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KALLIOPI KOUFA FOUNDATION
FOR THE PROMOTION OF INTERNATIONAL
AND HUMAN RIGHTS LAW

Jean Monnet Project | EURIS

EU Responsibility in the International System

Working Paper No. 2

The EU and its Member States before the Dispute Settlement Mechanisms of the WTO and the earlier GATT (Part I)

Aliki Semertzi

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The EU and Its Member States before the dispute settlement mechanisms of the WTO and the earlier GATT

1. Introduction

This three-part Working Paper(s) focus on the dispute settlement (DS) cases under the framework of the GATT 1947, as well as its successor, the WTO.[1] It examines how issues of the international responsibility of the EU and its Member States (MS) have been dealt with by the GATT/WTO DS panels. This paper is intended to be read together with the Training Manual on 'The EU and its Member States before the Dispute Settlement of the WTO and the earlier GATT'. It complements the latter with a systematic analysis of the detailed extracts of the dispute settlement (DS) cases provided in the Manual. It also frames the question of the EU's international responsibility as it arose and dealt with by the GATT/WTO dispute settlement panels, against the broader – historical, political, legal, and economic – background in which it appeared. This broader framing is indispensable in order to grasp why the GATT/WTO DS proceedings are a case apart and quite distinctive vis-à-vis the international responsibility of the EU and its MS under general international law.

The Working Paper proceeds as follows. **Section 2** starts precisely by taking up this general international law angle. It asks whether the International Law Commission's (ILC) Articles on the Responsibility of International Organizations (ARIO) provide a pertinent lens in order to grasp the idiosyncrasy of the EU's international responsibility within the framework of the GATT/WTO.[2] It advances that the ARIO figure most prominently in scholarly debates, as well as in the context of the submissions by the European Commission before the ILC when the ARIO were being drafted. By contrast, the GATT/WTO DS panels have not, so far, used the ARIO to address the question of the EU's responsibility. Instead, the GATT/WTO panels have paid deference to the EU's practice of the so-called 'single voice' within the WTO. GATT/WTO panels have not questioned the European Commission in taking the lead in all disputes involving the EU and/or its MS. This holds true both in the undisputed cases when the complainant targets only the EU, or an EU act –but it also holds true when the complainant targets a MS– alone, or alongside the EU –or a MS measure– alone, or alongside an EU act.

[1] The founding documents of the WTO, as well as the text of the GATT 1947 which is now incorporated therein, can be found at the WTO's website, at https://www.wto.org/english/docs_e/legal_e/legal_e.htm.
[2] Draft Articles on the Responsibility of International Organizations, annexed to UNGA Res 66/100, UN Doc A/Res/66/100, 27 February 2012 (hereinafter 'ARIO').

To explain this divergence –namely, the non-immediate relevance of the ILC ARIO in the GATT/WTO's dispute settlement practice, beyond the mere chronological fact that they came into existence only in 2011, whereas the GATT/WTO DS system functions since the GATT's inception in 1947– **Section 3** embeds the EU's responsibility within the GATT/WTO in the longer historical trajectory of the evolution of international trade regulation. Here, it is argued that such a longer historical trajectory holds more explanatory potential in order to grasp why, for instance, in areas of undisputed EU competence like trade remedies (anti-dumping, countervailing, and safeguard measures), there has been 'no discussion of whether or not the EU is responsible of the measures'. And in trade remedies too, it is also consistently the case that the 'complaining WTO members have only identified as measures at issue the EU acts'.[3] This longer historical trajectory probably also better explains why the EU's responsibility gets more complicated in disputes where 'fundamental societal choices' are involved.[4] It is, particularly too, in such disputes that complainants tend to target not only the EU, but also certain of its MS – as evidenced in the WTO disputes in the civil aircraft cases,[5] or in the energy disputes (renewable energy generation sector,[6] biodiesel,[7] palm oil[8]).

