

THE NEO-MONISM OF THE EUROPEAN LEGAL ORDER

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1. INTRODUCTORY REMARKS

After more than a century of debate, the effect of international law within internal legal orders still remains one of the most fascinating topics for international lawyers. It touches upon grandiose issues such as the unity of the legal experience and the diversity of its individual components. Yet, in spite of the intellectual efforts of generations of scholars, it still appears fraught with mysteries from both theoretical and practical viewpoints.

In the preceding Chapter,¹ the adequacy of the two contradictory theories of monism and dualism was widely discussed, with particular reference to the effect of international law within the European legal order. Even in general terms, the idea of developing a coherent and all-embracing theoretical model, capable of explaining all the complexities and the infinite theoretical and practical issues arising from this troubled relationship seems more and more questionable. To contemporary eyes, this idea seems but the relic of a different era.

In the present paper, neither the adequacy of monism or dualism nor the existence of an alternative model will be discussed in full. The aim of this paper is more modest by far. I propose to analyse the process of transformation which led the European legal order from the approach originally adopted, deeply influenced by monist theories, to a new approach which, for brevity, will be referred to as 'neo-monism'. In this approach, which does not yet have the dignity of a full-fledged legal doctrine, notions and techniques of monism are employed not so much in order to secure compliance with international engagements

* I was finalising this work for publication when I learned of the dramatic death of a friend of my youth, Nadia Capogreco. I wish to dedicate these pages to her memory.

¹ See the inspired analysis of R.A. Wessel, 'Reconsidering the Relationship between International and EU Law: Towards a Content-Based Approach', which opens this book, *supra*, Chapter 1.

but rather to enhance the autonomy of the internal legal experience *vis-à-vis* international law.

In the first part of the paper, an attempt will be made to set out the steps of this process of transformation, mainly through an analysis of the case law of the European Court of Justice (ECJ). In the second part, the systemic implication of this approach will be examined with a view to seeing whether we are merely in the presence of a distorted use of legal notions and concepts, or whether this approach might open a new direction for legal research.

2. THE EFFECT OF INTERNATIONAL AGREEMENTS WITHIN THE EUROPEAN LEGAL ORDER: A GENERAL APPRAISAL

It is a common assumption that international law enjoys a privileged status within the European legal order. According to Article 216 (2), of the Treaty on the Functioning of the European Union (“TFEU”), which substantially reproduces a provision present in the original 1957 Treaty on the European Community (“TEC”), “agreements concluded by the Union are binding upon the institutions of the Union and on its Member States”.²

In the prevailing view of scholars, and in the case law of the ECJ, Article 216 (2) expresses the general philosophy of the European legal order, which is deeply inspired by a monist conception: international law is part of European Union law without need for any special act of incorporation, and it prevails over inconsistent European legislation.³ Direct effect and supremacy of international law within domestic law are the traditional hallmarks of the classical monist theories.

² See P. Pescatore, *L'ordre juridique des Communautés européennes. Etude des sources du droit communautaire*, Liège: Presses Universitaires, 1973, p. 151; C. Timmermans, ‘The EU and Public International Law’, in *European Foreign Affairs Review*, 1999, p. 181.

³ For a variety of views, see recently A. Rosas, ‘The European Court of Justice and Public international Law’, in J. Wouters, A. Nollkaemper and E. de Wet (Eds.), *The Europeanisation of International Law*, The Hague: T.M.C. Asser Press, 2008, p. 71; R. Holdgaard, ‘Principles of Reception of International Law in Community Law’, in *Yearbook of European Law*, 2006, p. 263; P. Eeckhout, *External Relations of the European Union. Legal and Constitutional Foundations*, Oxford: Oxford University Press, 2004, p. 277; A. Peters, ‘The Position of International Law within the European Community Legal Order’, in *German Yearbook of International Law*, 1997, p. 9.

This conception unfolds, although not univocally, along a line of famous cases. The first is *Haegemann*. In this case, the ECJ was asked to determine whether provisions of an association agreement between the Community and Greece could be the object of a reference for preliminary ruling under Article 177 TEC (now Article 267 TFEU). In order to answer the question, the Court first had to determine whether that agreement might be considered a Community act within the meaning of that provision. The answer of the Court was straightforward: “The provisions of the agreement, from the coming into force thereof, form an integral part of Community law [...] Within the framework of this law, the Court accordingly has jurisdiction to give preliminary rulings concerning the interpretation of this agreement”.⁴

The line of reasoning in *Haegemann* revolves around a syllogism. First comes the contention that international law is, from the time of its entry into force, part of Community (or now, ‘Union’) law. Being part of Community law, the consequence seems to flow logically that international law must be ascertained and enforced through the system of secondary rules, within the Community legal order, which assist with the implementation of ‘ordinary’ Community law.⁵ By so saying, the ECJ seemed to accept the classical scheme, which tends to regard domestic implementation as a means for securing compliance with international obligations and for enhancing its effectiveness.

Ten years later, in *Kupferberg*,⁶ the ECJ took an analogous yet more cautious approach. In that case, we find once again the statement that international rule forms an integral part of Community law. The Court then added what appears to be the logical corollary of this statement, namely that each Institution of the Community, and each of the Member States, has the duty to exercise its powers in order to secure compliance with the agreement.⁷ However, *Kupferberg* also contains another holding which seems to point in a slightly diverging direction:

⁴ ECJ, Case 181/73 *Haegeman v. Belgium* [1973] ECR 449.

⁵ To some extent, the syllogism of the ECJ may be analogised to the famous syllogism of the US Supreme Court in *The Paquete Habana*, 175 U.S. 677 (1900): after affirming emphatically that “International law is part of our law”, the Supreme Court went on to say that it “must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination”.

⁶ ECJ, Case 104/81 *Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A.* [1982] ECR 3641.

⁷ *Ibid.*, paras 11–14.

