External trade law and the Constitution Treaty

External trade law and the Constitution Treaty:
Towards a federal and more democratic common commercial policy?

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1. Introduction

In June 2004, the Intergovernmental Conference (IGC) approved the draft Treaty establishing a Constitution for Europe (the Constitution Treaty). 1 By and large, the IGC accepted the text prepared by the European Convention 2 with a few, but important changes, in particular concerning decision-making in the Council. The Constitution Treaty clearly creates a constitutional momentum for the future of European external relations by proposing important and radical changes, including the establishment of a single legal framework for European foreign policy (Articles III-193 to III-231 Constitution Treaty) and the creation of a Union Minister for Foreign Affairs, who would be Vice-President of the Commission, chair the Foreign Affairs Council and represent the Union externally (Article I-27 Constitution Treaty). 3

When compared to such changes, the provisions of the Constitution Treaty relating to the common commercial policy seem to be of less significance. They do, however, deserve attention, given that they could have important practical consequences for one of the key areas of European external policy. Furthermore, the common commercial policy was and still is the most important constitutional battle ground for European external relations and important lessons for the constitutionalisation of foreign affairs in Europe can be learned from the development of the common commercial policy. In light of this context, the present article adopts a constitutional perspective and will assess whether the Constitution Treaty would make the common commercial policy more democratic and more federal.

This article is organized as follows: Part 2 develops the general constitutional themes of the framework of analysis for the common commercial policy. Part 3 briefly recalls the constitutional law of the common commercial policy as it currently stands. Part 4 sketches the debates of this subject in the European Convention and traces the negotiating history of the common commercial policy provisions. Part 5 analyses the proposed changes in-depth with a particular focus on the distribution of competence between Union and Member States, voting procedures in the Council and the role and function of the European Parliament. Based on this analysis the article concludes that while the Constitution Treaty makes the common commercial policy more federal, its achievement concerning democratisation is questionable.

2. Constitutional law and external affairs: Issues of vertical and horizontal distribution of powers

Constitutional law concerns the justification and limitation of political power. Central constitutional issues therefore evolve around the allocation of power to different governmental levels, entities and organs and the control of the exercise of power. Two aspects of the constitutional law of foreign relations are of particular importance in the context of the common commercial policy.

The first aspect concerns the vertical allocation of powers, i.e. the distribution of competences between different levels of governance. This is of particular importance for federal systems, but also becomes an issue when governmental powers are decentralised or re-allocated to lower levels as in the devolution of Government in the United Kingdom. In both situations power over foreign affairs is typically located in the federal or central level. In some systems states or subcentral entities retain some competences in external relations.

Two aspects of the vertical allocation of powers bear particular potential for constitutional conflict: The scope of the respective powers of the central and of the subcentral units in foreign affairs and how these powers relate to each other (exclusive central competence, parallel or shared competences or exclusive competence of the subcentral units in areas of their internal legislative competence); and the consequences of a separation of competence to conclude an international treaty (external competence) and competence to implement a treaty in internal law (internal competence): If the former rests with the central level and the latter is allocated to the subcentral level constitutional custom often requires entities at the federal level to consult with subcentral entities before an international agreement is concluded.

These issues also determine the vertical distribution of competence between the EU/EC and the Member States. One important practical aspect of this distribution is the distinction between exclusive EC competence to conclude an international agreement, which allows the European institutions to act alone, and shared (or joint) competence of the EC and the Member States, which requires the conclusion of a mixed agreement.

A related question of vertical allocation of powers concerns voting rules in the Council. Even though this issue actually relates to the decision-making process at the European level and hence is clearly distinct from the distribution of competence, it can be considered part of the vertical allocation of powers, because voting rules and allocation of votes have important practical implications on the actual power balance between the EU/EC and its Members, which may be at least as important as the distribution of competences.

The second aspect of the constitutional law of foreign affairs, which is important in the present context, concerns the democratic legitimacy of foreign policy. Foreign policy – like

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all exercise of government power – needs to be legitimised from a democratic perspective. Traditionally, the democratic legitimacy of external relations and foreign policy rests on two pillars: Ratification of international agreements by parliament, i.e. parliamentary consent to an international agreement, and the general parliamentary control of the government and the executive. Both pillars relate to the distribution of powers among different government branches of the same level and can therefore be understood as issues of horizontal allocation of powers.

It is well-known that the democratic legitimacy of external acts of the European Community is less developed than the traditional standard of democratic legitimacy would require. First, the European Parliament generally has only a right to be consulted before the conclusion of an international agreement and needs to give its consent only to certain types of agreements (cf. Article 300 (3) ECT). Second, the European Parliament does not fully control the executive in foreign relations. Even if parliamentary control of the Commission is increasing, the European Parliament does not control the Council, who concludes international agreements and is therefore part of the “executive” in this context.

Two additional pillars, upon which the democratic legitimacy of European foreign policy-making rests, are conferred by national parliaments: National parliaments scrutinize Council members as part of the general parliamentary control of government; and national parliaments are also required to give their consent to an international agreement if it falls within the shared competence of Community and Member States. This reveals an important link between democratic legitimacy and the two aspects of the vertical distribution of powers mentioned above: An international agreement which falls into the exclusive competence of the Community is not subject to parliamentary consent at the national level. This, combined with an underdeveloped control of international agreements by the European Parliament, may lead to a particularly low standard of democratic legitimacy.

3. The current constitutional law of the common commercial policy

The common commercial policy has been subject to a number of constitutional conflicts and reforms throughout the process of European integration. The “milestones” of the constitutional development include various decisions of the ECJ and changes through the Amsterdam and Nice treaties. Since these developments have been discussed and analysed extensively elsewhere, it will be sufficient to briefly recall the most important aspects.

3.1. Vertical distribution of powers: The federal question

Concerning the vertical allocation of powers - the “federal question” - it should be remembered that the ECJ held that Article 133 ECT confers an exclusive competence to the
However, the scope of the common commercial policy and hence the scope of this exclusive competence remained contested and varied over time. In Opinion 1/94 on the WTO agreement, the ECJ ruled that trade in goods, but only some aspects of trade in services (GATS) and trade-related intellectual property rights (TRIPS) were covered by the exclusive competence. In particular, the Court ruled that trade in services supplied from one country to another without the movement of the consumer or the supplier (so called mode 1 of trade in services according to GATS) was “not unlike goods” and was therefore included in the scope of the common commercial policy. Concerning trade-related aspects of intellectual property rights, the Court decided that only provisions on trade with counterfeit goods were covered by Article 133. Because the WTO agreement was a single agreement and could not be divided into agreements or parts thereof falling into the competence of the EC and those of the Members, the agreement fell into the shared competence of the EC and the Member States. Consequently, it had to be concluded as a mixed agreement.

The Amsterdam Treaty gave the Council the power to extend the scope of the common commercial policy by unanimous vote to the international negotiations and agreements relating to those aspects of trade in services and TRIPS, which were not covered by it on the basis of Opinion 1/94. However, the Council never used this power. The Nice Treaty entrusted the Community with the competence to negotiate and conclude agreements concerning trade in services and commercial aspects of intellectual property insofar as these aspects were not already covered by Article 133 (Article 133 (5)). However, cultural and audiovisual services and health, education and social services are excluded from this extension of the scope of the common commercial policy by virtue of Article 133 (6) subparagraph 2. Because of this “sectoral carve-out”, the negotiation and conclusion of agreements covering these services falls into the “shared” competence of the Community and the Member States.

Herrmann argues that the power of the Community in the field of services and commercial aspects of intellectual property are not exclusive because of Article 133 (5) subparagraph 4. As a consequence, Member States could conclude an agreement in this field jointly with the Community (parallel competence). This is not convincing: Article 133 (5) clearly extends

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15 According to Article I GATS trade in services is defined as the supply of a service through one of four modes of supply. Mode 1 covers the supply of a service from the territory of one Member into the territory of any other Member (“cross-border supply”). Mode 2 covers the supply of a service in the territory of one Member to the service consumer of another Member (“consumption abroad”). Mode 3 is supply of a service by a service supplier of one Member, through commercial presence in the territory of any other Member (“commercial presence”) and mode 4 covers supply of a service by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member (“presence of natural persons”). See generally Krajewski, National regulation and liberalization of trade in services (Kluwer Law International, 2003), p. 65-68.
16 Opinion 1/94, WTO, above note, para. 44.
17 Opinion 1/94, WTO, above note, para. 55.
20 Herrmann, above note, p. 19.
paragraphs 1 to 4 of Article 133 to the services and commercial aspects of intellectual property rights. Since Article 133 (1) confers an exclusive competence to the Community, services and commercial aspects of intellectual property rights must also fall into the exclusive competence of the Community with the exception of the sectoral carve-out.