Hence, Section 3 revisits the common historical roots that the 1947 GATT and the 1957 EEC share. After all –in the words of Pescatore, former judge at the European Court of Justice (ECJ) and one of the sitting judges in all the early seminal ECJ decisions involving the international responsibility of the EEC, including GATT[9]– 'it was primarily the GATT of 1947 which supplied the conceptual and legal framework within which the negotiations on the core of the Community, i.e., on the common market, more specifically, the free movement of goods,

[3] J. Flett, 'The World Trade Organization and the European Union and its Member States in the WTO', in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press 2017) 849, 873-884.

[4] F. Hoffmeister, 'The European Union in the World Trade Organization – A Model for the EU's Status in International Organizations?' in C. Kaddous (ed), *The European Union in International Organisations and Global Governance: Recent Developments* (Hart Publishing 2015) 121, 132.

[5] European Communities and Certain Member States (France, Germany, Spain, United Kingdom) – Measures Affecting Trade in Large Civil Aircraft, WT/DS/316; European Communities and Certain Member States (France, Germany, Spain, United Kingdom) – Measures Affecting Trade in Large Civil Aircraft, WT/DS/347.

[6] European Union and certain Member States (Italy, Greece) – Certain Measures Affecting the Renewable Energy Generation Sector, WT/DS/452.

[7] European Union and a Member State (Spain) – Certain Measures Concerning the Importation of Biodiesels, WT/DS/443.

[8] European Union and certain Member States (France, Lithuania) – Certain Measures Concerning Palm Oil and Oil Palm crop-based biofuels, WT/DS/600.

[9] For instance, Pescatore was sitting judge in the central decisions of *International Fruit Company* (Joined Cases 21-24/72, *International Fruit Company NV and others v Produktschap voor Groenten en Fruit*, ECLI:EU:C:1972:115, delivered 12 December 1972); *Opinion 1/75*, Draft understanding on a local cost standard, ECLI:EU:C:1975:145, delivered 11 November 1975; Case 38/75, *Douaneagent der NV Nederlandse Spoorwegen v Inspecteur der Invoerrechten en Accijnzen*, ECLI:EU:C:1975, delivered 19 November 1975.

took place'.[10] As Pescatore further remarked, there was a 'clear allusion to article XXIV of GATT' in article 9 of the EEC treaty providing that the 'Community shall be based' on a customs union which 'shall cover all trade in goods'.[11] This initial 1957 'shall be based' formulation persisted in the text of the EEC/EC treaty, up until the 2009 Treaty of Lisbon which eventually replaced it with the words 'shall comprise'[12] – arguably to reflect how far the EU has outgrown its incipient basis and proving an outstanding 'example of what the establishment of a customs union may lead to'.[13] Nevertheless, the fact that the EEC's common market was modelled largely on the GATT and that many of the EEC/EC/TFEU provisions 'clearly reflect this',[14] can explain why legal competence –as debated through the ARIO– might not be the 'most appropriate yardstick for measuring the nature or extent' of the EU's responsibility within the GATT/WTO.[15] One reason that this is so, is because GATT rules are claimed to contain a distinct legality, a legality of an 'economic-legal logic',[16] and, consequently the GATT/WTO DS system is also perceived as diverging from the traditional legal concept of state responsibility for internationally wrongful acts.[17]

At the same time, however, Section 3 argues, that if that has been the case at the time when the GATT was created in 1947, or the EEC in 1957, or even the WTO in 1994 – today, it is increasingly advanced that the 'face of international trade has changed'.[18] This is true not only for the EU, for which the 'principle of liberalization' – even if one of the two founding principles of the EU's external Common Commercial Policy (CCP), alongside unity, and expressed prominently in the EU's participation in the process of multilateral liberalization through the GATT and the WTO – appeared always rather tempered, with liberalization lying