“the effects within the Community of provisions of an agreement concluded by the Community with a non-member country may not be determined without taking account of the international origin of the provisions in question”.⁸

A reading of *Kupferberg* thus leaves the impression of a contamination of the ‘pure’ monist approach of *Haegemann*. The domestic effect of international law must be determined on the basis of a dual standard. On the one hand, international law is part of domestic law and must be enforced through the domestic system of remedies; on the other hand, its effect must be determined taking into account its international origin.

Only some years later, in *Demirel*, did this impression boil down to a general statement, which was from then on to remain as a general clause in the ECJ’s case law: “[a] provision in an agreement concluded by the community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure”.⁹ Thus, on the one hand the Court seems to assume that the domestic effect of international law provisions must be determined by applying the same standard used for domestic provisions, namely clarity and precision of its wording. On the other hand, the Court concludes that the domestic effect of an international provision depends also on the international nature of that provision and on the purpose assigned to it in the international legal order from which it emanates.¹⁰

Throughout its entire development, the ECJ’s case law has been swinging from one to the other of these two apparently contradictory

⁸ This statement was reiterated on a number of occasions. See ECJ, Joined cases C-120/06 P and C-121/06 P *Fabbrica italiana accumulatori motocarri Montecchio SpA (FLAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC, Giorgio Fedon & Figli SpA and Fedon America, Inc. v. Council and Commission* [2008] ECR I-6513. See also CFI, Case T-367/03 *Yedaş Tarım ve Otomotiv Sanayi ve Ticaret AŞ v. Council and Commission* [2006] ECR II-873.

⁹ ECJ, Case 12/86 *Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR 3719, para. 14.

¹⁰ See I. Cheyne, ‘Haegeman, Demirel and their Progeny’, in A. Dashwood and C. Hillion (Eds.), *The General Law of E.C. External Relations*, London: Sweet & Maxwell, 2000, p. 20 ff.

and perhaps also antithetical tests, in search of an appropriate balance between the two.¹¹

3. THE NATURE AND PURPOSE OF INTERNATIONAL PROVISIONS: CATEGORISING INTERNATIONAL PROVISIONS?

I propose now to follow more closely the approach of the ECJ for determining the effect of international law within the European order. To this end, I will examine the three elements considered by the ECJ in the context of its assessment of the nature and purpose of international provisions: namely reciprocity, the existence of a dispute settlement mechanism, and the existence of individual rights.

3.1 *Reciprocity*

This subject is well known in all its manifold aspects, and it hardly needs to be dealt with in detail. The concept of reciprocity, in the present context, was fashioned by the ECJ in the GATT 1947 saga, and it was further fine-tuned in the Court's more recent case law concerning the domestic effect of WTO agreements.

The benchmark on this point is again *Kupferberg*. In that case, the ECJ rejected an argument put forward by several Member States and found that reciprocity is irrelevant in determining the domestic effect of an agreement. The famous passage reads:

although each contracting party is responsible for executing fully the commitments which it has undertaken it is nevertheless free to determine the legal means appropriate for attaining that end in its legal system unless the agreement, interpreted in the light of its subject-matter and purpose, itself specifies those means. Subject to that reservation the fact that the courts of one of the parties consider that certain of the stipulations in the agreement are of direct application whereas the courts of the other party do not recognize such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement.¹²

¹¹ See A. Nollkaemper, 'The Direct Effect of Public International Law', in J.M. Prinssen and A. Schrauwen (Eds.), *Direct Effect. Rethinking a Classic of EC Legal Doctrine*, Groningen: Europa Law Publishing, 2002, p. 180; P.-J. Kuijper, 'Epilogue: Symbiosis?', *ibid.*, p. 253.

¹² *Supra* note 6, para. 18.

This statement seems to be at variance with what the Court had said, a few years earlier, in *International Fruit*.¹³ In that case, the ECJ had considered that the GATT 1947 was based on the principle of negotiations undertaken on the basis of “reciprocal and mutually advantageous arrangements”.¹⁴ On the basis of this holding, the ECJ concluded that GATT was incapable of being directly applicable, i.e. it was incapable of conferring on citizens of the Member States rights that would be enforceable before a Community court.¹⁵

There seems to be a deep cleavage, therefore, between the approaches followed in *International Fruit* and in *Kupferberg*. In this latter case, the Court seems to remain within the classical perspective, where domestic integration of international law has the function of securing the implementation of international obligations. In this perspective, it is naturally assumed that each party to a treaty has an unfettered right to choose the means to execute its commitments.

A different perspective is the one advocated in *International Fruit*. In this case the main concern of the Court is avoid using domestic implementation to bestow additional guarantees upon international rules and, by so doing, to alter the normative balance among their parties in international law.

Subsequent case law shows that this is the path along which the ECJ was heading. In *Portugal v. Council of the EU*,¹⁶ the ECJ, after recalling its precedent in *Kupferberg*,¹⁷ fashioned the distinction between the two approaches in the following terms:

the lack of reciprocity in that regard on the part of the Community’s trading partners, in relation to the WTO agreements which are based on ‘reciprocal and mutually advantageous arrangements’ and which must ipso facto be distinguished from agreements concluded by the Community... may lead to disuniform application of the WTO rules.

¹³ ECJ, Joined cases 21 to 24/72 *International Fruit Company NV v. Produktschap voor Groenten en Fruit* [1972] ECR 1219.

¹⁴ *Ibid.*, para. 21.

¹⁵ See E.-U. Petersmann, ‘Applicability of GATT by the Court of Justice of the European Communities’, in *Common Market Law Review*, 1983, pp. 425–426.

¹⁶ ECJ, Case C-149/96 *Portugal v. Council of the EU* [1999] ECR I-8395.

