EXTERNAL COMPETENCES OF THE EUROPEAN UNION AND THE TREATY-MAKING POWER OF ITS MEMBER STATES

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I. INTRODUCTION

The European Union (EU) and its member states have become members of the World Trade Organization (WTO) and parties to the agreements and legal instruments negotiated in connection with it. Judicial review of acts of the EU or its member states which aim to implement such international trade agreements may be initiated at different levels. The dispute settlement mechanism of the WTO works on the international level to settle disputes between WTO members. Private persons may seek redress using the domestic procedures provided for in the judicial systems of the EU and its member states.

One of the problems parties and decision makers may face arises from the fact that, on the EU's side, treaty-making powers or competences concerning international trade relations are divided between the EU and its member states.

On the international level, the question of how treaty-making powers should be distributed may arise, for example, in a dispute relating to services in which competences are divided. In such cases, is it the EU or a single member state that may initiate a dispute settlement procedure? What about cross-retaliation—if the infringement was committed in an area of exclusive EU competence, such as within the GATT, but the retaliation is aimed at an area of member states' competence, such as within GATS or TRIPs?

Domestic procedures initiated by private parties within the EU may also be affected by the division of external powers. The allocation of treaty-making powers may be relevant, for instance, in determining who is to have the last word in deciding a dispute: the national courts or the European Court of Justice?

II. SOME GENERAL OBSERVATIONS ON THE DISTRIBUTION OF EXTERNAL POWERS

In contrast to the treaty-making competences accorded by treaty to traditional international organizations, the external competences of the EU have far-reaching effects on the corresponding treaty-making competences of its member states. Just as the law adopted by the EU prevails over national laws in the case of internal EU legislation, the treaties the EU concludes may restrict the treaty-making powers of its member states.

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The delimitation of the EU's competences has been a constant cause of dispute between the EU and the member states' governments. Two reasons for that may be discerned. The first reason arises from the fact that external EU competences, if they are considered to be exclusive, intrude upon the member states' sphere of external sovereignty, thereby occupying a field which states consider to be essential to their very existence as subjects of international law. The Montevideo Convention of December 26, 1933, on the Rights and Duties of States provides an explanation for this attitude.[1] Article 1 of the Convention gives a definition of "(t)he State as a person of international law."[2] This definition requires four qualifications, the fourth—after population, territory, and government—being the "capacity to enter into relations with the other States."[3] The member states are very reluctant to concede that they might be overruled by the EU organs in that field of capacity, thereby being deprived of powers that form a constituent aspect of sovereignty.

The second reason for the ongoing disputes is the rudimentary nature of the EC-Treaty provisions regarding the definition and delimitation of the areas in which the EU has been conferred external competences. Thus, we enter a field that has become the domain of the European Court of Justice, which has in effect laid down the law pertaining to external competences of the EU and its impact on the member states' treaty-making powers. The weakness of this judicial law-making is that the Court sometimes has a tendency to hand down judgments and opinions of a very apodictic character, leaving ample room for further interpretation of these judgments and perhaps for doubts regarding whether the Court's arguments can be reconciled with former rulings.

As member states have consistently endeavored to retain their rights of national self-determination in the sphere of external relations, many multilateral treaties have been concluded as so-called mixed agreements, which means that the EU as well as the member states participate in the treaty. The seeming advantage of this practice is that the delimitation of the relevant competences could at first remain undefined. However, these mixed agreements create a host of new and even more difficult questions.

In several instances of mixed agreements, the European Court has been called upon to pass judgments or to give binding opinions. The most important of these is the very recent Opinion 1/94 of November 15, 1994, regarding the participation of the EU and its member states in the WTO-Treaty and its Annexes.[4] In this opinion, the Court clarified some of the issues posed by the

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1. Convention on the Rights and Duties of States (Montevideo Convention), Dec. 26, 1933, 165 L.N.T.S. 19.

2. *Id.* art. 1, 165 L.N.T.S. at 23.

