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Will EU Member States Play Any Role at the WTO after the EU Reform Treaty?

A. INTRODUCTION

In this paper, I address the issue of European Union (EU) Member States' participation in the World Trade Organization (WTO) after the EU Reform Treaty enters into force. In Giuliano Amato's view, no member of the EU is powerful enough to be taken seriously on its own in the international arena. Thus, in order to play an effective role in the world, the EU must join together. In this sense, coordinating its foreign trade policies and streamlining the process was one of Amato's major ambitions during the Convention on the Future of Europe.¹ If Amato's ambitions were to materialize, it would therefore be correct to interpret that EU Member States will no longer participate in the WTO forum because the EU Constitutional and Reform Treaties give exclusive competence to the EU in all areas of trade policy. However, how do we reconcile the fact that the EC and its Member States are currently members of the WTO, but after the EU Constitutional Treaty or its successor, the Reform Treaty, the EU will have exclusive competence in all trade matters? Aren't EU Member States sovereign states? Once the EU Reform Treaty is in force, how will the current polycephalous physiognomy of the EU in the WTO change? Will it make a difference? Will the EU become monocephalous in international trade negotiations, i.e., a sole trade actor? What will its implications be? Will EU Member States disappear from international trade *fora*? Is the EU becoming a federation of States when it comes to trade policy?

The Brussels European Council of June 2007 on a Reform Treaty addressed some of these issues by confirming what the EU Constitutional Treaty had already guaranteed, i.e., that the EU will never be a centralized all-powerful superstate by laying down:

- (a) The obligation to "respect the national identities of member states, inherent in their fundamental structures, political and constitutional;"²
- (b) The principle of conferred powers (whereby the Union has only those competences bestowed on it by the Member States);³

1 See conversation with Giuliano Amato in the framework of a seminar held at NYU Law School on March 26, 2002 under the title "The Futures of Europe: Ideas, Ideals and Those Who Make Them Happen", available at http://www.jeanmonnetprogram.org/seminar/02/Amato_script.rtf (last visited June 20, 2007).

2 See Presidency Conclusions of the Brussels European Council, 21-22 June 2007, 11177/07, CONCL 2, Annex I, p. 25.

- (c) The principles of subsidiarity and proportionality, limiting EU action to the minimum necessary to achieve the objectives agreed by EU Member States;⁴
- (d) The participation of EU Member States themselves in the decision-taking system of the Union; and
- (e) The principle of "unity in diversity."⁵

This paper is divided into three main sections. The first tackles the issue of the current WTO membership of the European Community (EC) and its Member States. Section two analyzes the Reform Treaty from a trade policy viewpoint and acknowledges that EU trade policy will become federal after the Reform Treaty. The third section before the conclusions provides an assessment of national parliaments' roles in EU trade policy decision-making. The paper concludes that the EU is not yet ready to bypass its Member States in all areas of trade regulation (notably trade issues related to immigration policy) and consequently EU Member States will continue to be present in the WTO after the Reform Treaty enters into force.

B. THE EUROPEAN COMMUNITY AND ITS MEMBER STATES AS MEMBERS OF THE GATT AND WTO

As indicated earlier, both the EC and the EU Member States are members of the WTO. The EC and its 27 Member States in the WTO is the largest and most comprehensive entity in this member-driven organization (i.e., the WTO), with decisions mainly taken on a consensus basis.⁶ While the 27 Member States coordinate their positions in Brussels and Geneva, the European Commission alone speaks for the EC and its Member States at almost all WTO meetings. When looking at the history of the EC external trade relations, one sees that the EC was not a contracting party to the General Agreement on Tariffs and Trade 1947 (GATT),⁷ although it actually participated in the negotiations of the

3 *Id.*, at p. 22.

4 *Id.*, at p. 17.

5 *Id.*, at p. 5.

6 In the WTO, voting consensus is achieved if no Member "present at the meeting when the decision is taken, formally objects." Each WTO Member has one vote, regardless of its economic clout and, among them, developing countries are increasingly making their presence felt. The WTO cannot therefore be hijacked by a group of countries or multinational companies.

7 Although the General Agreement on Tariffs and Trade, signed in 1947, was not formed at the Bretton Woods Conference that took place in Bretton Woods, New Hampshire (U.S.), in 1944, the participants at the conference contemplated the necessity of an international trade organization (ITO). The GATT, which set out a plan for economic recovery after World War II, by encouraging reduction in tariffs and other international trade barriers, is therefore one of the three mechanisms for global economic governance that comprise the Bretton Woods System, being the other two the International Monetary Fund (IMF) and the World Bank. The GATT was a collection of rules applied temporarily, without an institutional basis, unlike the WTO, which is a permanent organization with a permanent framework and its own Secretariat. For almost fifty years, the GATT focused exclusively on trade in goods, leaving tariffs and quotas aside in the various rounds of negotiations of the world trading system. The GATT set

Kennedy Round. European countries such as France, Belgium, Luxembourg, the Netherlands, and the United Kingdom (but not Italy and Germany) were founding contracting parties to GATT 1947. Subsequently, all EC Member States became full members of the GATT 1947. However, accession protocols and trade agreements negotiated in the GATT framework provided in their final provisions that the agreements were open for acceptance by contracting parties to the GATT and by the EC. In addition, the substantive and procedural provisions of these agreements treat the EC like a GATT contracting party.

