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37 The Limitations of the Common Commercial Policy as an Exclusive Competence of the European Union

Plarent Ruka[*]

37.1 Introduction

The Lisbon Treaty brought significant changes to the common commercial policy of the European Union ('EU' or 'Union'). It expanded the scope of the exclusive competence of the Union with areas relating to trade in services, trade related aspects of intellectual property and foreign direct investments (with the exclusion of portfolio investments). In this way, the Lisbon Treaty concluded more than a decade of attempts of redefinition of the role of the Union in the global trade. In light of this constitutional change, the role of the Member States in the national external commercial policy is reduced to the benefit of the Union in these areas.[1]

Many scholars believe that the expansion of the common commercial policy would finally settle the controversies related to the unity of representation of the European Union bloc.[2] Certainly, the exclusive nature of the competence makes the common commercial policy an excellent premise for the single representation of the Union in international economic relations. In light of these observations, this article shall aim to explore some of the reasons why the limitations of the common commercial policy as an exclusive competence still constitute an issue, and some of the sources these limitations stem from.

* LLM, Dr iuris Candidate, Albrecht Mendelssohn Bartholdy Graduate School of Law/ University of Hamburg, plarent.ruka@law-school.de.

1 W. Weiβ, 'Common Commercial Policy in the European Constitutional Area: EU External Trade Competence and the Lisbon Decision of the German Federal Constitutional Court', *in* M. Bungenberg & C. Herrmann (Eds.), *Common Commercial Policy After Lisbon*, Berlin & Heidelberg, Springer-Verlag, 2013, p. 29.

2 See also Id., p. 32. Weiβ essentially suggests that the expansion of the EU common commercial policy may make unnecessary the need for a mixed agreement in the Doha Round of WTO negotiations.

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37.2 The Relevance of the Limitations of the Common Commercial Policy

Before addressing the issue of the relevance of the limitations of the common commercial policy competence, it would be useful to have a short retrospective look at the capacity of the common commercial policy for ensuring a unified representation of the Union in trade matters. Certainly, the issue of the unified representation constitutes a significant argument for the EU in terms of claiming authority towards Member States in the external action. As we already know, the negotiation of the WTO Agreement during the Uruguay Round was led by the European Communities in the name of the entire bloc. However, the WTO Agreement following these negotiations was concluded as a mixed agreement, where the European Communities and each of its Member States signed individually. Behind this single fact, one can find the argument that the common commercial policy, as it was configured in the European Union law at the time of the conclusion of the WTO Agreement, did not suffice to ensure a single representation of the Union polity. As the European Court of Justice ('ECJ') in its Opinion 1/94 maintained, the arguments for the mixity were found in the very content of GATS and TRIPS. The Court differentiated between the GATT disciplines, for which the Union was exclusively competent, and the GATS/TRIPS disciplines, for which the competence should be exercised from the Member States jointly with the Union.[3] Article 207(1) of the current Treaty on the Functioning of the European Union ('TFEU') seems to have addressed this concern by having expanded the competence with the areas of trade in services, TRIPS and foreign direct investments.[4] Therefore, from a conventional perspective, it could be suggested that, in case that the WTO Agreement would be concluded nowadays, the European Union would sign it as a single actor. The same proposition could be valid also for the conclusion of agreements in the context of the WTO Agreement (such as those that may conclude the Doha Round of negotiations).

This proposition remains however doubtful and the limitations of the common commercial policy explain at best the uncertainty related with the succession of the Member States from the European Union in the current and new international economic agreements. The era of mixity in international trade agreements is not over yet. Rather, the recent developments with the negotiations of the Transatlantic Trade and Partnership Agreement illustrate the struggle of the European way of international trade. Trade and investment agreements are being negotiated and concluded in a mixed modus. At the European Union

