an updated

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10 Ibid., p. 130ff.

11 „*Wechselwirkungen zwischen verwaltungsverfahrensrechtlichem und gerichtlichem Individualrechtsschutz in der EG*" (interactions between administrative procedural and judicial individual legal protection in the EC), Ibid., p. 135ff.

12 „*Verfahrensrechtlicher und gerichtlicher Individualrechtsschutz im EG-Antidumpingrecht aus der Sicht der Praxis*" (procedural and judicial individual legal protection in EC antidumping law from a practice perspective), Ibid., p. 177ff.

concept of judicial control that emphasises procedural rather than material correctness and fairness in administrative decision-making. Nehl compliments EC administrative law for the guarantees it affords citizens and suggests that its German equivalent, which does not "take seriously"[13] the constitutional values involved, should imitate the EC scheme of administrative procedural and judicial legal protection.

For his part, Kamann addresses the growing problem in EC state aid control procedure of the position of Member States, (potential) receivers of state aid, their competitors and indirectly affected parties before the Commission and courts. He finds that the varying legal protection afforded the interested parties under administrative procedure and judicial control contradicts the basic rules of equality and effectiveness of legal protection. Reform of the Community system is necessary. He tentatively proposes that the EC courts afford interested parties protection in keeping with the effect of decisions on their Community economic freedoms and not on their material or immaterial interests.

The particular contribution that Berrisch makes in examining EC antidumping law is to consider the effectiveness of individual legal protection not only in terms of the relevant legal elements but also in terms of what he calls the 'real elements' at play beyond legislative provisions and judicial decisions. Berrisch explains how the financial and personnel resources available to parties during adminstrative procedure can determine the procedure's outcome as much as the parties' entitlement to inspect files and make statements. Likewise, the length of the judicial procedure is shown on the basis of own experience to considerably influence the effectiveness of individual legal protection just like access and standards of review. Berrisch convincingly cites as an example of the interplay of both elements the conflict in the enforcement of antidumping law between the right to defence and the maintenance of business secrets. Finally, the essay is to be applauded for its refreshingly direct and lucid style, which matches its practical, substantive take on the subject.

F. A stillborn Comparison

It is the conception of the third and final part that this reviewer found the most unsatisfying aspect of *Individualrechtsschutz in der EG und der WTO*. The positioning

[13] Ibid., p. 136.

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of the essays concerning individual legal protection in the WTO vis-à-vis the others in the collection as well as the two essays' particular orientation are problematic.

It is true that Peter Behrens' *Die private Durchsetzung von WTO-Recht*[14] and Stefan Oeter's *Gibt es ein Rechtsschutzdefizit im WTO-Streitbeilegungsverfahren?*[15] complement one another in their exposition of individual legal protection in the WTO. Both begin with the observation that WTO law is generally intended to protect the individual interests of participants in international trade against state restrictions and competitive distortions, but that its rights and duties refer immediately to state parties. Behrens then considers the practical significance of this asymmetric arrangement for the private enforcement of international trade law and Oeter its theoretical significance for the legal protection afforded. In so doing, the former logically emphasises the complaint procedure in the EC and the latter other possible forms of participation before WTO tribunals and the appellate body. It is at this point that the two essays' approaches diverge. Based on a review of the various available mechanisms, Behrens concludes that there are "not insignificant possibilities"[16] at the various levels for private parties to pursue their commercial interests based on WTO law. Oeter in contrast begins with the idea that from private parties' perspective a deficit of legal protection in the WTO dispute settlement system undoubtedly exists. He then reflects upon if and how the possibilities for private parties to participate in the system might be expanded and concludes that their greater participation would meet hard to surmount structural obstacles, arising in particular from the lack of direct effect of WTO law.

While Behrens' and Oeter's essays largely complement one another, they benefit little from and contribute less to the preceding discussions. The positioning of the essays concerning individual legal protection in the supranational regime vis-à-vis those concerning the international regime is poorly conceived: from the disproportionate attention accorded the EC relative to the WTO, through the absence of a framework introduction (or better, a summary of lessons learned), to the infrequency of cross references in the essays, an opportunity presented by the study of different international regimes goes unexploited. This conception (or rather misconception) does mean that the final two essays may be profitably read independently of the others, but it also means that the comparative insight offered by the collection is correspondingly limited.

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14 or, The private enforcement of WTO law, Ibid., p. 201ff.

15 or, Is there a deficit of legal protection in the WTO dispute settlement system?, p. Ibid., p. 221ff.

16 Ibid., p. 220.

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As mentioned above, the particular orientation of Behrens' and Oeter's essays is also problematic. Behrens seems content to view the 'glass of individual legal protection' as half full and therefore disinclined to consider if and how the private enforcement of WTO law might be enhanced. (The final sentence of his essay exemplifies this orientation.) Oeter does look beyond the *lege lata* at the possibilities for the greater participation of private parties in the WTO dispute settlement system. The *lege ferenda* issues of whether private parties should be accorded such rights and the means by which reform might be realised do not, however, interest him much. He prefers merely to demonstrate that efforts at greater participation (in particular at direct access) would currently face formal, systemic and institutional difficulties.