Furthermore, since 1970, most agreements negotiated in the framework of GATT were accepted by the EC alone, without acceptance by EC Member States. The only exceptions are two agreements at the end of the Tokyo Round of multilateral trade negotiations and the part of the Tariff Protocol relating to European Coal and Steel Community (ECSC) products.⁸ The EC exercised all rights and fulfilled almost all obligations under GATT law in its own name like a GATT contracting party. Since the 1960s all GATT contracting parties had accepted the EC's exercise of rights and fulfillment of obligations and had asserted their own GATT rights, even in dispute settlement proceedings relating to measures of individual EU Member States, almost always against the EC.⁹ The EC had replaced, with the consent of other GATT contracting parties, its Member States as bearers of rights and obligations under the GATT. During the GATT, therefore, the EC was not a member although it acted as if it were one. Since the Uruguay Round, there has been a tendency to give the EC the right to act on behalf of all the Member States.

The Agreement establishing the WTO formally recognized the EC's membership alongside the EU Member States. The precise division of rights and responsibilities between the EC and its Member States was left open in the WTO Agreement, but was a matter of contention during the preparation of the WTO Agreement, and has remained so ever since.

The Diagnosis: Many EU Countries (and Voices?) in the WTO¹⁰

During the Uruguay Round of multilateral trade negotiations, the EC faced the issue of the scope of its authority under the EC Treaty in the field of international

the terms for countries who wanted to trade with each other. The GATT signatories were called "contracting parties." The Uruguay Round, completed in 1994, replaced the GATT with the WTO, a global trade agency with binding enforcements of comprehensive rules expanding beyond trade. The GATT has now become one of the eighteen agreements enforced by the WTO.

- 8 J. H. J. Bourgeois, "The Tokyo Round Agreements on Technical Barriers and on Government Procurement," 19 CML Rev 5, 22 (1982).
- 9 E.U. Petersmann, "The EEC as a GATT Member –Legal Conflicts between GATT law and European Community Law," in THE EUROPEAN COMMUNITY AND GATT 23 at 37-8 (M. Hilf, F.G. Jacobs & E.U. Petersmann, 1986).
- 10 M. Farrell, *EU and WTO Regulatory Frameworks: Complementarity or Competition?*, Kogan Page European Dossier Series, 1999; J. Sack, "The EC's Membership of International Organisations," 32 *Common Market Law Review* 1227 (1995); N. Reich, "Judge-made 'Europe a la carte': some remarks on recent conflicts between European and German constitutional law

economic relations, particularly with respect to trade in services¹¹ and intellectual property rights.¹² Negotiations were conducted according to the normal procedures for GATT negotiations, albeit that the European Commission negotiated on behalf of both the EC and its Member States.¹³ The assumption throughout was that EU Member States would continue to be members of the world trading system (and therefore WTO Members), and would not be completely replaced by the EC. With regard to the latter point, two constraints of a political nature led the European Commission not to stand up and claim exclusive EC membership of the new organization. The first constraint stemmed from a discussion at a meeting of the EU Council in November 1993; this was after the Maastricht Treaty had entered into effect with some difficulty and so it was thought wise not to push this issue at that stage. The second political constraint was that around this time, the Council had not yet approved the Uruguay Round and Sir Leon Brittan (the EU trade commissioner at the time) thought it was preferable not to put another contentious issue on the table.¹⁴ The result was the adoption of Article XI of the Marrakesh Agreement establishing the WTO, which states that the contracting parties to GATT 1947 and the European Communities shall become original Members of the WTO.¹⁵

This dual WTO membership of the EC and its Member States may be a handicap for both the EC and its Member States.¹⁶ The European Court of Justice had stated that the division of powers between the EC and its Member States was a domestic question in which third parties have no need to intervene.¹⁷ In the minutes of the Council meeting of 7-8 March 1994, the Commission relied on this argument by saying that: "The Final Act ... and the Agreements thereto fall

provoked by the bananas litigation", *European Journal of International Law* 103 (1996); P.J. Kuijper, "The Conclusion and Implementation of the Uruguay Round Results by the EC," 6 *European Journal of International Law*, 222 (1995); U. Everling, "Will Europe Slip on Bananas? The Bananas judgments of the ECJ and national courts," 33 *Common Market Law Review* 401 (1996); T. Cottier & K. N. Schefer, "The Relationship Between World Trade Organization Law, National and Regional Law," 1 *Journal of International Economic Law* 83 (1998); P. Pescatore, "Opinion 1/94 on 'Conclusion' of the WTO Agreement: is there an escape from a programmed disaster? 36 *Common Market Law Review* 387 (1999); S. Princen, "EC Compliance with WTO Law: The Interplay of Law and Politics," 15 *European Journal of International Law*, 555-74 (2004).

11 P. Mengozzi, "Trade in Services and Commercial Policy," in M. Maresceau (ed.), *The European Community's Commercial Policy after 1992*, pp. 223-47, (1993).

12 See I. Govaere, "Intellectual Property Protection and Commercial Policy," in M. Maresceau (ed.) *The European Community's Commercial Policy after 1992*, pp. 197-222, (1993); P. Demiray, "Intellectual Property and the External Power of the European Community: The New Dimension," 16 *Michigan Journal of International Law*, pp. 187-239, (1994).

13 P. van den Bossche, "The European Community and the Uruguay Round Agreements," in *IMPLEMENTING THE URUGUAY ROUND*, 23 at 56-7 (J. H. Jackson & A. Sykes eds., Clarendon Press, Oxford, 1997).

14 *Id.*, pp. 23-102.

15 World Trade Organization, *The Uruguay Round Results. The Legal Texts.* (Geneva, 1995), 6.

16 See generally M.E. Footer, "The EU and the WTO Global Trading System," in P.-H. Laurent & M. Maresceau (eds.), *The State of the European Union Vol. 4. Deepening and Widening*, Lynne Rienner Publishers, 1998.