On the basis of the current law, one could therefore assume that some results of the current WTO negotiations, the so-called Doha Development Agenda (DDA) would be concluded by the Community alone and some results by the Community and the Member States. However, like the results of the Uruguay Round, the results of the DDA will most likely be combined in a single agreement (“single undertaking” or “single package”). Therefore the sectoral carve-out for certain services may submit the whole agreement to the shared competence and hence require conclusion by the Community and each Member State.

Decisions in the Council concerning the common commercial policy are generally taken by qualified majority voting (Article 133 (4) ECT). However, there are some areas where unanimity is required. First, Article 133 (5) subparagraph 2 holds that unanimity is required for agreements concerning trade in services and commercial aspects of intellectual property rights, where such agreements contain provisions which require unanimity for their implementation and where the Community has not yet exercised its internal competences. Second, Article 133 (5) subparagraph 3 requires unanimity for the conclusion of a horizontal agreement insofar as it concerns subparagraph 2 of Article 133 (5) or Article 133 (6) subparagraph 2 (cultural and audiovisual services, educational services, and social and human health services). If any of these aspects are included in the results of the current WTO negotiations and if they are part of a single agreement, the Council will have to conclude this agreement by unanimous vote, because the Council needs to decide unanimously on the whole agreement even if only a minor part of the agreement requires unanimity (so called “Pastis” principle).

3. 2. Horizontal distribution of powers: The democratic question

It will be remembered that trade agreements are explicitly excluded from the general requirement of Article 300 (3) ECT according to which the Council needs to consult with the European Parliament before the conclusion of an international agreement. To this day, the EC treaty seems to rest on the archaic assumption that external trade policy is best conducted without any parliamentary input or interference. This is where the treaty most clearly resonates the classical doctrine of the necessity of unlimited and unchecked foreign affairs powers. Despite its reduced formal role, the European Parliament manages to exercise some influence on the common commercial policy in practice. In particular, the Commission informs the Parliament on its main strategies and the European Parliament has voiced its opinion on the state of affairs in international trade negotiations numerous times.

Since the Maastricht Treaty, Article 300 ECT requires parliamentary consent for the conclusion of association agreements according to Article 310 ECT, agreements with


22 See also Krajewski, “Foreign Policy and the European Constitution”, 23 YEL (2003), pp. 438-442.

important budgetary implications, agreements which require amendments of Community legislation adopted under the co-decision procedure and agreements which establish a specific institutional framework by organising co-operation procedures. An agreement establishing an International Organisation would typically be an agreement of the latter type. The Uruguay Round agreements were therefore considered to belong to this category and were hence submitted to the European Parliament for its approval.\textsuperscript{24}

It is not clear whether this provision would also cover the results of the current WTO negotiations. These negotiations include a wide range of issues including implementation issues, market access for non-agricultural goods, agriculture and services.\textsuperscript{25} The negotiations, however, do not aim to a specific institutional framework. It may be possible that the results of the Doha negotiations will require amendments of an act adopted under the co-decision procedure. In such a case, the results of the negotiations would require parliamentary consent if they are contained in a single package. However, if the results of the negotiations do not require changes in Community legislation adopted under Article 251 ECT, the European Parliament may not be asked to give its consent to the agreement resulting from the current WTO negotiations.\textsuperscript{26}

Turning to the democratic legitimacy conferred upon trade policy by national parliaments, it should be remembered that the consent of the parliaments of the Member States is required if the agreements in question fall into the joint (or shared) competence of the Community and its Member States. As mentioned above this was the case for the WTO agreement.\textsuperscript{27} The current WTO negotiations will be concluded on the basis of the increased Community competence according to the Nice Treaty. Hence, the results of the current negotiations will fall into the shared competence of the EC and the Member States only if the results cover trade in cultural, audiovisual, health, education or social services. This raises the question about the scope of the current GATS negotiations which are part of the DDA.\textsuperscript{28} Since the Draft Offers of the EC of April 2003 submitted in this context contain offers in education, social and health services, it seems very likely that the final results of the GATS negotiations will fall into the shared competence of Community and Member States.\textsuperscript{29} Assuming that the results of the DDA will be combined in a single agreement national parliaments would have to give their consent to the results of the Doha negotiations.

3.3. Conclusion

The development of the competence of the common commercial policy seems to be characterized by a move from exclusive competence prior to Opinion 1/94 to shared (joint) competences afterwards and – in recent years – back to an increased extent of exclusive competence in particular through the Treaty of Nice. However, the perceived “shift” from exclusive to joint competences following the increase of the scope of international trade policies through the Uruguay Round can also be seen as the first step of a gradual increase in

\textsuperscript{24} van den Bosche, “The European Community and the Conclusion of the Uruguay Round”, in: Jackson and Sykes (eds.), Implementing the Uruguay Round (Clarendon, 1997), 23-102, at 71-77.
\textsuperscript{26} Arguably, the European Parliament may be consulted on the basis of Article 300 ECT concerning the conclusion for agreements falling into the shared competence of Community and Member States according to Article 133 (6) subparagraph 2. See Herrmann, above note, p. 25.
\textsuperscript{27} See above section 3.1.
\textsuperscript{28} On the GATS negotiations see Footer, “The General Agreement on Trade in Services: Taking Stock and Moving Forward”, 29 (1) LIEI (2002), 7-25.
\textsuperscript{29} Trade in Services, Conditional Offer from the EC and its Member States, 29 April 2003. Available at http://europa.eu.int/comm/trade/issues/sectoral/services/wto_negotiations/index_en.htm (22 April 2004).
the scope of exclusive competence. In this sense, Opinion 1/94 extended the exclusive competence to limited aspects of services and TRIPS. The Amsterdam Treaty created the potential for further increase and the Nice Treaty actually realized this extension. During the decades since 1957, the influence of the European Parliament on trade policy remained limited if not non-existent on the basis of the letter of the law. Nevertheless, the Parliament was involved as a matter of constitutional practice and was also asked to ratify the Uruguay Round agreements, because they established a special institutional framework for cooperation.

4. Discussions and proposals in the European Convention

In the Laeken Declaration of December 2001 the European Council identified democratic accountability and Europe’s role in a globalized world as being among the key challenges faced by the EU today. The Council wanted to bring the Union “closer to its citizens” and saw a need for the Union to “shoulder its responsibilities in the governance of globalisation”. Accordingly, the European Convention was asked to suggest a better division and definition of competences in the European Union and make proposals for more democracy, transparency and efficiency. These objectives and principles – more democracy and more efficient global activities – have a direct bearing on the rules and principles of the common commercial policy. Nevertheless, the common commercial policy remained a “low-key” subject during the first months of the European Convention.

4. 1. Early phase of Convention work and Working Groups

The Convention began its work in February 2002, at a time when the Treaty of Nice was not yet in force. Consequently, the first Convention documents still refer to the framework of the common commercial policy according to the Treaty of Amsterdam. In a discussion paper of 3 July 2002 the Praesidium did not consider major changes to the provisions of the common commercial policy. It was even suggested that the common commercial policy could possibly be used as a lesson for other policy areas. The Praesidium only wondered how the common commercial policy could be made more effective. During the plenary debates in 2002, these issues did not receive much attention.

