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GUEST EDITORIAL

A neo-classical approach for the coming IGC[1]

1. Introduction

In view of the risk of a stalemate between "federalists" and "intergovernmentalists" at the coming IGC, these reflections will explore the merits of an alternative five-step-path to positive results of the IGC. I have characterized this conceptual path above as "neo-classical", because it starts by looking at the national constitutional roots of European integration, and the next classical steps prove to follow automatically from there.

2. First step: A look at the national constitutional roots of european integration

The debate between national policy-makers on the future of the European Union after Maastricht started in 1993 with John Major's famous article[2] in favour of an intergovernmental approach, and the public proposals by the speaker on foreign affairs of the CDU/CSU group and the French prime minister Balladur. Especially in view of the particularities of these three countries, a comparison of the relevant constitutional provisions of the Member States proves to be particularly rewarding for our reflec-

1. This guest editorial is based on a more detailed paper presented by the author to the Asser Institute Colloquium on European law of 14–16 Sept. 1995, and literature quoted therein, the proceedings of which will be published.
2. *Economist* 25 Sept. 1993.

tions.[3] It then appears that in six Member States, the legal basis for the European Communities is found in constitutional provisions authorizing these States to transfer sovereign rights (including legislative and administrative powers and the administration of justice) to international organizations. I refer to Article 24 (and subsequently Article 23) of the German Constitution, Article 11 of the Italian Constitution, Article 49bis of the Luxembourg Constitution, Article 92 of the Netherlands Constitution, Article 10 of the Portuguese Constitution and Article 93 of the Spanish Constitution. The specific new German constitutional Article 23 on the EU, introduced *after* Maastricht, while considering that the EU is obliged to respect *inter alia* federal principles, maintains the concept of *transfer* of sovereign rights, which is contained in Article 24 with regard to international institutions other than those of the EU. The specific French Constitutional EU provision (Article 88–1) does not speak of *transfer* of sovereign rights, but more appropriately of *participation* in the European Communities and the European Union, which are established by States which have freely decided, on the basis of the treaties which established them, to *exercise together* certain powers.[4] The remaining Member States simply rely on the power of all sovereign States to conclude international treaties. In the majority of the Member States, sovereignty is explicitly based on the sovereignty of their people, in the UK however on the sovereignty of its parliament (since its Bill of Rights of 1689).

From this very brief survey of the relevant national constitutional provisions I draw the following conclusions. Before Maastricht half of the Member States relied on a constitutional provision which was equally applicable to *all* international organizations. In the remaining Member States the legal basis for European integration was to be found in the power of sovereign States to conclude binding treaties, this without prejudice to constitutional conditions for their ratification.

This first conclusion makes it worthwhile sketching some lessons which can be drawn from a comparison with other international organizations, also known as "intergovernmental" organizations. This will be the subject of step two of these reflections.

3. In 1994 "La documentation française" published (in French) the texts of the constitutions of the 12 Member States which had participated in the TEU negotiations. Similar compilations exist in other languages

4. "*d'exercer en commun* certaines de leurs compétences".

Finally, the general constitutional reliance on the treaty-making power of sovereign States makes it worthwhile exploring briefly the relevance of the classic principle of *"pacta sunt servanda"* for the coming IGC, which I will do in the third step.

3. Step two: Some lessons from a comparison with other organizations of public international law

In the first place, the effectiveness of all international organizations depends on the adaptation of their institutional framework and of their means of action to their tasks and the number of their Member States.[5] The generally high quality of the work of the OECD, for example, depends mainly on the skill and impartiality of its secretariat and the contributions of national experts, working together in the general interest of all of its Member States. Because the OECD does not have legislative powers, nor powers to take binding decisions with regard to individual Member States or their subjects, it does not need either a parliament for the democratic legitimation of its legal acts, nor a Court of Justice for resolving legal conflicts.

In the second place, even the United Nations (especially its Security Council), the IMF and the World Bank show that their intergovernmental character does not imply that all their Member States have to be represented individually in each of their institutions, nor does it exclude majority voting, nor does it imply that all Member States should have equal voting rights.

