Comment on Dorota Leczykiewicz - Common Commercial Policy: The Expanding Competence of the European Union in the Area of International Trade

By Karen Kaiser *

A. Introduction

I would like to elaborate on some of the elements of unity and differentiation with regard to the Union's common commercial policy under the Constitutional Treaty. I do not want to touch upon the elements of differentiation that are already part of the common commercial policy under the EC Treaty (EC) and would remain so under the Constitutional Treaty, such as the special so-called 133-committee[1] and the principle of unanimous voting in cases where agreements include provisions for which unanimity is required for the adoption of internal rules.[2] However, I try to find out whether the Constitutional Treaty introduces new elements of differentiation.

B. Elements of Unity

I would like to distinguish between elements of internal and external unity. As understood here, internal unity reflects the unity of the Union as a political community *vis-à-vis* its Member States, illustrated most prominently by the "Community method,"[3] while external unity reflects the unity of the Union *vis-à-vis* third countries.

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[1] *Compare,* Treaty Establishing the European Community, art. 133 (3) (2), Nov. 10, 1997, 1997 O.J. (C 340) [hereinafter EC] and Treaty Establishing a Constitution for Europe, art. III-315 (3) (3), Dec. 16, 2004, 2004 O.J. (C310) [hereinafter Constitutional Treaty].

[2] *Compare,* EC, art. 133 (5) (2), and (3) and Constitutional Treaty, art. III-315 (4) and (2).

[3] *See* Bast, in this volume.

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I. Internal Unity: Parliamentary Consent to International Agreements

Dorota Leczykiewicz has pointed out one element of internal unity: the regular involvement of the European Parliament within the context of the common commercial policy, foreseen for the first time under the Constitutional Treaty. Hereunder, the common commercial policy would be implemented by means of European laws, which are adopted according to the ordinary legislative, i.e. co-decision, procedure.

However, unlike to Dorota Leczykiewicz, I think that the common commercial policy has not arrived at the "Community method" in only this respect. Parliamentary consent would not only be required where European laws are adopted, but also where international agreements are concluded. According to Art. III-325 (6) (a) of the Constitutional Treaty, "agreements covering fields to which [...] the ordinary legislative procedure applies" would require parliamentary consent. As has been shown, the common commercial policy is a field to which the ordinary legislative procedure applies. An exception applicable to agreements under Art. III-315 (3) of the Constitutional Treaty has not been provided for.[4]

This would not only strengthen democratic control within the Union, but also within the World Trade Organization (WTO). Two different suggestions for strengthening democratic control within the WTO have been discussed so far: establishing a standing Parliamentary Assembly with consultative power and, alternatively, convening regular inter-parliamentary meetings through existing structures such as the International Parliamentary Union. However, it is doubtful that even the second, less improbable suggestion can be realized in the near future.

Members of the US Congress have only reluctantly taken part in past inter-parliamentary meetings and, in view of the authority of the US Congress over US trade policy;[5] it is unlikely that their participation will ever increase. The reason is that the members of the US Congress do not need inter-parliamentary meetings to exercise democratic control. Inter-parliamentary meetings could even diminish US power, whereas the meetings would enhance the power of the members of national parliaments who have no say regarding the trade policy of their countries.[6] It can be argued that, just like the US Congress, the European Parliament would no longer

[4] *Compare,* EC, art. 300 (3).

[5] U.S. Const. art. I, § 8.

[6] Gregory Shaffer, *Parliamentary Oversight of WTO Rulemaking*, 7 JOURNAL OF INTERNATIONAL ECONOMIC LAW 629, 630 (2004).

need inter-parliamentary meetings to exercise democratic control should the Constitutional Treaty enter into force and put the European Parliament within the Union on a similar powerful footing as the US Congress within the US.

II. External Unity: Exclusivity of the Extended Common Commercial Policy

Dorota Leczykiewicz has also alluded to an element of external unity: the exclusivity of the common commercial policy that would be extended to trade in services and the commercial aspects of intellectual property as well as to foreign direct investment. Current Art. 133 (5) 4 EC is interpreted as giving the Community only a concurrent competence in the fields of trade in services and the commercial aspects of intellectual property.[7]

Although exclusivity is not the standard type of competence of the "Community method," and therefore rather an element of differentiation, the exclusivity of the extended common commercial policy can be seen as an element of external unity in so far as the number of mixed agreements – at least in the field of international economic law – would decrease. Mixed agreements are an inevitable corollary of the limited and normally non-exclusive scope of the Community's competence. When the content of a particular agreement goes beyond the Community's competence, the Community's action will have to be complemented by that of the member states.

Although persistent criticism has been voiced against the practice of concluding mixed agreements "as a way of whittling down systematically the personality and capacity of the Community as a representative of the collective interest,"[8] the European Court of Justice (ECJ) has come to recognize the position of mixed agreements on several occasions, most prominently with regard to the General Agreement on Trade in Services (GATS)[9] and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),[10] both of 15 April 1994.

GATS and TRIPS, however, would no longer be considered to be mixed agreements, should the Constitutional Treaty enter into force. Both agreements

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[7] PIET EECKHOUT, EXTERNAL RELATIONS OF THE EUROPEAN UNION: LEGAL AND CONSTITUTIONAL FOUNDATIONS 51 (2004); Christoph Herrmann, *Common Commercial Policy After Nice: Sisyphus Would Have Done a Better Job*, 39 COMMON MARKET LAW REVIEW 7, 19 (2002).

