International Law in the EC Legal Order: The Contribution of the

*Intertanko* Case

There is a common feature in the scholarly contributions which have addressed, in a variety of ways, the case law of the ECJ on the effect of WTO rules within the EC legal order. The authors which approved as well as the authors which disagreed, even sharply, with the restrictive view adopted by the ECJ seem to understand the approach of the Court as being exceptional and due to the idiosyncratic nature of the legal regime set up by the WTO treaties. To an extent, this seems also to be proven by the fact that the ECJ, starting from *International Fruit* (12 December 1972, Joined cases 21 to 24-72, [1972] ECR1219), has repeatedly ruled out the effect of WTO rules in the EC legal order, but has never stretched the scope of this case law to other agreements. As the Court said most recently in *Simutenkov* (12 April 2005, Case C-265/03, [2005] ECR I-2579), “it is clear from the Court’s case-law that when an agreement establishes cooperation between the parties, some of the provisions of that agreement may, under the conditions set out in paragraph 21 of the present judgment, directly govern the legal position of individuals”.

One could reasonably argue that the special treatment accorded to WTO agreements constitutes an exception to the uniform rule according to which international law is part of EC law. It must be administered by the ECJ and by domestic courts and, in accordance with Art. 300, para. 7, of the EC Treaty, enjoys priority over conflicting EC secondary law.

For those who start from this premise, the recent *Intertanko* decision comes as no small surprise. In *Intertanko* the Court was faced with the question of determining the validity of an EC directive allegedly conflicting with the UN Convention of the Law of the Sea and came to the conclusion that the Convention, in its entirety, has no effect within the EC legal order. In para. 64 the Court fashioned its conclusion as follows: “it must be found that UNCLOS does not establish rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States, irrespective of the attitude of the ship’s flag State.”

In all appearances, *Intertanko* has extended to the Convention on the Law of the Sea, a complex body of law, concluded in mixed form, the special treatment
accorded to WTO agreements. In the course of the proceedings, the parties relied largely on the case law concerning WTO rules as a precedent. The insistence on the analogy or, respectively, on the dissimilarities between the two situations, was generally the argument employed in order to ask the Court to accept or to reject the case. In the same vein, Advocate General Kokott concluded that, unlike WTO agreements, “(t)he Convention on the Law of the Sea therefore constitutes the criterion for the legality of the actions of Community institutions. The degree to which individuals can rely on it can consequently be determined solely on the basis of each respective relevant provision. Such provisions must, as regards their content, be unconditional and sufficiently precise” (para. 59 of the Advocate General’s Opinion).

A different course, however, was taken by the Court. A careful reading of the decision reveals that the argument by which the ECJ reached its conclusion is sensibly different from that traditionally employed in WTO cases. Whereas the lack of effect of WTO rules is traditionally traced back to their reciprocal character, in Intertanko the Court tends rather to insist on the inter-stateal character of the obligations flowing from the UN Convention on the Law of the Sea.

***

The idea that GATT/WTO rules do not produce effects within the EC legal order due to the role exerted by reciprocity in moulding the scope and content of their obligations dates back to International Fruit (1972). In this case, which was to remain the essential point of reference for the forthcoming jurisprudence, the Court decided that the GATT “is based on the principle of negotiations undertaken on the basis of ‘reciprocal and mutually advantageous arrangements’, is characterized by the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties”. According to the Court, then, the nature and the broad logic of the GATT made it unsuitable to produce direct effect and, henceforth, to constitute a limit to the validity of EC secondary law.

This element was further elaborated in subsequent case law. In Portuguese Republic v. Council (23 November 1999, case C-149/96, [1999] ECR I-08395) the
Court drew a distinction between agreements based on reciprocity, such as the GATT/WTO and those "agreements concluded between the Community and non-member countries which introduce a certain asymmetry of obligations, or create special relations of integration with the Community, such as the agreement which the Court was required to interpret in Kupferberg" (para. 44). In Portuguese Republic, the Court referred also to a highly persuasive argument according to which an analogous course was taken by "some of the contracting parties, which are among the most important commercial partners of the Community" (para. 43).