The first substantive discussions on external trade law took place in the Working Group VII of the Convention on “External Action”. In his intervention during the deliberations of this Working Group, the Commissioner responsible for External Trade, Pascal Lamy, mentioned the issues of efficiency and legitimacy as the key areas where trade policy needed to be reformed. Specifically he identified four aspects of the common commercial policy which

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31 Ibid.
32 See e.g. European Convention, EU External Action, 3 July 2002, CONV 161/02, p. 3. All Convention documents can be accessed at the Convention’s webpage at http://european-convention.eu.int/.
33 Ibid.
34 It should be noted that the first working document of Working Group VII already concerned trade policy: The delegate of the Swedish Parliament to the Convention called for an abolition of all tariffs and quantitative restrictions applied to third countries as a contribution to prosperity and productivity in Europe and the rest of the world. See European Convention, Proposal to the European Convention on EU trade policy, Paper by Mr Göran Lenmarker, 23 September 2002, Working Group VII, Working Document 1.
he saw as problematic: exceptions to the rule of decision-making by qualified majority, mixed competences concerning the conclusion of agreements, a disconnection of internal and external competences in policy areas with an effect on trade policy such as international environmental agreements and the reduced role of the European Parliament in trade policy.\(^{36}\) Commissioner Lamy’s remarks resonated the central constitutional issues of the common commercial policy and suggested an ambitious agenda for constitutional reform of the common commercial policy.\(^{37}\)

Despite this invitation for bold changes, Working Group VII made no far-reaching proposals for the common commercial policy in its final report.\(^{38}\) Concerning competence, the Working Group suggested that the Treaty should indicate that the Union is competent to conclude agreements dealing with issues falling under its internal competences and that a new provision in the Treaty should specify that the Council should decide on such agreements according to the same voting procedure which would apply to internal legislation concerning the same issues.\(^{39}\) However, the Working Group did not specifically address the question of mixed agreements in certain services sectors. The Working Group did, on the other hand, report a “high degree of support” for using qualified majority voting in all areas of trade policy, including services and intellectual property, however “without prejudice to current restrictions on harmonization in internal policy areas.”\(^{40}\) Concerning parliamentary participation only several members considered an enhanced involvement of the European Parliament. Some pleaded specifically for the requirement of parliamentary consent for all international agreements, including trade agreements, but this was certainly not a majority position.\(^{41}\) Working Group III on Legal Personality also dealt with parliamentary participation. Though a “large majority” in this Group called for an increased role of the European Parliament in relation to trade agreements, this majority apparently felt that extending the consultation procedure to trade agreements was sufficient.\(^{42}\)

### 4.2. Plenary discussions and the Praesidium proposals of 2003

The first proposals for articles on external relations were submitted to the Convention by the Praesidium in April 2003 (April Draft) together with comments explaining the rationale behind the different proposals.\(^{43}\) Articles 23 and 24 of Part II, Title B of that Draft contained the provisions on the common commercial policy. They were already relatively similar to the current provisions of the Constitution Treaty. According to the Praesidium, these articles aimed at a simpler version of the current law and enhanced the role of the European Parliament “both for the adoption of autonomous measures and for the conclusion of international agreements.”\(^{44}\)
The proposal included services, commercial aspects of intellectual property rights and foreign direct investment in the scope of the common commercial policy and abolished the carve-out for audiovisual and cultural services, educational services and social and human health services. The Praesidium explained that foreign direct investment was included in the scope of the common commercial policy “in recognition of the fact that financial flows supplement trade in goods and today represent a significant share of commercial exchanges”.45 Furthermore, the Praesidium stated that if the Convention wanted to maintain the sectoral carve-out for certain services, this should be specified in Part I of the constitution, which defined the Union’s competences.46

Despite the clear tendency in the Working Group on External Action to use qualified majority voting in all areas of the common commercial policy, the Praesidium opted to maintain unanimity for the negotiation and conclusion of agreements in trade in services involving the movement of persons and commercial aspects of intellectual property rights because of “political reasons”.47 Concerning the participation of the European Parliament, the April Draft did not explicitly require parliamentary consent for trade agreements. It sought to enhance the role of the parliament by applying the “standard legislative procedure” to implementing measures. This reference should be seen in the context of Article 33 of the April Draft – the general provision on the conclusion of international agreements – which required parliamentary consent for all international agreements covering areas to which the legislative procedure applied.48 As will be argued below, this can be seen as the implicit requirement of parliamentary consent to trade agreements.49

A large number of suggestions for amendments to Articles 23 and 24 of the April Draft were received on the basis of this proposal, including suggestions from some of the more prominent members of the Convention, such as Foreign Ministers Dominique de Villepin of France and Joschka Fischer of Germany and British Minister for Europe Peter Hain.50 Apart from recommendations concerning only linguistic or other minor changes, there were four major themes to these proposals: A first group of suggestions concerned the scope of the common commercial policy. Many proposals rejected the inclusion of foreign direct investment in the common commercial policy.51 Others also wanted to maintain the sectoral carve-out for cultural, educational, health and social services.52 A second group of proposals called for greater and more explicit parliamentary rights concerning the negotiation of commercial agreements.53 Thirdly, some proposals concerned the voting procedure in the Council: While some called for qualified majority voting in all areas in line with the proposal of the Working Group54, others wanted to maintain or even increase the scope of decision-making on the basis

45 Draft Articles on external action (April Draft), supra note, p. 54.
46 Ibid., p. 55.
48 Ibid, p. 67.
49 Supra Section 5.4.1
51 Suggestions by David Heathcoat-Amory; Ingvar Svensson; Erwin Teufel; William Abitbol; Voggenhuber, Lichtenberger, Wagener and Nagy; the Earl of Stockton; Madame Palacio; Monsieur de Villepin; Joschka Fischer; and Dick Roche, supra note
52 Suggestions by Erwin Teufel; William Abitbol; Voggenhuber, Lichtenberger, Wagener and Nagy; Monsieur de Villepin; Mr Kiljunen; Jacques Floch; Robert Maclellan; and Mr Hain, supra note
53 Suggestions by John Cushnahan; Piia-Noora Kauppi; Joachim Wuermeling; Marietta Giannakou; Voggenhuber, Lichtenberger, Wagener and Nagy; Sylvia-Yvonne Kaufmann; Louis Michel and others; Borrell and Carnero y López Garrido; Brok and others; Caspar Einem; and Adrian Severin, supra note. Some proposals only called for consultation rights of the EP, see proposals by Andrew Duff and others; Linda McAvan and others; Teija Tiilikainen and others, supra note.
54 Suggestions by Jan Kohout; Mr Lennmarker; Santer and Helminger, supra note.
of unanimity. Finally, a large number of proposals suggested additional goals and objectives of the common commercial policy such as sustainable development, poverty eradication, minimum labour rights, protection of the environment or the preservation of services of general interest. In light of the large number of different proposals the Praesidium may have felt that a proposal, which receives criticism from all corners, is a good compromise. In any event, the version of the Draft Constitution Treaty of 27 May 2003 did not contain major changes concerning common commercial policy compared with the April Draft. The only substantive amendment concerned the requirement of the Commission to report regularly to the Parliament on the progress of the negotiations. The draft version of the Constitution Treaty of 12 June 2003 left the provisions on the common commercial policy unchanged. Based on this draft version, Convention Members tabled again a large number of proposals, which focused on the same issues and contained similar proposals as the suggestions based on the April Draft. However, these proposals did not lead to any changes in the penultimate draft version of the Constitution Treaty at the end of June 2003. In the plenary debate on this draft, a number of speakers urged for a shared competence between the Union and the Member States concerning agreements on audiovisual, culture, education or health services. Again this did not impress the Praesidium when it prepared the final version of the draft Constitution Treaty, which was submitted to the European Council in Rome on 18 July 2003.

After the submission of the Draft Constitution to the European Council a Working Group of Legal Experts of the Intergovernmental Conference (IGC) convened to agree on the Constitution proposed a number of changes to the text as proposed by the Convention. Many of these changes concerned obvious linguistic and legal mistakes or inaccuracies. However, in some cases the Working Group also suggested an additional sentence or provision or a renumbering or restructuring of paragraphs for reasons of clarity.

The provisions of the Constitution Treaty on the common commercial policy were even subject to some last minute changes concerning unanimity requirements in the Council shortly before the Dublin summit of 17 and 18 June 2004, which adopted the final version of the Constitution Treaty.

4.3. Conclusion

55 Suggestions by David Heathcoat-Amory; Pierre Lequiller; Erwin Teufel; Hjelm-Wallén and others; Madame Palacio; Erâni Lopes and others; Hubert Haenel and Robert Badinter, supra note
56 Proposals by Ingvar Svensson; Gianfranco Fini and Francesco Speroni; Voggenhuber, Lichtenberger, Wagener and Nagy; John Gormley; Borrell and Carnero y López Garrido, Ms Dybkjær, Emilio Gabaglio, Renée Wagener, Anne Van Lancker, supra note
57 European Convention, Draft Constitution, Volume II, Draft text of Parts Two, Three and Four, 27 May 2003, CONV 725/03.
58 See the highlighted amendments in European Convention, Draft sections of Part Three with comments, 27 May 2003, CONV 727/03, p. 69.
59 European Convention, Draft Constitution, Volume II, Revised Texts of Parts Two, Three and Four, 12 June 2003, CONV 802/03.
60 See the summary of these proposals in European Convention, Reactions to draft text CONV 802/03 – Analysis, 27 June 2003, CONV 821/03.
61 European Convention, Draft Constitution Volume II, 27 June 2003, CONV 836/03.
62 European Convention, Note on the plenary session - 4 July 2003, 14 July 2003, CONV 849/03, p. 5
63 European Convention, Draft Treaty Establishing a Constitution for Europe, 18 July 2003, CONV 850/03.
In conclusion, it seems fair to say that the articles on the common and commercial policy of the Constitution Treaty are based largely on conceptions of the Convention Praesidium and to some extent also on positions of the Working Party. In terms of competence, the Praesidium went further than the Working Party and followed ideas similar to those outlined by Commissioner Lamy in his presentation. Concerning parliamentary participation the Praesidium seems to have been more progressive than the Working Party. However, the Praesidium took a compromise position on the question of voting procedures in the Council.