In the third place, extensive comparative studies show that the effectiveness and quality of the work of international organizations always depend on the existence of impartial institutions or mechanisms, preparing analyses and proposals of high quality, based on the general common interest of all of their members. The proposals should then be submitted to political institutions, representing *all* their Member States and responsible for the major final decisions. Insofar as international organizations also dispose of executive powers, such impartial institutions are often also entrusted with such powers.

It is submitted that even this cursory survey indicates that the most ex-

5. This is explained in more detail in my paper mentioned note 1 *supra*.

treme proposals from the side of intergovenmentalists are incompatible with the lessons to be drawn from a comparison with other "intergovernmental" organizations, of which all of the Member States are members.

4. Step three: The relevance of the "pacta sunt servanda" principle

The relevance for the coming IGC of this very old principle of public international law becomes already clear if one looks at the last objective of the Union, contained in Article B TEU, "to maintain in full the 'acquis communautaire' and build on it with a view to considering, through the procedure referred to in Article N(2), to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with *the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community*" (my emphasis).

The final part of this provision (as italicized) and lessons from other international organizations such as those mentioned in step two above, seem important for these reflections.

5. Step four: The relevance of the (political and economic) relations between the EU and the rest of the world

It is submitted that the relevance of the preceding three steps of these considerations is strongly supported by the political and economic aspects of the relations between the EU and the rest of the world.

On the *political side*, I limit my observations to the experience of the EU in dealing with the Yugoslavian drama. This experience, I suggest, has made abundantly clear that the effectiveness of the institutional framework, and the means which the EU and the WEU had for dealing with this drama were inferior even to the not exaggeratedly effective institutional mechanisms and means of action of the Security Council and the NATO. This conclusion, if correct, would indicate, that important institutional revisions of the second pillar of the EU will also be necessary if the EU wants to play an important political role in the framework of its external relations.

With regard to the *economic relations* with the rest of the world, I would observe the following.

In the first place, the rapidly developing global market is penetrating the European common market more and more, just as this common market penetrated the national markets of the Member States more and more. The latter had far-reaching consequences for national monetary, macroeconomic, structural, social and financial developments and policies. Statistical data indicate that this penetration by the world market of the common market has a far greater impact on international flows of foreign direct investment and of foreign capital than on the flows of foreign trade in goods and services. The share represented by the common market in the exports of most Member States, which was already large, continued to increase over the last decades, until it became a clear majority share with regard to exports. On the other hand, in a number of Member States the proportion of foreign direct investments in other Member States is now tending to decrease in favour of investments in third countries, including the USA and the far East.

In the second place, in order to ensure not only a free flow of goods, services and investments, but also fair and generally acceptable conditions in relation to them, these developments require the strengthening of international mechanisms for regulating foreign trade and foreign investments at the world level. In this context, mention should be made of the impact, also in legal terms, which the new WTO might have within the EU.[6] In May of this year, the Council of the OECD decided to prepare a draft multilateral treaty on foreign investments, which should be signed in 1997 and – if possible through the intermediary of the WTO – become a basis for a world-wide multilateral regime for foreign investments.

I will make only one observation with regard to the potential impact of the developing global market on the future of the EU. If the EU wants to maintain an important internal and external role within the global market, the IGC should indeed ensure that the EU remains an international organization, much in advance of all other international organizations as a result of the legal and political quality and the effectiveness of its mechanisms, institutions, instruments and procedures, all of which the European Union needs for the implementation of its substantive objectives.

6. Petersmann deals with this in his paper for the Asser Conference mentioned *supra* note 1.

6. Step five: Some potential merits of the proposed alternative approach for the IGC 1996

6.1 *A general basis for discussion*

The greatest potential merit of the outcome of the preceding steps is that it could help both federalists and intergovernmentalists to become more aware of the limits of their theses. Those federalists who continue to see a European federal State as the model for all further progress of European integration may become more aware of the fact that the national constitutions of the Twelve who prepared the TEU do not contain a basis for such a model. The comparison with other organizations of public international law, which is made relevant by six of the national constitutions, may help them moreover to recognize that it may be more promising to look at the experiences of other international organizations, which we have shortly summarized here, than to compare the European Commission with a federal government or the Council with a federal senate. In particular, it may help them to recognize that unlike federal States, but like other international organizations, even the European Communities, which are in many respects more advanced, in last resort have to rely on strong and effective national institutions for the enforcement of their rules and decisions. Nor are there any indications, with regard to their financial means, that any Member State would be willing to grant the EC fiscal autonomy, which would involve providing financial means comparable in size with those of federal States.