3 Opinion 1/94 of the European Court of Justice *re WTO Agreement*, [1994] ECR I-5267, paras. 34, 53, 71, 98 & 105.

4 Art. 207(1) TFEU provides that "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."

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level, it remains "a recurring issue whether FTAs should be concluded by the Union alone, following a decision by the Council further to the consent of the European Parliament, or whether they should be concluded as 'mixed' agreements by the Union and the Member States, according to their respective national procedures".[5] Member States are of the opinion that "both TTIP and the Comprehensive Economic Trade Agreement between the European Union and Canada (CETA) should be concluded as mixed agreements because 'they concern policy areas within the competence of the Member States', including in particular "certain elements of policy areas such as services, transport and investment protection".[6] Furthermore, the FTA with South Korea, the first of its kind as an FTA of the new generation, was concluded in a mixed way, "because it included matters within the Member States' competence, including in particular some provisions on cultural matters".[7] As to the FTA with Peru, although the Commission, judging from its content, recommended its conclusion as an European Union-only Agreement, the Council decided its conclusion in a mixed way.[8] With all these facts in mind, it seems obvious that the redefinition of the common commercial policy has not ensured the single and unified representation of the Union polity in the global trade arena. In view of this, it appears plausible to endorse the thesis that there exist significant, although latent, limitations that preclude the Union to exercise the common commercial policy in an exclusive way.

37.3 The Sources of the Limitations of the Common Commercial Policy as an Exclusive Competence

In order to address the sources of the limitations on the exclusive nature of the common commercial policy, it could be first useful to provide an overview of the nature and the content of these limitations. To this extent, two different categories of limitations on the common commercial policy are elaborated in the following subsections.

37.3.1 Institutional Limitations

The first category of limitations is institutional, and is found in the horizontal interaction of the Union's institutions with each-other, as well as with the influence of the Member States on the institutional framework of the European Union. The limitations are treaty-based, and can be explored in the following configurations.

5 Letter of the Vice-President of the Commission Maroš Šefčovič to National Parliaments, C(2014) 7557final, 16.10.2014.
6 Id., p. 2.
7 Id., p. 3.
8 Id., p. 3.

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1. Article 207(3) of the TFEU imposes significant safeguard instruments on the common commercial policy.[9] This article provides for the application of internal legislative procedures at the Union level to the negotiation and conclusion of international agreements in the context of common commercial policy in compliance with the Union policies and rules. These instruments ensure the horizontal check and balance between the Union institutions during the negotiation phases of the international agreements related to the common commercial policy. Indeed, the Member States exercise enormous influence on the Union's common commercial policy.[10] This influence is exercised institutionally on the European Union.[11] The Commission, which conducts the negotiations in the name of the entire bloc, should consult a special committee appointed by the Council (otherwise referred to as 'Article 207 Committee'), and should report regularly to this committee, as well as to the European Parliament. The Commission should follow the directives of the Council in this regard.
2. The fact that the Commission, as an executive body, reports to the legislative branch of the Union, which includes a special committee of the Council representing the Member States, speaks for a normal procedure in the democratic governance. However, the consideration of the nature of the Council as a domain of the Member States, hints in favor of an institutional limitation allowing for the Member States to participate in the direction and the observation of the common commercial policy. The conduct of the common commercial policy is led by the Commission in close agreement with the Article 207 Committee of the Council, and this is an evidence of a systemic limitation to the further supra-nationalization of the common commercial policy.[12]
3. Another safeguard is imposed from Article 207(4) of the TFEU.[13] This requires the unanimity procedure for the negotiation and conclusion of international agreements

9 Art. 207(3) TFEU provides that "[w]here agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article. The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations."

10 M. Hahn & L. Danieli, 'You'll Never Walk Alone: The European Union and Its Member States in the WTO', *in* M. Bungenberg & C. Herrmann (Eds.), *Common Commercial Policy After Lisbon*, Berlin & Heidelberg, Springer-Verlag, 2013, p. 51.

11 Id.

12 See also Weiβ, *supra* note 1, p. 47.

13 Art. 207(4) provides that "[f]or the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority. 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. The Council shall also act unanimously for the negoti-