5. The common commercial policy according to the Constitution Treaty

The provisions on the common commercial policy in the Constitution Treaty can be found in Articles III-216 and III-217. These articles would partially reproduce, but also substantially revise and amend the current Articles 131 (1) and 133 ECT. A reference to the favourable effect of the abolition of customs duties between Member States on the competitive strength of undertakings similar to paragraph 2 of Article 131 ECT would be abolished. Furthermore, the Constitution Treaty would eliminate Article 132 ECT on the harmonization of state aid for exports to third countries, because this provision was never used.\(^{65}\) Similarly, Article 134 ECT on requisite measures in case of trade diversion or economic difficulties due to the execution of the common commercial policy was not included in the Constitution Treaty, because it was deemed incompatible with the internal market and was not used since 1993.\(^{66}\)

Articles III-216 and 217 of the Constitution Treaty form Chapter III of Title V on “The Union’s External Action”. The common commercial policy is hence integrated into the single framework of the Union’s external relations together with provisions on the Common Foreign and Security Policy (Chapter II), on cooperation with third countries and humanitarian aid (Chapter IV) and other policy areas.\(^{67}\) Title V also contains provisions of general application (Articles III-193 and III-194) and on the conclusion of international agreements (Chapter VI). All provisions of Title V form the context of the common commercial policy.

5.1. Principles and objectives

Article III-216 would slightly modify the wording of the current Article 131 (1) ECT\(^ {68}\) but still states that harmonious development of world trade, progressive abolition of restrictions on international trade and lowering of customs and other barriers are among the policy objectives of the common commercial policy. Article III-216 adds the abolition of restrictions on foreign direct investment to these goals. This reflects the extension of the scope of the common commercial policy to foreign direct investment according to Article III-217 (1).\(^ {69}\)

The Constitution Treaty would also significantly increase the objectives and principles of the common commercial policy through the second sentence of Article III-217 (1) stating that the common commercial policy shall be conducted “in the context of the principles and objectives

\(^{65}\) Draft Articles on external action (April Draft), supra note, p. 55.

\(^{66}\) Draft Articles on external action (April Draft), supra note, p. 55.

\(^{67}\) On the common framework of the EU’s external actions see Cremona, supra note, at 1352-1353.

\(^{68}\) Article 131 (1) states that “By establishing a customs union among themselves Member States aim to contribute to …”, while Article III-216 of the Constitution Treaty holds: “By establishing a customs union in accordance with Article III-36 the Union shall contribute…”. The legal implication of the new wording may be small, but the version of the Constitution Treaty makes the predominant role of the Union as an actor much clearer than the old treaty text.

\(^{69}\) See below 5.2.3.
of the Union’s external actions.” These principles and objectives can be found at the beginning of Title V of the Constitution Treaty in Article III-193 (1). They include “democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, equality and solidarity, and respect for the United Nations Charter and international law.” Furthermore, according to Article III-193 (2) the Union shall define and pursue common policies inter alia in order “to foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty, encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade and help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development.” These goals reflect and reinforce the general objectives of the Union’s relations with the “wider world” according to Article I-3 (4).

As a consequence of these general goals and objectives, the common commercial policy should not just aim at the traditional trade policy objectives mentioned in Article III-216 (development of world trade and abolition of restrictions on trade and investments), but at “new” trade policy objectives, such as human rights, equality and solidarity, sustainable development and the preservation and improvement of the quality of the environment. While some of these objectives are currently contained (at least implicitly) in the Preamble of the ECT and Article 2, the second sentence of Article III-217 (1) in conjunction with Article III-193 explicitly requires the common commercial policy to contribute to these objectives rather than simply focus on the reduction of barriers to trade.

It could even be argued that the reduction and abolition of restrictions to trade and investment could no longer be considered an objective of the common commercial policy in its own right, but should contribute to the objectives and principles set out in Article III-193. This could also mean that the reduction and abolition of restrictions to trade and investment should not serve as an objective of the common commercial policy unless it contributes to the goals mentioned in Article III-193. The practical implication of this reading of the Constitution Treaty could be that Council and Commission would need to explain and justify a particular trade policy with reference to the objectives and goals mentioned in Article III-193.

5.2. Competence

5.2.1. External and internal competence

Article I-12 (1) (e) of the Constitution Treaty explicitly holds that the common commercial policy falls into the area of exclusive Union competence. This is based on the case law of the ECJ since Opinion 1/75 (“Local Costs”). According to Article I-11 (1) of the Constitution Treaty, exclusive competence means that only the Union may legislate and adopt legally binding acts. Member States would be able to do so only if empowered by the Union or if they implement Union acts. According to Article I-12 (2) of the Constitution Treaty the exclusive competence would also include the conclusion of an international agreement “when its conclusion is provided for in a legislative act of the Union, or is necessary to enable the Union to exercise its internal competence, or affects an internal Union act.” This provision is an attempt to codify the case law of the ECJ on

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70 Cremona, supra note, at 1363 also highlights the significance of this addition to the provisions on the common commercial policy.
71 Above note
72 The Convention version read: “when its conclusion is provided for in a legislative act of the Union, is necessary to enable it to exercise its internal competence, or affects an internal Union act.”
implied external powers, in particular in the AETR judgment and the WTO-Opinion.\footnote{Cremona, supra note, p. 1351 and Herrmann, „Die Außenhandelsdimension des Binnenmarktes im Verfassungsentwurf – Von der Zollunion zur Weltordnungspolitik“, to be published in Europarecht, Beiheft 1/2004.} According to this case law, the Community not only enjoys external powers if and insofar as the Treaty explicitly confers such powers, but also implicit powers, which follow from internal competences of the Community.\footnote{For a comprehensive overview see Eeckhout, above note, chapters 3 and 4.}

Article III-217 (1), sentence 1 of the Constitution Treaty specifies the scope of the common commercial policy and would explicitly extend its scope to services, commercial aspects of intellectual property rights and foreign direct investment:

“The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements \textit{relating to trade in goods and services and the commercial aspects of intellectual property, foreign direct investment}, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.”\footnote{The text in italic was added to the text of the first paragraph of the current version of Article 133 ECT.}

Article III-217 (2) holds:

“European laws shall establish the measures defining the framework for implementing the common commercial policy “

This provision was changed in the process of the Intergovernmental Conference by the Working Group of Legal Experts. The Convention suggested the following: “European laws or framework laws shall establish the measures required to implement the common commercial policy”. The reason for the deletion of the reference to framework laws seems to be that the majority of internal legislative acts of the common commercial policy are regulations (“laws” according to Article I-32 (1) of the Constitution Treaty).\footnote{Herrmann, above note.} However, Article 133 ECT does not preclude the use of directives (“framework laws” according to the Constitution Treaty). The Working Group of the IGC did not reveal why it thought that the use of framework laws should be excluded.

Despite this ambiguity, it is clear that the common commercial policy according to the Constitution Treaty would include the negotiation and conclusion of agreements (external competence) as well as the implementation of these agreements (internal competence), because Article III-217 (2) explicitly refers to implementation. This not only covers measures of the autonomous trade policy, but also implementation of trade agreements. The competence in trade in services and intellectual property rights would hence no longer be divided into those aspects, which were already part of the scope of Article 133 (1) ECT on the basis of Opinion 1/94 and those aspects, where the competence was restricted to the negotiation and conclusion of international agreements according to Article 133 (5) subparagraph 1. According to the Constitution Treaty trade in services and commercial aspects of intellectual property rights will – subject to the limitations mentioned in Article III-217 (6)\footnote{See below 5.2.4.} – be covered by the exclusive external and internal competence of the Union.