[10] P. Pescatore, 'Introduction', in Meinhard Hilf, Francis Geoffrey Jacobs and Ernst-Ulrich Petersmann (eds), *The European Community and GATT*, vol 4 (Kluwer 1986) xv.
[11] *Ibid.*
[12] For the consolidated text of the TFEU, *see* https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF. For the amendments in detail, *see* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2007:306:FULL&from=EN. The current article 28 TFEU reads: '1. The Union shall comprise a customs union which shall cover all trade in goods (…)'.
[13] As Piet Eeckhout remarks in P. Eeckhout, 'The EU and its Member States in the WTO – Issues of Responsibility', in L. Bartels and F. Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2006) 449.
[14] G. de Búrca and J. Scott, 'The Impact of the WTO on EU Decision-making' in G. de Búrca and J. Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (1st ed., Hart Publishing 2001) 2.
[15] D. Brauns and T. Baert, 'The European Union in the World Trade Organization Post-Lisbon: No Single Change to the Single Voice?', in Kaddous (n 4) 109, 111.
[16] J. Tumlir, 'GATT Rules and Community Law – A Comparison of Economic and Legal Functions', in Hilf/ Jacobs/Petersmann (n 10) 6.
[17] E.-U. Petersmann, 'The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948' (1994) 31 Common Market Law Review 1157, 1171.
[18] M. Damestoy and N. Levrat, 'The Mixed Nature of the EU-Canada FTA: Between Competences Distribution and Democratic Legitimacy', in R. A. Wessel *et al.* (eds), *The EU and Its Member States' Joint Participation in International Agreements* (First edition, Hart Publishing, Bloomsbury Publishing 2022) 77, 79.

in the balance alongside the pursuance of other objectives through trade, like, for instance, development or market stabilization.[19] The changing face of international trade regulation is no less true for the WTO itself, and contemporary scholars contend that the 'conventional understanding of trade agreements as encapsulated in the WTO agreements is now outdated'.[20] As presciently Cottier had noted, even if the WTO is 'concerned principally to secure freer trade among its members', without a concern for distributive justice other than in terms of inefficient allocation of resources –Cottier did not exclude that as the process of liberalization unfolded and intensified, this might eventually require not only an efficient, but also an 'equitable' allocation of resources as well.[21] Such changes in the face of international trade might not directly impact –or unsettle– the EU's single voice before the GATT/WTO panels – for reasons of path dependency, practical necessity, political leverage, or economic considerations. However, inserting a political economy angle, and embedding the EU's responsibility along a broader historical trajectory of international trade regulation, provides a fuller understanding of how the EU obtained its single voice before the GATT/WTO, as well as a better grasp of the –inextricably intertwined with law, and legally expressed – economic and political reasons advanced for the EU to keep it.

Having thus complexified the question of the EU's responsibility before the GATT/WTO by placing it along the longer historical trajectory of international trade regulation, **Section 4** then, looks into the disputes involving the EU as they arose under GATT 1947 and analyzes how the GATT 1947 panels have dealt with it. **Section 5** follows in the same vein and performs the same analysis for the dispute settlement cases as they arose within the framework of the WTO. **Section 6** concludes.

Before proceeding to the substantive sections of the paper, a note on the abbreviations with respect to GATT/WTO and EEC/EC/EU is in order. The text of GATT 1947 has been incorporated into the WTO and remains essentially the same. However, when the papers refer to the 'GATT/WTO' together, it is in order to encompass the whole regime regulated under both, and in its continuity – that is, from the 1947 GATT to the 1994 WTO, to this day. Likewise, when the papers refer to the EU, this term also encompasses the previous entities of the EEC and the EC, in denoting the continuity of the presence of the EU within the GATT/WTO – even

[19] M. Cremona, 'The External Dimension of the Single Market: Building (on) the Foundations' in C. Barnard and J. Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (1st ed., Hart Publishing 2002) 351.
[20] K. Claussen, 'Next-Generation Agreements and the WTO' (2022) 21 World Trade Review 380.
[21] T. Cottier and C. Germann, 'The WTO and EU Distributive Policy: the Case of Regional Promotion and Assistance' in Búrca and Scott (n 14) 185-210.

if strictly speaking, before the 2009 Lisbon Treaty it was the EC participating within the GATT/WTO. It was then precisely the Treaty of Lisbon which launched a new treaty structure of the EU, and merged the EC into the EU, and, thus, the EU emerged as a single entity with a single legal personality.[22]