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in the areas of trade in services and intellectual property. This is where such agreements risk the Union's cultural and linguistic diversity, or may hinder the responsibility of the Member States to deliver health and educational services. This provision reaffirms the doctrine of parallelism of competences, whereby the Union's external competences are construed as parallels of the internal powers, as long as the external action serves to the exercise of these powers.[14] Further to the doctrine of parallelism, Article 207(4) of the TFEU provides that the limitation on the Union's exclusivity on the common commercial policy may emerge from the condition of unanimous voting in the Council.[15] This is so, when international agreements risk to prejudice the Union's cultural and linguistic diversity,[16] or they could affect trade in social, education and health services by risking seriously to disturb the national organization of such services and prejudice the responsibility of the Member States to deliver them.[17] It suffices to mention in this regard the French intention to condition its vote for the TTIP with a greater consideration of its interests in these areas. In a fairly recent statement, the French President François Hollande, made clear that "[France] will never accept questioning essential principles for [its] agriculture, [its] culture and for the reciprocity of access to public [procurement] markets".[18] France, and each of the remaining Member States, would never issue this statement if they would not possess the relevant instruments that constraint a European common commercial policy. This is without prejudicing the content of the TTIP in terms of its compliance with the conferred powers of the European Union.

In view of the institutional limitations, Article 207 of the TFEU is likely to restrict largely the Union's action in most of the common commercial policy directions. Obviously, this could jeopardize the Commission's effectiveness and bargaining power in the negotiation of international economic agreements.[19] Member States maintain decision-making instruments that could control the Union's external action in the common commercial

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ation and conclusion of agreements: (a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity; (b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them."

14 See also A. Antoniadis, 'The Participation of the European Community in the World Trade Organization: An External Look at European Union Constitution-Building', *in* T. Tridimas & P. Nebbia (Eds.), *European Union Law for the Twenty-First Century. Rethinking the New Legal Order*, Vol. 1: Constitutional & Public Law: External Relations, Oxford, Hart Publishing, 2004, p. 324.

15 This is for areas covered by international agreements in the field of trade of cultural and audiovisual services.

16 Art. 207(4) para. 3(a) of the TFEU.

17 Art. 207(4) para. 3(b) of the TFEU.

18 Statement of the French President François Hollande reported in Foreign Policy on 3 May 2016, available at http://foreignpolicy.com/2016/05/03/french-president-says-non-to-ttip/ (3 October 2016).

19 Antoniadis, *supra* note 14, p. 324.

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policy domain. After all, the deepening and the expanding processes of the European integration in the area of the common commercial policy ultimately depend on the level of integration of Member States in this area; hence the legal orders of the Member States may impose constitutional limitations on a further expansion of the common commercial policy.[20]

Overall, in assessing these safeguards, one can see that they are exceptional to the ordinary procedures provided in Article 218 of the TFEU for the negotiation and conclusion of international agreements from the Union. The rationale behind these instruments is to ensure that the Member States have a say in the negotiation proceedings of international agreements relating to the common commercial policy. They could influence these proceedings in several stages, such as the definition of the mandate of negotiations, during the consultations with the special committee of the Council, and finally in the conclusion phase of the agreement. This is obviously not a mere procedural arrangement allowing for the Member States to have a say in the negotiations. This is an evidence of the incomplete unionization of the common commercial policy.

37.3.2 Systemic Limitations

The second category of limitations is more systemic, and is related with the content and scope of the common commercial policy competence *per se*. Obviously, the unanimity requirement mentioned above indicates the presence of strong interests, which the Member States intend to observe in a strict way. Accordingly, although Member States have conferred material competences to the Union, they still withhold the instruments for exercising such competences. In this way, they tend to push the achievement of the lowest common denominator during the decision-making processes to the very extremes. In view of that, there can be no action of the Union in conducting the common commercial policy without satisfying the interests of each Member State in these areas. This would not be the case for areas where qualified majority voting would be required. Hence, the institutional and systemic limitations intersect with each-other.

The predictions of Article 207(4) of the TFEU are particularly relevant for the residual powers of Member States, by reemphasizing their responsibility in delivering services in particular areas. Accordingly, although the competence of the Union in the areas of common commercial policy is virtually an exclusive one, the measures in areas such as the one related with the social policy, education and health remain the sole responsibility of Member States. Such powers are not conferred to the Union in the material sense, in that the Member States remain the ultimate holders of the powers and exercise them in an

20 Weiβ, *supra* note 1, p. 47.

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exclusive way.[21] The content of the ancillary powers of the Union corresponds to the residual powers of the Member States. For this reason, there exist certain systemic limitations that preclude the application of the doctrine of parallelism. It follows, that the Union's external action in such areas is not justified in terms of the internal powers.[22] The unanimity voting in the Council serves as a guarantee that the interests of the Member States are duly observed from the Union when concluding international agreements that affect residual powers.