Thus, in the legal doctrine shaped by the Court, the role of reciprocity seems to be the factor which makes it possible to draw a distinction among various categories of agreements. Whereas for the vast majority of cases reciprocity constitutes simply the motivation for concluding an agreement, in WTO agreements reciprocity rather constitutes the legal condition for either party to comply with the obligations; an element, therefore, which continuously moulds, on a bilateral basis, the content and scope of the agreements. By stressing the conduct of other parties which have correspondingly ruled out the effects of WTO rules within their own internal legal order (a fact by itself devoid of meaning for determining the effect of an agreement in the EC legal order), the Court thus seems to refer to the subsequent practice of the parties to an agreement as an element for determining the content of its obligations in the international legal order.

Even more explicitly, this distinction seems to inspire the cases in which the Court has ruled out the effect of decisions of the Dispute Settlement Body (DSB) of the WTO. In Van Parys, for example, (1st March 2005, case C-377/02, [2005] ECR I-1465) the Court made it clear that reliance on internal (EC) legal bodies as a means for securing the effectiveness of decisions of the DSB would upset the legal balance underlying the system of judicial adjudication set up by WTO. The lack of effect of DSB decisions is thus explicitly traced back to the will of parties to enforce compliance of WTO rules solely at the international law level.

***

Although sometimes labelled as dualistic, the ECJ case law on the effect of WTO rules within the EC legal order seems rather to evade a more precise theoretical qualification. Indeed, it tends to deny the existence of one (and maybe not
even the only one) theoretical premise common to both the dualistic and the monistic approach, according to which the function of the implementation of international law in domestic legal orders is precisely to secure compliance with international obligations through internal means of enforcement. It seems clear that the intent of the ECJ case law is the opposite: to avoid a situation in which the EC legal order, through the application of Art. 300, para. 7, and, accordingly, the invalidity of EC secondary law conflicting with WTO rules, acts as an instrument for enhancing the effectiveness of the WTO legal order. In the line of reasoning adopted by the ECJ, this form of guarantee would go well beyond what is required by the parties to the agreements and would even risk altering the normative balance on which the WTO system rests.

If one were to attempt to qualify this approach from a theoretical standpoint, it could plausibly be labelled as ‘neo-monistic’. In the conceptual system emerging from the ECJ case law, WTO rules do indeed produce effects within the EC legal order. However, they should not be considered in isolation as pure rules (each having its own normative content) but rather as part of a more complex legal regime, composed by substantive obligations, assorted in accordance with its own system of secondary rules which establishes the consequences of their breach. In other words, instead of focusing on substantive rules, this approach tends to consider the effect produced within the EC legal order by the entire system of WTO agreements, including the rules aimed at determining the means of enforcement, based on reciprocity and on the exclusive nature of the system of dispute settlement. If assessed against this conceptual background, the tenacious tendency of the ECJ to deny internal effects to WTO rules seems nothing more than the logical consequence of the vocation of these rules to unfold their normative content only through international legal dynamics.

If not well circumscribed, the spill-over effect of this doctrine might be dangerously far-reaching. Indeed, if the premise that compliance with international obligations of the EC must not be secured through internal means were to be given general application, the entire edifice of the relationship between international law and EC law would be in danger. The supremacy of international agreements set up by Art. 300, para. 7, would be meaningless if conflicting secondary law were nonetheless valid. It is therefore understandable that the “special” nature of WTO rules has for years been an implicit, albeit very clear, premise of the ECJ case law.
If we now turn our attention to the UN Convention on the Law of the Sea, we can notice that, in this regard, none of the arguments traditionally employed by the ECJ in order to rule out the effects of WTO rules in the EC legal order can convincingly stand.

The UN Convention on the Law of the Sea is not based “on the principle of negotiations undertaken on the basis of ‘reciprocal and mutually advantageous arrangements’. It is not characterised by the great flexibility of its provisions, nor does it contain a system of derogations based on the principle of mutual understanding. Its dispute settlement system does not envisage a negotiating phase of implementation. Moreover, one could hardly discern a well-settled tendency of the States parties to the Convention to consider its provisions unfit to be applied to domestic legal relations by virtue of their nature and content. Quite to the contrary, the Convention has been for years peacefully applied in the municipal systems of States parties to it, including a conspicuous number of EC Member States.

Although reciprocity did play a role in the process of negotiation of the Convention on the Law of the Sea, it is much more difficult to maintain that it constitutes the legal condition for determining the content of the obligations flowing from the Convention.

