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Constitutional Debate on European Union's Shifting Pathway towards Supranationalism

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Abstract *The rapid evolution of the European Union (EU) has suggested a new debate on regionalism due to the institutional transformation from intergovernmentalism to supranationalism. Hitherto, the EU has undergone a shifting pathway as a supranational institution that raises a further debate on supranational constitutionalism. This paper aimed to critically examine the EU's legal capacity for external relations at the World Trade Organization (WTO) following in identifying the impact of the EU member states to become members of this world institution as well. However, new approaches were considered within the shifting paradigm, which includes supranational union as an emerging pivotal global actor in international relations. This paper showed that the emergence of EU supranationalism has challenged the traditional debate on state sovereignty rooted in the Westphalian concept, particularly against the state primacy in international law. While the EU regionalism contributed to legal conversation both in the regional and international arena, the juxtaposition of the state and the supranational 'state' has increasingly blurred their limits, becoming sui generis in regionalism and state discourses among the areas of international law and constitutional law.*

Keywords European Union, Regionalism, Supranationalism, Westphalia.

1. Introduction

After World War II, establishing new international and intergovernmental organizations was an inevitable trend. The European Union (EU) was an example in which its current pivotal role has become part of such a development in how the European integration was originally established some years after World War II. The EU has quickly transformed into a supranational body that integrates almost all economies in Europe. By integrating the economies of Europe and with its power as a supranational body, the EU has rendered significant powers pooled from its member states and has risen as the emerging entity in the global economy. The emergence of the EU embedded with significant powers over member states has resulted in an academic debate on the new definition and characterization of actors that fragment in international law.

In external economic relations, the EU conferred international legal personality at the WTO, which supposedly challenges member states' legal personalities. It is the result of the Common Commercial Policy (CCP), which provides the EU to conduct external relations on trade on behalf of its member states.¹ This power has been exercised not solely due to Article 24 of the European Union Treaty affirms the legal personality but also Articles 206 and 207 regarding exclusive external competence.² The conferment of such legal personality asserts

¹ As the result of the conferment of exclusive competence, the legislation regarding trade matters within its member states is merely granted to the EU. In contrast, its member states no longer have a role on the international stage. Though the EU has not exercised its exclusive power, the member states have not conferred the right to legislate unless the EU has empowered them or implemented EU measures. Henri de Waele, *Layered Global Player* (Berlin, Heidelberg: Springer Berlin Heidelberg, 2011), 10, <https://doi.org/10.1007/978-3-642-20751-8>.

² In this context, the European Union has reformed the institutional power pulled from the member states through exclusive competence in all areas of trade policy. Rafael Leal-Arcas,



that the EU can enter the international arena, especially international economic relations. Through legal personality,³ particularly, the EU can enter into contractual and other relations with third parties (state and/or non-state entities). Therefore, this paper investigates the concurrent membership at the WTO toward the EU and its member states by analyzing the extent to which EU member states remain to become members of the WTO, despite the EU membership at the WTO. However, the argument is that the underlying reason for such duality is the EU's status as a single market. Another argument is that although the EU has the power to regulate internal and external trade,⁴ some residual competences affecting the WTO agreements still lie with the EU member states. By taking into account the Westphalian Treaty of Peace 1648 as the legitimate framework to qualify states as entities enjoying sovereignty and equality of states,⁵ such supranational body membership comes with several questions, both theoretically and normatively.

This paper attempts to fill the gap between state and union entities in the WTO membership. The argument claims that the EU is an intergovernmental organization in nature, different from the state entity. However, the EU's status as a customs union⁶ within the members changes the shape of its nature, which was

"Will EU Member States Play Any Role at the WTO after the EU Reform Treaty?," *ICL Journal* 1, no. 2 (2017): 75, <https://doi.org/10.1515/icl-2007-0203>.

³ Malcolm N. Shaw, *International Law* (Cambridge University Press, 2008), 196.

⁴ Matthias Herdegen, *Principles of International Economic Law* (OUP Oxford, 2013), 179.

⁵ According to the Westphalian sovereignty, states become the sole representative of inhabitants and the sole subjects of the law of nations. The concept is rooted in understanding the external dimension of sovereignty, which comprises two elements, i.e., the sole representative of the inhabitants and the exclusion of what the ruler considers external from the domestic authority structure. Turan Kayaoglu, "Westphalian Eurocentrism in International Relations Theory," *International Studies Review* 12, no. 2 (June 1, 2010): 198, <https://doi.org/10.1111/j.1468-2486.2010.00928.x>.

⁶ The term customs union refers to the trade agreement to impose standard external tariffs from countries outside the customs union. In the EU context, the customs union covers all trade in

previously assumed that intergovernmental organization did not have the direct capacity in the negotiation process along with member states. Today, the EU is granted a powerful exclusive competence in the trade sector and plays an essential role at the WTO. It asserts that the EU, even some considered it an intergovernmental organization, currently has a direct capacity at the WTO rather than solely its member states.