The residual powers of Member States may become a concern for the common commercial policy during the implementation of international economic agreements. Areas such as the protection of public moral or public health, and social services, could be deemed to be absolute prerogatives of the Member States' sovereignty, which, by virtue of its nature, cannot be delegated at the Union level.[23] Furthermore, areas such as education and vocational training remain outside the scope of harmonization at the Union level.[24] From an analysis of these provisions, it becomes obvious that the Union is clearly excluded from executive competences, and its action is limited to ancillary powers for supporting or supplementing Member States' actions in these areas. The role of the Commission remains

21 Art. 5(3) of the TFEU provides that "[t]he Union may take initiatives to ensure coordination of Member States' social policies", while Art. 6 of the TFEU provides that "[t]he Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be: (a) protection and improvement of human health; (b) industry; (c) culture; (d) tourism; (e) education, vocational training, youth and sport; (f) civil protection; (g) administrative cooperation."

22 See also Antoniadis, *supra* note 14, p. 325.

23 Art. 167(1) TFEU provides that "[t]he Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore". Art. 168(1) TFU provides that "[…the] Union action, which shall complement national policies, shall be directed towards improving public health, preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health", while Art. 168(2) specifies that "the Union shall encourage cooperation between the Member States in the areas referred to in this Article and, if necessary, lend support to their action". Art. 157(1) provides for the Union the competence to "[…] support and complement the activities of the Member States in the following fields: (a) improvement in particular of the working environment to protect workers' health and safety; (b) working conditions; (c) social security and social protection of workers; (d) protection of workers where their employment contract is terminated; (e) the information and consultation of workers; (f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5; (g) conditions of employment for third-country nationals legally residing in Union territory; (h) the integration of persons excluded from the labour market, without prejudice to Article 166; (i) equality between men and women with regard to labour market opportunities and treatment at work; (j) the combating of social exclusion; (k) the modernisation of social protection systems without prejudice to point (c)."

24 Art. 165(1) TFEU provides that "[t]he Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity". Similarly, Art. 166(1) TFEU provides that "[t]he Union shall implement a vocational training policy which shall support and supplement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organisation of vocational training".

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coordinative for the actions of the Member States. In this way, any action at the Union level in the course of exercising the common commercial policy demands the contribution of the Member States. Such contribution, more than as a European Union obligation, is to be conceived as a prerogative of the Member States entailed from their ownership of residual powers. Hence, the exclusive nature of the common commercial policy does not suffice to harmonize the European Union's policy in these areas. Any external action of the Union requires further supplementing actions from the Member States; the WTO Agreement is the best example for this.[25] The limitations imposed by Article 207(6) TFEU[26] should be understood as an inability of the international economic agreements to entail the harmonization of the Member States' prerogatives in areas where the Union is vested with ancillary powers.[27]

These limitations concern not only the newly added areas of common commercial policy, such as the trade in services, commercial aspects of intellectual property and the foreign investment protection. They concern also the traditional exclusive competence on the trade in goods. Member States preserve significant executive tools that hinder a complete autonomy of the European Union in the trade in goods. Furthermore, certain residual competences of the Member States are inextricably linked with conferred competences of the European Union. The Lisbon Treaty did not alter the existing considerations on the transport policy either. Accordingly, Article 207(5) of the TFEU has excluded the transport policy from the operation of the common commercial policy.[28] The transport policy is regarded as a shared competence (Art. 4(2)(g) of the TFEU). As such, this competence could hardly be exercised in an exclusive way by the Union by virtue of a broad construction of Article 3(2) of the TFEU.[29]

It is for these reasons that the designation of the common commercial policy as an exclusive competence, at least from a substantive point of view, does not suffice to terminate the state of mixity in certain common commercial policy domains, such as the WTO Agreement, comprehensive trade and investment agreements, etc. As a matter of example, it suffices to mention that the European Union and its Member States shall continue to

25 See further Weiβ, *supra* note 1, p. 34.

26 Art. 207(6) provides that "[t]he exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation."

27 Weiβ, *supra* note 1, pp. 34-35.

28 Art. 207(5) provides that "[t]he negotiation and conclusion of international agreements in the field of transport shall be subject to Title VI of Part Three and to Art. 218."