It has been argued that the competence relating to services and commercial aspects of intellectual property rights is limited to the external competence because of the unanimity rule in Article III-217 (4).\footnote{Herrmann, above note.} However, competence issues cannot be affected through voting rules
in the Council. Article III-217 (1) and (2) confers a uniform competence, which is only limited through Article III-217 (6).

5.2.2. Trade in services and commercial aspects of intellectual property rights

Article III-217 of the Constitution Treaty abandons the sectoral exception concerning trade in cultural and audiovisual services, educational services, and social and human health services of Article 133 (6) subparagraph 2 ECT. As already mentioned, the question of the exclusion of certain services from the exclusive competence was a contested proposal in the Convention. A number of Convention Members called for this sectoral carve-out to be maintained, but could not convince the Praesidium. The only remains of the sectoral carve-out is the third subparagraph of Article III-217 (4) of the Constitution Treaty, which requires unanimity in the Council for the conclusion of trade agreements in cultural and audiovisual services and in social, education and health services in particular circumstances.

Concerning intellectual property rights, the competence would be restricted to the “commercial aspects” of these rights. Article III-217 keeps the term “commercial aspects of intellectual property”, which has no direct equivalent in international trade law: The WTO’s agreement of intellectual property rights refers to trade-related aspects of these rights. This linguistic inconsistency was criticised after the Nice treaty and the critique has been repeated in the deliberations of the Convention. However, the term can be seen as “established” now and the maintenance of the old wording does not have any new legal implications.

It should also be noted, that the Constitution Treaty abolishes the possibility of the Council to extend the external competence to those aspects of intellectual property rights, insofar as they are not covered by Article 133 (5) ECT, i.e. non-commercial aspects of intellectual property rights, which is currently contained in Article 133 (7) ECT. The meaning and purpose of this last paragraph of Article 133 is not entirely clear. It has been argued that it supports a “static” reading of the term commercial aspects of intellectual property rights referring to TRIPS as it currently stands and that Article 133 (7) could be used if the scope of the TRIPS were to be extended. It could therefore be argued that the abolition of this provision in the Constitution Treaty would mean that the EC’s competence according to Article III-217 does not embrace changes of the TRIPS agreement. This reading, however, seems too narrow. It was the intention of the Convention to broaden and simplify competences relating to external trade matters. The term “commercial aspects of intellectual property rights” in Article III-217 should therefore be read as a reference to all trade-related aspects of intellectual property rights within the world trading system. As a preliminary conclusion it can be argued that Article III-217 of the Constitution Treaty extends the sole competence of the EC to all three “pillars” (trade in goods, trade in services and trade-related aspects of intellectual property rights) of the WTO.

5.2.3. Foreign direct investment

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79 See above 4.2.
80 See below 5.3.
81 Similar inconsistencies exist in other languages. Compare e.g. “les aspects commerciaux de la propriété intellectuelle” with “droits de propriété intellectuelle qui touchent au commerce” or “Handelsaspekte des geistigen Eigentums” with “handelsbezogene Aspekte der geistigen Eigentumsrechte” or “aspectos comerciales de la propiedad intelectual” with “aspectos de los derechos de propiedad intelectual relacionados con el comercio”.
82 Suggestion by Mr Hain, supra note
83 Herrmann, supra note p. 18.
The extension of the competence to foreign direct investment should be seen in the context of attempts in the WTO and other international organisations (such as the OECD) to negotiate multilateral rules on investment.\(^84\) Such an extension of the scope of the common commercial policy was already discussed in the context of treaty revisions of Amsterdam and Nice, but was not agreed upon.\(^85\)

In the first stage of the Convention deliberations, this issue was not raised and the Working Group on External Action did not suggest such an extension. The proposal was made by the Praesidium in the April Draft. Even though a number of prominent members of the Convention (Fischer, de Villepin) demanded that the common commercial policy should not be extended to foreign direct investment or that the extension should be restricted (Hain), this aspect of the scope remained unchanged.\(^86\) After the publication of the Draft Constitution Treaty the issue remained controversial.\(^87\)

An interpretation of the inclusion of “foreign direct investment” in the scope of the common commercial policy should begin with the term itself. It should be noted that foreign direct investment usually refers to long-term investment in a foreign country and can be distinguished from short-term port-folio investment.\(^88\) Therefore, Article III-217 would only apply to agreements or parts of agreements which cover foreign direct investment.

Agreements which would cover all forms of investment, because of a broad definition of the term “investment” such as the failed Multilateral Agreement on Investments (MAI)\(^89\) of the OECD would therefore not fall within the scope of the exclusive commercial competence. Though the Community would be exclusively competent in relation to those aspects of the agreement which relate to foreign direct investment, the Member States would remain competent in relation to port-folio investments.

The extension of the common commercial policy to foreign direct investment has the potential to establish a whole new competence area in external relations of the EU. Traditionally, there is a clear distinction between international trade agreements and international investment agreements in the field of international economic law.\(^90\) Both types of agreements cover different aspects of international transactions: Trade agreements concern the exchange of goods and services across borders, whereas investment agreements concern protection of investment in a particular country. In practical terms, trade agreements are often regional or multilateral agreements, whereas investment agreements are often bilateral agreements.\(^91\) This does not deny that investment and trade are closely linked and the scope of agreements may overlap. For example, the WTO’s Agreement on Trade-Related Investment Measures (TRIMs) aims at investment measures, which restrict trade.\(^92\) Nevertheless, investment treaties and trade agreements generally have distinct areas of application.

\(^84\) For an overview of the activities in the WTO in this field see the WTO’s webpage on “Trade and investment” at www.wto.org/english/tratop_e/invest_e/invest_e.htm (17 March 2004).
\(^85\) Cremona, supra note, p. 13-17 and Herrmann, supra note, p. 14
\(^86\) See supra note.
\(^88\) UNCTAD, World Investment Report 2003, (UNCTAD, 2003), p. 100
\(^90\) Overviews of international investment law provide Lowenfeld, International Economic Law (OUP, 2002), Part VI and Qureshi, International Economic Law (Sweet&Maxwell, 1999), Chapter 16.
\(^92\) See Matsushita et al., supra note, p. 524.
The extension of the common commercial policy to foreign direct investment therefore raises the question whether the Constitution Treaty intends to give the EU the exclusive competence to negotiate and conclude investment agreements. Until now, EC bilateral agreements did not contain provisions on investment protection. Bilateral investment treaties remained within the competence of the Member States. Extending the competence to conclude such agreements to the Union would have remarkable practical consequences: Some Member States, such as Germany and the UK, are currently parties to more than 100 bilateral treaties with different countries. Assuming an exclusive competence for the Union would mean that Member States would lose the competence to negotiate, conclude and implement these agreements and the Union would be responsible for the negotiation of new or the renegotiation of old investment agreements.

It is, however, submitted that the extension of the common commercial policy to foreign direct investment could and should be read more narrowly. As pointed out above, there are already a number of areas, where international trade law and international investment law overlap. This concerns not only the TRIMs-Agreement of the WTO, but also certain aspects of GATS and discussions in the WTO on trade and investment. The inclusion of foreign direct investment in Article III-217 (1) should therefore be understood to refer only to those aspects of foreign direct investment which have a direct link to international trade agreements.

This reading of Article III-217 (1) is supported by context, object and purpose of the provision and by its negotiating history: As mentioned above, Chapter III of Title V of the Constitution Treaty is entitled “Common Commercial Policy”. The common commercial policy traditionally concerned trade agreements. It seems more appropriate to understand Article III-217 (1) in such a way that only investment negotiations which have a clear trade component are part of the common commercial policy. Furthermore, according to Article III-216 the Union aims to contribute to “the progressive abolition of restrictions on international trade and on foreign direct investment” (emphasis added). This also suggests that foreign direct investment is only part of the common commercial policy as far as restrictions to foreign direct investment are concerned, but not investment protection against expropriation, which is traditionally an element of investment agreements.

The Convention deliberations also support this reading. As mentioned above the Working Group did not discuss an extension of the common commercial policy to investment. Clearly, a change in the treaty structure, which would have changed the legal basis and practice for hundreds of international agreements of the Member States would have required discussion in that Working Group. When the Praesidium suggested the extension it argued that this was necessary because “financial flows supplement trade in goods and represent a significant

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93 See Article 21 of the EC-Chile association agreement (OJ L 352 30.12.2002 p.3): „Promoting investment
1. The aim of cooperation shall be to help the Parties to promote, within the bounds of their own competence, an attractive and stable reciprocal investment climate.
2. Cooperation shall cover in particular the following: (a) establishing mechanisms for providing information, identifying and disseminating investment rules and opportunities; (b) developing a legal framework for the Parties that favours investment, by conclusion, where appropriate, of bilateral agreements between the Member States and Chile to promote and protect investment and avoid dual taxation; (…)”
94 Peterson and Ceyssens, supra note.
share of commercial exchanges”. This indicates the anticipation of a close link between investment issues and trade. In fact, *Peter Hain*, who was also critical of this provision, suggested that the reference to foreign direct investment should be explicitly limited to investment negotiations in the WTO.