The critical examination precedes the legal capacity of the EU to international economic relations at the WTO. It then identifies the impacts of the EU membership at the WTO on the state as the main subject in international law, particularly on the member states of the EU within the WTO. However, new approaches consider changing paradigms from the state as the main actor of international law to the emerging supranational union as the new pivotal global actor in international relations. Thus, it will discuss the impacts of arising supranationalism or multilevel governance in the aftermath of World War II to the current globalized world in the 21st century.

This paper is organized into three parts of the discussion. The first part discusses the structure and supranationalism of the European Union, following its continuity and change. The second part examines the impacts of the EU's legal personality in establishing an emerging constitutional structure at the supranational level, which shifts the nature of an international organization to the debate over constitutional aspects since the EU has been a model of supranationalism. Then, this paper identifies EU membership at the WTO towards the state as the primary subject in international law, particularly in the EU's

goods, prohibits customs duties on imports and exports between EU member states, and entails the adoption of a standard customs tariff in their relations with third countries. Kathrin Limbach, *Uniformity of Customs Administration in the European Union* (Bloomsbury Publishing, 2015), 13.

member state within the WTO, following its impacts on its legal personality. Finally, in the last part, these impacts are not only accounted for solely under the EU lens but also to the extent it contributes to debate over the traditional concept of the Westphalian model and deals with the constitutional system.

2. Method

The research was mainly based on historical and analytical methods, part of doctrinal research. As the topic was from laws of international economic institutions, the historical approach was adopted to study the international treaties and agreements to comprehend the historical background and evolution of international economic law institutions concerned. The work mainly used library literature with historical and analytical methodology traits. The doctrinal was in the form of a critical study of international instruments relating to the international economic law in general and the laws of the WTO and the EU in particular. The primary sources of information were collected from declarations, charters, treaties, international agreements, acts, books, case laws, and journal articles on research. In addition, regional laws sourced from the European Communities and European Union were also used for this research.

3. Result & Discussion

A. The European Union: Its Continuity and Change

There may be considerable confusion on the distinction between the European Communities and the European Union.⁷ To some extent, it may result in a contentious argument due to their rapid development. The first argument

⁷ Vicki Paskalia, *Free Movement, Social Security and Gender in the EU* (Bloomsbury Publishing, 2007), 1.

comes that the EU replaced the EC after the Treaty of Lisbon that came into force in 2009. The following argument is that the EC and the EU are two entities that the EU does not replace the EC, so both entities co-exist. Before concluding the distinction, it needs to explain both clearly from historical, normative, and institutional aspects.

1. European Communities

Historically, under French Minister Robert Schuman, there was a plan to establish a supranational organization, as it considered the desire to control raw materials in the continent. As a consequence, the European Communities was established came from three communities, in which the Communities formerly were known as the European Coal and Steel Community (the ECSC),⁸ European Economic Community (EEC), and the European Atomic Energy Community (the Euratom).⁹ The EEC was renamed to European Community upon the Treaty of Maastricht, in which the European Communities consisted of the European Community, the ECSC, and the Euratom.¹⁰ These three communities under the European Communities became the first of three pillars of the European Union.

However, after the Treaty of Lisbon came into force in 2009, the European Community was abolished, which incorporated the European Communities into the EU with a broader framework. Accordingly, the European Communities were different institutions from the EU, albeit the Communities became the pillars of the EU. However, after the Treaty of Lisbon, the European Communities ceased to

⁸ The establishment of the European Union was primarily started with the European Coal and Steel Community (ECSC), established under the Treaty of Paris signed in 1951. Wolfram Kaiser, "Culturally Embedded and Path-Dependent: Peripheral Alternatives to ECSC/EEC" Core Europe" since 1945," *Journal of European Integration History* 7, no. 2 (2001): 12.

⁹ Hilaire Barnett, *Constitutional and Administrative Law* (Routledge, 2006) at 196.

¹⁰ *Ibid.*

exist because they had been incorporated into the EU. Article 47 of the Treaty on European Union (TEU) explicitly acknowledges the EU's legal personality. The conferment of a single legal personality to the EU is another reason to merge the EC into the EU. Under this structure, the second and third pillars of the EU covering the CFSP and police and judicial cooperation on criminal matters were governed by intergovernmental cooperation. The first pillar encompasses the other European policies to which the Community method was applied. This simplification from the EC to the EU increases the efficiency, consistency, and visibility of EU action. The conferment of legal personality to the EU means that it can internationally conclude and negotiate agreements, become a member of international organizations, and sign treaties.

2. European Union

As a regional organization within Europe, the European Union establishes economic and political partnerships to represent a distinctive form of cooperation among sovereign states. The EU started in 1951 with only six members of the European Communities comprising Belgium, France, Germany, Italy, Luxembourg, and the Netherlands.¹¹ Hitherto, the members of the European Union are 28 countries, including most of the countries of Central and Eastern Europe, and has helped promote peace, stability, and economic prosperity throughout the European continent.¹² As a customs union, the EU has a single market in which goods, people, and capital move freely, a common trade policy, and a common agricultural policy. It includes the adoption of a common currency

¹¹ Debra Johnson and Colin Turner, *European Business: Policy Challenges for the New Commercial Environment* (Psychology Press, 2000), 24.