3. *Id.*

4. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS–RESULTS OF THE URUGUAY ROUND vol. 31; 33 I.L.M. 81 (1994).

EU's Common Commercial Policy. At the same time, it has apparently changed its jurisprudence regarding the possible creation of external competences of the EU and the relation of such competences to national treaty-making powers.

Two phases in the development of the Court's jurisprudence may be discerned. The first one, beginning in the early 1970s and continuing until the early 1990s, could be called the integrationist phase, in which the Court played an activist role in expanding the EU's powers. In the second phase, which was ushered in by the WTO-Opinion of 1994,[5] the Court set clear limits on these powers, again widening the range of the member states' treaty-making powers.

III. THE INTEGRATIONIST PHASE OF THE EUROPEAN COURT'S JURISPRUDENCE

A. The Creation of the External Powers of the European Community

1. The Principle of Enumerated Competences

EU law-making is governed by the principle of enumerated competences. This means that legal acts which affect third parties—private persons or states and their subdivisions—must be based on provisions of the EC-Treaty which confer on the EU a special competence for taking such an act. The general task of creating an internal market, for example, is not a sufficient basis for law-making. This is true not only for legal acts directed at the member states and their spheres of jurisdiction, but also for the EU's external powers, such as the treaty-making power, which allow for acts directed towards third states or for the conclusion of agreements in the field of international law.

2. Explicit and Implied Powers

The EC-Treaty provides the EU with explicit treaty-making powers in very few instances. Aside from the ability to establish administrative relations with international organizations, only two cases were mentioned in the original Treaty: external acts in the area of the Common Commercial Policy,[6] and the conclusion of association agreements with third states.[7] A few further competences were added by amendments to the EC-Treaty. For example, in the fields of research and technological development,[8] environmental policy,[9] and development

5. *Id.*

6. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, O.J. (C 224) 1 (1992), [1992] 1 C.M.L.R. 573 (1992) art. 113 [hereinafter EC TREATY].

7. *Id.* art. 238.

8. *Id.* art. 130(m) § 2.

cooperation.[10] The question of the EU's treaty-making competences in other fields, especially in the core area of the internal market (which might involve issues such as the movement of workers and service providers or the freedom of establishment) has not been addressed by the Treaty.

This being so, one might come to the conclusion that, in many of the cases in which the EU was accorded law-making competences in the internal market, it was barred from concluding treaties with third states or international organizations. This is where the European Court of Justice, in what might be called the integrationist phase of its jurisprudence, provided a solution in favor of the EU. Starting with its famous ERTA-judgment in 1971,[11] it developed the doctrine of implied external powers. Wherever the EU had internal law-making competences—such as in the field of international transport—and wherever it had already made use of these competences, it was implicitly empowered to conclude treaties with third states.

One of the questions the Court didn't expressly address was whether the EU possessed treaty-making powers even before it had made use of its internal competences. It seemed odd that for the EU to regulate international transport only in connection with third states, it should be necessary to first enact community legislation in order to acquire the competence to conclude such an agreement. The subsequent jurisprudence of the Court, however, seemed to suggest that this was not necessary. In the preliminary ruling in the *Kramer* case[12] and in a binding opinion on an international agreement including Switzerland, a non-member state, on the laying-off of ships in the Rhine river traffic scheme,[13] the Court, or so it was understood at that time, held that external competences followed from the very existence of internal competences. Previous internal law-making did not seem to be a prerequisite for the creation of external powers.