5.2.4. Limitation of the exercise of competences

Article III-217 (6) contains a limitation of the exercise of the competences of the common commercial policy:

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

In light of the increased scope of Article III-217 (1) this provision gains particular importance. Its exact meaning and scope therefore warrants special attention, even though the provision is perplexing to say the least. A preliminary remark should be made about the wording of the provision: If one compares it with Article 133 (6) subparagraph 1 ECT, which apparently served as a model for the provision of the Constitution Treaty, Article III-217 (6) is less unequivocal about its normative content. Article 133 (6) ECT clearly states that an international agreement “may not be concluded”, whereas paragraph 6 of Article III-217 states that the delineation of internal competences shall not be affected. The German (“hat keine Auswirkungen”) and the French versions (“n’affecte pas”) are even less clear, because they use positive rather than normative language.

Notwithstanding the ambiguous language it could be argued that Article III-217 (6) limits the competences of the Union in external trade policy according to the internal distribution of powers between Union and Member States. Consequently, the Union would not have the exclusive competence to negotiate, conclude, and implement an international agreement which covers aspects on which the Union does not have the power to legislate internally. For example, since the Union has only the competence for “supporting, coordinating and complementary action” in education and health, agreements covering these aspects would not fall within the scope of Article III-217. This reading of Article III-217 (6) could be supported by the wording of the provision which refers to the exercise of “the competences conferred by this Article in the field of commercial policy”. Unlike the similar provision of Article 133 (6) ECT, paragraph 6 of Article III-217 extends to the entire Article and not just to one paragraph. The wording of Article III-217 (6) is therefore not limited to the negotiation and conclusion of international agreements. Consequently, Article III-217 (5) would constrain the external (“treaty-making”) and internal (“treaty-implementing”) power of the Union to the same extent. One could argue that such a broad reading of Article III-217 (5) is a consequence of the doctrine of competence parallelism developed by the ECJ in the AETR ruling and the WTO Opinion.

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96 Draft Articles on external action (April Draft), supra note, p. 979.
97 Supra note 98.
98 The Working Group of the IGC suggested a renumbering of the paragraphs of Article III-217, so that subparagraph 3 of Article III-217 (4) according the Convention version, which concerns transport agreements would become a separate paragraph 5.
99 For an interpretation of Article 133 (6) see Herrmann, supra note, p. 21-23.
100 Draft Articles on external Action (April Draft), supra note, p. 54.
101 Article 1-16 (2) Constitution Treaty.
However, it is submitted that such a reading of Article III-217 (6) is not convincing. It would mean that the abolition of the sectoral carve-out in trade in services would be rendered meaningless. As shown above, the Convention deliberately extended the scope of the common commercial policy to all sectors of the services economy. In some of these sectors the Union would not have legislative competences according to the Constitution Treaty. Reading Article III-217 (6) as a limitation of the external and internal competences would therefore mean that the Union’s external competences would be limited. This would contradict the expressed intention of the drafters of the Constitution. The extension of the scope of the external competence through paragraph 1 of Article III-217 and the subsequent removal of this competence through paragraph 6 would be a “one step forward, one step backward” approach, which would be more than awkward even for a policy area, whose constitutional development was once compared with the “Echternach Procession”.103

It is therefore more convincing to interpret Article III-217 (6) in such a way that it only limits the internal competence of the Union, i.e. the competence to implement trade agreements and not the external competence, i.e. the competence to negotiate and conclude agreements as well. An expressed limitation of the internal competence is necessary, because without such a limitation the Union’s internal competences according to the Constitution Treaty would encompass the entire scope of the common commercial policy. Consequently, the Union would gain the competence to legislate in all areas concerning education, health and other services as well as all aspects of intellectual property rights in order to implement international agreements. This would distinguish the Constitution Treaty from the current version of the ECT, which expressly limits the competence concerning services and intellectual property rights to the negotiation and conclusion of international agreements (Art. 133 (5) ECT). In other words, since the Constitution Treaty provides for a single and comprehensive external competence it needs to limit the internal competence. Therefore, Article III-217 (6) should be read as a limitation of the Union’s internal competences: The Union can only implement international agreements insofar as it enjoys internal legislative competence.

As a consequence of such a reading of Article III-217 (6) the Union’s external competence (“treaty-making”) would extend beyond the scope of the internal competence (“treaty-implementing”). Such an incongruence between internal and external competences would not be a deviation from the AETR doctrine and its codification in Article I-12(2) of the Constitution Treaty, because this doctrine only provides for parallel competences if an internal competence exists. It does not affect the possibility that an external competence can exist without a parallel internal competence. In fact, the ECJ mentioned the possibility of an incongruence between external and internal competences in Opinion 1/75 (“Local costs”) when it held that it was without prejudice to the treaty-making powers of the EC if the implementation of the agreement were to be the responsibility of the Member States.104

An incongruence of external and internal competences is not unheard of in constitutional law. In many federal systems the federation has an all-inclusive competence to conclude international agreements, but cannot implement agreements as long as the relevant legislative

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103 Traditionally the Echternach Dancing Procession required the pilgrims to dance three paces forward, and two back. Today it only proceeds forward, but the image of moving forth and back remains. See http://www.luxembourg.co.uk/dancproc.html (19 March 2004). The picture of the Echternach Procession has been used in the literature to describe the development of EC competences in common commercial trade, see Bourgeois, “The EC in the WTO and Advisory Opinion 1/94: An Echternach Procession”, 32 CMLRev (1995), 736-787 and Herrmann, supra note, p.10.

power rests with the states. For example, the German Basic Law entrusts the Federation with
the competence to conclude international agreements. According to a widely held view, this
competence also includes areas where the legislative competence rests with the Länder, for
example in cultural or educational affairs.\footnote{See e. g. Geiger, above note, p.124-127.}
A constitutional convention (the Lindau Agreement) requires the Federation to consult with the Länder before it enters into such an
agreement.\footnote{Ibid. p. 126-127.} Similarly, Swiss constitutional custom of a “courtoisie fédéraliste” requires the
Federation to consult with the cantons before the Federation concludes an international
agreement which extends to cantonal competences.\footnote{Häfelin and Haller, above note, p. 319.}

In EU law, a similar requirement of the Union to consult the Member States before the
conclusion of an agreement which requires implementation by the Member States could be
based on the principle of loyal cooperation between Union and Member States which is
expressively laid down in Article I-5 of the Constitution Treaty. Accordingly, “the Union and
the Member States shall, in full mutual respect, assist each other in carrying out tasks which
flow from the Constitution”. The provision also requires the Union to respect the national
identities of the Member States and their essential state functions.

Despite the comparatively limited implementing competence of the Union, the factual impact
on an international agreement concluded by the Union should not be underestimated. The
legal necessity to implement an international agreement will put political pressure on the
Member States, even if they remain formally responsible for the implementation. In fact, in
accordance with the general standards of state responsibility the Union were to become liable
under international law if a Member State would refuse to implement an international
agreement concluded by the Union.\footnote{In federal systems the central unit will typically be responsible for the acts of the subcentral state entities, see e. g. Cassese, International Law (OUP, 2001), 187-188.} The competence to implement an international
agreement may therefore in many cases be little more than an administrative competence,
which does not leave the Member States with a lot of legislative discretion on a de facto basis.

5.2.5. Conclusion

The Constitution Treaty would extend the Union’s external or treaty-making competences in
common commercial policy to the entirety of trade in services, commercial aspects of
intellectual property rights and foreign direct investment insofar as the latter is connected to
international trade law. This competence would be an exclusive Union competence as
specifically stated in Article I-12 of the Constitution Treaty. It would therefore exclude the
possibility of the Member States to conclude agreements in these fields. Consequently, the
Member States (and hence also their parliaments) would no longer be required to give their
consent to international trade agreements. The Member States would nevertheless still control
the common commercial policy in the Council.\footnote{On decision-making in the Council see section 5.3.}

The Constitution Treaty would also confer the internal, treaty-Implementing power to the
Union, but this would be limited according to the general delimitation of internal competences
between Union and Member States. As a result, the Union’s external competences would go
beyond its internal competences. This is not atypical for federal systems and requires
coordination and cooperation between the Union and the Member States before an agreement
can be concluded. This particular consequence of the Constitution Treaty can be seen as a step
towards further “federalisation” of the Union’s external relations. Instead of only
“centralising” additional external powers at the Union level, the Constitution Treaty would
require policy co-ordination and co-operation at different government levels – a typical feature of federal systems.