¹² Kristin Archick, "The European Union: Questions and Answers," *Russia, China and Eurasia* 27, no. 4/5 (2011): 823.

by nineteen EU member states. In addition, the EU has been developing a Common Foreign and Security Policy (CFSP),¹³ which includes a Common Security and Defence Policy (CSDP),¹⁴ and strengthening cooperation under the Justice and Home Affairs (JHA) to maintain common internal security measures.¹⁵

3. Supranational Institution

Supranationalism is a new emerging concept of governance after World War II. It signifies the establishment of the European Economic Community in 1951,¹⁶ which is now evolving to become the European Union. The term supranational has an undefined meaning, and it is usually used other than the terms international, global, or transnational. It may be defined as something that happens above nations or states.¹⁷ However, it has a basic understanding that supranational is governance other than national polity, which encompasses integrating the system of states. It can argue as the group of states which creates the new governance among states has a particular power to govern the states through a political and economic union. This concept, indeed, is still debatable. The debate is about the system of governance, the sovereignty of states which become members of such supranational entity, and the relationship between state and supranation. On the one hand, it can be assumed as the new patron of transformation to create a federation in a political union. On the other hand, it

¹³ Alina Kaczorowska, "European Union Law," n.d., 20.

¹⁴ *Ibid.*, 89.

¹⁵ *Ibid.*

¹⁶ Alberta M. Sbragia, "The European Community: A Balancing Act," *Publius: The Journal of Federalism* 23, no. 3 (January 1, 1993): 23, <https://doi.org/10.1093/oxfordjournals.pubjof.a038084>.

¹⁷ Janusz Ruzkowski, "Supranationalism between the Nation-State and International Cooperation," *Journal of Public Administration and Policy Research* 1, no. 1 (2009): 4.

deals with the members' governmental systems that run their political system irrespective of the system of the supranation.

In a basic legal definition, supranation is usually referred to as sovereign states which agree to abide by norms adopted at a higher level of organization (state). This supranationalism explicitly adopts the conferral principle as outlined in Articles 1 and 5 of the Treaty of the European Union. Consequently, some powers are granted from member states to the EU so that the EU has the power to create and regulate within its member states. For instance, the Common Commercial Policy (CCP) reserves the EU the affairs relating to the external trade relations within its member states. The EU member states apply the common policy relating to commerce due to the Customs Union. Thus, it affirms that the power of the states has been rendered to the EU, which means this is a kind of transfer of sovereignty, albeit it is not a total transfer.

B. Emerging Constitutional Structure of Supranationalism

The emerging constitutional structure of supranationalism indicates the pathway of the European Union that desires the single entity to integrate its member states. The integration of the European states through the European Union is the path to transforming states within Europe into a new regional order. This integration is built by incorporating independent nation-states in the continent of Europe into the EU to deepen economic, social, and political relationships through a political and economic union. This desire notably emerged in the early 21st century that lasted with the structure under the Treaty of Lisbon, after the Union ceased to have the Treaty Establishing a Constitution for Europe. The integration is not only challenged by Brexit but negates the desire for integration. In 2004, the EU's reformation to have a single constitution over EU

member states was challenged¹⁸ as the Treaty Establishing a Constitution for Europe was not entered into force and ceased into existence because of the problem of ratification.¹⁹

Following the unratified international treaty above, the Treaty of Lisbon was created. This treaty amended the Treaty on European Union (TEU or the Maastricht Treaty) and the treaty establishing the European Community (TEC or the Treaty of Rome).²⁰ Accordingly, the Treaty of Lisbon expands the competences of the EU²¹ in the field of trade and other external commercial relations. The areas of exclusive competence consist of a customs union, competition rules for the internal market, monetary policy, the conservation of marine biological resources, and common commercial policy.²² In addition to the exclusive competence, the EU can legislate and adopt binding acts, including international agreements, and does not allow the member states to legislate and adopt binding acts without the EU's approval.²³ However, the treaty determines that a shared competence confers the EU and its member states to legislate and adopt legally binding acts. The member

¹⁸ Armin von Bogdandy, "The European Constitution and European Identity: Text and Subtext of the Treaty Establishing a Constitution for Europe," *International Journal of Constitutional Law* 3, no. 2–3 (May 1, 2005): 297, <https://doi.org/10.1093/icon/moi021>.

¹⁹ The treaty was signed on October 29, 2004, by representatives of 25 EU member states. Eighteen member states ratified it, but the ratification was rejected by French and Dutch voters in the referendum in May and June 2005 to ratify the document.

²⁰ Then, the Rome Treaty was renamed the treaty on the Functioning of the European Union (TFEU).