29 Art. 3(2) TFEU provides that "[t]he Union shall also have exclusive competence for 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 in so far as its conclusion may affect common rules or alter their scope.

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be joint Members of the WTO even after the expansion of the common commercial policy.[30] This constitutes a strong premise for the mixity of international agreements in areas covered by this policy, notwithstanding the exclusive nature of the Union's competence.

The safeguard mechanism reaffirms a further constitutional restriction on the common commercial policy in terms of harmonization of residual powers of the Member States, and particularly in the areas where the Union has only ancillary powers.[31] The Union is not allowed to harmonize actions in the area of protection and improvement of human health, industry, culture, tourism, education, vocational training, youth, sport, civil protection, and administrative cooperation.[32] This fact shows that the Union is precluded from external actions, which could affect the Member States' autonomy in these areas. This is also in line with the predictions of Article 207(6) of the TFEU which reaffirms the limits of Article 2(5) TFEU[33] in relation with Article 6 TFEU inasmuch as it prohibits the unionization of certain areas in which the conferred powers of the Union are limited to ancillary functions only.[34] This provision precludes any effects of the common commercial policy on the internal delimitation of powers, and particularly the harmonization of ancillary powers.[35] Since the internal competence of the Union is limited only to ancillary functions, such as the support, coordination, or supplementation of the role of Member States in these areas, based on the doctrine of parallelism, the Union cannot supersede the limits of the conferred internal powers in the conduct of its external action. Hence, the systemic limitations are supported by means of sound normative propositions in the Treaty framework.

Further to the inconsistencies between the exclusive and shared powers, which raise direct concerns in terms of the ownership of two different categories of conferred powers, one could consider that various subcategories of the common commercial policy are also not very easily to be defined as exclusive powers. For instance, the expansion of the scope of the common commercial policy with the Lisbon Treaty so as to include the foreign direct investments cannot exclude any further doubts on the exclusivity of this competence. Accordingly, the contrast between the foreign direct investments and portfolio investments

30 Weiβ, *supra* note 1, pp. 31-32.

31 Antoniadis, *supra* note 14, p. 325.

32 Art. 6 of the TFEU provides that "[t]he Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be: (a) protection and improvement of human health; (b) industry; (c) culture; (d) tourism; (e) education, vocational training, youth and sport; (f) civil protection; (g) administrative cooperation."

33 Art. 2(5) TFEU provides that "[i]n certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas. Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations."

34 See also Weiβ, *supra* note 1, p. 34.

35 See also Antoniadis, *supra* note 14, p. 325.

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could raise the issue of the necessity to localize an adequate conferred competence for the Union to conclude full scope investment agreements that include portfolio investments.[36] Otherwise, the negotiation and conclusion of such agreements cannot be construed by virtue of Article 207 TFEU alone. The application of the doctrine of parallelism could be even more difficult in relation with the internal competences of the Union in the area of portfolio investments in case that this area is not unionized sufficiently so as to constitute an internal competence. The competence of the Union's Member States remains hence necessary for sustaining activities in the area of the portfolio investments, national security issues, balance of payment issues of non-Eurozone Members of the EU and budget law.[37]

The Union's action is determined from the nature of powers (exclusive, shared or ancillary). Even if the Union would be required to act in the ancillary areas of powers, in the internal domain, it cannot exercise more than the available ancillary functions conferred in the Treaties. For this reason, any obligation of the Union derived in the course of its external action, although virtually conceived under the exclusive competences of the Union, could be construed as inextricably linked with the attributes of Member States to exercise their residual powers in these areas. Therefore, the Union and the Member States have to act jointly due to the inextricable linkage of their competences.[38] This makes the EU virtually competent for areas falling within the common commercial policy in the external action. Internally, however, the Member States maintain the residual powers that they actually exercise. As a matter of example, one can recall the residual power of France to regulate the trade with asbestos on the grounds of public health policy, although the GATT has been a prerogative of European Economic Community since its very inception in the '50s. Thus, the scope of substantive matters covered from the WTO Agreement remains broader than the common commercial policy. Its designation as an exclusive competence of the Union does not prove sufficient for overcoming the institutional and systemic limitations that preserve the Member States' interests.[39] Furthermore, the trade in services is also a WTO domain that could hardly be accommodated entirely within the conferred competences of the Union.