5.3. Decision-making in the Council

Article III-217 (4) of the Constitution Treaty contains the voting requirements of decision-making in the Council. This provision was significantly altered throughout the course of the Intergovernmental Conference.

Although it was the intention of the Convention to provide for the use of qualified majority voting as a rule\textsuperscript{110}, the Convention version of Article III-217 did not specifically mention qualified majority voting. The Working Group of Legal Experts of the Intergovernmental Conference rectified this by adding an additional subparagraph in Article III-217 (4), which reads: “For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by qualified majority.” The sentence was proposed for the sake of clarity, but the wording of the provision could be misleading. It 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. Yet, majority voting is already the general rule for the exercise of powers in the field of commercial policy as stated in Article 133 (4) ECT.\textsuperscript{111} Therefore, the proposed provision should be interpreted that majority voting applies as a general rule subject to the exceptions provided for in subparagraphs 2 and 3 of Article III-217 (4).

Subparagraph 2 of Article III-217 (4) holds:

“For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.”

In the areas of trade in services, commercial aspects of intellectual property and foreign direct investment, the Constitution Treaty thus applies the principle of parallelism concerning voting requirements: The conclusion of international agreements shall be governed by the same decision-making procedures as internal legislation with the same content.

It should be noted that the Convention wanted to apply this principle of parallelism only to agreements concerning commercial aspects of intellectual property rights and agreements concerning trade in services “involving the movement of persons”. The term “movement of persons” is a reference to the so-called “modes of supply” of GATS, in particular to mode 2 (“consumption abroad”, i. e. movement of a natural person for the consumption of a service), mode 3 (“commercial presence”, i. e. movement of a juridical person for the supply of a service) and mode 4 (“presence of natural persons”, i. e. movement of a natural person for the supply of a service). In the explanation for this proposal the Praesidium justified the maintenance of unanimity in these areas with “political reasons”.\textsuperscript{112}

The deletion of the term “movement of services” and the inclusion of foreign direct investment in Article III-217 (4) was only proposed a couple of weeks before the Dublin summit.\textsuperscript{113} It evidences the sensitivity of services and foreign direct investment for national regulatory autonomy and shows that the Member States are reluctant to loose the control over

\textsuperscript{110} See above.
\textsuperscript{111} “In exercising the powers conferred upon it by this Article, the Council shall act by qualified majority.”
\textsuperscript{112} April Draft, supra note. The Praesidium also referred to Opinion 1/94 and distinguished cross-border supply of services (GATS mode 1) from trade in services involving the movement of persons.
\textsuperscript{113} IGC, Meeting of Focal Points (Dublin, 4 May 2004) working document, CIG 73/04, 29 April 2004.
international agreements in this field. However, it must be kept in mind that Article III-217 (4) subparagraph 2 only requires unanimity in the Council if unanimity is also required for the adoption of internal legislation. If the Council can adopt legislation by qualified majority, it can also conclude international agreements in the same way.

This rule is modified in subparagraph 3 of Article III-217 (4) stating:

“The Council shall also act unanimously for the conclusion of agreements:

(a) in the field of trade in cultural and audiovisual services, where these risk prejudicing the Union's cultural and linguistic diversity;

(b) in the field of trade in social, education and health services, where these risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.”

The requirement for unanimity according to letter (b) of subparagraph 3 seems to have been suggested literally days before the Dublin summit and took many observers by surprise. Apparently, it was not thought to be politically feasible to require unanimity for cultural and audiovisual services, but to subject social, health, and education services to qualified majority voting. Despite the last minute change, it should be noted that many Convention members also repeatedly called for unanimity in these services. Therefore, the proposed version represents the will of a large group, possibly even the majority of the Convention.

Subparagraph 3 of Article III-217 (4) raises a number of questions. At the outset it should be noted that it only covers the conclusion of agreements, and not the negotiation, which distinguishes it from subparagraphs 1 and 2. Hence, the negotiating process will not be influenced by the unanimity rule of subparagraph 3. Another aspect of the scope of subparagraph 3 concerns its sectoral coverage, which could be determined on the basis of the standard classification of services (CPC) used by the WTO.114

The interpretation of the term “cultural and linguistic diversity”, which is new in the context of the common commercial policy, poses a more difficult interpretative problem. The term can currently only be found in Article 149 (1) ECT. The Constitution Treaty also uses it in Article I-3 (3) which states that the Union “shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced.” However, neither the ECT nor the Constitution Treaty define this term. Apart from the ambiguity of this term, the operation of Article III-217 (4) subparagraph 3 (a) also requires an assessment of the risk posed by a trade agreement to the Union’s linguistic and cultural diversity. It is questionable whether and how such a risk could be assessed.

Subparagraph 3 (a), unlike 3 (b) does not aim to protect a particular value of the Union, rather the organisational and institutional necessities for the provision of services in the three sectors at the national level. It therefore seeks to protect the national autonomy in this context. Both subparagraph 3 (a) and 3 (b) do, however, require an assessment of the risk posed by an international agreement to the organisational context of the provision of a service.

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114 WTO, Services Sectoral Classification List, 10 July 1991, MTN.GNS/W/120, reproduced as part of the Guidelines for the Scheduling of Specific Commitments under the GATS of 23 March 2001, WTO-Document S/L/92. Audiovisual services include motion picture and video tape production and distribution services and television and radio production and transmission services. Cultural services include a variety of services broadly associated with literature, art, music and history, such as museums, archives and theatre services. Education services include primary, secondary, higher and adult education. Health services include hospital services, and possibly also medical services of doctors, nurses, midwives and physiotherapists, which are actually considered professional services. Social services are not further specified in the WTO classification, but could include social work, care, and community services.
The exception from qualified majority voting in subparagraph 3 requires a Member State calling for a unanimous vote to specifically invoke either subparagraph 3 (a) or 3 (b) and explain why and how the agreement concerned would pose a risk to the Union’s cultural and linguistic diversity or to the provision of health, social, education services. If the other Council members do not share this view and the decision is taken by qualified majority voting, only a judgement by the ECJ would provide ultimate clarity.

Arguably, the interpretative uncertainties could render subparagraph 3 non-operational. As a consequence the Council could either decide to conclude all agreements involving audiovisual, cultural, health, and education services by unanimous vote in order to avoid risking a violation of the voting requirements or Member states could refrain from invoking subparagraph 3 in the first place. The actual practice will most likely depend more on the political context of the issues concerned and less on legal niceties.

In any event, a trade agreement which includes issues requiring unanimity and issues requiring only a qualified majority will be concluded in its entirety by unanimous vote in the Council according to the “Pastis” principle. This could in particular be the case for agreements concluding future rounds of multilateral trade negotiations, which typically include a large variety of subjects. The differentiated rules on decision-making in the Council could therefore be of greater practical importance for the conclusion of single issue trade agreements.

5.4. Role of the European Parliament

5.4.1. Parliamentary consent to international agreements

The role and the function of the European Parliament in the field of the common commercial policy remains complex according to the Constitution Treaty, because two different articles need to be taken into consideration. Article III-217 only mentions the European Parliament once: According to paragraph 3 subparagraph 2, second sentence the Commission shall inform the special committee of the Council (“Committee 133”) and the European Parliament on the progress of negotiations. The additional reference to the Parliament is new in the Constitution Treaty and would legally require the Commission to inform the European Parliament on trade matters. As the Commission already informs the Parliament and since the Constitution Treaty does not specify the terms of this information (content, time and frequency), it is not likely that the new obligation would have a large practical implication.

Apart from this specific reference to the European Parliament, Article III-217 (3) refers to the general rules of the Constitution Treaty for the conclusion of international agreements, which can be found in Article III-227. This provision preserves the well-known structure of European decision-making concerning international agreements: The Commission (now also the Union Minister for Foreign Affairs) proposes the opening of negotiations, the Council authorizes them and adopts negotiating directives, the Commission (or the Union Minister of Foreign Affairs) conducts the negotiations, and the Council based on a recommendation by the negotiator adopts a decision concluding the agreement. In the common commercial policy these general proceedings are slightly modified, because only the Commission and not the Union Minister of Foreign Affairs negotiates and the special Committee 133 is involved in the negotiations.