²¹ Article 1 paragraph 1 of the Treaty of the Functioning of the European Union states, "This Treaty organizes the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences."

²² Article 3, paragraph 1 of the Treaty of the Functioning of the European Union.

²³ Article 2 paragraph 1 of the Treaty of the Functioning of the European Union states, "When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of acts of the Union."



states shall exercise competence in which the EU does not exercise its competence. The member states are also obliged to exercise their competence and the EU has decided to cease exercising its competence.²⁴

The Lisbon Treaty groups the multiple aspects of the EU foreign policy and external relations under the Union's External Action. The Lisbon Treaty abolished the old three pillar structure consisting of EC, CFSP, and JHA.²⁵ However, Article 24 of TEU states that CFSP is subject to specific rules and procedures. It asserts that the structure of decision-making in CFSP remains essentially intergovernmental, and most member states' unanimity is required for most policies.²⁶ The abolishment of the three pillars structure affects the EU's only institutional conferred legal personality. In other words, there is only a single personality that is entitled to the European Union. The conferment of legal personality to the EU brings rights and duties. It legally acts that the EU will be able to negotiate and conclude international agreements and bring international claims and be responsible for its breaches of obligation by being subjected to such claims. It should also, in principle, simplify the EU's representation in international organizations such as the IMF, the World Bank, and the WTO. However, the EU member states do not want to cede their voting rights to be represented collectively by the EU. Therefore, the fragmented representation will be experienced by the EU in the future in the various vital international bodies.²⁷

²⁴ Article 2, paragraph 2 of the Treaty of the Functioning of the European Union.

²⁵ The Lisbon Treaty has replaced the European Communities pillar to the European Union by Article 47, which states "shall have legal personality."

²⁶ Anne Pollet-Fort, "Implications of the Lisbon Treaty on EU External Trade Policy. EU Centre Background Brief No. 2, March 2010," EU Centre Background Brief, March 2010, 5, <http://aei.pitt.edu/33652/>.

²⁷ *Ibid.*, 6.

1. The Common Commercial Policy

A customs union adopted by the EU generates common arrangements for trade activities from other countries. The adoption of CCP then has been an exclusive competence conferred to the EU. This CCP is based on a common external tariff applied to member states. It is the main instrument governing EU trade relations with non-EU countries and is used by the EU to shape its interests in the external economic sphere.²⁸ Therefore, it is commonly called the EU external trade policy. Before the Lisbon Treaty, the CCP was constituted in Article 2 of the Treaty of Rome as one of the primary policies of the European Economic Community. It stated that the primary mission of the Community is to establish a common market and specify the measures that it must undertake to achieve the objective.

Since the Treaty of Lisbon, the EU has had a growing interest in abolishing restrictions on international trade, FDI, and lower customs and other barriers. In addition, the application of the CCP should be based on the principles of uniformity about changes in tariff rates, the conclusion of tariff and trade agreements (relating to trade in goods and services), and the commercial aspects of IP, FDI, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade. As a result, trade agreements do not need to be ratified by the national parliament.

2. Strengthening Powers of the European Parliament

After the Treaty of Lisbon amending the Treaty of European Union and the Treaty of European Communities (not replaced by a new one), some fundamental changes in the EU power and decision-making process exist in the EU trade policy. Despite the CCP being one of the exclusive competences conferred to the EU, the

²⁸ *Ibid.*, 5.

treaty provides power to the European Parliament in the decision-making process. Formerly, it only involved the European Commission and the Council, which both acted to regulate EU trade policy. Before the Treaty of Lisbon, the European Parliament had a limited role in negotiating and concluding trade agreements and adopting trade legislation. After the Treaty of Lisbon, however, the EU legislation for implementing trade policies has been strengthened, and it is now collaborating with that of the Council and the European Commission.

Since 2009, according to Article 207 of the TEU, it should involve in which the European Parliament, together with the Council acts through regulations under the ordinary legislative procedure to adopt the measures defining the framework for implementing the CCP. It asserts that the policy-making processes of agreements in the CCP are subjected to the share decision between the Council and the parliament. The parliament's new power makes Parliament and the Council equal in law-making.

The Commission shall make recommendations to the Council, authorizing it to open the necessary negotiations. Thus, the Council and the Commission shall ensure that the agreements negotiated are compatible with internal EU policies and rules. Besides, 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. Finally, the Commission shall regularly report to the European Parliament on the progress of negotiations, and its consent is required to adopt trade agreements.

3. The Division of Powers

After the Treaty of Lisbon, there was a division of power between the EU and member states. The treaty on the Functioning of the European Union (TFEU)

distinguishes three types of competences as follows: exclusive, shared and supporting competences. *First*, exclusive competences. According to Article 3 of the TFEU, the EU alone can legislate and adopt binding acts. The role of member states is limited to applying acts unless the EU authorizes them to adopt certain acts. It encompasses customs, the Union, the establishment of the competition rules necessary for the functioning of the internal market, monetary policy for the member states whose currency is the Euro, conservation of marine biological resources under the common fisheries policy, common commercial policy, and concluding international agreements.