17 Ruling 1/78, 1978 E.C.R. 2151, para. 35.

exclusively within the competence of the European Community."¹⁸ This argument does not allow the *a sensu contrario* inference that because the Member States and the EC are formally WTO Members, it is irrelevant for the division of powers within the EC legal system. On the contrary, the Agreement establishing the WTO and the agreements that form part of it were approved by the Council on behalf of the EC expressly "as regards matters within its competence."¹⁹ Therefore, there must be a plausible *raison d'être* for the joint WTO membership of the EC and its Member States also from the point of view of the division of powers within the EC.

C. THE REFORM TREATY

The ratification of the EU Constitutional Treaty failed. Although the EU Constitutional Treaty will not enter into force,²⁰ the European Council meeting of June 2007 agreed on a fall-back revision treaty²¹ which confirms much of the substance of the EU Constitutional Treaty,²² including the provisions concerning external trade.²³ Therefore, an examination of these external trade provisions is amply justified, since they are still likely to enter into force, possibly in 2009.²⁴

18 Cited in the ECJ Opinion 1/94, 1994 E.C.R. I-5267, para. 5.

19 Council Decision of 22 December 1998 (OJ 1994 L 336/1).

20 Before the European Council of June 2007, the idea was that when the EU Constitutional Treaty would enter into force, the EC Treaty, the EU Treaty, as well as acts and Treaties which have supplemented or amended them, would have been repealed, as laid down in the general and final provisions in Part IV of the EU Constitutional Treaty. The EU Constitutional Treaty was supposed to enter into force after ratification by all EU Member States. It was also provided for that the Union would succeed to all the rights and obligations, whether internal or resulting from international agreements, which arose before the entry into force of the EU Constitutional Treaty. The case-law of the ECJ would have been maintained as a source of Union law interpretation. As stated in Article I-6 of the EU Constitutional Treaty, the Constitution and law adopted by the Union's institutions in exercising competences conferred on it would have had primacy over the law of the Member States.

21 The Reform Treaty (also known as "future institutional settlement" or "legal basis," among others) is a proposed replacement for the EU Constitutional Treaty, since the latter failed ratification in France and the Netherlands in 2005, despite having been ratified by more than 15 EU Member States. An Intergovernmental Conference with a mandate to draft the treaty commenced work on 23 July 2007, after a political agreement was reached at the European Council meeting of 22-23 June 2007.

22 In sharp contrast to the abandoned EU Constitutional Treaty, which would have replaced all previous Treaties in a single text, there will be yet another layer of Treaty law with the Reform Treaty. The IGC mandate provides in its paragraph 22 that "a Protocol annexed to the Reform Treaty will amend the existing Protocols, as agreed in the 2004 IGC" (including the deletion of 10 of them). It is not clear at this stage to what extent, if at all, obsolete Treaty provisions will be abrogated. See Presidency Conclusions of the Brussels European Council, 21-22 June 2007, 11177/07, CONCL 2, Annex I, para. 22.

23 Presidency Conclusions of the Brussels European Council, 21-22 June 2007, 11177/07, CONCL 2.

24 Early analyses of the EU Constitutional Treaty can be found at M. Cremona, "The Draft Constitutional Treaty: External Relations and External Action," *Common Market Law Review*, 40: 1347-1366, 2003; G. de Búrca, "The EU Constitution: In Search of Europe's International

On 23 July 2007, the Portuguese Presidency launched an intergovernmental conference for the negotiation of a Reform Treaty, embracing a revised Treaty on European Union and a revised European Community Treaty, which will be called a Treaty on the Functioning of the European Union. Much if not all of the content of the new Treaties was agreed at the European Council meeting in Brussels on 21 and 22 June 2007. The Portuguese Presidency produced a draft text of the new Treaties on 23 July 2007, reflecting the agreement at the European Council in June 2007. In theory therefore, this intergovernmental conference should be less controversial than its predecessors which led to the Single European Act and the Maastricht, Amsterdam, and Nice Treaties, as well as the – now abandoned – EU Constitutional Treaty. The European Council decided that the intergovernmental conference would conclude before the end of 2007, so that the Reform Treaty could be ratified by all 27 national parliaments before the European Parliament elections in November 2009.

Unlike the abandoned EU Constitutional Treaty, the Reform Treaty will add to – but not replace or consolidate – the existing TEU and EC Treaty, including the Acts of Accession. On the positive side however, the Reform Treaty will be a substantive legal document, introducing significant legal, procedural, and institutional changes. It will draw heavily on the EU Constitutional Treaty.

Both the Convention on the Future of Europe²⁵ and, consequently, the EU Constitutional Treaty tried to improve the current situation on trade issues created by the Nice Treaty. The common commercial policy was a topic considered by the Convention on the Future of Europe, although it was clearly regarded as being less important than the common foreign and security policy. Article III-217 (1) of the Convention's draft Treaty stipulated that the "common commercial policy shall be conducted in the context of the principles and objectives of the Union's

Identity," Walter van Gerven lecture, Leuven, November 2004, where de Búrca argues that the external relations provisions of the EU Constitutional Treaty are the most innovative and important parts of the constitutional reform; B. de Witte, "The Constitutional Law of External Relations," in I. Pernice, & M. Poiares Maduro (eds.), *A Constitution for the European Union: First Comments on the 2003-Draft of the European Convention*, pp. 95-106, Nomos, 2003, available at <http://www.ecln.net/elements/conferences/booklisbon/dewitte.pdf> (last visited February 26, 2007).

25 The European Convention (also known as the Convention on the Future of Europe) was set up in December 2001. It had 105 members, representing the presidents or prime ministers of the EU Member States and candidate countries, their national parliaments, the European Parliament and the European Commission. Its Chairman was former French President Valéry Giscard d'Estaing. The Convention's job was to draw up a new Treaty that would set out clear rules for running the European Union after enlargement. It was, in effect, to be the Constitution of the EU. The Convention completed its work on 10 July 2003.