G. How it might have been?

It is to be regretted that the essays in the collection were written at least six months before the European courts' decisions in *Jégo-Quéré* and *Unión de Pequenos Agricultores*.[17] This pair of decisions brought the still dynamic and controversial nature of private parties' access to the ECJ sharply into focus (though the court's traditional approach did not change).[18] Some of the contributors might have thereby been provoked to consider the political tensions between the ECJ on one hand and Member States and national courts on the other that inform standing rules. They might have also been more likely to consider the ethical significance of an incompletely realised system of individual legal protection. Reflection upon these broader issues would have usefully set the examination of the particulars of the EC legal system in a larger context. A better conceptual basis would then have been laid for comparative regime analysis and more, for access to the subject by would-be readers from other fields.

An alternative starting point for the collection's discussions might have been the abovementioned observation from international organisation theory that the EC displays a wide-ranging legalisation of politics and economics. Indeed, its degree of

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17 Case T-177/01 (Judgment of 3 May 2002) and Case C-50/00 P (Judgment of 25 July 2002), respectively, available at http://curia.eu.int/en/jurisp/index.htm.

18 See Dominik Hanf, Facilitating Private Applicants' Access to the European Courts? On the Possible Impact of the CFI's Ruling in *Jégo-Quéré*, GLJ Vol. 3 No. 7, 01 July 2002 and, same, Kicking the ball into the Member States' field: the Court's response to *Jégo-Quéré* (Case C-50/00 P *Unión de Pequenos Agricultores*, Judgment of 25 July 2002), GLJ Vol. 3 No. 8, 1 August 2002.

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legalisation is unprecedented and unrivalled in an international - hence 'supranational' - regime. The fact of this exceptionally high degree of legalisation calls for extended reflection in order to understand its significance for the design of comparable regimes and for the empowerment of individuals subject to its rule.

From this starting point, the next step might have been to observe that the EC legal system is not only a force for the integration of other elements of community life (economics, politics etc.) but also an expression of the community's ethical unity amid its other diversity (cultural, linguistic etc.). This shared conception of what is morally correct shows itself in the arrangements that implement the agreement(s) constituting the relevant legal community (here the EC) or more specifically, in the dispute-resolution mechanism provided. For implementation arrangements do not come predetermined or value-free; they are the product of deliberate choices by decision-makers that reflect their values. Such choice involves trade-offs between competing considerations: legalisation means the balancing of politics and law or more fundamentally, the weighting of collective and individual interests within the relevant community. The outcome is a balancing or weighting that differs by international regime and, for scientific purposes, a promising conceptual basis for a broad perspective on the arrangements provided for in a regime.

Seen from this perspective, *van Gend & Loos*, in which the ECJ characterised the purpose and system of the Rome treaty constituting the EC, takes on particular - and arguably exemplary - significance. The decision transformed the preliminary ruling procedure from a *prima facie* check on supranational power in the exercise of Community authority to a check on national power per Community law available to private litigants. As the essays in the collection detail, standing may be said from a legal perspective to define who – i.e. which social and political actors - may complain before a dispute-settlement mechanism. A political perspective, however, understands these rules as determining who 'sets the agenda' of the relevant court or tribunal. A look at the ECJ's docket in the aftermath of *van Gend &* Loos validates this latter understanding: the vast majority of cases – especially the important cases – that have been brought before it have been brought under the preliminary ruling procedure. On the basis of the Community courts' experience, it might then be conjectured that the number of cases that an international dispute-settlement mechanism will receive and the likelihood that litigants will challenge national policymaking will vary in positive correlation to the permissiveness of standing rules.

An increased number of challenges to official decision-making means more, however, than the clarification and progressive development of impugned laws. An individual litigant is not merely a potential mechanism for objective legal control but is also the possessor of subjective interests. Imposing substantial constraints on the policymaking autonomy of states empowers private parties, increasing the legal

protection that litigants can find from the abuse of state power. The direct effect doctrine or comparable permissive standing rules have, in other words, an ethical dimension: they may be seen as a choice in favour of law and the individual and against politics and collective interests. Our concern with the technical workings of an international legal regime should not cause us to lose sight of the abiding truth of the Roman maxim *hominum causa omne ius constitutum* (all law is created for the benefit of man).

Accordingly, a question precedent regarding the working of a legal regime, be it the EC or any other, is how exactly 'man' should benefit from legalisation. Individuals, groups and states can all plausibly – and have historically - stake claims in international law to be actors worthy of legal empowerment. Where favouring a particular claimant in the design of a given arrangement is not already socially determined, participants in the discourse are challenged to justify their weighting of interests within the relevant community. How and why should the various claims to empowerment be prioritised and reconciled with one another in, for example, standing rules? Discussions about individual legal protection under various regimes like those in the collection here reviewed may proceed on clearer conceptual basis when the underlying ethical dimension of the subject is made explicit.

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