Second, shared competences. According to Article 4 of the TFEU), the EU and its Member States are authorized to adopt binding acts. Member states may exercise their competence only if the EU has not exercised or has decided not to exercise its competence. It comprises the internal market, social policy (limited to the aspects defined in the TFEU), economic, social, territorial cohesion, agriculture and fisheries, environment, consumer protection, energy, and transport. *Third*, supporting competences. Article 6 of the TFEU determines that the EU can only intervene to support, coordinate, or complement member states' actions. It brings consequences that the EU has no legislative power in certain fields and may not interfere in exercising competences reserved for the Member States. It protects and improves human health, industry, culture, tourism education, vocational training, youth and sport, civil protection, and administrative cooperation.

In this context, it can conclude that the EU is a distinctive body different from either state or international organization. Some powers of member states have been pooled with the EU and shared, but the EU has been given the exclusive competence which the member states do not have the power to do it. Hence, the concept of the EU can refer to terms of supranational, superstate, or multilevel governance. In the EU, there are at least two levels of governance, *viz.*, state and

the EU. Thus, multilevel governance can describe and understand the ongoing process of establishing new government structures complementary to and building upon---while also changing---existing forms of self-organization of the people or society.²⁹

C. The Interplay Between the EU and the WTO in the Trade Policy

The EU and the WTO are both international organizations playing a role in economic areas. Both organizations have aimed to promote international trade between countries. However, they have some distinctions. As an intergovernmental organization with a regional scope, the EU is geographically limited to Europe, while the WTO is a large intergovernmental organization to regulates economic areas worldwide. However, the EU is not characterized as an intergovernmental organization due to its supranational power. The power granted to the EU has pooled some significant powers attached to member states' power, such as the power to regulate their home affairs and particularly the power to regulate international trade as the effect of the common commercial policy.

The existence of EU institutions, indeed, brings a more complex framework to the internal affairs of member states. The establishment of the Council, the European Commission, the European Court of Justice, and other institutions brings evidence to transform structural relations. The constitutional framework within the member countries encompasses beyond the state. It reaffirms that the EU has been built to encompass power between the EU and its member states and the institutional framework under the EU itself. It subsequently brings the EU's nature into *sui generis*, in which it is less than the state but it is more than an

²⁹ Ingolf Pernice, "Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?," *Common Market Law Review* 36 (1999): 703.



international organization.³⁰ This fact has become a unique membership at the WTO, in which the EU, as a *customs territory* because it applies customs policy within its member states, can be a member of the WTO. Also, EU member states still retain their membership in the WTO. However, the customs policy of international trade makes collective representatives of European countries through the EU a strong party rather than an individual party of EU member states.

The interplay between the EU and the WTO brings dynamic and unprecedented relations. However, at the WTO, it is a supranational union treated like the states of WTO members. Article XI:1 of the WTO Agreement clearly states that the EC is one of the contracting parties at the WTO. It plays a role as a supranational institution and its member states on its behalf. The EU membership at the WTO and the EU member states being members at the WTO bring concurrent membership to its member states. However, these two entities (the EU and its member states) play a different role at the WTO. The EU can enter into trade relations governing the CCP, applied to the member states. It can negotiate and conclude an internationally binding agreement with member states in the field in which the EU is competent. Besides, if the competence is shared, the EU, together with its member states, can speak of the mixed agreement.

Observing the interplay between the EU and the WTO has become essential. This observation underlies both trade policy and the process of decision-making. This study preferably refers back to the controversy of beef hormones between the EU and the WTO;³¹ this instance is when the EU still being the EC. It is important

³⁰ Marek Hlavac, "Less than a State, More than an International Organization: The Sui Generis Nature of the European Union," December 2, 2010, 3.

³¹ Glenn C. W. Ames, "Bananas, Beef, and Biotechnology: Three Contentious U.S.-EU Trade Disputes," *Applied Economic Perspectives and Policy* 23, no. 1 (March 1, 2001): 217, <https://doi.org/10.1111/1058-7195.00056>.

to note how the EC responded when it had found itself in the position of a member whose regulatory policies in the case of beef hormones. The EU is open to challenges for compatibility with the trade organization's rules. It is commonly said that this case has been one of the uncompromising controversies in agriculture since the inception of the WTO. It started after the EU banned the import of meat that contained artificial beef hormones. WTO rules, then, permit such bans as long as where a signatory presents valid scientific evidence that the ban is due to health and safety measures. Canada and the US opposed this ban and took the EU to the WTO Dispute Settlement Body regarding this rule. Thus, in 1997 the WTO ruled against the EU, and it appealed the ruling.