Presumably because of this difficulty, the Court abstained from using the reciprocity argument towards the Convention and reached its conclusion following a different path. Intertanko does not contain any reference to reciprocity nor to the enforcement machinery of the Convention. Rather, the argumentative itinerary of the Court hinges on the inter-statal character of the substantive obligations of the Convention. This can be easily seen in para. 59, where the Court observed that “[i]ndividuals are in principle not granted independent rights and freedoms by virtue of UNCLOS. In particular, they can enjoy the freedom of navigation only if they establish a close connection between their ship and a State which grants its nationality to the ship and becomes the ship’s flag State”. By referring to the legal rights and duties of individuals, the Court thus clearly had in mind the rights and duties granted to individuals under international law.

Having found that no provision of the Convention is meant to govern individual conduct, the Court was thus led to observe, in para. 64, “that UNCLOS
does not establish rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States, irrespective of the attitude of the ship’s flag State”. In para. 65, therefore, the Court came to the ultimate conclusion that “[i]t follows that the nature and the broad logic of UNCLOS prevents the Court from being able to assess the validity of a Community measure in the light of that Convention”.

In the articulation of this legal reasoning, therefore, the possibility for an international agreement to constitute a parameter of validity of EC secondary law is made dependent on whether the agreement creates substantive rights and duties for individuals in the international legal order.

***

Should the conclusions of *Intertanko* be confirmed by future case law, and should it develop into a fully-fledged legal doctrine, its consequences would be far-reaching and would entail a significant change in the traditional approach of the EC legal order towards international law. It would nonetheless be a very questionable doctrine. It does not seem reasonable to make the existence of the internal effects of international agreement conditional upon whether the agreement is intended to create rights and duties for individuals in the international legal order. Since, in the current state of development of international law, such a circumstance is very rare, this conclusion would be tantamount as to radically denying the relevance of international law in the EC legal order.

Even theoretically the shortcomings of this doctrine would be quite radical. In *Intertanko*, the Court seems to depart from its traditional case law, in which the lack of domestic remedies for breach of agreements is seen as justified in order to avoid interference with the remedies provided for in the international legal order. In contrast to that notion, the rationale of *Intertanko* seems to rely on substantive considerations. The Court effectively holds that agreements which do not aim to produce rights and duties for individuals in the international legal order are unfit to produce rights and duties for individuals in the EC legal order.

This way of thinking seems to call into question the classical methodology employed to determine the effect of international law within national systems, common, as said above, to both the dualistic and the monistic approach. That
methodology is based on the assumption that international obligations (which predominantly address States and impose upon them obligations enforceable in the international legal order) typically unfold their normative content in the domestic legal orders of the States concerned. It follows that the application of international obligations within domestic jurisdictions, either directly or through implementing legislation, is part of the process of implementation of the international obligations.

The idea that international law must produce in domestic jurisdictions the same effect produced in the international legal order seems to pervert the conception at the basis of the monistic approach, adopted by Art. 300, para. 7, of the EC Treaty. Monism by nature is not merely the reproduction of international rules within domestic jurisdiction but rather the possibility for international law to pierce the veil separating international law and domestic law and to introduce its normative content directly in the domestic legal orders. Otherwise, a distorted idea of monism – according to which international law must have the same content in both international and domestic legal orders - would end up with sealing off domestic legal orders from the influx of international law. By way of historical nemesis, not unprecedented in the vicissitudes of legal thought, the application of the monistic approach would produce a result which the most tenacious followers of the dualistic approach could not even dare to imagine.

* * *

In the end, the reading of Intertanko leaves a certain uneasiness in the reader attentive to theoretical and systemic implications. The tone and the content of the case seem to indicate unequivocally that a dramatic uprising is taking place in the jurisprudential conception of the relationship between EC law and international law, already deeply shaken by the WTO saga. On the other hand, arguments for a less dramatic conclusion are not lacking. Rather than laying the foundation of a new and quite adventurous doctrine on the relationship between international and domestic law, what the Court attempted to do in Intertanko was merely to find arguments for avoiding an unwanted consequence: the use of the UN Convention on the Law of the Sea as a parameter for the validity of EC secondary law.

At the present moment, and waiting for more case law, which could dispel the theoretical restlessness caused by a difficult decision, Intertanko constitutes an example of how the incautious use of complex and sophisticated concepts in order to
solve practical problems can generate legal doctrines whose ultimate effects are hard to predict.