36 See also T. Cottier, 'Towards a Common External Economic Policy of the European Union', *in* M. Bungenberg & C. Herrmann (Eds.), *Common Commercial Policy After Lisbon*, Berlin & Heidelberg, Springer-Verlag, 2013, p. 9.
37 Weiβ, *supra* note 1, pp. 32-34.
38 C. Timmermans, 'Organising Joint Participation of E.C. and Member States', *in* A. Dashwood & C. Hillion (Eds.), *The General Law of E.C. External Relations*, London, Sweet & Maxwell, 2000, p. 245.
39 See further on a pre-Lisbon discourse on the matter Antoniadis, *supra* note 14, pp. 322-323.

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37.4 SUMMARY AND CONCLUSION

The issue of the limitations on the common commercial policy is far from a mere theoretical question. Its practical relevance may be primarily raised in terms of the position of the Member States in the mixed agreements dominated from the common commercial policy. Accordingly, one question raised after the Lisbon Treaty entered into force, was the prospect of the Member States in the WTO Agreement, after the arguments of the Opinion 1/94 for the conclusion of the WTO Agreement as a mixed agreement became theoretically futile.[40] The same concern could be shared also for other mixed agreements, most prominently the trade and investment agreements where foreign direct investments also play a role. The prevailing thesis in this regard is that the Union cannot succeed Member States in international mixed agreements, where no clear vertical separation of powers could be established between the European Union and its Member States. In light of these observations, it could be endorsed that the redefinition of the common commercial policy was unable to terminate the state of mixity in international trade agreements of the Union. This proposition is explained by the thesis that the constitutional infrastructure of the Union polity entails normative limitations on the common commercial policy that preclude the complete unionization of this competence as an exclusive one. The Member States withhold residual powers that are inextricably linked with the conferred powers of the Union. This influences the common commercial policy, inasmuch as national constitutional courts have denied the supra-nationalization of this exclusive competence.[41] The institutional instruments in the Treaties are able to operationalize this stance.

To conclude, from the above overview, it could be inferred that the limitations on the common commercial policy stem from the constitutional structure of the Union polity. The vertical distribution of powers is responsible for a vertical system of check and balance. This system maintains institutional and systemic limitations on the exercise of the common commercial policy. These limitations, amount to an incomplete unionization of the common commercial policy as an exclusive competence. Having said that, it could be maintained that the common commercial policy is not a 'safe harbor' for deepening the European integration process. Therefore, the common commercial policy as an exclusive competence should not be overestimated. This competence could barely amount to a normative basis for justifying the succession of Member States from the Union in the course of international economic agreements dealing with wide areas of the common commercial policy. This is the rationale for the indispensable mixity in the conclusion of international economic agreements. This competence could remain somehow hostage of the Member States'

40 See for example Weiβ, *supra* note 1, pp. 29 *et seq*. See also P. Ruka, 'The International Legal Responsibility of the European Union in the Context of the World Trade Organization in Areas of Non-Conferred Competences', publication expected in 2017.

41 See further, Weiβ, *supra* note 1, p. 29.

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reluctance to accept the Union as a unified representative of the interests of the entire bloc. After all, this shows that Member States cannot easily grasp their diminishing role in international relations, which is considered their essential attribute as sovereign states.[42]

The limitations of the common commercial policy do not deny the thesis of exclusivity of the competence *per se*, while at the same time, these limitations do not preclude the Union action in the core areas of this policy. However, the exercise of the competence should not amount to the hindrance of the Member States in exercising their residual powers. Hence, considering that the notion of the limitation to the common commercial policy is regarded as a limitation to the exercise of the competence and not to the competence *per se*,[43] it could be endorsed that the limitation can be conceived as a dynamic, rather than a static process.

42 See also M. Hilf, 'The ECJ's Opinion 1/94 on the WTO: – No Surprise, but Wise? –', *European Journal of International Law*, No. 6, 1995, p. 245.

43 Weiβ, *supra* note 1, p. 36.