The Court's Opinion 2/91 on the ILO-Convention Nr. 170, given on March 29, 1993,[14] summarizes this jurisprudence, reiterating that whenever EU law has been created for the institutions of the EU powers within its internal system for the purpose of attaining a specific objective, the EU has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express grant to that effect.[15]

This view had been widely approved of in the legal literature. It confirmed the principle of the initial unity of internal and external competences, which rests on the equivalence of autonomous and treaty-made rules in the scope of the EC-

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9. *Id.* art. 130(r) § 4.
10. *Id.* art. 130(y).
11. Case 22/70, Commission v. Council, 1971 E.C.R. 263.
12. Joined Cases 3, 4, & 6/76, Officier van Justitie v. Kramer, 1976 E.C.R. 1279.
13. Opinion 1/76, Laying-Up Fund for Inland Waterway Vessels, 1977 E.C.R. 741 [hereinafter Laying-Up Fund].
14. Opinion 2/91, 1993 E.C.R. I-1061 [hereinafter Opinion 2/91].
15. *Id.* at I-1076.

Treaty. The efficiency of EU action would be diminished if the EU could not conclude agreements with third states in a field in which it had internal competences. Otherwise, it would be dependent on the actions of each single member state for the international coordination of EU law-making. Moreover, the EU would then be exposed to the danger of becoming politically bound by member state treaties, the conclusion of which would have been effectuated without the participation of EU organs.

B. The Impact of European Community External Competences on Member States' Treaty-Making Powers

Given the existence of EU treaty-making competences, the question arises as to whether these competences affect the treaty-making power of the member states.

As the distribution of powers within federations shows, several modalities are possible. Powers of the federal authority may be exclusive, leaving no room for action by the constituent states. Powers may also be concurrent or parallel. In that case, the constituent states may legislate or otherwise act in the same field. There is, however, need for a norm governing the relationship of EU and domestic laws which conflict with each other.

The EC-Treaty does not contain any express provisions in this respect. However, there is a firm judge-made set of rules that distinguishes between exclusive and concurrent or parallel powers, the exclusive powers being divided into competences which are exclusive *ab initio* and those which become exclusive at a later stage.

The European Court of Justice has granted initial exclusivity in very few cases, the prominent one being Article 113 on the Common Commercial Policy toward third states and international organizations. In its Opinion 1/75 on "Local Costs Standards," 1975,[16] the Court held that the Common Commercial Policy was conceived in Article 113 in the context of the operation of the common market for the defense of the common interests of the EU, within which the particular interests of the member states must endeavour to adapt to each other.

Quite clearly, however, this conception is incompatible with the freedom to which the member states could lay claim by invoking a concurrent power, so as to ensure that their own interests were separately satisfied in external relations, at the risk of compromising the effective defense of the common interest of the EU.

To accept that the contrary were true would amount to recognizing that, in relations with third countries, member states may adopt positions that differ from those which the EU intends to adopt, and may thereby distort the institutional framework, call into question the mutual trust within the EU, and prevent the latter from fulfilling its task in the defense of the common interest.[17]

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16. Opinion 1/75, Local Costs, 1975 E.C.R. 1355.
17. *Id.*

Apart from such special cases as the Common Commercial Policy, however, the treaty-making power of member states is not in principle adversely affected by a EU competence covering the same field. If, however, the EU makes use of its legislative competence in this field, the treaty-making power of the member states lapses to the extent to which the EU has legislated. To this extent, the EU's treaty-making competence becomes exclusive. The reason for this, in the view of the Court, was the necessity of protecting the unity of the common market and the uniform application of EU law.

This view was confirmed by Opinion 2/91 (pertaining to ILO-Convention Nr. 170).[18] There the Court once again articulated the view that:

> [T]he exclusive or non-exclusive nature of the Community's competence does not flow solely from the provisions of the Treaty but may also depend on the scope of the measures which have been adopted by the Community institutions for the application of those provisions and which are of such a kind as to deprive the Member States of an area of competence which they were able to exercise previously on a transitional basis . . . . [W]here Community rules have been promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope.[19]

Thus, concurrent powers becoming exclusive seems to be an effect of the general priority rule developed by the Court, a rule that says that EU law-making excludes member states' regulations in the field occupied by the EU's act. Member states are not allowed to make treaties which might—if not legally, but at any rate politically—endanger the application of EU law already enacted in the field concerned.