¹⁷ *Ibid.*, para. 44: “Admittedly, the fact that the courts of one of the parties consider that some of the provisions of the agreement concluded by the Community are of direct application whereas the courts of the other party do not recognise such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement”.

To accept that the role of ensuring that Community law complies with those rules devolves directly on the Community judicature would deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners.¹⁸

Even more explicitly, the Court reiterated its view in *Van Parys*¹⁹ that:

to accept that the Community Courts have the direct responsibility for ensuring that Community law complies with the WTO rules would deprive the Community's legislative or executive bodies of the discretion which the equivalent bodies of the Community's commercial partners enjoy. It is not in dispute that some of the contracting parties, which are amongst the most important commercial partners of the Community, have concluded from the subject-matter and purpose of the WTO agreements that they are not among the rules applicable by their courts when reviewing the legality of their rules of domestic law. Such lack of reciprocity, if admitted, would risk introducing an anomaly in the application of the WTO rules.²⁰

Assessed against the classical conceptual background, this argument appears widely controversial.²¹ The search for reciprocal advantages

¹⁸ According to the Opinion of AG Poiares Maduro of 20 February 2008, in ECJ, Joined cases C-120/06 P and C-121/06 P *FIAMM*, *supra* note 8, the lack of direct effect or an international rule does not necessarily entail that this rule does not form part of the European legal order: "the fact that WTO law cannot be relied upon before a court does not mean that it does not form part of the Community legal system. From this point of view, the formulation used by the Court in *Portugal v. Council* is undoubtedly unfortunate. It nurtures a belief that an international agreement does not form part of the body of Community legality, whereas it is merely a question of the provision's enforceability, of the jurisdiction of the courts to take cognisance of it". On this basis the AG builds his conclusion that individuals damaged as a result of a breach of WTO rules by the Community are entitled to seek compensation. However, this assumption appears difficult to reconcile with the syllogism developed by the ECJ in *Haegemann*, according to which the implementation of international law *qua* law of the EU is assisted by the same system of remedies which protects, under similar conditions, individuals rights that are purely of domestic origin.

¹⁹ ECJ, Case C-377/02 *NV Firma Leon Van Parys v. Belgisch Interventie- en Restitutiebureau* [2005] ECR I-1465.

²⁰ *Ibid.*, para. 53.

²¹ For some critical remarks, see J. Klabbbers, 'International Law in Community Law: the Law and Politics of Direct Effect', in *Yearbook of European Law*, 2001-2002, p. 263; T. Cottier, 'A Theory of Direct Effect in Global Law', in A. von Bogdandy, P. Mavroidis and Y. Mény (Eds.), *European Integration and International Co-ordination: Studies in Transnational Economic Law in Honour of Claus Dieter Ehlermann*, The Hague: Kluwer Law International, 2002, p. 99; P. Eeckhout, 'Judicial Enforcement of WTO Law in the European Union - Some Further Reflections', in *Journal of International Economic Law*, 2002, p. 91.

does not only represent the constant underlying motive for *concluding* most international agreements; it also represents the most powerful factor which induces the parties to *abide by* their international commitments. If one excludes the possibility of direct effect of agreements establishing reciprocal obligations, this would automatically deprive the system of domestic implementation of much of its effect.

The merits of this argument can be perceived in a different perspective, according to which reciprocity is an element that moulds the respective obligations of the parties. In such a system, reciprocity ceases to be regarded, statically, as a mechanism of compliance. It rather seems to constitute a part of the legal commitments entered into; the precise content of those commitments is determined dynamically on the basis of a continuous mutual adjustment between the positions of the parties. By referring to direct effect as an “anomaly in the application of WTO rules”,²² the ECJ seems to indicate that the content of WTO rules must be determined not only on the basis of the substantive provisions but also on the basis of its particular process of law making, based on that process of continuous adjustment of the respective positions of the parties.

3.2 *Dispute Settlement Mechanism*

In the classical approach, which considers that direct effect of international rules follows from the clarity and precision of their wording, the existence, within a treaty, of a judicial, or quasi-judicial, mechanism of disputes settlement should be irrelevant.²³ Since judicial adjudication of disputes spells out the content of the substantive provisions and contributes to their clarity and precision, it could even be regarded as an element pleading in *favour* of direct effect. Moreover, the existence of a dispute settlement mechanism should indicate that the obligations deriving from a treaty are unconditional and, therefore, enforceable. One might conclude that treaties that provide for an effective dispute settlement mechanism can be expected to be highly effective on the

²² ECJ, Case C-377/02 *Van Parys*, *supra* note 19, para. 53.

²³ See the contribution by 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.

international plane. This, in turn, should dissipate possible doubts about the domestic implementation of its provisions.²⁴

It might come as a surprise, therefore, that domestic courts have sometimes referred to the existence of a dispute settlement system as an element that supports the view that a treaty should have no direct effect within the domestic legal order. In this line of reasoning, domestic enforcement of treaty provision could constitute an undue interference with the functioning of such a system.²⁵

In the case law of the ECJ, reference to the inclusion of dispute settlement mechanisms in international agreements is not necessarily decisive. Indeed, in a consistent line of cases, the ECJ treated certain agreements as having direct effect without paying attention to the fact that they included various forms of dispute settlement mechanisms. A clear example of this tendency is *Chiquita*,²⁶ where the Court attributed direct effect to the provisions of the Fourth ACP-EEC Convention even though the Convention laid down a special procedure for settling disputes between the contracting parties.

In *Polydor*,²⁷ the ECJ went a step further by saying that certain provisions of the agreement on free trade between the Community and Portugal did not have the same effect as provisions of the founding Treaty in spite of the similarity of the phraseology employed. Among the arguments supporting this conclusion, the Court also mentioned the fact that “the instruments which the Community has at its disposal in order to achieve the uniform application of Community law [...] have no equivalent in the context of the relations between the Community and Portugal”.

