The Common Commercial Policy and the Lisbon judgement of the German Constitutional Court of 30 June 2009

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Table of Contents

I. Introduction

In its judgement (paras. 370 to 380) of 30 June 2009, the German Constitutional Court (BVerfG) analysed the modifications of the Lisbon Treaty to the Common Commercial Policy currently in place, with a view to assessing the implications of the contemplated changes in light of German constitutional law.

The following remarks are neither intended to present an exhaustive analysis of the new Common Commercial Policy under Lisbon, nor to offer an academic commentary on the intricacies of German constitutional law. The purpose is instead to comment on the BVerfG's Common Commercial Policy analysis from a World Trade Organisation (WTO) perspective.

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II. Opinion 1/94 as starting point of the BVerfG's analysis

Interestingly, the BVerfG begins its analysis of the status quo of the Common Commercial Policy by looking at Opinion 1/94 of the Court of Justice of the European Communities (ECJ) of 15 April 1994.[1]

It is certainly true that this Opinion by the ECJ constitutes a landmark decision within the sphere of the European Community's Common Commercial Policy. This said, Opinion 1/94 is more than fifteen years old, but, more importantly, interpreted Community law as it was at the time. The Common Commercial Policy was at the time of the Opinion based on Art. 113 of the Maastricht version of the EC Treaty, which has been modified subsequently by the Amsterdam version of the EC Treaty in order to become, after very significant modifications and extension of the coverage, Art. 133 of the EC Treaty in its presently applicable Nice version.[2]

In Opinion 1/94 the European Commission had asked the ECJ to establish whether the European Community could conclude the international agreements negotiated within the framework of the General Agreement on Tariffs and Trade (GATT) Uruguay Round Trade Negotiations alone, or whether the Community could do so only together with its Member States (mixed agreement).

While the results of previous rounds of trade negotiations under the auspices of the GATT clearly fell under Art. 113 of the Treaty, new topics such as intellectual property rights (Agreement on Trade Related Aspects of Intellectual Property Rights – TRIPS) and services (General Agreement on Trade in Services – GATS) complicated the situation significantly.

In the absence of any textual reference in Art. 113 of the Treaty, it did not come as a surprise at the time that the Court essentially denied an exclusive European Community competence for TRIPS and GATS.[3]

Eventually the results of the Uruguay Round Trade Negotiations were concluded by the European Community and each of its then Member States as a mixed agreement, without any mention of the relative scope of the ratifications by the European Community and its Member States.[4]

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1 ECJ, Opinion 1/94, *WTO*, Rec. 1994, I-5267.

2 A good explanation of the development of Art. 113/133 can be found in *van Nuffel*, Le Traité de Nice, Un commentaire, Revue du Droit de l'Union Européenne 1/2001, pp. 31-37.

3 The Court did accept that a small part of TRIPS (border enforcement measures) and more importantly the services mode 1 GATS provision (where a service is provided from one country to the other without the service provider or the service recipient moving) were indeed covered by Art. 113 of the Treaty.

4 Council Decision 94/800/EG of 22/12/1994, OJ L 336 of 23/12/1994, p. 1.

Subsequently, within the framework of the Amsterdam modifications to the EC Treaty, textual references to trade-related intellectual property rights and trade in services have been added to Art. 113. As the Amsterdam version of the Treaty was superseded by the Nice version, that is, the one presently in force, it does not appear particularly useful to further elaborate on the Amsterdam version.[5]

The Nice version of the now as Art. 133 renumbered Common Commercial Policy provision of the EC Treaty was supplemented by a new paragraph 5 which reads:

> "5. Paragraphs 1 to 4 shall also apply to the negotiations and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, in so far as those agreements are not covered by the said paragraphs and without prejudice to paragraph 6".

While the precise meaning of this provision has not yet been established by the ECJ,[6] the author is of the view that this provision has to be interpreted as meaning that the European Community also has exclusive competence in the areas of TRIPS and GATS.[7] Apart from the textual interpretation of this provision, the principle of effective treaty interpretation[8] would appear to militate for this interpretation.[9] This viewpoint is also confirmed by how the European Community and its Member States act and present themselves in the WTO relating to TRIPS and GATS.

Before the entry into force of the Nice version of the Treaty, the European Commission, which had already before and throughout the duration of the Uruguay Round of Trade Negotiations been the sole negotiator and spokesperson for both the European Community and its Member States, acted in the name of the European Communities and its Member States.[10]

An interesting illustration of this situation is given by the way in which the TRIPS waiver for access to medicine[11] was adopted in 2003 under the Amsterdam version

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5 See also *van Nuffel*, (fn. 2).

6 In ECJ, case C-13/07, *Commission/Council*, concerning the accession of Vietnam to the WTO, the ECJ will have to address this question.