In addition, there is evidence in the Court's jurisprudence that not only internal EU law-making but also EU treaty-making renders the relevant Community's treaty-making competence exclusive. If the EU had concluded a treaty—for example, in the field of international transport, an agreement of a member state in the same field would likewise endanger the application of EU law. This is all the more true where the conclusion of a EU agreement has immediate legal effects within the community according to Article 228 section 7 of the EC-Treaty,[20] at least in cases where the agreement's provisions are self-executing. The Court has not yet deviated from its dictum that in such cases an agreement concluded by the Council forms an integral part of the EU's legal order.

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18. Opinion 2/91, *supra* note 14.
19. *Id.* at I-1077.
20. EC TREATY art. 228 § 7.

C. The Problem of Mixed Agreements

In practice, the reluctance of member states to give up treaty-making powers in favor of the EU has led to the conclusion of mixed agreements in which both the EU and the member states participate in a treaty with third states or international organizations. The WTO-Treaty is only one of many. How does this practice comply with the rules just presented? Until the most recent Court rulings, especially on the WTO-Treaty, the legal situation in EU law seemed to be rather clear. Mixed agreements could be concluded only insofar as the participation of member states was necessary to compensate for a deficit of EU competences. In relation to third states, the binding force of the treaty extends equally to both the member states and the EU. However, in relation to each other, member states and the EU have to observe the distribution of competences provided for by EU law. Therefore, in their internal relationship, member states are to be considered as treaty parties only to the extent to which the external competences are not attributed to the EU. The reason for this rule lies in the threat mixed agreements may pose to the position of the EU through domination by the member states. Each single member state can block the conclusion of or the accession to the agreement for the EU as a whole. The agreement may be concluded by either the EU and the member states or by neither of them. Granting competences to the EU as far as possible diminishes the scope of action at a member state's disposal for asserting deviating positions in negotiating an agreement.

IV. THE TURNING OF THE TIDE: THE RECENT JURISPRUDENCE OF THE EUROPEAN COURT OF JUSTICE, ESPECIALLY OPINION 1/94-WTO

The recent jurisprudence of the European Court of Justice, as set forth especially in the WTO-Opinion, has apparently brought to an end the long phase of Court promotion of integration notwithstanding member states' reluctance to give up external powers. On the one hand, it has shed new light on the concept of a Common Commercial Policy as a field of exclusive EU power, clearly setting limits to the EU's position. On the other hand, it has expanded the ambit of member states' action in those fields in which the EU has only internal competences, as in the area of the internal market. Both treaty-making and treaty implementation have become more complicated.

A. The Scope of the Common Commercial Policy

In its WTO-Opinion, the Court reiterated its longstanding view that the powers conferred on the EU in the field of external trade policy were exclusive: that the member states had lost their regulating and treaty-making powers in this field. Consequently, the crucial question concerned the ambit of the external trade

policy. The Court had previously held that all transactions of trade in goods fell under the scope of this policy. Thus, it was the EU alone which was competent to conclude agreements concerning GATT 1994.

The Court further held that part of the trade in services as defined in the GATS Agreement now also falls within the ambit of the Common Commercial Policy. This is true for cross-frontier supplies, where the service is rendered by a supplier established in one country to a consumer residing in another. It was the similarity of this kind of service provision to the transborder movement of goods which caused the Court to include it in the Common Commercial Policy. The other modes of supplying services, however—including the cross-border movement of persons—were not considered part of this policy, as there are specific chapters in the EC-Treaty which deal with the movement of natural and legal persons.

Using very similar arguments, the Court held that only part of the TRIPs Agreement concerning intellectual property rights could be brought under the scope of the Common Commercial Policy. This was only the case where prohibition of the release into free circulation of counterfeit goods was involved. It refers to measures to be taken by the customs authorities at the external frontiers of the EU and could therefore be based on Article 113 of the EC-Treaty. Apart from this special case, the Court held an international agreement concerning the protection of intellectual property rights did not specifically relate to the EU's international trade, as distinguished from internal trade within the common market. Therefore, it did not fall within the ambit of the exclusive powers of the Common Commercial Policy.