²⁴ See, in particular, J. Groux, ‘L’“invocabilité en justice” des accords internationaux des Communautés européennes’, in *Revue trimestrielle de droit européen*, 1983, p. 203.

²⁵ A recent example of this reasoning might be inferred from the *Medellin* case (*Medellin v. Texas*, 552 U.S. 491 (2008)), where the US Supreme Court referred to Art. 94 of the UN Charter, which confers to the Security Council the power to enforce ICJ decisions, as an argument for declining to recognise direct effect of these decisions. Since the drafters of the Charter vested the Security Council with the power to enforce ICJ decisions – the Supreme Court reasoned – they implicitly wished to link the enforcement of these decisions to the frame of the competence assigned to that organ.

²⁶ ECJ, Case C-469/93 *Amministrazione delle Finanze dello Stato v. Chiquita Italia* [1995] ECR I-4533.

²⁷ ECJ, Case 270/80 *Polydor Ltd. v. Harlequin Record Shops Ltd.* [1982] ECR 329.

In other cases, however, the Court took a different approach. In *International Fruit*,²⁸ the flexibility of the provisions concerning the settlement of disputes between the contracting parties, which was substantially based on international negotiations, was considered among the factors which led the Court to conclude, as already noted, that the GATT 1947 was incapable of conferring on citizens of the Member States rights that could be enforced by Community courts.

This holding might have engendered the idea that a different conclusion could be reached with regard to the WTO agreements, which in contrast to the GATT 1947 includes, as is well known, a compulsory mechanism of dispute settlement. However, those who might have hoped for an evolution in the Court's approach in light of the new institutional arrangements were disappointed. In *Portugal v. Council*,²⁹ although it recognised that this new dispute settlement mechanism differed in many respects from the preceding system, the Court still maintained that the existence of this mechanism revealed the desire of the parties to keep the process of enforcement of WTO rules at the interstate level. This conclusion was fashioned in the following terms:

to require [domestic] courts to refrain from applying rules of domestic law which are inconsistent with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 of that memorandum of reaching a negotiated settlement, even on a temporary basis.³⁰

Even more expressly, in *Omega Air*,³¹ the Court seemed to argue that the dispute settlement mechanism set up by a treaty constitutes the *proper forum* for the parties to litigate their claims. This is particularly so when the mechanism leaves a certain room for manoeuvre for the party who prefer to compensate the breach instead of providing for restitution in kind.

resolution of disputes concerning WTO law is based, in part, on negotiations between the contracting parties. Withdrawal of unlawful measures is indeed the solution recommended by WTO law, but other solutions

²⁸ *Supra* note 13.

²⁹ *Supra* note 16.

³⁰ *Ibid.*, para. 40.

³¹ ECJ, Case C-27/00 *R. v. Secretary of State for the Environment, Transport and the Regions, ex parte Omega Air Limited* [2002] ECR I-2569.

are also authorised, for example settlement, payment of compensation or suspension of concessions.³²

This argument appears highly questionable. In particular, it seems improper to construe Article 22 of the Dispute Settlement Understanding (DSU) as a rule which attenuates the binding effect of the decisions of the Dispute Settlement Body (DSB). Rather, Article 22 seems to be aimed at giving an additional guarantee to the party injured by a breach in those cases in which the wrongdoer does not respect the obligation to give full effect to a DSB decision.

The argument would be even more controversial if it were fashioned in general terms. It tends to convey the idea that international law could be enforced by domestic courts only if it were assisted by a secondary mechanism of enforcement capable of securing, at the international level, effective compliance with the primary rules breached. However, this conclusion is quite unconvincing, as it mistakes the legally binding effect of international decisions with the factual difficulty of enforcing them.³³

A more moderate conclusion would be that the ECJ might have regarded Article 22 of the DSU as a special secondary rule on responsibility which gives to the author of a breach the option to maintain in force, temporarily, measures that are inconsistent with the obligations flowing from primary rules, and to offer compensation for the wrongdoing. This would entail that, in the normative sub-system of the WTO, the normative balance brought about by the application of this special secondary rule is considered temporarily as equivalent to the original balance altered by the breach.³⁴

3.3 *Individual Rights*

In its most recent case law, the ECJ seems to turn to a different test for assessing whether international rules have direct effect. This consists

³² *Ibid.*, para. 89.

³³ See G.A. Zonnekeyn, 'The Status of Adopted Panel and Appellate Body Reports in the European Court of Justice and the European Court of First Instance. The Banana Experience', in *Journal of World Trade*, 2000, p. 93; P. Eeckhout, 'The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems', in *Common Market Law Review*, 1997, p. 11.

³⁴ For a more in-depth analysis, see A. Tancredi, 'On the Absence of Direct Effect of the WTO Dispute Settlement Body's Decisions in the EU Legal Order', in this volume.

of determining whether international provisions are designed to create individual rights.³⁵ This argument was first set out in *Biret*.³⁶ In these cases, both the CFI and the ECJ considered that direct effect was inconsistent with the nature and purpose of agreements that were designed “to govern relations between States or regional organisations for economic integration and not to protect individuals”.³⁷

However, the value of this precedent is diminished by two observations. First, the case was prompted by an action for damages. In this context, the ECJ had already developed the idea that a distinction must be drawn between Community rules designed to protect individuals, whose violation entitles the individuals damaged to ask for compensation, and Community rules designed to govern inter-institutional relations, whose violation entails the invalidity of inferior law but does not entitle individuals to compensation. Arguably, the Court simply extended this approach to international provisions. Secondly, the ambiguous phrasing in *Biret* does not allow one to identify a clear standard for determining whether an agreement is designed “to protect individuals”. The holding in *Biret* is logically consistent with the classical view that agreements designed in principle to create interstate legal relations might nonetheless create rights and duties for individuals within domestic orders if their provisions are sufficiently clear and precise. Things would be radically different if this passage indicated that only agreements which establish rights and duties for individuals within the international legal order could establish individual rights enforceable before domestic courts.