In order to reach a compromise for all parties present, the Convention consulted diverse groups of civil society (citizens, social partners, NGOs, economic sectors, *et cetera*) in various ways, of which the Forum on the Future of the Union was one. The Forum on the Future of the Union was created by the Convention Secretariat, with the technical assistance of the Commission, and received contributions from interested national and supranational organizations. Eight contact groups were set up to prepare auditions for the academic world, study groups, the social sector, the environment, human rights, development, regions and local authorities, culture, and citizens and the EU institutions. The Convention also created an online forum on the future of Europe to connect with civil society.

external action."²⁶ The main innovation introduced by the EU Constitutional Treaty was to specify the various types of competence that exist in the EU,²⁷ which has never been done in any of the previous Treaties.²⁸ Thus, the Union's external trade policy will become more federal,²⁹ but not necessarily more democratic, even if the European Parliament will have more powers in relation to the conclusion of international trade agreements. The empowerment of the European Parliament is outweighed by the fact that national parliaments will not take part in the ratification of trade agreements. Therefore, the Constitutional Treaty improved some aspects of the current EC's common commercial policy, but created new (unnecessary) problems.

I. The Union's Exclusive Competence In Trade Policy: Symptoms Of A Federation

Part I, Title III (Articles I-11 to I-18) of the Constitutional Treaty³⁰ dealt with the division of competences between the Union and the Member States.³¹ It presented a threefold classification: exclusive competence, shared competence, and supporting action.³² However, Title III did not seek to allocate competences

26 Draft Treaty establishing a Constitution for Europe, Brussels, 18 July 2003.

27 For an analysis of the division of competences in the EU by the EU Constitutional Treaty, see K. Lenaerts, "The Constitution for Europe: Fiction or Reality?" *Columbia Journal of European Law*, Vol. 11, No. 3, Summer 2005, pp. 465-479.

28 The ECJ, however, had already prefigured such a categorization in that it defines three types of competences: exclusive, shared, and complementary.

29 The general rule laid down in Article I-13 of the Constitutional Treaty is that the Union has exclusive competence for the conclusion of an international agreement in areas defined by European legislative acts, when the competence is necessary to enable the Union to exercise its internal competence, or affects an internal Union act. This praxis gives a federal approach to the Union in trade agreements.

30 Official Journal of the European Union C 310, Volume 47, 16 December 2004, available at <http://europa.eu.int/eur-lex/lex/JOhtml.do?uri=OJ:C:2004:310:SOM:EN:HTML> (last visited June 23, 2007).

31 For an analysis on competence and the EU Constitution, see S. Weatherill, "Competence," in B. de Witte, (ed.), *Ten Reflections on the Constitutional Treaty for Europe*, April 2003, pp. 45-66.

32 In relation to the exclusive competences of the Union, the EU can legislate alone and adopt legally binding acts in areas of exclusive competence (or authorize the Member States to do so). In areas of competences shared between the EU and its Member States, both can intervene. The areas of support, coordination or complimentary action open to the Union's competence are: industry; protection and improvement of human health; education, vocational training, youth and sport; tourism; administrative cooperation; culture; and civil protection. In these areas, the legally binding acts adopted by the Union (law, framework law, regulation and decision) on the basis of provisions specific to these areas, may not entail harmonization of Member States' laws or regulations. The Constitutional Treaty also recognizes the Union's competence for the definition and establishment of a common foreign and security policy, including the progressive definition of a common defense policy. However, the Constitutional Treaty does not give details about Member States' competences, in other words, areas in which the Union cannot intervene. That said, however, it is clear that "the rest" of competences which are omitted is Member States' competences.

in the way that a federal constitution might.³³ In this respect and same line of thought, the European Council of June 2007 proposed that the Reform Treaty add an additional declaration to emphasize the limitations on the EU's competences.³⁴ It is debatable how far Title III fulfils the demands of the Laeken European Council. The basic threefold classification may be controversial.³⁵

The Convention on the Future of Europe gave birth to the Constitutional Treaty.³⁶ The tasks of the Convention were set by the Laeken Declaration,³⁷ which asked the Convention to consider "how the division of competence can be made more transparent,"³⁸ "whether there needs to be any reorganization of competence"³⁹ as well as "how to ensure a redefined division of competence"⁴⁰ and to ensure European dynamism at the same time. As for the right balance between the maintenance of any "redefined division of competence" and ensuring that "the European dynamic does not come to a halt," one has to look at Article I-18 of the Constitutional Treaty, entitled "Flexibility clause."⁴¹

Article I-13 seeks to describe and define those areas where the Union has exclusive competence.⁴² This new Article may be controversial, especially for the relationship between the Union and the Member States, but also for the involvement of national parliaments in the control of Union legislation.⁴³ It deals with internal competence⁴⁴ and external competence.⁴⁵

33 See the German experience of a clear division of competences between the Federal level and the Länder level in Title VII of the Fundamental Law for the Federal Republic of Germany of May 23rd 1949, especially Articles 70-75.

34 Presidency Conclusions of the Brussels European Council, 21-22 June 2007, 11177/07, CONCL 2, Annex I, para. 19b, p. 20.

35 Article I-13 of the Constitutional Treaty.

36 For a chronological overview of the EU constitutional story, see A. Duff, *The Struggle for Europe's Constitution*, Federal Trust, 2006, chapter 1.

37 Laeken Declaration on the Future of the European Union of 15 December 2001, available at <http://european-convention.eu.int/pdf/LKNEN.pdf> (last visited June 30, 2007).