The beef hormones case was substantially related to the Sanitary and Phytosanitary (SPS) Agreement.³² SPS has become one of the GATT/WTO areas, covering the intersection of health and trade concerns adopted in the Uruguay Round package. It refers to Article XX(b) of the GATT that in Article 2.1, member states should be free to make decisions on trade relating to health and safety measures.³³ Also, Article 2.2 states that regulatory measures having the effect of excluding or limiting imports should be legitimate only if they are under scientific pieces of evidence or findings.³⁴ If the scientific findings on which an import restriction is based are incorporated into a widely accepted international standard, the import restraint should be deemed to be necessary to protect human, animal, or plant life or health and presumed to be consistent with the relevant provision of the SPS Agreement and the GATT (Article 3.2).

³² Dale E. McNeil, "The First Case under the WTO's Sanitary and Phytosanitary Agreement: The European Union's Hormone Ban," *Virginia Journal of International Law* 39 (1999 1998): 93.

³³ Yusuf Adiwibowo, "The Scientific Principle of Food Safety in the Agreement on Sanitary and Phytosanitary Measures," *Lentera Hukum* 7, no. 2 (July 28, 2020): 176, <https://doi.org/10.19184/ejrh.v7i2.17805>.

³⁴ *Ibid.*, 177.



The Beef Hormones dispute raises attention in which it deals with state actors and non-state actors. First, the US and Canada filed a complaint with Dispute Settlement Understanding (DSU), asserting a violation of several provisions of the SPS Agreement by the EC.³⁵ Prohibition by the EC had not been based on standards and recommendations of that body or any other internationally agreed standard.³⁶ Hence, the US and Canada contended that *a prima facie* case had been made out against the EC measure, and it had not met the burden of proof of scientific justification set out in Article 3.3 of the SPS Agreement.³⁷ However, the EC argued that Article 3.3 authorizes member states to maintain a higher level of protection called international standards. The burden should fall on the states challenging such a measure.³⁸ In this case, the EC argued that based on the precautionary principle,³⁹ which had become the general customary law. The US and Canada rejected that argument contending that the precautionary approach could be characterized at most as an emerging principle that may, in the future, crystallize into one of the general principles of law recognized by civilized nations.⁴⁰

This case should not be seen to the controversy of been hormones relating to the SPS Agreement only, but it also needs to be related to the nature of the actors in this dispute. It deals between the state entity (the US and Canada) and a non-state entity (the EC). The examples also deal with anti-dumping measures on

³⁵ Andreas F. Lowenfeld, *International Economic Law* (Oxford University Press, 2008), 401–2.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Ryan David Thomas, “Where’s the Beef--Mad Cows and the Blight of the SPS Agreement,” *Vanderbilt Journal of Transnational Law* 32 (1999): 496.

⁴⁰ Lowenfeld, *International Economic Law*, 401–2. Article 38 (1) of the Statute of the International Court of Justice mentions that one of the sources of international law is general principles of law recognized by civilized nations and customary law.

biodiesel⁴¹ and raw materials⁴² between Indonesia and the EU. It asserts that the EC is deemed equal with a state entity in dispute settlement. This argument assumes there is a juxtaposition of state entity and non-state entity. Hence, it questions whether the EC (now the EU) is still regarded as a non-state entity or has already transformed into a state entity.

D. The EU's Legal Personality at the WTO

The EU's legal personality is clearly confirmed in Article 47 of the Treaty of Lisbon. Due to its legal personality, the EU can negotiate and conclude international agreements, bring international claims, and be responsible for its breaches of obligation by being subjected to such claims. In substance, this confirmation of EU legal personality in the Treaty of Lisbon followed by the external trade competence being exclusive competence conferred to the EU. Hence, all trade matters with non-EU-states should be subjected to EU provisions. The EU entering into international agreements and being a member of WTO is also because of having legal personality. Initially, the EU's legal personality did not state clearly in the Treaties. This membership at the WTO is caused by the EU being an international organization and applying the CCP. However, the impact on the EU's legal personality brings consequences to member states in which EU member states are no longer having a dominant position because some of their power has been pooled with the EU.

⁴¹ World Trade Organization, "WTO | Dispute Settlement - DS480: European Union – Anti-Dumping Measures on Biodiesel from Indonesia," accessed June 13, 2020, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds480_e.htm.

⁴² World Trade Organization, "WTO | Dispute Settlement - DS592: Indonesia - Measures Relating to Raw Materials," accessed June 13, 2020, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds592_e.htm.

1. Rendering the Role of the EU Member States

In this part, the institutional structure of the EU is multilevel governance because there is more than one governance, which comprises domestic governance and beyond domestic governance. This multilevel governance within Europe brings a unique intersection between constitutional law and international law, and it is linked explicitly between a state and an international organization. This intersection can be observed through the behavior of the EU. The EU, as an international organization, apparently pushes to eliminate limits of boundaries towards states within Europe over time. The Treaty of the European Union signified in 1993⁴³ and it can be tracked back into the long history of European integration from the Establishment of the European Economic Community (EEC) in 1958. From the Amsterdam Treaty to the Treaty of Lisbon, the EU has adopted the CCP, bringing the relationship between states and the EU deeper. Thus, this relationship became more complicated after the Treaty of Lisbon, extending that the CCP includes all issues concerning trade in services, trade-related aspects of intellectual property, and foreign direct investment.