7 At least as far as the TRIPS and GATS subject matter in a WTO-context is concerned.

8 What other than giving the European Communities exclusive competence for TRIPS and GATS could this provision stand for?

9 The introductory reference by the Advocate General *Kokott* in her conclusions in ECJ, case C-13/07, *Commission/Council*, that "Sisyphus would have done a better job", does not appear to shed any additional light on this issue.

10 See for example in the area of dispute settlement on TRIPS submissions in *US - Section 110(5) of the US Copyright Act*, WT/DS160/R, attachment 1.

11 The objective of this waiver consists in making the provisions for the grant of compulsory licences contained in the TRIPS Agreement more flexible in order to facilitate the supply of developing and least developed countries with certain medicines.

of the Treaty[12] for the "European Community camp". Here both the European Community and each of its then Member States expressly marked their agreement to the waiver.[13]

Since the entry into force of the Nice version of the Treaty the "European Community camp" presents itself in submissions and interventions concerning TRIPS and GATS as "The European Communities".[14] This new situation is also well reflected in the way an amendment to the TRIPS Agreement (intended to eventually replace the waiver referred to above) has been ratified and deposited by the "European Community camp". Here the Community ratified the TRIPS amendment[15] alone and in the ratification decision deposited on 30 November 2007 with the WTO Director General it is expressly said that:

> "The President of the Council of the European Union confirms, in accordance with Article 300(7) of the Treaty establishing the European Community, that the Protocol will be binding on the Member States of the European Union".[16]

III. Art. 207(1) of the Treaty on the Functioning of the European Union

Article 207(1) of the Treaty on the Functioning of the European Union (TFEU) reads:

> "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 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. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action."

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12 The Nice version of the Treaty entered into force on 1/2/2003, but the entire preparation of the waiver occurred under the terms of the Amsterdam version of the Treaty.

13 See paragraph 1(b) footnote 3 of Decision of 30 August 2003, WT/C/540.

14 See for example in the area of dispute settlement on TRIPS Third Party Submission by the EC in *China - Measures affecting the protection and enforcement of intellectual property rights*, WT/DS362/R, http://trade.ec.europa.eu/doclib/docs/2008/august/tradoc_140289.pdf (25/11/2009).

15 First and only WTO amendment to date, not yet in force.

16 WLI/100 of 10/12/2007.

While under the Nice text of the Treaty one could discuss whether TRIPS and GATS were covered by exclusive Community competence to the same extent as trade in goods, the wording of Art. 207(1) TFEU does not leave any doubt that TRIPS and GATS are now covered by exclusive Community competence. Nor does the BVerfG express any doubt about this.

In light of the foregoing, the changes to be brought by Art. 207(1) TFEU – in the WTO context – as compared to the present Nice version of the Treaty, are essentially of a declaratory and clarifying character and would appear much less dramatic than the BVerfG has suggested.[17]

In reality, Member States have lost their competence in the area of Common Commercial Policy (including TRIPS and GATS) in a gradual manner. As pointed out above, already in Opinion 1/94 had the ECJ said that one mode of services (namely cross-border services) out of a total of four service modes was already covered by the original Art. 113 of the Treaty (Maastricht version). Furthermore, the ECJ also held that the provisions on border enforcement measures contained in TRIPS fell under exclusive Community competence by applying its so-called AETR jurisprudence.[18]

Furthermore, in light of the extensive internal legislative activities of the European Community in the areas of intellectual property rights protection[19] and services[20] over the last fifteen years, it would appear safe to say that the European Community has gained additional external competences outside the Common Commercial Policy through the application of the AETR principle.

Finally, the way in which the "Community camp" has acted within the WTO, at least since the entry into force of the Nice version of the Treaty, would suggest that the entire subject matter covered by the WTO Agreement was subject to exclusive Community competence.

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17 BVerfG, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 of 30/6/2009, para. 314, first sentence.

18 Expressed in simple terms, this jurisprudence stipulates that the European Community gains exclusive external competence also in areas for which no express provision exists in the Treaty, but where the EC has extensively used its internal competence to harmonize a certain subject matter. ECJ, case 22/70, *Commission/Council*, Rec. 1971, 263.

19 For example, numerous legislative activities occurred since 1994 in the area of copyright and related rights.

20 For example, numerous legislative activities occurred since 1994 in the area of financial services.

IV. The loss of status of Member States in the World Trade Organisation

The alleged loss of status of Germany (and other Member States) in the WTO appears to be based on a certain misconception of the role which Germany and other EC Member States play in the WTO under the present Treaty provisions.

Since the creation of the WTO, the European Community and all its Member States have been full members of the WTO and this situation will in no way be affected by the entry into force of the Lisbon Treaty.