38 *Ibid.* at p. 3.

39 *Ibid.* at p. 4.

40 *Ibid.*

41 Flexibility clause (Article I-18 of the Constitutional Treaty) is the procedure which gives the Union new competences in areas unspecified by the Constitutional Treaty. If the Commission deems it necessary to conduct a new action in order to reach the Union's objectives, it makes a proposal to that effect to the EU Council, which acts unanimously after obtaining the approval of the Parliament. With respect to the control procedure of the subsidiarity principle, the EU Council may assign the necessary competences to the Union. The new competences cannot, however, entail harmonization of Member States' laws or regulations in cases where the EU Constitutional Treaty excludes such harmonization.

42 Cremona, however, has her doubts as to the desirability of the attempt to codify the ECJ's case-law on competence, especially external competence. See M. Cremona, "The Union's External Action: Constitutional Perspectives," in G.. Amato, H .Bribosia & B. de Witte (eds.), *Genèse et destinée de la Constitution européenne – Genesis and Destiny of the European Constitution*, Bruxelles: Bruylant, 2007, pp. 1173-1217, at 1183.

43 In fact, the Protocol on the role of the EU's national parliaments attempts to clarify relations between national representatives and the EU institutions. The protocol states that, when the European Council uses the procedure laid down in Article I-24 (4)(2) – meaning that when a Council Decision opens a new area to vote at qualified majority – the national parliaments

The Union is said to have exclusive competence to establish "the competition rules necessary for the functioning of the internal market," as well as in the areas of customs union, *common commercial policy*, monetary policy for the Member States which have adopted the Euro, and fisheries conservation.⁴⁶ The list in paragraph 1 of the areas of the Constitution in which the Union has exclusive competence goes beyond the present situation, as it includes the entire common commercial policy. Since Article I-13 does not define the scope of the common commercial policy, it is only by reading the relevant Article in Part III of the Constitutional Treaty that one discovers that the EU's exclusive competence is being extended compared to the Nice Treaty. This means that Article 133 (6), subparagraph (2) EC as modified by the Nice Treaty will have to be deleted if the EU Constitutional Treaty's successor enters into force, unless we give a different definition to the common commercial policy, far from the current one. The EU Constitutional Treaty would have repealed the existing treaties entirely, had it entered into force,⁴⁷ and would have therefore dealt with this problem. The implication of the Union's exclusive competence in trade policy is the assurance of the unitary representation of interests within the WTO for the first time in the EU. The proposed changes tend toward greater centralization of trade policy and toward reducing the EU Member States' influence in trade policy. After analyzing the new definition of the scope of EU trade policy by the Constitutional Treaty, more work may be needed to secure an adequate level of transparency required by the Laeken Declaration.

Antoniadis, however, has a more skeptical approach on the Constitutional Convention's proposals in this matter. According to him, the designation of the common commercial policy as an exclusive Union competence does not insulate the system from external threats, and thus perpetuates the constitutional conflicts between the EC and its Member States in trade policy with regard to services trade and the commercial aspects of intellectual property rights.⁴⁸ Why is this the case? Because EU Member States still retain competence to legislate over matters pertaining to the internal market. These measures are destined to

must be notified at least four months prior to the first vote in that area. The Constitutional Treaty also clarifies and organizes the national parliament's information mechanisms, which for a long time were informal or falling under the Amsterdam Protocol. The EU institutions are obliged to forward documents. For example, the Commission sends all its consultation documents, its annual legislative program or legislative proposals. It also contains a constitutional recognition of the Conference of bodies specialized in EC affairs, which is the link between national parliaments and the European Parliament.

44 Article I-13 (1).

45 Article I-13 (2).

46 Article I-13 (1) of the Constitutional Treaty.

47 This idea of repealing the existing EU treaties has been scrapped in favor of an "amending" treaty routine in the same format and style as previous treaties such as Maastricht, Amsterdam, and Nice. See Presidency Conclusions of the Brussels European Council, 21-22 June 2007, 11177/07, CONCL 2, Annex I, para. 1, p. 15.

48 A. Antoniadis, "The Participation of the European Community in the World Trade Organization: An External Look at European Union Constitution-Building," in T. Tridimas, & P. Nebbia (eds.), *European Union Law for the 21st Century: Rethinking the New Legal Order*, Vol. I, Oxford and Portland (Oregon), Hart Publishing, 2004, pp. 321-344, at 337.

have a trade impact and, more importantly, may be incompatible with the WTO Agreements. For example, let us think of a case involving national patent law which offers limited protection, thereby violates the TRIPS Agreement. Or a situation in which the law provides restrictions to the establishment of third country service providers, thereby violates the GATS.

Another reason that explains why the designation of the common commercial policy as an exclusive Union competence will not eliminate the constitutional conflicts between the EC and its Member States in trade policy with regard to services trade and the commercial aspects of intellectual property rights is the fact that EU Member States remain members of the WTO of their own right. This means that any other WTO member may request the establishment of a WTO Panel against any given EU Member State, and not against the EC (despite the exclusivity of the Union in the common commercial policy).⁴⁹ If that particular EU Member State is found in violation of WTO law, it must repeal its legislation. In some cases, it may then not have the competence to do so domestically; in other cases, in doing so, it may violate EC law, and be found between conflicting legal obligations.

II. The Constitutional And Reform Treaties And International Trade

The EU Constitutional Treaty proposes to transfer further competences in trade policy to the supranational level, which causes problems for national governments.⁵⁰ In practice, problems arise because there is no definition or scope of the common commercial policy in the EU Constitutional Treaty, as mentioned before. Therefore, if a given agreement is on a subject of national regulation, then it will have to be signed as a mixed agreement, even under the EU Constitutional Treaty.