³⁵ It is remarkable that the ECJ abstained from using this argument in its previous case law. See P. Eeckhout, *External Relations of the European Union. Legal and Constitutional Foundations, cit.*, at 314, according to whom “the suggestion here is not that the Court should become much more restrictive in its direct-effect analysis, by confining direct effect to provisions which expressly address the position of individuals. Rather, this is an extra dimension of the direct-effect issue, which should also be taken into account. It is for example remarkable that the case law on the lack of direct effect of WTO law in no way concentrates on the issue of rights, whereas it would have been relatively straightforward for the Court to establish that the WTO Agreement is not intended to confer rights”.

³⁶ CFI, Case T-174/00 *Biret International SA v. [2002] ECR II-00017*; CFI, Case T-210/00 *Etablissements Biret et Cie SA v. Council [2002] ECR II-47*; ECJ, Case C-93/02 P *Biret International SA v. Council [2003] ECR I-10497*; ECJ, Case C-94/02 P *Établissements Biret et Cie SA v. Council [2003] ECR I-10565*.

³⁷ *Ibid.*, para. 72.

The first conception emerges from *Simutenkov*.³⁸ In that case the ECJ seemed to revert to the classical approach by accepting that the effect of an agreement at the international level does not necessarily coincide with its effect within domestic law. The relevant passage reads: “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”.³⁹

A similar approach was also taken in *IATA*.⁴⁰ In that case, the ECJ ruled on the validity of an EC regulation that was allegedly in conflict with Articles 19, 22 and 29 of the Montreal Convention. However, it took great care in pointing out that these rules were meant to give effect to the purpose of the agreement, which was to protect “*the interests of consumers in international carriage by air* [...] It is in the light of this objective that the scope which the authors of the Convention intended to give to Articles 19, 22 and 29 is to be assessed”.⁴¹ In this passage the Court seems to maintain that direct effect of these provisions is a necessary means for attaining the result prescribed by the Convention, which entails the grant of rights to individuals.

This approach changed radically in *Intertanko*.⁴² In this case, the Court was asked to assess the validity of an EC directive that allegedly

³⁸ ECJ, Case C-265/03 *Simutenkov v. Ministerio de Educacion y Cultura and Others* [2005] I-02579.

³⁹ *Ibid.*, para. 28. See also ECJ, Case C-18/90 *National Employment Office v. B. Kziber* [1991] ECR I-199. However, in ECJ, Case C-377/02 *Van Parys*, *supra* note 19, and, more recently, in ECJ, Case C-160/09 *Ioannis Katsivardas v. Ýpourgos Oikonomikon*, n.y.r., the Court ruled out the direct effect of certain cooperation agreements extending the most favoured nation clause envisaged in Article I (1), of the GATT to the member countries of the *Cartagena* Agreement. In the reasoning of the Court, these agreements were drafted with a view to extending to these countries “the benefit of the most-favoured-nation clause in Article I (1) of the GATT, without altering its scope”. Therefore, they could not have, within the EU legal order, more extensive effects than those granted to the GATT.

⁴⁰ ECJ, Case C-344/04 *The Queen, on the application of International Air Transport Association (IATA) and European Low Fares Airline Association (ELFAA) v. Department for Transport* [2006] ECR I-403.

⁴¹ *Ibid.*, para. 41.

⁴² 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. See P. Eeckhout, Case C-308/06, in *Common Market Law Review*, 2009, p. 2041; 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, pp. 213–214.

conflicted with the UN Convention of the Law of the Sea. The Court came to the conclusion that the Convention, in its entirety, has no effect within the EC legal order. It might appear that *Intertanko* 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. The insistence on the similarities or, conversely, the dissimilarities between the two situations was generally the argument employed in order to ask the Court to accept or to reject the case.⁴³ However, a careful reading of the judgment reveals that the argument employed by the ECJ in *Intertanko* differs from those employed in the WTO cases.

This is probably due to the difficulty of extending to the UN Convention on the Law of the Sea the arguments traditionally employed by the ECJ in order to exclude a domestic effect of WTO rules. 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”.⁴⁴ 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 for years been peacefully applied in the municipal systems of States parties to it, including in a number of EU Member States. Although reciprocity did play a role in the process of negotiation of the Convention on the Law of the Sea, in comparison with the WTO Agreements it is much more difficult to maintain that it constitutes the legal condition for determining the content of the obligations that flow from the Convention.

Presumably because of this difficulty, the Court abstained from using the reciprocity argument towards the UNCLOS and reached its conclusion on a different itinerary. *Intertanko* does not contain any

⁴³ On the difference between the WTO agreements and the UNCLOS, see Kokott, AG, who concluded that “[t]he Convention on the Law of the Sea...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” (Opinion of AG Kokott delivered on 20 November 2007 in ECJ, Case C-308/06 *Intertanko*, *supra* note 42, para. 59).

⁴⁴ ECJ, Joined cases 21 to 24/72 *International Fruit*, *supra* note 13, para. 21.

reference either to reciprocity or to the enforcement machinery of the Convention. Rather, the argument of the Court hinges on the interstate character of its substantive obligations. This can be easily seen in para. 59, where the Court observed that “individuals 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 was meant to govern individual conduct, the Court was 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 ultimately came to the 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/EU secondary law is made dependent on whether the agreement creates substantive rights and duties for individuals in the international legal order.

Should this idea be generalised, it would definitively mark a significant change of the conceptual framework concerning relations between international law and domestic law. Theoretically, the judgment is based on the premise that the effect of provisions of an agreement within the European legal order must coincide with its effect under international law. This conclusion may appear to be in accordance with the need to respect the international origin of treaty-based rights. However, beyond the theoretical suggestion, its practical effect would be to nullify the domestic effect of international law. Agreements which confer rights to individuals enforceable in the international legal order are notoriously rare.⁴⁵

⁴⁵ E. Cannizzaro, ‘Il diritto internazionale nell’ordinamento giuridico comunitario: il contributo della sentenza *Intertanko*’, in *Il Diritto dell’Unione Europea*, 2008, p. 651.