With regard to the functioning of the WTO, the representation of the European Community is carried out by the Commission, i.e. it is its officials who contribute written and oral submissions within the framework of the ordinary work of the WTO Councils and Committees, in ongoing trade negotiations and in dispute settlement procedures. At the occasion of WTO Ministerial Conferences, the competent Commissioner(s) act on behalf of the "Community camp".

The BVerfG also seems to assume that EC Member States have under the present regime a comprehensive right to vote in the WTO and actually exercise such rights.[21]

As pointed out above, only the European Community, through the mouth piece of a Commission official, speaks in WTO meetings and casts votes.[22]

There exists no reason to believe that this situation would change with the entry into force of the Lisbon Treaty.

As to the remark by the BVerfG that Member States would lose their formal entitlement to be a party in the dispute settlement procedures of the World Trade Organisation,[23] this is at best misleading. To start with, two spheres have to be distinguished. As a matter of WTO law there can be little doubt that any WTO member can be a party to WTO dispute settlement procedures. Given that all Member States are WTO members, each of them can – from a WTO law point of view – be a party (complainant or respondent) to WTO dispute settlement procedures. This situation will remain unaffected by the entry into force of the Lisbon Treaty.

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21 BVerfG, (fn. 17), para. 374.

22 Formal voting takes place very rarely in the context of WTO work; decisions are essentially taken by consensus. The WTO Agreement contains a special provision on the number of votes of the European Community camp in footnote 2 to Art. IX, which reads: "The number of votes of the European Communities and their Member States shall in no case exceed the number of the Member States of the European Communities".

23 BVerfG, (fn. 17), para. 374.

The WTO dispute settlement system has since its creation almost 15 years ago had to deal with some 400 disputes, of which approxmiately 150 led to Panel reports and of these Panel reports approximately 100 gave rise to Appellate Body reports which have been adopted by the Dispute Settlement Body. While the European Community has participated in almost all of these disputes, either as a main party (complainant or respondent[24]) or third party, Member States have never participated individually in WTO dispute settlement procedures.[25]

This does not, however, mean that Member States do not play an important role in the WTO's functioning. Practically all interventions made by Commission officials[26] have been, often very intensively, coordinated with Member States in Brussels (in the context of the so-called 133 Committee which meets once per week and plays a key role in the area of Common Commercial Policy). In addition, a second co-ordination often takes place in Geneva with Member States' officials before positions are taken in WTO bodies.

Every Member State has a diplomatic mission in Geneva accredited to the WTO (some have even a mission and an ambassador separate from the United Nations mission and accredited to the WTO only). The officials from Member States are regularly present in all formal (and some informal) meetings which take place at the WTO. Furthermore, Member States are in the lead on budgetary matters and indeed contribute to the WTO budget while the European Community does not contribute to the ordinary WTO budget.[27] In the context of dispute settlement, the initiative to actively launch a procedure is taken by the Commission after consultation with Member States in the 133 Committee.[28] At formal consultations and hearings before panels and the Appellate Body, Member States are represented by their officials as part of the Community team.

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24 In some instances in particular the US has designated one or more Member States together with the European Communities as defendants, e.g. *EC - Measures affecting trade in large civil aircraft*, DS316, where next to the European Communities, France, Germany, Spain and the UK were designated as defendants, which is possible under the WTO aspect of the issue as pointed out above. In all these cases a single defence was submitted by the European Commission in relation to all designated defendants.

25 In a number of pre-Nice disputes in the area of TRIPs the "Community camp" presented itself as the "European Communities and its Member States". See e.g. *Canada - Patent Protection of Pharmaceutical Goods*, WT/DS114/R.

26 This does not apply to written or oral submissions in dispute settlement procedures.

27 In this context it is interesting to note that the ECJ has already in Opinion 1/94, (fn. 1), para. 21, made it clear that the issue of who pays the membership fees is irrelevant for the question of who has competence.

28 For obvious reasons no consultation can be carried out for defence cases where the European Communities is named as a respondent by another WTO member.

Given that this will remain completely unaffected by the entry into force of the Lisbon Treaty, the concern expressed by the BVerfG[29] that Member States' status might be reduced to a merely formal one does not appear to be justified. The status of Member States under the Lisbon Treaty remains essentially unchanged as compared to the status quo.

As to the more fundamental question of a continued formal membership of Member States in the WTO after the entry into force of the Lisbon Treaty,[30] it would appear safe to say that nobody has so far seriously suggested that this would require reconsideration under Lisbon. In any event, this is probably more a political than a legal question.

