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A New Treat for the EU and a Return to Geneva for the WTO: Surprising Parallels?

From the Board

'Brussels', that oft-reviled and ill-defined amalgam of Community institutions, Member States' representatives, lobbyists and other hangers-on, is frequently accused of being a slow and cumbersome machinery that is also totally opaque. 'Brussels' is the epitome of the German saying that politics and sausage-making are highly comparable: you had better not care about what ingredients and processes are involved in the making of it, as long as the final taste is good.

'Ausgerechnet', under the German Presidency, and their successors, the Portuguese, 'Brussels' may well succeed in agreeing on a new text of a European Union treaty and so, judging by what is being made publicly available on the website of the Intergovernmental Conference,[1] in considerable transparency. The German Presidency was able to wrangle a so-called mandate for the Intergovernmental Conference out of the June European Council. The idea behind this 16-page document was that it would give directives for the modification of the existing EU- and EC-treaties with such a degree of precision that it would be a near-mechanical task to be performed largely by legal experts, though under the watchful eye of the Member States meeting as an Intergovernmental Conference, to produce the necessary amending treaties. And indeed, within six weeks after the European Council, the diligent General-Secretariat of the Council, and in particular its Legal Service, had produced a 145-page draft text of the new treaty, the so-called Reform Treaty, amending respectively the Treaty on European Union and the Treaty establishing the European Community, henceforth to be called the Treaty on the Functioning of the European Union. This was complemented by two documents of around 60 pages, containing respectively the Protocols and their technical modifications and the various declarations to be attached to the two draft treaties. The total text is about 260 pages.

The structure of the Reform Treaty is on the one hand very simple and on the other, precisely for that reason, impossible to understand for the layperson. It counts seven articles, five of which are final clauses, such as unlimited duration, renumbering, ratification, equal authenticity in all 23 languages etc. The first Article lists 63 points of amendment to the Union Treaty and the second

1. http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=1297&lang=en.

lists 296 points of modification of the Community treaty (becoming the Treaty on the Functioning of the Union). These amendments resulted from taking the Nice Treaty as the default text and amending it through the introduction of the relevant provisions of the Treaty establishing a Constitution for Europe, unless these provisions had been set aside or amended once again according to the mandate given by the European Council of June.

This has resulted in some Articles from the Treaty establishing a Constitution being introduced into the Union Treaty as full text; for instance, the simple and clear articles on the main institutions of the Union (Articles I-19ff) will be introduced in somewhat modified form as Articles 9a-f of the modified Treaty on European Union. However, other provisions give rise to extremely complicated formulae of amendment, which do not give rise to a text that can be understood by somebody who does not dispose of the text of the Nice Treaty and the Treaty establishing a Constitution for Europe. An example is the new provisions on public health, which begin as follows: 'An Article 176c shall be inserted with the wording of Article 152; it shall be amended as follows', followed by five points of amendment, one of which is divided into four sub-points, without the text of the new Article 176e becoming clear at all.

Obviously, this is normal treaty amendment technique, but the length and the complicated nature of these 260 pages of treaties, protocols and declarations demonstrate at least two things:

1) The extreme levity (not to say irresponsibility) of some European politicians, when they speak blithely of the '*traité simplifié*'. One of them, Bernhard Kouchner, even went so far as to waive the 16-page mandate in front of the camera, claiming that this document clearly showed that President Sarkozy's approach of the simplified treaty had won. If the political class itself willingly confuses the term 'simplified' in the sense of 'politically less loaded' than a treaty establishing a constitution with 'simplified' in the sense of size, one should not be amazed that, if the electorate sees that the result is a 260 page document that is incomprehensible, there will be some (negative) reaction.

2) The preposterous character of the idea that this treaty amending two other treaties could fruitfully be submitted to a referendum. Even the consolidated version of the two treaties resulting from the Reform treaty will not be easy to read and to understand in their mutual relationship (for the general public). Indeed, the Member States and the institutions of the Union will probably not wish to produce a quasi-official consolidated version of the treaties before the Member States will actually have ratified the Reform Treaty. It is about time that governments, like the Dutch one for instance, own up to the fact that all (quasi-) constitutional aspects have been removed from the Reform treaty and that, therefore, it does not go beyond the constitutional clause (which exists in some form or another in more Member States than the Netherlands alone) that states that sovereign powers can be transferred to

international organizations (or specifically to the EC). A referendum thus does not seem to be justified.[2]

After all, this Reform Treaty, and even the Constitution, is more of a consolidation and extrapolation of existing trends, as well as a necessary adaptation to the accession of 12 new Member States than anything else. With only slight hyperbole, one could argue that the Constitution was the moment when European politicians proudly wanted to show to the national populations in what all the incremental steps of the 'constitutional decades' of Europe (from the Single European Act, through Maastricht and Amsterdam, to Nice) had resulted: a beautiful Venus de Milo or a 'wrestler' from Praxiteles (depending on one's gender perspectives). They had the irresistible urge to beautify it further with an official anthem and a flag, etc. Large parts of the public, however, were not prepared for this and saw something ugly instead: 'look Ma, no clothes'.

In reaction, the politicians have hidden their beautiful statue again behind the usual old veils of treaty amendment techniques, since the public does not seem to be able to stand the beautiful truth. However, what they have hidden behind there is still substantially the same result of years of incremental change. Some of them have really done their best to put some warts on the statue, mostly inspired by some kind of miserable minimalism.