4. APPRAISING THE ECJ'S CASE LAW: TOWARDS A NEO-MONIST CONCEPTION?

Assessed against the background of the classical approach, the ECJ's case law conveys a sense of disconcert. It appears to deviate significantly from the founding Treaties, which were inspired by a sense of openness towards international law. The weight of consideration of judicial policy appears considerable and its logical coherence is precarious.⁴⁶ Not surprisingly, this case law has been received with ample criticism by legal scholarship.⁴⁷

However, comprehensively considered, the attitude adopted by the ECJ towards international law seems to highlight the insufficiency of the traditional conceptualization of the relations between international rules and the EU legal order.⁴⁸ The classical conception tends to consider international rules within domestic legal orders as a de-structured set of rules, uprooted from their international legal environment and transplanted in another one, where they are administered and enforced through a different set of remedies. By contrast, the approach emerging from the ECJ's case law tends to look at international law as a *structured* set of rules or even a full-fledged and fully effective normative system, with its own set of remedies.

The theoretical value of this new approach thus seems to reside primarily in the consideration of international law not so much in terms of its abstract legal value or as a set of isolated substantive rules, but rather as the final product of a complex process of law-making and law-determining. It is this final product, and not so much the legal provisions considered as abstract sources of law, which must be implemented and enforced through internal remedies.⁴⁹

⁴⁶ See G. Gaja, 'Trends in Judicial Activism and Judicial Self-Restraint Relating to Community Agreements', in E. Cannizzaro (Ed.), *The European Union as an Actor in International Relations*, The Hague/Boston/London: Kluwer Law International, 2002, p. 117.

⁴⁷ See E.-U. Petersmann, 'The EEC as a GATT Member', in M. Hilf, F.G. Jacobs and E.-U. Petersmann (Eds.), *The European Community and GATT*, Deventer: Kluwer, 1986, p. 23; M. Maresceau, 'The GATT in the Case Law of the European Court of Justice', *ibid.*, p. 107.

⁴⁸ See J. Klabbers, 'International Law in Community Law: The Law and Policy of Direct Effect', in *Yearbook of European Law*, 2002, p. 263.

⁴⁹ Starting from this assumption, it might be surprising to read the ECJ holding in *Kadi I* (ECJ, Joined cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-6351):

In this light, there seems to be a common thread in the various cases decided by the ECJ, which consists of the tendency to consider international rules not in isolation but rather as part of a more complex legal *system*. Ultimately, it is this legal system with its idiosyncratic dynamics – and not a series of isolated substantive rules, decontextualized from their own legal order of origin – that becomes part of the European ‘domestic’ law. Since this approach seems inspired by the need to respect the comprehensiveness and consistency of international law in the process of domestic implementation, it seems appropriate to characterise it as ‘neo-monism’.

“it is not [...] for the Community judicature, under the exclusive jurisdiction provided for by Article 220 EC, to review the lawfulness of such a resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with *jus cogens*”. Indeed, a pre-condition for domestic courts ascertaining and administering international law within domestic law is that that law must be validly produced within its own legal order of origin. In this sense, the ECJ holding, which excludes the power of domestic courts to pass over the validity of SC resolutions, appears to be inspired by a radical dualism. For various views on this issue, see the Symposium on the *Kadi* judgment in *Yearbook of European Law*, 2009, with writings by S. Poli and M. Tzanu, M. Cremona, E. Cannizzaro, A. Ciampi, G. Gaja, N. Lavranos, R. Pavoni, M. Scheinin, Ch. Tomuschat and F. Fabbrini. I have articulated my criticism towards the findings of the ECJ in my comment ‘Security Council Resolutions and EC Fundamental Rights: Some Remarks on the ECJ Decision in the *Kadi* Case’, *ibid.*, p. 593. In that contribution, I have argued that the autonomy of the EU legal order does not rule out the judicial review of international law in the light of higher international law standards. The philosophy of openness towards international law, which inspires the European legal order, should rather imply that the consistency of international law with fundamental principles be tested previously at the international level. Indeed, ordinary international law conflicting with higher international principles is null and void and therefore does not produce effects within domestic law.

This perspective is also interesting from a general perspective, as it tends to transform inter-systemic conflicts between international law and national orders into intra-systemic conflicts, where different domestic orders vie for exerting influence over the process of development of international fundamental values. Insofar as this process remains within the limits of the ordinary dialectic between legal orders – and insofar as it does not trespass the threshold separating such a virtuous competition from legal imperialism – I assume that both legal order can greatly benefit from it. In particular, the development of a sphere of fundamental values protecting human rights is arguably a crucial step in the process of evolution of the UN from a purely interstate legal system to one governing directly individual. For a more general consideration of this topic, see the contributions by A. Gattini, ‘Effects of Decisions of the UN Security Council in the EU Legal Order’ and P. Palchetti, ‘Judicial Review of the International Validity of UN Security Council Resolutions by the European Court of Justice’, in this volume.

The following section discusses further the consequences of the adoption of this scheme, with a view to seeing whether there is space for a balanced doctrine of neo-monism.

5. THE NEO-MONISM OF THE ECJ; A) USES...

This adjustment of the classical monism theories might produce significant beneficial effects in those legal orders which have adopted a monist approach. In particular, it can reduce some of the most disturbing implications traditionally connected with that approach and provide a flexible tool to domestic courts in order to mitigate some of the consequences deriving from the supremacy of international law. Furthermore, it can shape a conceptual framework in which emerging problems can find an appropriate solution.