In conclusion of the WTO related aspects, it would appear that the distribution of competences between the Community and its Member States in a WTO context will not be fundamentally affected by the entry into force of the Lisbon Treaty, the latter being largely declaratory of the situation under the present Nice version of the Treaty. Therefore, the concerns raised by the BVerfG vis-à-vis Lisbon would appear to be exaggerated and seem to be due to a certain remoteness of the BVerfG from the respective roles effectively played by the Community and its Member States in a WTO context under present Community law. This said, if indeed the present distribution of powers in a WTO context between the Community and Germany raised fundamental concerns under German constitutional law, such a conclusion would appear rather belated.

V. The inclusion of "foreign direct investment" in Art. 207(1) TFEU

While the inclusion of "foreign direct investment" (FDI) in Art. 207(1) TFEU is of little if any relevance for the WTO at present,[31] a few remarks seem to be warranted despite the WTO emphasis of this article.

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29 BVerfG, (fn. 17), para. 374.

30 Ibid., para. 375.

31 The term "Trade related investment measures Agreement" in the WTO is rather a misnomer, given that the measures covered by this Agreement relate to trade measures under Arts. III and XI GATT, which in turn may have an effect on investment decisions. In addition, the investment measures in the context of the GATS, in particular under services mode 3 (commercial presence), are not affected by the FDI inclusion but are rather covered by the reference to services.

Moreover, the BVerfG addresses the FDI issue separately from other areas of the Common Commercial Policy analysis.[32]

The BVerfG starts out its analysis by assuming that the Community presently has no competence at all in this area.[33] This categorical assumption is certainly inaccurate in the light of the jurisprudence of the ECJ. It will eventually and fundamentally depend on the interpretation the ECJ will give to the term foreign direct investment as used in Art. 207(1) TFEU.

The BVerfG offers as a definition:[34]

> "Much, however, argues in favour of assuming that the term 'foreign direct investment' only encompasses investment which serves to obtain a controlling interest in an enterprise."

The BVerfG does not offer any argument to support its definition attempt and avoids in particular any reference to the definitions given by the ECJ. The ECJ had the opportunity to address this question in the context of the Treaty provisions concerning the free movement of capital at several occasions.

In the most recent judgment[35] the ECJ interpreted "direct investments" as:

> "investments of any kind made by natural or legal persons which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity. [...] That object presupposes that the shares held by the shareholders enable him to participate effectively in the management of that company or in its control."

Assuming that the meaning of "direct investment" in the context of free movement of capital under the Treaty is also relevant in respect of Art. 207(1) TFEU, it is obvious that the ECJ's definition is much wider than the BVerfG's definition.

Another open question relates to the categories of investment measures captured by Art. 207(1) TFEU. Coverage – within the definition of direct investment in Art. 207(1) TFEU, eventually to be given by the ECJ – would appear to be unproblematic for admission measures. As to so-called post-admission measures, the situation may be more difficult. One of the difficulties relates to expropriation measures where conflicts with Art. 345 TFEU (currently Art. 295 of the Treaty) may occur. Here, however, it is interesting to note that the ECJ has stipulated on

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32 BVerfG, (fn. 17), para. 377.

33 Ibid., para. 379.

34 Ibid.

35 ECJ, case C-326/07, *Commission/Italy*, not yet reported, para. 35.

several occasions that the area of expropriation is not *per se* excluded from the scope of the Treaty.[36]

Finally, the impact of Art. 207(1) TFEU on existing and future bilateral investment treaties (BITs) is likely to become an area of controversy.

To the BVerfG, the situation seems to be straight forward when it says:[37]

> "The continued legal existence of the agreements already concluded is not endangered."

This statement can probably not be criticized from the perspective of general public international law. However, from the perspective of Community law, many doubts exist. The BVerfG itself recognizes that Art. 351(1) TFEU (currently Art. 307 of the Treaty) does not directly give any guarantees for the continued existence of Member States' BITs.[38] The reliance by the BVerfG on:[39]

> "the legal concept that a situation in the Member States which qualifies as a legal fact will in principle not be impaired by a later step of integration"

and on

> "the current practice, expressly declared or tacitly practiced, concerning the continued validity of international agreements concluded by the Member States"

would appear to be somewhat too weak to fully support the categorical statement by the BVerfG that the continued existence of Member States BITs is not endangered.

There can be little doubt that the foreign direct investment angle of Art. 207(1) TFEU will constitute a formidable battleground for diverging legal opinions both for practitioners of Community law and academics in the field and it is likely to end up before the ECJ rather sooner than later.

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36 See e.g. ECJ, case C-182/83, *Faeron*, Rec. 1984, 3677 and ECJ, case C-350/92, *Commission/Spain*, Rec. 1995, 1985, para. 16 et seq.

37 BVerfG, (fn. 17), para. 380, first sentence.

38 Ibid., para. 380, second sentence.

39 Ibid., para. 380, second and last sentence respectively.