Part III of the Constitutional Treaty (The Policies and Functioning of the Union) deals with the common commercial policy in Chapter III of Title V (The Union's External Action). Articles III-314 and 315 of the EU Constitutional Treaty deal with the common commercial policy and state that the common commercial policy includes "the conclusion of tariff and trade agreements *relating to trade in goods*

49 However, dispute settlement body practice in the WTO dictates that WTO Member States tend to bring actions against the EC, not against individual EU countries, even in areas of shared competence.

50 Authors that have previously analyzed the issue of supranationalism are, among others: P. Lindseth, "The Contradictions of Supranationalism: Administrative Governance and Constitutionalization in European Integration since the 1950s," *Loyola of Los Angeles Law Review*, Fall 2003, 363; P. Lindseth, "Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of The European Community," April 1999, 99 *Colum. L. Rev.* 628; D. Feddersen, "Papers from the Zavikon VI Conference (1994): Between Supranationalism and Regionalism--Economic and Political Trends of Federal Systems in the East and West," 1995 *St. Louis-Warsaw Transatlantic Law Journal* 103; D. Esty, "Good Governance at the Supranational Scale: Globalizing Administrative Law," 115 *Yale Law Journal* 1490, May 2006; J. Weiler, "The Community System: The Dual Character of Supranationalism," 1 *Y.B. European L.* 268 (F.G. Jacobs ed., 1981); E. O. Eriksen, "Deliberative Supranationalism in the EU," in *Democracy in the European Union: Integration through Deliberation?* (E. O. Eriksen & J. E. Fossum eds., 2000).

and services and the commercial aspects of intellectual property, foreign direct investment [...]" (paragraph 1).⁵¹ The text in italics was added to the text of the first paragraph of the current version of Article 133 EC as modified by the Nice Treaty. This makes it very clear that goods, services, intellectual property rights and investment would be covered by the common commercial policy and would therefore fall within the exclusive competence of the EU. Compared to the Nice Treaty, the scope would be increased in two respects: Firstly, the exception concerning cultural and audiovisual services, educational services, and social and human health services would be removed; and secondly, investment would be included in the scope of the common commercial policy.

Although the Union will gain a comprehensive external competence, covering thereby all fields of the world trading system, Article III-315 of the Constitutional Treaty does not provide the Union with full internal competence to adopt legislation to implement trade agreements. This might mean that the Union would need to coordinate with EU Member States before trade agreements can be concluded. This deficiency changes with Article 188c, paragraph 2 of the Reform Treaty, which gives the Parliament and Council the power to adopt the measures defining the framework for implementing the common commercial policy. Furthermore, the implementation of an international agreement by the Union will put political pressure on EU Member States to adopt that piece of legislation. Since EU Member States will only have a formal competence to implement international agreements, it will not leave them a large margin of discretion, though. Given that Article III-315 of the Constitution, as it stands, would remove any shared competence in EC trade policy (i.e., services and commercial aspects of intellectual property rights), it would exclude national parliaments from ratifying any future WTO agreements since these would no longer be mixed agreements. Therefore, EU national parliaments would see their influence on trade policy minimized. However, as we will see below, the cultural exception in services trade will remain, but in a different form, giving a veto power to EU Member States in specific circumstances (Article III-315-4(a) of the EU Constitutional Treaty).

In trade policy, the distinction between qualified majority⁵² and unanimity in the Council remains in the Constitutional Treaty, depending on the area of trade policy. The voting requirements of decision-making in the EU Council appear in Article III-315 (4) of the Constitutional Treaty. The idea behind the Convention was to provide for the use of qualified majority voting as a rule. However, the Convention version of Article III-315 did not specifically mention it since it established elsewhere in the EU Constitutional Treaty that qualified-majority voting (QMV) was to be the default rule for EU Council decision-making. This was rectified by adding a subparagraph in Article III-315 (4): "for the negotiation and

51 Article III-315 (1) of the Constitutional Treaty. Emphasis added by the author.

52 Article I-25 (1) of the Constitutional Treaty defines qualified majority:

1. A qualified majority shall be defined as at least 55 % of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union.

A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained.

conclusion of the agreements referred to in paragraph 3, the Council shall act by qualified majority." This seems to suggest that only the negotiation and conclusion of international agreements shall be subject to the majority rule, but not the adoption of unilateral actions and the implementation of agreements. Nevertheless, majority voting is already in the Nice Treaty the general rule for the exercise of powers in the field of commercial policy.⁵³ Thus, the proposed provision should be interpreted in such a way that majority voting applies as a general rule, subject to the exceptions provided for in subparagraphs 2 and 3 of Article III-315 (4). That said, a trade agreement which includes issues that require unanimity and qualified majority will be concluded by unanimous vote in the EU Council according to the *pastis*⁵⁴ principle.⁵⁵

Protection of National Interests?

More competences have been given to the EU in trade matters with the EU Constitutional Treaty. So does the EU Constitutional Treaty provide protection against liberalization when national interests are at stake? This element of the common commercial policy allows the Commission, after a qualified majority vote in the Council of Ministers, to make deals in the General Agreement on Trade in Services (GATS) and the WTO Agreement on what the Commission itself defines as the commercial aspects of these services. The commercial aspects of these services are not defined in the EU Constitutional Treaty or elsewhere. The implication of the fact that the commercial aspects of these services are not defined in the EU Constitutional Treaty or elsewhere is that an EU Member State would have to go to the European Court of Justice to challenge the Commission, arguing a defense that would have to show that the Commission was opening trade in non-commercial aspects of these services. This would be a very difficult legal argument to make, since many parts of these services can be broken into individual functions and contracted out. Examples of this can be seen in Ireland and the UK. In practice, the above-mentioned protection Articles are but a fig-leaf covering the overriding drive toward uniform liberalization of trade in services contained in the common commercial policy. If those who cite these Articles are serious about protecting health, education, and cultural and audiovisual services from commercialization, they should at least press for the

53 Article 133 (4) EC: "in exercising the powers conferred upon it by this Article, the Council shall act by qualified majority."