[8] Pierre Pescatore, *Opinion 1/94 on "Conclusion" of the WTO Agreement: Is There an Escape from a Programmed Disaster?*, 36 COMMON MARKET LAW REVIEW 387, 388 (1999).

[9] 1994 O.J. (L 336) 190.

[10] 1994 O.J. (L 336) 213.

would no longer fall partly within the competence of the European Community or within the competence of the Member States, but fully within the competence of the Union for the extended common commercial policy. This would put an end to discussion of the delimitation of competences in the abstract, undermining external unity, and would assure the unitary representation of interests within the WTO for the first time.

Admittedly, according to the ECJ's case law, Community institutions and Member States have the duty to cooperate within the context of mixed agreements at present.[11] The duty of cooperation is said to flow from the requirement of unity in the international representation of the Community and applies to the processes of negotiation, conclusion and fulfillment of the commitments entered into in mixed agreements. The duty of cooperation is both a mutual concept because the European Community and the Member States must co-operate with each other, and a flexible concept because the European Community and the Member States are allowed to reach a practical solution tailored to the facts of the particular case. So far, so good.

In cases of emergency, however, the duty of cooperation does not assure the unitary representation of interests. Having its legal basis in Article 10 EC, the duty is only an obligation of conduct, i.e. an obligation to endeavor to or to strive to reach a certain result, but not an obligation of result, i.e. an obligation to attain a precise result.[12] In other words, Community institutions and Member States must cooperate, but this cooperation does not necessarily have to lead to the unitary representation of interests.

C. Element of Differentiation: Inconsistency between Internal and External Competences?

I will now reach a possible new element of differentiation with regard to the common commercial policy, the inconsistency between internal and external competences. Dorota Leczykiewicz has also mentioned that, under the Constitutional Treaty, the Union would have a set of unitary principles, values, and objectives guiding its external policy-making. Art. III-292 (3) of the Constitutional Treaty introduces the principle of consistency: consistency between the different areas of external action on the one hand and, more importantly, consistency between the Union's external and internal action on the other hand.

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[11] *See, e.g.*, Case 1/94, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property (re WTO), 1994 E.C.R. I-5267, para. 108.

[12] KAREN KAISER, GEISTIGES EIGENTUM UND GEMEINSCHAFTSRECHT 168 (2004).

A possible element of differentiation relating to this principle could be seen in Art. III-315 (6) of the Constitutional Treaty, which would limit the exercise of the competences of the common commercial policy. It reads:

> The exercise of the competences conferred by this Article in the field of common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonization of legislative or regulatory provisions of Member States insofar as the Constitution excludes such harmonization.

Dorota Leczykiewicz has interpreted this ambiguous paragraph in line with the principle of consistency between the Union's external and internal action. According to her interpretation, the Union would not have the competence to conclude international agreements in the field of the common commercial policy which cover aspects on which the Union does not have the power to legislate internally. However, Art. III-315 (6) could also be interpreted differently; namely, in such a way that it would only limit the Union's competence to implement international agreements in the field of common commercial policy, but not its competence to conclude them.[13] Otherwise, one could argue, the exclusivity of the extended common commercial policy would not become effective. Since the external competence would extend beyond the scope of the internal competence, this interpretation would, however, deviate from the principle of consistency between the Union's external and internal action.

Until now, one of the major arguments put forth against extending external competences beyond the scope of internal competences is the effect such extensions would have on the division of powers between the Community and the Member States. The legislative discretion left to the Member States, when implementing Union agreements, would be considerably small. One has to ask oneself whether the aim of allowing the Union to act effectively is to be given precedence over the conflicting aim of preserving Member States' powers.

The Union has been compared with federal systems where the inconsistency between external and internal powers is nothing unusual.[14] However, the national

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[13] *See, e.g.,* Jacques H. J. Bourgeois, *Mixed Agreements: A New Approach?, in* LA COMMUNAUTE EUROPEENNE ET LES ACCORDS MIXTES 83, 89 (Jacques H. J. Bourgeois, et al. eds., 1997) and, more recently, Markus Krajewski, *External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy*, 42 COMMON MARKET LAW REVIEW 91, 116 (2005).

[14] Bourgeois, *supra* note 13, at 91 (Belgium). Krajewski, s*upra* note 13, at 117 (Germany and Switzerland).

legal orders of the Member States are not as homogeneous as the legal orders of the sub-entities of federal systems. In the field of intellectual property law for example, Ireland and the United Kingdom follow an economically-oriented copyright approach, while the continental Member States follow an approach based on the author's human rights. If the external competence of the Union would extend beyond the scope of the internal competence, who would take care that the Union agreements can actually be implemented into the national legal orders of the Member States?

Eventually, the interpretation that is in line with the principle of consistency between the Union's external and internal action would not render the exclusivity of the extended common commercial policy as ineffective as it seems at first glance. The exclusivity of the extended common commercial policy would no longer depend on the nature of the Union's internal competences. Most of the Union's internal competences, in particular the competence for the internal market, are concurrent. Exclusivity, as such, would be an improvement.