115 Above note.
116 Since the Constitution Treaty most likely will not enter into force before the end of the current WTO negotiations (the Doha Development Agenda) its provisions will only be used in future rounds.
117 This includes the possibility to nominate a specific negotiator as the leader of the Union’s negotiating team by the Council.
Similar to existing constitutional law, the Constitution Treaty would contain two means of parliamentary participation concerning the conclusion of international agreements. In general the European Parliament would need to be consulted before the Council concludes an agreement (Article III-227 (6) subparagraph 2 (b)). The only exception to this rule would be for agreements relating exclusively to the common foreign and security policy. However, no exception would exist for trade agreements. This distinguishes the Constitution Treaty from the current version of the ECT, which excludes trade agreements from parliamentary consultation. Therefore the European Parliament would at least need to be consulted before a trade agreement is concluded.

In addition to the right to be consulted, the Constitution Treaty would require parliamentary consent in five specific categories of cases according to Article III-227 (6) subparagraph 2 (a). The provision would maintain the requirement of parliamentary consent for association agreements, agreements establishing a specific institutional framework by organizing cooperation procedures and agreements with important budgetary implications.\(^\text{118}\) In addition it would require parliamentary consent for the Union’s accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms and – more importantly in the present context - for “agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the Parliament is required” (Article III-227 (6) subparagraph 2 (a) (v)).

The term “ordinary legislative procedure” refers to Article III-302 of the Constitution Treaty, which contains the procedure applying to the law-making process, i. e. the making of European laws and European framework laws. Hence whenever an international agreement covers an area, to which the legislative procedure applies, its conclusion requires the consent of the European Parliament.

Even though Article III-217 does not contain an explicit reference to the ordinary legislative procedure, paragraph 2 of this Article, which provides that European laws shall establish the measures defining the framework for implementing the common commercial policy can be read as a reference to the legislative procedure according to Article III-302. Such a reading is supported by the first draft version of this article, which referred specifically to “legislative procedure”.\(^\text{119}\) Indeed, it would seem implausible if the European Parliament would have the right to be a co-legislator on the basis of Article III-217 (2) when implementing international agreements, but would not have to give its consent to the conclusion of the agreement. It should also be remembered that it was the clear intention of the Convention to give the European Parliament a greater influence in the common commercial policy. Furthermore, the specific information right of the European Parliament according to Article III-217 (3) does not exist in other areas of international agreements. It would seem unbalanced, if Article III-217 (3) were to give the European Parliament an additional, participatory right in the negotiation process, while Article III-227 (6) only required parliamentary consultation for the conclusion of an agreement.

It is therefore safe to conclude that the European Parliament’s consent is required for the conclusion all international agreements which need to be implemented in accordance with the provision of Article III-217 (2). However, this does not answer the question, whether the Parliament’s consent is required for agreements, which do not need to be implemented, because they do not contain any requirements which need to be transferred into domestic law. For example, changes in the WTO’s Dispute Settlement Understanding (DSU) would not need to be transferred into domestic law, because the DSU is only applicable at the international level. It could therefore be argued that Article III-217 (2) does not apply to

\(^\text{118}\) Article III-227 (6) subpara. 2 (a) (i), (iii) and (iv).

\(^\text{119}\) CONV 685/03, wording changed in CONV 727/03 27 May 2003.
changes of the provisions of the DSU. As a consequence, Article III-227 would not require parliamentary consent for the conclusion of an international agreement changing provisions of the DSU. Therefore, if such an agreement would be concluded independently of the results of the other current WTO negotiations, the European Parliament would not be asked for its consent. However, since Article III-227 would abandon the exception for trade agreements from the general consultation requirement, the European Parliament would need to be consulted.

5.4.2. Parliamentary control of the executive

As mentioned in section 2, parliamentary control of the executive is traditionally seen as the second pillar of democratic accountability of international law. It should be recalled that the European Parliament does not directly elect the Commission and its right to recall the Commission or its President through a motion of censure is subject to procedural constraints.

The Constitution Treaty would change the selection process of the Commission only slightly: According to Article I-26 of the Constitution Treaty the President of the Commission shall be elected by Parliament based on a proposal of the European Council. The latter shall take the results of the elections to the European Parliament into account. Though the European Parliament would have the right to reject the candidate of the European Council, it would not be able to choose its own candidate and would be given no choice but to accept or reject a candidate of the European Council. In fact, the European Council would not even have to present more than one candidate. The Commission President would then choose the Members of the Commission and subject them to a collective vote of approval in the European Parliament. The European Parliament could pass a censure motion and request the whole Commission to resign. However, such a motion would require a two-thirds majority.

Kokott and Rüth have rightly called the provisions on parliamentary accountability of the Commission a “cosmetic gloss” to the present procedure, which is disappointing from a democratic perspective. According to their view “the amendments introduced change little (if anything), in practical terms, in comparison to the rubber-stamping role the Parliament is currently limited to”. Therefore, the Constitution Treaty does not provide the European Parliament with sufficient means to enforce the Commission’s parliamentary responsibility, even though Article I-25 (8) of the Constitution Treaty specifically declares that the Commission shall be responsible to the European Parliament.

5.4.3. Conclusion

The new requirement of parliamentary consent to the conclusion of international agreements is an improvement from the perspective of democratic legitimacy and ought to be welcomed. The apparent limitation of this right to agreements which need implementation in internal law is disappointing, but may not be too significant in practice. In any case, the requirement of parliamentary consent will also strengthen the European Parliament’s influence in the negotiation process of international agreements, which is arguably just as important as the right to accept or reject an agreement.

When assessing the overall level of democratic legitimacy of external trade policy according to the Constitution Treaty, the increased rights of the European Parliament must be seen in light of other changes. In this context, it is regrettable that the Constitution Treaty will not

120 Article I-25(5) and III-243 Constitution Treaty.
121 Kokott and Rüth, supra note, p. 1332-1333.
122 Ibid.
substantially increase the European Parliament’s supervisory role vis-à-vis the Commission. The second pillar of democratic legitimacy of external policy would thus remain comparatively weak at the European level. Furthermore, since the Constitution Treaty submits all areas of trade policy to the exclusive competence of the Union, Member States’ parliaments would no longer be required to ratify trade agreements. This in turn would reduce their influence on those agreements and the level of legitimacy they could confer upon the common commercial policy. In particular because of the reduced influence of national parliaments on the common commercial policy, the Constitution Treaty would not substantially decrease the deficit of democratic legitimacy of this policy area.

6. Conclusion

If ratified, the Constitution Treaty would change the constitutional law of the common commercial policy in a number of important aspects. Overall, it can be concluded that these changes would make the Union’s external trade policy more federal, but not necessarily more democratic. The Union would gain a comprehensive external competence which would cover all fields of the current multilateral trading system. However, Article III-217 would not provide the Union with full internal competence to adopt legislation to implement respective agreements. Hence, the Union would need to co-ordinate with the Member States before such an agreement can be concluded. This is a situation which can be found in many federal systems and is therefore neither unusual nor impractical. In fact, the co-ordination between Union and Member States is facilitated by the fact that a number of issues still require unanimity in the Council. Many of those issues which would require unanimity in the Council for the conclusion of an international agreement are also the issues for which the Union would not have internal competence. Therefore, the voting rules would require co-ordination and a common accord of the Member States in matters where the internal competence of the Union would be limited.

The necessity to implement an international agreement of the Union will nevertheless put political pressure on the Member States to adopt the relevant legislation. The formal competence of the Member States to implement an international agreement may in fact not leave the Member States a large margin of discretion.

The Constitution Treaty would increase the rights of the European Parliament in relation to the conclusion of trade agreements. However, this improvement is partly – if not fully – outweighed by the fact that the national parliaments would lose the right to ratify trade agreements and would therefore lose influence on external trade policy. Furthermore, the Constitution Treaty does not establish full parliamentary accountability of the Commission. The right to revoke – a constituting element of democratic accountability in parliamentary systems – remains restrained. The Constitution Treaty therefore repairs some democratic defects of the current constitutional law of the common commercial policy, but also introduces new problems. At least from the perspective of democratic legitimacy, the Constitution Treaty provisions of the common commercial policy therefore resemble – once again – an “Echternach Procession.”