54 Pastis is an anise-flavored liqueur and aperitif from France, typically containing 40-45% alcohol by volume, although there exist alcohol-free varieties. Pastis is normally diluted with water before drinking (generally 5 volumes of water for 1 volume of pastis). The resulting decrease in alcohol percentage causes some of the constituents to become insoluble, which changes the liqueur's appearance from dark transparent yellow to milky soft yellow.

55 According to Lamy, "... under the Pastis principle, a little drop of unanimity can taint the entire glass of QMV [qualified majority vote] water," argued in a speech given in Brussels, "The Convention and trade policy: concrete steps to enhance the EU's international profile", available at http://europa.eu.int/comm/archives/commission_1999_2004/lamy/speeches_articles/spla146_en.htm (last visited January 8, 2007).

retention of the unanimity requirement in the Council of Ministers on decisions to open trade in these services.

With regard to culture and audiovisual services, Article III-315-4(a) of the EU Constitutional Treaty gives a veto on changes in the common commercial policy only in the "conclusion of agreements in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity." The same veto exception applies in the "conclusion of agreements in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them" (Article III-315-4(b) of the EU Constitutional Treaty). How such risk is defined, when it is defined, and by whom it is defined, is open to interpretation. Would a general opening up of the university sector, or of the primary school sector (as is happening in the UK), to unlimited competition pose a threat to the organization of education? For instance, in the case of Ireland, would the same levels of support to linguistically specific radio and TV – like TG4⁵⁶ and projects it supports – also have to be given to private commercial channels like TV3⁵⁷? How would defenders of linguistic diversity establish that certain trade agreements pose risks to culture? Who decides what constitutes a risk is not defined in the EU Constitutional Treaty, so those who might see their culture as being at risk will not have veto powers, although they can ask the European Court of Justice (ECJ) on this or any other point of legal interpretation. Certainly, EU Member States will continue to participate in the EU's trade policy whenever there is a national regulation sector that the European Commission neither controls nor knows about when it comes to national preoccupations. In practice, the European Court of Justice will determine which services should be protected and which should be commercialized.

A final comment can be made in relation to the emphasis made by Article III-292 of the EU Constitutional Treaty, which sets out a series of principles and objectives to guide all Union external action. This Article is reinforced by Article III-315 (1) of the EU Constitutional Treaty, which provides that the Union's common commercial policy shall be conducted in the context of those principles and objectives. This makes clear that the Union not only has a liberalization agenda, but that other objectives must be taken into account when formulating EU trade policy within the multilateral context.⁵⁸ It also makes clear that trade policy can be used in order to attain other non-economic objectives,⁵⁹ that links

56 TG4 is an Irish television channel aimed at Irish language speakers and established as a wholly owned subsidiary by Radio Telefis Eireann on October 31, 1996. It was known as Teilifís na Gaeilge or TnaG before a rebranding campaign in 1999.

57 TV3 Ireland is the sole commercial terrestrial television channel in the Republic of Ireland.

58 M. Cremona, "The Union's External Action: Constitutional Perspectives," in G. Amato, H. Bribosia & B. de Witte (eds.), *Genèse et destinée de la Constitution européenne – Genesis and Destiny of the European Constitution*, Bruxelles: Bruylant, 2007, pp. 1173-1217, at 1213.

59 Case C-62/88 *Greece v. Council* [1990] ECR 1527; Case 45/86 *Commission v. Council* [1987] ECR 1493.

can be made between trade policy and the Union's principles, and it provides a basis for the use of conditionality in trade policy.⁶⁰

D. WHAT ROLE FOR NATIONAL PARLIAMENTS?

Former EU commissioner for trade, Pascal Lamy, emphasized in 2001 the view that "all governments need to assure that transparency also starts, like they used to say about charity, at home. We need a closer involvement of parliaments in WTO matters."⁶¹ The European Parliament (EP) currently has no formal consultation on EC policy for trade agreements. Thus, the only parliamentary input on EC trade policy comes indirectly from EU national parliaments, which remain the sole source of democratic legitimacy. As witnessed from numerous demonstrations at EU summits in recent years, shifting primary rule-making power away from national legislative bodies to supranational institutions remains highly contested. So the Protocol on the role of national parliaments in the EU, which was annexed to the EC and EU Treaties in Amsterdam, has also been adapted to meet the need for greater transparency and more effective document transmission.

Furthermore, I would argue that national parliamentarians are the true democratic representatives of civil society, not unelected leaders of non-governmental organizations. National parliamentarians wish to capture a public space from anti-globalization civil-society activists. In the words of former WTO Director-General Mike Moore, "parliamentarians are the legitimate accountable representatives of civil society."⁶² The elected representatives are "the main expression of civil society"⁶³ and "have a special responsibility to inform their constituents of the benefits a rules-based trading system can offer."⁶⁴ In addition, parliamentary involvement is important to overcome the impression that non-governmental organizations (NGOs) are civil society's representatives. That said, national parliamentary influence and presence is rather weak in the European and international trade policy context. Why is this so? Arguably,

60 M. Cremona, "The Union's External Action: Constitutional Perspectives," in G. Amato, H. Bribosia & B. de Witte (eds.), *Genèse et destinée de la Constitution européenne – Genesis and Destiny of the European Constitution*, Bruxelles: Bruylant, 2007, pp. 1173-1217, at 1213.