B. The Abolition of Parallelism

The next question to be answered by the Court was whether the EU could rely on implied treaty-making powers in the field not covered by the Common Commercial Policy, especially where the EU had express competences only for internally regulating common market affairs, such as in the field of TRIPs. Surprisingly, the Court did not hold onto the view that—apart from the very special case in which the EU could not reasonably make use of an internal competence without the participation of third states—an external competence existed implicitly wherever the EU was accorded internal regulating powers. The Court's opinion suggests that an implied external competence can be assumed only in cases where the EU has already made use of the internal competences. Consequently, there are two conditions for treaty-making competences in the field of internal market freedom. First, there must be an internal legislating competence (which is not hard to find). Secondly, EU legislation must already have been enacted. Treaty-making powers are implicitly accorded to the EU only insofar as a field is already covered by such regulations or directives. Where there is no such EU legislation, the member states alone are competent to conclude treaties in these fields.

C. The New Rules on "Mixed Agreements"

This recent jurisprudence of the Court has far-reaching implications for the participation of member states in "mixed agreements." Formerly, as could be inferred from opinions of the Court,[21] the participation of member states in treaties concluded by the EU would be allowed only in exceptional cases. Only where participation of the member states was inevitable because the EU lacked competences to cover the whole scope of the treaty were the member states allowed to join it. They were obliged to limit their activities to the severable area that necessitated this participation. In the field of internal market competence, the participation of the member states could have been considered unnecessary because the EU could make use of its implied external powers.

The situation has now reversed. The participation of the EU in a field in which it was accorded internal legislative powers was not admissible under EU law because of a lack of implied external powers unless the EU had already legislated in the fields concerned. Even if the EU became a party to the treaty as a whole and even if it enjoyed legislative competences to regulate the internal market, the provisions of the treaty—for lack of implicit external competences—cannot become part of EU law according to the EC-Treaty,[22] even if they are self-executing.

Strangely enough, however, implicit external competences can come into existence subsequently through implementation of the treaty by internal EU law-making. As a consequence, the relevant treaty provisions become EU law. The apparent adverse effect of this situation is that the EU's position is compromised, since these treaty provisions retain their binding character for the EU even though they were negotiated subject to the control and veto of each individual member state.

Thus, the division of external competences between the EU and the member states entails serious complications for both treaty-making and treaty implementation. The Court finally tried to moderate the adverse effects of its WTO-Opinion. When the European Commission drew its attention to the fact that the EU's unity of action vis-à-vis the rest of the world would be undermined and its negotiating power greatly reduced, the Court pointed out that it is essential to ensure close co-operation between the member states and the EU institutions, both in the process of negotiation and conclusion and in the fulfillment of the commitments entered into. That obligation, the Court set forth, flows from the requirement of unity in the international representation of the EU.

This advice was certainly not very helpful. It set forth only the end which had to be attained, but it failed to define the means of effectively overcoming the cleavage between the interests of the member states and those of the EU in the practice of treaty-making and treaty implementation.

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21. Laying-Up Fund, *supra* note 13.
22. EC TREATY art. 226 § 7.

IV. THE EUROPEAN UNION IN THE PHASE OF CONSTITUTION MAKING

All these difficulties and complications seem to originate from the fact that the member states do not have a clear picture yet as to what the EU should look like at its final stage. They may agree that the EU already forms a novel entity in international relations—neither a federal state nor an international organization of the traditional type. It must be something in between, but its image is blurred. We are witnessing, as Joseph Weiler has put it, the transformation of Europe.[23] Until this process has completed itself, we will see fragments of the traditional models of both federations and international organizations used alternately in constructing the future edifice of the EU. It will be difficult to recognize an unequivocal blueprint. Perhaps it will be the outside world—for example third states in the WTO—that will insist on more reliability and will thus induce the EU to reformulate and clarify its system of action in the field of its external relations.

23. J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2434 (1991).