2. The relevance of the ILC's ARIO as a lens through which to approach the EU's responsibility before the GATT/WTO

The debate over the EU's responsibility through the lens of the ILC's ARIO usually takes as its starting point the WTO phase in the longer GATT/WTO historical trajectory. However, this does not mean that there were not cases involving the EU under the GATT dispute settlement system, as Section 4 will show. And neither is it so straightforward that the GATT DS merely reflected a 'diplomatic culture of anti-legal GATT pragmatism'.[23] Especially since, there are also accounts emphasizing that the rule of law had been entrenched in the GATT legal culture from the very beginning.[24] Or, and rather poignantly, that it was no less the early controversies over the consistency of certain features of the EEC itself with GATT –and in particular the EEC's association with overseas territories– which had a 'profound effect on GATT', in that they were a crucial turning point on how law was viewed within GATT.[25] As Jackson interestingly notes, 'up to that time, GATT was more responsive to legal arguments (…) there were more frequent formal complaints in GATT and these complaints were more often processed with the use of a "panel", which rendered a report that dealt with the legal arguments in great detail'. Quite to the contrary, 'subsequent to the GATT examination of the EEC, there have been fewer formal complaints, and lately –this was written in 1969– there has even been the hint that the complaint procedure has fallen into disfavor in GATT, at least among the larger nations'.[26] Rather ironically from an EEC perspective, and yet along the same lines,

[22] M. Cremona, 'The Two (or Three) Treaty Solution: The New Treaty Structure of the EU', in P. Eeckhout, S. Ripley and A. Biondi (eds), *EU Law after Lisbon* (Oxford University Press 2012) 40, 45.
[23] E.-U. Petersmann, 'The establishment of a GATT Office of Legal Affairs and the limits of 'public reason' in the GATT/WTO dispute settlement system' in G. Marceau (ed), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (Cambridge University Press 2015) 186, 189.
[24] P. Luyten, 'We were young together: At the GATT, 1956-58' in *ibid*., 79-80.
[25] J. H. Jackson, *World Trade and the Law of GATT (A Legal Analysis of the General Agreement on Tariffs and Trade)* (Bobbs-Merrill 1969), 759.
[26] ibid. For Jackson, 'the reasons for the inability of GATT to come to grips with the possible noncompliance by the EEC with the GATT treaty are complex'. They had something to do with the fact that clearly the EEC itself was a 'powerful force in international economics'. What he also notes, is that the 'US interest in European integration and economic stability led it to lend its weight on the side of the EEC in the GATT debates'. What followed, is that for the other representatives to GATT, 'faced with this position of the two most powerful trading

Pescatore had remarked that from the 'legal viewpoint', the EEC's policy 'quite openly consisted in playing down the legal substance of GATT' –and such downplaying was evidenced, no less, in that, in his view, the ECJ's *International Fruit Company* 'gave a preference to a political reading of GATT over a legal interpretation'.[27] And it was then, upon such a reading of the GATT by the ECJ, that the EEC treated accordingly the GATT as 'a flexible instrument of negotiation in the field of commercial policy and not as a system of binding legal rules'.[28]

At the time of the creation of the WTO, though, in 1994, such initial controversies had largely eclipsed, and the WTO and the EU largely converged in their approach toward liberalization and the regulation of international trade. The WTO was optimally legalized through the enhancement of its DS mechanism. The EU had largely completed its internal market, following the European Commission's White Paper of 1985.[29] In the 1990s, the GATT/WTO and the EU reconverged, and the EU's single and distinctive presence within the WTO system got further solidified.