With regard to the extreme theses of intergovernmentalists, such as those to be found in the "Proposal for a European Constitution" of the European Constitutional Group of 1993, I have already observed that they are even incompatible with the institutional framework of worldwide "intergovernmental" organizations to which the States of origin of its members adhere.

6.2 Specific institutional issues

In the limited space available here, I would like – briefly – to draw the following conclusions.[7]

7. I have expanded on these ideas in my Epilogue to the recently published fifth

The composition of the *Commission* will have to be restructured. This is necessary in order for it to maintain its capacity to carry out objective and mutually consistent analyses of the problems to be solved, to submit proposals for their solution and to perform out its other tasks (among them, the classical task faced by all international organizations, which is to supervise the respect of their decisions) in the general interest of the Community, as Article 157 EC requires. According to my analyses of the tasks of the Commission,[8] not more than 10 members, with coordinating tasks, should attend the weekly meetings of the Commission; each of these members could be assisted on the various agenda points by members responsible for the relevant specialized part of the coordinating responsibility. It is submitted that, for example, five different members of the Commission for external relations or four different members dealing with highly interdependent aspects of the internal affairs of the common market already renders impossible any consistent policy of the Commission within these crucial areas. Moreover, the external and internal policy areas are becoming increasingly mutually interdependent. It is not reasonable to expect that over 20 members of the Commission would still be able to produce coherent proposals or decisions in the many highly interdependent areas of its responsibility.

With regard to the *Council*, the best way to maintain a reasonable equilibrium between greater and smaller Member States in an enlarged EU is expressed in the proposals from various sources to require a double majority for the decisions of the Council: a majority of all of the Member States (based on the principle of sovereign equality of all states) and the requirement that the states voting for a proposal also represent together the majority of the citizens of the EU (based on the principle of sovereignty of the people, found in most of the national constitutions). With regard to the chairmanship of the Council, the most reasonable solution in a further enlarged EU might be a common chairmanship with division of their tasks by a troika to be selected by the European Council for a term of one year, in which one of the biggest countries should always be represented.

As far as the *European Parliament* is concerned, it must be noted that this institution, with its essential and increasing role in the institutional

edition of Kapteyn-VerLoren van Themaat, *Inleiding tot het recht van de Europese Gemeenschappen – Na Maastricht* (Kluwer, 1995).

8. In the publications referred to in notes 1 and 7 *supra*.

system of checks and balances in a Community with legislative powers, has a position which certainly is not comparable in all respects with that of parliaments in the Member States, whether federal or not. This of course does not exclude the desirability of further development of its rights of co-decision and other powers.[9]

6.3 *The intergovernmental component*

If we now turn to the second and third pillars of the TEU, the above reflections seem to show, *firstly*, that the independent and impartial capacity of the Commission to analyse problems objectively in the general interest of all Member States and to formulate coherent proposals on the basis of these analyses should be fully used also with regard to these two new policy-areas. *Secondly*, to the extent that the intergovernmental character of those pillars is maintained, majority votes (necessary for their effectiveness) will not be able to bind outvoted minorities without their consent. *Thirdly*, in order to win sufficient public support, intergovernmental policy decisions in both areas will have to be submitted to effective parliamentary control at the national level, at least. *In the fourth place*, because of their impact on vital interests of individuals, the policy decisions and their implementation under the third pillar will require from the coming IGC safeguards for effective and uniformly interpreted legal protection of these individual interests by independent tribunals; the recent discussions on Europol have made this abundantly clear. *Finally*, the sometimes unavoidable inter-connections with Community law will also require from the coming IGC a reexamination of the desirability of a transfer of at least some of the tasks enumerated in Article K.1 TEU to the European Community. This, it is submitted, is also implied in the final part of the mandatory objectives for the coming IGC, in Article B TEU (quoted above).

One last point I would like to make is that the model proposed here might also clarify the specific role of the EU in the growing network of international organizations.

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9. See the contribution by Mr. Deringer, former MEP, to the *Festschrift für Ulrich Everling* (Baden-Baden, 1995).

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