Through the CCP, the EU has the exclusive competence to regulate commercial matters uniformly towards its member states. This creation of the CCP, which governs the EU trade relations with non-EU countries, followed due to a logical consequence of forming a customs union among its member states. Hence, the conferment of this exclusive competence in external trade to the EU affects the limits of EU member states. Member states no longer have the power to regulate international trade, so that all policies of international trade should be

⁴³ Accordingly, the Treaty of Maastricht responds to five key goals, among other things, (a) strengthening the democratic legitimacy of the institutions; (b) improving the effectiveness of the institutions; (c) establishing an economic and monetary Union; (d) developing the Community social dimension; and (d) establishing a common foreign and security policy.

subjected to the EU. It signifies that the EU, through its power, renders the member states' dominant position because they have pooled the competence of trade policy to the EU. In other words, we can conclude that the dominant position of states within the EU has been reduced and delegated to the EU.

2. Emerging Confederation at Multilevel Governance

Despite the CCP and other salient features of the Treaty of Lisbon, there is exceptional attention to the EU governance. The evolution of the EU makes a new pivotal intersection between constitutional law and international law. It emerges because some parts of the EU have domestic law or constitutional law characteristics, and in other parts, it has characteristics of international law.

In the decision-making process, the European Parliament's power has been strengthened. The EU legislation for implementing trade policies is now the collaboration between the European Parliament and the Council in which the European Parliament has equal powers and position towards the Council. If we track back before the Treaty of Lisbon, the European Parliament had a limited role in negotiating and concluding trade agreements and adopting trade legislation. According to the 1957 Treaty of Rome, Parliament was an advisory role in the legislative process, the Commission proposed, and the Council adopted legislation; the policy-making processes of agreements in the CCP are subjected to the share decision between the Council and the parliament. Hence, this new power entitled to the European Parliament makes parliament and the Council equal in law-making.

The CCP is a new pivotal policy applied throughout the EU member countries. It is important to notice because, in the areas covered by the CCP, the EU member states have a uniform policy prescribed by the EU. The EU member countries are not allowed to regulate such competence. It refers to the division of

power between the EU and its member states as prescribed by the TFEU. The treaty distinguishes three types of competence: exclusive, shared, and supporting competences. The CCP entitled to the EU is categorized as exclusive competence, which means that the EU alone can legislate and adopt binding acts, and EU member states are limited to applying acts. The power is given to the EU regarding concluding international agreements because it is classified as an exclusive competence. In addition to Article 47 of the Treaty of Lisbon dealing with legal personality, by this competence, the EU substantively is confirmed to have an international legal personality that can negotiate and conclude international agreements.

This practice can be observed that the EU tends to make a new system of governance.⁴⁴ It tries to combine the forms of governance by adopting federation and confederation concepts. In the sense of federalism, the EU divides powers between the EU and its member states, in which the power regarding the CCP has been pooled to the EU for governing over member states. The EU and its member states have a legal personality. Then, member states have to take charge to harmonize by pooling the EU the power to regulate the CCP; member states render their competence to the EU and are no longer in a dominant position. However, it does not mean that the EU takes over the sovereignty of its member states. It materializes the unification of law to bring uniform policy under the EU so that they get mutual benefit under the auspices of the EU.

The confederation concept materialized by the EU shows that both the EU and its member states have legal personalities. In other words, the establishment of the EU does not mean fusing all member states into a single personality under the EU. However, the EU member states retain their sovereignty and still have

⁴⁴ The terms of government and governance are interchangeable in the process of governing. The government refers to the governing body itself, and governance refers to the act of governing.

legal personality to enter into international relations excluded in international trade policy. Regarding the scope of the customs union and primarily external trade, they are limited only to applying acts governed by the EU.

The concept of customs union brings the consequences of alteration from the scope of domestic power to the scope of multilevel governance. The common market, in this regard, the CCP, changes the cooperation model between states under the EU to integrate the economic system, which applies uniform policy regulated by the EU. This customs union model can be linked to the federal system of government.

The federal system consists of states and the central government in which certain power is reserved to the states and may not be exercised by the central government. In respect of trade and commerce, it may refer to the US; the US Constitution does not contain any express provision which guarantees the freedom of commerce, interstate or intrastate. However, the freedom of interstate commerce has been deduced by way of interpretation of Article 1 s. 8(3) gives Congress the power to regulate commerce among several states.⁴⁵ It has similarities to the EU. The EU has been reserved exclusive competence to govern common commercial policy regarding external trade relations, and member states have been limited to applying a policy from the EU. The European Parliament and the Council have the power over this common policy toward member states. It asserts that interstate relations within the US similarly characterize the inter-member state relation within the EU.