First, neo-monism tends to consider more realistically the degree of normativity of international rules. The logic of domestic implementation would be subverted if the content of an international rule were determined in the abstract, on the basis of the content that lawyers can extract from a certain international provision. This logic would be much more respected by contextualizing international law within its own legal order, taking into account the capacity of international rules to govern the conduct of their addressees.

The case law of the ECJ on the WTO Agreements is an excellent example of this. The earlier case law of the Court, although in unclear terms, tended to convey the idea that the normative content of the provisions of these agreements could not be determined only on the basis of their wording, however clear and precise, but rather had to be revealed through an ongoing process of diplomatic intercourse. Domestic implementation, therefore, ought not to interfere with this idiosyncratic process of lawmaking. It should not bestow domestic normativity upon international rules but rather must respect their indeterminate nature and avoid superimposing judicial enforcement upon provisions whose content must still be determined at the international level.⁵⁰

⁵⁰ For an overall appraisal of this case law, see J.P. Kuijper and M. Bronckers, 'WTO Law in the European Court of Justice', in *Common Market Law Review*, 2005, p. 1313; F. Snyder, 'The Gatekeepers: the European Courts and WTO Law', in *Common Market Law Review*, 2003, p. 313; P. Eeckhout, 'The Domestic Legal Status of the WTO Agreement: Interconnecting Legal System', in *Common Market Law Review*, 1997, p. 11.

This process of contextualisation, according to which law must be determined comprehensively, in its original legal turf, does not necessarily lead to a curtailment of the effect of international rules within domestic law. Notable examples can be put forward of situations in which this contextualising process has the effect of strengthening the effect of international rules.

The first example comes from the vexed issue of the domestic effect of international judicial decisions. Such decisions normally assess the existence of a breach and indicate the consequences arising therefrom under the law of State responsibility. Therefore, international judicial decisions typically address the States parties to the proceedings and establish obligations in their mutual relations. However, they also materialise and give specific content to the secondary rules on State responsibility. International decisions can, for example, require a State to repeal internal laws and regulations in order to secure the obligation of non-repetition. Inasmuch as these legal obligations entail individual rights in domestic legal orders, these rights should be enforceable before domestic courts.

A second example, with some logical connection to the first, comes from domestic effect of treaties which include a dispute settlement mechanism. We have seen that, by itself, this element should not be considered for a reason to discard domestic judicial protection. One can hardly say, however, that the existence of a system of remedies at the international level is domestically irrelevant. It must be considered as part of the complex normative system to which domestic implementation refers. Appropriate forms of coordination between the international and the domestic system of law determining and law enforcing should be established accordingly.

A detailed analysis of these forms of coordination falls well outside the scope of the present paper. However, it might be useful to draw attention to one of them which is assuming increasing importance and which well exemplifies, in the opinion of the current writer, the contribution of neo-monism to the solution of complex problems in the relations between legal orders. The particular form of coordination to be highlighted here relates to the concept of equivalent protection.

This notion refers to the possibility for domestic courts to decline their jurisdiction in the presence of an external system of judicial protection featured by structural and functional analogies with the domestic one. This mechanism has been mainly developed out of a sense of expediency and judicial comity. However, it has theoretical

underpinnings in the systemic conception of the relations between legal orders. In this perspective, it is not unreasonable to assume that the domestic system of remedies should recognise the autonomy of the international system of remedies, and avoid superimposing its own system of judicial review, when the two systems are aimed at protecting analogous values, in the light of analogous legal standards and with an analogous degree of efficiency.

Finally, the contextualising approach could help making sense of the power of domestic courts to review the validity of international rules, in the light of higher international law. As seen above, the power of domestic courts to review the international validity of international law is logically grounded on the premise that international rules are not considered within domestic orders in isolation, but rather as part of a comprehensive legal order, which includes substantive higher principles whose breaches result in the invalidity of inferior law.

6. FOLLOWS: B) AND ABUSES

At its origin, monism was developed with a view to bridging the gap between international and domestic orders and re-establishing the unity of the legal experience, which had been altered by the conception of States as politically and legally self-contained units. Coherently with this view, the underlying philosophy of monism is the unitary nature of the law across the institutional boundaries which separate the internal and international legal dimensions. The technical instrument to achieve this philosophical project is the idea that the same provisions can create law in both legal orders – international obligations in the international legal order and internal rights and duties in the internal legal order of the State.

Classical monist theories thus seem to consider international law and internal law as two different phases in the process of a progressive ‘unfolding’ of law which pursues the ultimate goal of governing the community of humankind. In this conception, domestic remedies constitute a natural instrument at the disposal of international law for the achievement of this goal.

However, in some of its most radical expressions, the ECJ’s case law seems to deviate from these theoretical premises, and it seems rather to assume that the process of implementation must simply reproduce faithfully international law within the EU’s ‘domestic’ legal order, in

its normative content and with the degree of effectiveness which it possesses in its own legal order. This assumption thus paves the way for denying domestic effect to international law rules, either because they did not create individual rights within the international legal order or because they were not considered to be sufficiently effective in their own legal order.

These consequences are not a coherent development of a neo-monist perspectives, and rather they seem to constitute an abuse of this conceptual scheme. The idea that the content of international law can simply be reproduced within the domestic legal order is logically flawed and practically unfeasible. An obvious premise of legal logic is that, due to the structural differences among legal orders, similar or identical provisions produce different effects in different orders. A correct methodology aimed at preserving the nature of international law in its domestic implementation must necessarily be based on the assumption that international provisions (which predominantly address States and impose upon them obligations enforceable in the international legal order) also typically establish domestic rules enforceable the domestic legal orders of the States concerned. A neo-monist perspective should therefore not pursue the impossible objective of uniformity of international law across the boundaries separating legal orders.⁵¹

In particular, the idea underlying certain decisions of the ECJ according to which domestic implementation must not bestow upon international law more effectiveness than it possesses in its own legal order, appears misleading and must be rejected. Theoretically, this seems to blur the distinction between the process of international lawmaking and the process of law enforcement and, ultimately, it might turn out to deny the nature of international law as a full-fledged legal order. Indeed, it is one thing to assume that domestic implementation must reproduce internally the normative dynamics of international law; it is quite another to assume that domestic law must reproduce internally the degree of *effectiveness* of international rules.