Primacy of Community/Union law has been taken from the treaty and put into an ugly declaration. Competition has been removed from the objectives, but the danger that this constituted an indirect attack on the legal basis of the Merger Regulation has been counteracted by a special protocol. The declarations relating to the division of competence between the Union and Member State and on the CFSP are so excessively defensive in favour of reserving national competence and the national character of foreign policy that it verges on the ridiculous.

Further, the declaration on national parliaments and susidiarity is so theoretical that it could never be applied in practice. Before a final judgment on subsidiarity could be given in the abstract, the Commission proposal would probably already have been adapted so as to conform to subsidiarity in the political give-and-take in and between the Council and the European Parliament. Obviously, the grandest achievement of them all is the exclusion of direct effect of the Charter of Human Rights for the United Kingdom: a result of which its negotiators can truly be proud. It will substantially (and continuously) weaken the position of Union representatives when they will be discussing such matters in the regular human rights dialogues with third countries, in particular Russia and China.

Despite these attempts at 'uglification', the final result is still quite positive. After all, the Charter of Human Rights will now be law, even though it

2. As a matter of fact, the Maastricht Treaty, with the Economic and Monetary Union, was much more radical with respect to the giving up of sovereign powers than this Reform Treaty.

is not part of the Treaty itself. This and the possibility for the Community to accede to the European Convention of Human Rights will finally make human rights an integral and undisputed part of Community law and a check on the Community's powers. The division of competence between the Union and the Member States will be clearer. Through the extension of what is called the normal legislative procedure, both qualified majority voting in the Council and the influence of Parliament will be extended. This implies that both the efficiency and legitimacy of European decision-making will be much improved, *inter alia* in trade policy. The Union will have the possibility to create a more normal system for income from its own resources, which can put an end to the moaning about who is too much of a net contributor. Although the High Representative (ex-Minister) for External Relations will remain a difficult post to manage, with one leg in the Council and one in the Commission, the powers in the field of external relations are better grouped together and better defined (especially in the field of the CFSP and in trade policy). The judicial and police co-operation in the field of criminal law has been brought into the Treaty on the Functioning of the European Union (including the creation of European Public Prosecutor's Office) and hence been made subject to more normal decision-making procedures and the Court of Justice jurisdiction. Many other greater and smaller improvements could also be mentioned.

If governments throughout the Union, which have been part of this negotiation, firmly, enthusiastically and without reserve defend this as an acceptable result of the IGC (which, in spite of its voluntarily technical character will still have to overcome a few political hurdles in that Conference), it should be possible to achieve a positive outcome. It is high time that the Union stabilizes itself in the present 'quasi-constitutional situation' and that it will not immediately need another wide-ranging IGC. Over the nearly fifteen years of virtually continuous treaty modifications, the Union Treaty has become too flexible a constitution. Member States have, in contrast with the period 1958–1986, become so used to the fact that they are 'the masters of the Treaty', that nearly all of the constitutional authority had leaked out of the Treaty. Every problem was considered open to a solution reached by changing the rules, even when this was not really possible.[3] It is time for some constitutional rigidity and respect for the Treaty again, where the results of this Reform Treaty will remain valid for quite some time to come. Stability and inviolability of the treaty need to return to the European Union so that it can digest its own expansion under the rule of (stable) law, enforced by the Court of Justice with the help of the Commission.

There is an interesting parallel to be drawn here with recent developments in the WTO and the Doha Round. Seemingly, the Doha Round has stagnated, with the last push by the G-4 (US, EU, Brazil and India), which hoped to

3. The Excessive Deficit Procedure crisis is a good example.

revitalize the process, having failed. Many tend to regard the return of the process to Geneva as somewhat of a cosmetic move that will permit the Round to die a quiet death, or at best enter hibernation only to reawaken in two to three years time.

However, this return to Geneva and to the special negotiating groups, which are in fact 'alter egos' of the Council for Trade in Goods, of the Committee for Agriculture and of the Council for Trade in Services, with the TNC an emanation of the General Council, may actually be good for the WTO as an organization. Just as the Community/Union was suffering over the last decennium and a half of a Constitution, which was perceived as nearly totally flexible by the Member States, the WTO, in spite of having become a real international organization, was still suffering from what one could call 'Round sickness', a dangerous condition from GATT times which engenders the idea that a 'totally new deal' has to be done and can only be done in a so-called Round, where everything can be traded off against everything else. Never mind that no human being or chief negotiator can possibly grasp in the end what the real value of a concession in agriculture is compared to a desired change in the DSU, let alone when the equation has two, three, four or more variables of a different nature that cannot possibly be converted to the same denominator.

The more the World Trade Organization is allowed to work as the organization it actually is and through the organs it is equipped with, according to the rules of the treaty that underlies its existence, the better it is. These organs have demonstrated in the past that they are quite capable of bringing single-issue negotiations that they have been charged with (in financial services, in basic telecoms) to a successful conclusion, acceptable to all.[4]

Give the founding treaty of the organization (whether it is the WTO or the EC) a certain stability which will have to be respected, let the Member States work according to the founding treaty and the result will also instil a certain respect. It is this kind of rule stability and respect, of which everybody now says is a basic requirement for development in the third world, that is presently also urgently needed in international economic integration organizations, such as the EC and the WTO.

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4. Moreover, many initiates in the negotiations in the Doha Round will tell you that, if the agricultural negotiators were left alone, they could achieve an acceptable single-issue result fairly quickly.