When linking deeper to the EU, some components have been satisfied. In the EU, there is a division of power between the EU and member states. The EU is entitled to exclusive competence conferred by its member states, and it applies the single foreign policy in respect of trade. However, it still cannot be defined that

⁴⁵ Durga Das Basu, *Comparative Federalism* (New Delhi: LexisNexis, 2007), 510.

the EU has transformed from a regional organization to a federal system of government because both entities, the EU and its member states, have the legal personality, which means they have the legal capacity to enter into international law. In other words, the power of all foreign policies is not transferred to the EU, except for external trade relations. The combination of federalism characteristics and confederation in the EU brings us to rethink the EU's system of governance. At the EU, it is judicially not stated which concept it adopts. However, *de facto*, it is characterized by the fusion of federalism and confederation concepts, especially after adopting customs policy.

In the international arena, by learning from the membership of the EU at the WTO, we can conclude that the EU is being deemed a state because it is treated as other parties, which are state entities. This article does not argue that the EU is a state entity but a non-state entity (supranational-state entity as *customs territory*) to be treated like a state. This phenomenon, then, can be regarded as a new paradigm of intersection between constitutional law and international law, which classifies the study of the EU being *sui generis*.⁴⁶ The EU is neither purely about international law nor constitutional law scope. In the words of Nico Krisch, he introduces postnational, which relieves the distinction between national and international politics and between national and international law.⁴⁷ The relationship between the EU and its member state inclines us to go forward with this concept. This relation makes multilevel governance between the EU and its member states realize common interest through uniform policy under the EU. It tries to transcend

⁴⁶ Hlavac, "Less than a State, More than an International Organization: The Sui Generis Nature of the European Union," 3.

⁴⁷ Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP Oxford, 2012), 28.

boundaries between international law and constitutional law, and further, it needs harmonization and collaboration between those two scopes.

3. The Juxtaposition of State and Supranational 'State'

The preference of the EU and its member states to meet all their policies is quietly high. The Establishment of the Constitution of Europe or the Constitution of Europe is one of the pieces of evidence that the European countries under the EU want deeper integration, which is more than a customs union. However, the Constitution of Europe ceased to exist because it had a problem with ratification in several member states.

Although the EU failed to have a constitution, many substances in the Constitution of Europe have been adopted by the Treaty of Lisbon. Accordingly, in the words of Aristotle, the constitution's concept is substantive and does not require the form of a written document. However, it focuses on how a state (polis) is actually organized.⁴⁸ Given multilevel governance in the EU, we can observe that the EU governance inclines acting to governing rules toward member states.

The relationship between the EU and its member states brings juxtaposition of their nature, state, and supranational state. It is agreed that the EU is a supranational entity, and its member states are state entities. However, given their behavior in international law, they are juxtaposed in which supranational-state is deemed a state entity. The membership of the EU at the WTO is characterized by a customs union so that, given the single or uniform policy in trade, the EU has had status at the WTO as a member. However, over time, the EU tries to maximize its power and collectively pool the power of its member states, being a single power in the EU. The EU trade policy, which is the exclusive competence of the

⁴⁸ Axel Tschentscher, "Comparing Constitutions and International Constitutional Law: A Primer," February 10, 2011.

EU, is the proof that the EU pushes the limits of the state in respect of the trade policy rendered to the EU. Thus, this insight concludes that there is a juxtaposition of state and supranational-state in the international arena, especially in the foreign trade policy at the WTO.

In this context, the EU preaches that after World War II, especially after the Cold War, there is a new model of international trade relations. It transcends the limits of state jurisdiction, in which international trade relations are not merely intertwined between states but also between a state and an international organization. In this context, it is a regional organization like the EU. This new pattern develops because of the demand of states to integrate their interest to trade into a single policy so that they have the same policy to get more significant benefits in trade relations. The model of trade relations at the EU will be the benchmark for the future international trade relations in the world, which ASEAN may follow. As the fastest regional integration model after the EU, ASEAN is likely to intertwine regional models in international trade relations.⁴⁹

4. Conclusion

The evolution of the EU brings dynamic changes, both institutionally and constitutionally. This evolution contributes to the global theoretical framework of the shifting Westphalian model that relies upon state sovereignty to the European Union model that integrates states into a single union. Following the more globalized world in the 21st century, the emergence of the EU has added a new paradigm from the traditional theory of state based on the Westphalian concept to the more integrated states under the EU, indicating this Union as the emerging

⁴⁹ Phet Sengpunya, "ASEAN E-Commerce Legal Framework and Alignment of Lao PDR: A Review," *Lentera Hukum* 6, no. 3 (December 31, 2019): 378, <https://doi.org/10.19184/ejllh.v6i3.13709>.

actor in international law that often disputes against states. This juxtaposition of state-nature and supranational-state nature has relieved the limit between both, which affects the areas of international law and constitutional law. This phenomenon is regarded as a new paradigm of intersection between constitutional law and international law, classifying the study of the EU as *sui generis*. It indicates that today there is a paradigm shift in which the main subject of international law is a nation-state entity and a supranational state, as exemplified by the EU.

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