The first conception is based on the idea that domestic legal orders constitute the natural legal environment in which the normative effect of international law, created and determined through the legal

⁵¹ On the increasing influence that international law has on the determination of direct effect, see A. Nollkaemper, 'The Direct Effect of Public International Law', *op. cit.*, at 180.

dynamics of its own legal order, should manifest itself. The second appears, rather, to be a misconception of the role of domestic implementation, considered as the reproduction, on the internal plane, of the brutal balance of power which characterises international relations. In practical terms, it amounts to vindicating the right of a State to violate international obligations by taking advantage of the weakness of the international system of remedies.⁵² In this second perspective, the structural differences between legal orders have the effect of preventing any possible interaction and, thus, of re-establishing a state of separation which the most fundamentalist followers of the dualistic theories would never have dared to imagine. The difference between normativity and effectiveness thus seems to be the focal point for understanding and accepting neo-monism as a suitable conceptual model in which the relations between international and domestic law can be appropriately framed.

These observations might arguably serve as a contribution toward the building of a balanced modern doctrine of neo-monism. Neo-monism, by its nature, is not merely the reproduction of international law, with its original contents and its degree of effectiveness, within domestic jurisdictions, but rather the possibility for international law to pierce the veil separating international law and domestic law and to introduce its normative dynamics directly into domestic legal orders. Otherwise, a distorted idea of monism would end up sealing off domestic legal orders from a beneficial 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, as already noted, would exceed the imaginings of even the most tenacious followers of the dualistic approach.

7. CONCLUDING REMARKS

Respect and promotion of international law is one of the principles inspiring the external action of the EU, as expressly stated in Articles 5

⁵² See, *inter alia*, P. Eeckhout, *External Relations of the European Union. Legal and Constitutional Foundations*, *cit.*, at 306 according to whom "[T]he Court's reference to reciprocity and its desire not to interfere with the EU's political institutions may be looked at as overt judicial policy-making". Similarly, see S. Griller, 'Judicial Enforceability of WTO Law in the European Union: Annotation to Case C-149/96, *Portugal v. Council*', in *Journal of International Economic Law*, 2000, p. 441. Griller argues that the Court is simply giving a licence to the EU institutions to violate WTO law, and that this runs counter to Article 300 (7) TEC (now Art. 216 (2) TFEU).

and 21, paras. 1 and 2, of the Treaty on European Union. Arguably, the principle of respect and strict observance of international law also constitutes an inspiring principle for the EU's domestic legal order. Indeed, the European legal order is among the *völkerrechtsfreundlichsten* contemporary legal orders. As seen above, international law is an integral part of EU law and, if compatible with the founding Treaties, it prevails over inconsistent legislation.

The founding Treaties thus seem to enshrine an idealistic view of international law, conceived of as the realm of universal values and legality. This is, *hélas*, only a part of the reality. A more realistic view tends to regard international law as the arena where states vie to affirm their selfish interests. Understandably, the judicial wisdom of the ECJ is equally inspired by these two competing visions. While upholding the *Völkerrechtsfreundlichkeit* emerging from the founding Treaties, therefore, the ECJ has also tended to leave the door open for a more realistic conception of international law and to secure a certain margin of discretion to political institutions in their international intercourse.

It is in this complex frame that the case law of the ECJ should be explained. In other words, the adoption in the founding Treaties of a monist model can explain, in a systemic assessment, the tendency of the ECJ case law to use tools and instruments designed to mitigate the apparent excesses produced by the concomitance of direct effect and primacy of international law. Paradoxically, therefore, neo-monism was conceived of and prospered as a reaction against the systemic effect of classical monist theories.

However, by doing so, the ECJ has also radically transformed the methodology adopted by the Treaties in order to deal with conflicts between international and domestic law. Whereas the Treaties adopted a formal hierarchical method of conflicts settling based on the primacy of international law, the judicial management of conflict is based on a more flexible and nuanced approach in which considerations of policy play a great role. Not surprisingly, recent legal analysis tends to consider the ECJ as the gatekeeper of the domestic legal order,⁵³ and as being entitled to determine the outcome of the conflict on a case-by-case basis.

In turn, the judicial policy of the ECJ has gradually evolved into something very akin to a full-fledged legal doctrine which, for the sake

⁵³ See the path breaking analysis of J. Klabbers, 'International Law in Community Law: the Law and Politics of Direct Effect', *cit.*

of brevity, was referred to in this paper by the term neo-monism. In the particular legal order of the Union, neo-monism seems to have found appropriate soil on which to take root and flourish. Its underlying idea – that the process of implementation must not consider international rules in isolation but rather as part of a comprehensive legal system – seems to be particularly apt to cure some of the unbalances of a monist system and to offer a more flexible frame of reference for the relations between international law and EU law.

However, the reasons of political expediency prompted a further development, which raises the risk of upsetting the philosophy of the relations between international law and domestic EU law and ultimately of asserting the right of the EU to violate international law at will in order to pursue its own interests in the international arena.

By injecting a dose of realism into the idealistic view embedded in the Treaties, the ECJ deserves credit for starting a process of theoretical revision of the old schemes. Hopefully, this will lead to a development of more adequate models for the relations between international law and domestic law. Over-realistic misconceptions about political interests asserting themselves in the international arena may endanger the entire theoretical edifice and may pervert the wise aspiration of the EU to present itself as a promoter of international law around the globe.