GIVING INDIRECT EFFECT TO INTERNATIONAL LAW WITHIN THE EU LEGAL ORDER: THE DOCTRINE OF CONSISTENT INTERPRETATION

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1. Introduction

Although the clear-cut affirmation of an automatic incorporation of international law into the EU legal order and the consequent submission that international law is binding upon EU institutions and on its Member States,[1] the ECJ shows a significant reluctance in ensuring compliance with international law. In particular, the judicial recalcitrance concerns the direct effect determination of international obligations and, consequently, their invocability within the internal legal order.

The Luxembourg approach in determining the effects of the WTO obligations within the Union is well-known.[2] Despite some contrary indicators given by the ECJ in the last years,[3] this way of looking at the effects of international law represents a constant feature of the aptitude of the Court *vis-à-vis* the EU international obligations (in particular, as far as treaty law is concerned).[4] This is clearly visible in the *Intertanko* case, decided in 2008, where the Grand Chamber of the

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[1] Note that the primacy of international rules over both the Member States and the EU institutions laid down in Article 216 (2) TFEU is limited, in its own terms, to treaty law. An analysis of the ECJ's case-law concerning international law is contained in the chapter by C. Eckes, 'International Law as Law of the EU: The Role of the European Court of Justice', in this volume.

[2] For a general survey of the case-law see P. Koutrakos, *EU International Relations Law*, Oxford/Portland: Hart Publishing, 2006, p. 251, and C. Dordi (Ed.), *The Absence of Direct Effect of WTO in the EC and in Other Countries*, Torino: Giappichelli, 2010.

[3] See in particular ECJ, Case C-377/08 *Netherlands v. European Parliament and Council* [2001] ECR I-7079, para. 54.

[4] See B.I. Bonafé, 'Direct Effect of International Agreements in the EU Legal Order: Does it Depend on the Existence of an International Dispute Settlement Mechanism?', in this volume. In effect, while decisions stemming from international agreements are treated by the ECJ in the same way as treaties, the jurisprudence concerning the enforcement of customary international law avoids the direct effect determination of the norms: A. Gianelli, *Unione Europea e diritto internazionale*, Torino: Giappichelli, 2004, p. 188; and P. Koutrakos, *op. cit.*, at 248–249.

Court approached the challenging of an EU Directive in the light of the United Nations Convention on the Law of the Sea (UNCLOS) and held that the nature and logic of the Convention prevented the Court from assessing the validity of the internal measure.[5]

Even if the direct effect determination enables the Court to limit the legal effects of international law within the EU legal order, the lack of direct effect does not completely exclude – according to the Court – the taking into account of international rules. More precisely, as the Court made clear in its rulings, EU secondary law shall be interpreted in the light of the wording and the purpose of EU international obligations. Then, instead of accepting that international obligations may produce in any case direct effects within the EU legal order, the Court, by way of a conforming (or harmonious) interpretation, guarantees a general indirect effect to such rules.

What is also noteworthy is the fact that the judicial attitude seems to permit the recourse to the consistent interpretation also with regard to international rules that are not binding upon the Union and that, consequently, do not form, according to the ECJ's case-law,[6] an integral part of its legal order. In effect, as one commentator put it, the duty of consistent interpretation "does not really distinguish a binding norm from a non-binding one".[7] As a result, the doctrine of consistent interpretation also guarantees an open attitude of the ECJ towards the

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[5] ECJ, Case C-308/06 *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v. Secretary of State for Transport* [2008] ECR I-4057, para. 65. In this respect, see G. Gaja and A. Adinolfi, *Introduzione al diritto dell'Unione europea*, Bari/Rome: Laterza, 2010, p. 238; P. Eeckhout, 'Case C-308/06, *The Queen on the application of Intertanko and Others v Secretary of State for Transport*, judgment of the Court of Justice (Grand Chamber) of 3 June 2008, nyr', in *Common Market Law Review*, 2009, p. 2041, at 2055. M. Mendez, 'The Legal Effect of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques', in *European Journal of International Law*, 2010, p. 83, stresses, at 97, that the judicial approach to the WTO obligations remains anyway a case apart in the light of the "very atypical Community Agreement for which the conventional judicial edifice is inappropriate". For the view that in *Intertanko* the determination of the effects of UNCLOS exclusively insists on the argument that only States are in principle granted independent rights and freedoms by virtue of UNCLOS, see E. Cannizzaro, 'Il diritto internazionale nell'ordinamento giuridico comunitario: il contributo della sentenza *Intertanko*', in *Il Diritto dell'Unione Europea*, 2008, p. 645, at 649–650; and his contribution in this volume.

[6] See ECJ, Case 181/73 *Haegeman v. Belgium* [1974] ECR 449, para. 5.

[7] J.-W. van Rossem, 'Interaction Between EU Law and International Law in the Light of *Intertanko* and *Kadi*: The Dilemma of Norms Binding the Member States but not the Community', in *Netherlands Yearbook of International Law*, 2009, p. 183, at 208.