61 P. Lamy, Speech at the WTO Symposium on Issues confronting the World Trading System, 6 July 2001, in http://www.wto.org/trade_resources/quotes/mts/transparency.htm (last visited March 11, 2007).

62 M. Moore, *A World Without Walls: Freedom, Development, Free Trade and Global Governance*, p. 121, Cambridge University Press, 2003.

63 M. Moore, *A World Without Walls: Freedom, Development, Free Trade and Global Governance*, p. 121, pp. 235-237, Cambridge University Press, 2003; see also S. Charnovitz, "Trans-Parliamentary Associations in Global Functional Agencies", *Transnational Associations*, May-June 2002.

64 WTO Press Release, "Moore Calls for Closer Parliamentary Involvement in WTO Matters," February 21, 2000, in http://www.wto.org/english/news_e/pres00_e/pr169_e.htm (last visited March 18, 2007).

because of the complexity and technical nature of the international trade agenda.⁶⁵

In this sense, it is fair to argue that, despite the fact that WTO rules and international trade policy have significant implications for domestic regulatory policy and, therefore, there is an increasing need to oversee the WTO, there has been nevertheless little formal involvement of EU national parliaments, with some exceptions such as that of Denmark.⁶⁶ As it is, national parliaments are usually not formally consulted on European policies for international trade agreements. They are merely informed.

In Denmark's case – probably the most transparent country in the decision-making process within the EU countries – there is a system of wider consultation of civil society and national parliament with respect to trade matters, whereby various committees on multiple aspects of trade policy are set up and open to civil society for debates. The Danish Folketing (Danish parliament) though, has a constitutional consultation right on all EU policies, including international trade agreements. The Folketing approves a specific negotiating mandate for the Danish parliamentarians in international trade negotiations. This has led to a wider public debate through committees at national level on international trade issues. Thus, Danish trade officials participate in these committees and provide information to interested stakeholders, thereby offering much needed transparency for public debate in international trade issues.⁶⁷

Tensions and differences of opinion between the EP and national parliaments in relation to trade policy are likely to arise. In this sense, the House of Lords fears the possibility of increasing the formal powers of the EP, on the grounds that it would risk slowing down and politicizing the negotiating process in the Doha Round.⁶⁸ In addition, there is the potential danger that the EP will become a lobby for protectionist interests, and thus for anti-liberalization voices. Therefore, the House of Lords believes that there should be strong continuing dialogue between the EU Council, the Commission and the EP on trade policy, yet without increasing the formal powers of the European Parliament.⁶⁹

With the implementation of the Reform Treaty, EU national parliaments will no longer ratify trade agreements. However, trade is, more than ever, in the

65 On a less hopeful perception of the role of national parliaments in EU policy-making, see M. Wagner, "National Parliaments and Democratic Control in the EU," *The Federal Trust for Education and Research*, European Policy Brief, Issue 29, July 2006, available at <http://www.fedtrust.co.uk/admin/uploads/PolicyBrief29.pdf>.

66 This little participation of national parliamentarians in WTO matters is slowly being rectified, given the continued and growing interest of parliamentarians in the WTO. Their presence in the 6th WTO Ministerial Conference in Hong Kong certainly brought greater democracy and accountability to the WTO as an institution.

67 WWF-UK, "A League of Gentlemen. Who really runs EU Trade Decision-Making?" November 2003, p. 16.

68 House of Lords, "The World Trade Organization: the role of the EU post-Cancun," 16th Report of Session 2003-04, European Union Committee, Chapter 4, available at <http://www.publications.parliament.uk/pa/ld200304/ldselect/lducom/104/10406.htm#n13>.

69 House of Lords, "The World Trade Organization: the role of the EU post-Cancun," 16th Report of Session 2003-04, European Union Committee, p. 34, available at <http://www.publications.parliament.uk/pa/ld200304/ldselect/lducom/104/10406.htm#a43> (last visited March 19, 2007).

domestic domain. So national leaders wish to know what is going on when it comes to issues such as food, the environment or immigration. It is therefore quite ironic that the main purpose of the Convention on the Future of Europe (and therefore of the EU Constitutional Treaty) was to make policies more democratic and closer to EU citizens, and yet national parliaments will not ratify trade agreements in an era where international trade has a great incidence in domestic politics.

E. CONCLUSIONS

If the Reform Treaty is ratified, efficiency in EU trade policy will improve radically. A few questions arise: will EU Member States disappear from the international trade *forum*? How to reconcile the trend of a lesser role for EU Member States in the international trading system (with the entry into force of the Reform Treaty), with the fact that they are sovereign States according to public international law? Will the EU remain as a sole actor in trade policy after the Reform Treaty? Most likely EU Member States will not disappear from the international scene, since the European Commission is not fully aware of the Member States' needs when acting on their behalf.

In politically sensitive issues (such as agriculture, education, health, or immigration, to mention a few), EU Member States do not seem to fully trust the EC in trade matters. An example is the Doha Round, where France is in constant tension with the European Commission over agricultural negotiations, or Mode 4 in the GATS, where EU Member States are very cautious about a misunderstanding with immigration. Therefore, it would not seem plausible to exclude EU Member States from ratifying future trade agreements. Hence, I conclude that the EU is not yet ready to bypass its Member States in all areas of trade regulation (notably trade issues related to immigration policy) and consequently EU Member States will continue to be present in the WTO after the Reform Treaty enters into force.

In terms of accountability, the role of the Member States' national parliaments and the European Parliament should grow to minimize the democratic deficit in the EU trade policy making: they need to be consulted, given that there continues to be a democratic deficit in the negotiation and conclusion of EC international trade agreements.

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