In fact, in tracing the EU's single presence within GATT, it was since 1960, during the Dillon round (1960/61) and the Kennedy Round (1964/67), that it was the European Commission which negotiated within GATT tariff and trade agreements – concluded either as Community agreements by the EEC alone or as mixed agreements by the EEC together with individual EEC states. Since 1970, most trade agreements negotiated within GATT –except protocols of accession and the 1979 Tokyo Round Agreements on Technical Barriers to Trade and on Trade in Civil Aircraft– were concluded on behalf of the EEC as 'Community agreements' without additional direct acceptance by individual EEC Member States.[30] Likewise, it is remarked that all GATT contracting parties had accepted, since about 1960, this exercise of GATT rights and obligations by the EEC. Thus, in the case of GATT DS, likewise, GATT contracting parties, even in article XXIII GATT DS proceedings relating to national

areas', they 'felt it was fruitless to pursue the 'legal technicality' of possible EEC violation of GATT obligations any further'.

[27] Pescatore, 'Introduction', in Hilf/Jacobs/Petersmann (n 10).

[28] *Ibid.* As Pescatore remarked, 'it should not be forgotten that public international law – unlike national law and even Community law – often develops formlessly and establishes itself imperceptibly; an excessively formalistic view of the doctrine of the sources of law thus inhibits progress in international law'.

[29] Commission of the European Communities, 'Completing the Internal Market: White Paper From the Commission to the European Council (Milan, 28-29 June 1985)'; P. Hoeller and M.-O. Louppe, 'The EC's Internal Market: Implementation, Economic Consequences, Unfinished Business', vol 147 (1994) OECD Economics Department Working Papers 147 <https://www.oecd-ilibrary.org/economics/the-ec-s-internal-market_053605471675>.

[30] E.-U. Petersmann, 'The EEC as a GATT Member – Legal Conflicts Between GATT Law and European Community Law', in Hilf/Jacobs/Petersmann (n 10) 23, 36-39. As Petersmann notes, 'In particular various Protocols of Accession to the GATT, the International Textiles Agreement of 1973, and the 1979 Tokyo Round Agreements on Technical Barriers to Trade and on Trade in Civil Aircraft were concluded as mixed agreements by both the EEC and its member states'.

trade measures by an individual EEC MS, they have directed their complaints almost always against the EEC.[31] What had been then consolidated during the GATT years, was a 'consistent legal conduct of the EEC like a GATT contracting party *sui generis* for more than a quarter of a century, the likewise consistent unanimous GATT practice of treating the EEC as an autonomous bearer of rights and obligations under GATT, the participation of the EEC as a full contracting party in numerous agreements and accession protocols since 1962'. Not least, the large number of article XXIII GATT DS proceedings instituted against the EEC, as well as by the EEC against other GATT contracting parties, showed too that the GATT contracting parties 'considered the EEC responsible for all obligations under GATT law and entitled to exercise most, if not all, rights under GATT'.[32]

At the time of the conclusion of the WTO Marrakesh Agreement in 1994, then, and given the precedence of such an extensive EU practice acting on its own within GATT, the question that arose was whether the EU could not proceed, as well on its own, to conclude the WTO Agreement. It was this question that led to the well-known opinion of the ECJ. The ECJ was asked not only whether the EC had exclusive competence to conclude the GATT on trade in goods. It was also asked if the EC had exclusive competence to conclude also the GATS on trade in services, and the TRIPS on the trade related aspects of intellectual property rights. The Commission claimed exclusive competence for these last two agreements, GATS and TRIPS, by virtue of the ambit of its CCP –under the then article 113 TEC– or, on the basis of the parallelism of internal and external competence, or on the basis of article 100a (harmonization measures), or on the basis of article 235 (enabling the Community to cope with any insufficiency in the powers conferred on it, expressly or by implication, for the achievement of its objectives).[33] The ECJ in *Opinion 1/94* focused eventually solely on the question of whether the EC had exclusive competence to conclude the WTO Agreement, and did not address the question of which parts of the WTO Agreement came within the EC's non-exclusive external competences. Hence, all the agreements pertaining to trade in goods came within the exclusive competence of the EC pursuant to article 133 EC on the EC's CCP. By contrast, GATS and TRIPS, were held to come within the shared (or joint) competence of the EC and its MS.[34]

Following the ECJ's *Opinion 1/94*, the WTO Agreement was jointly concluded by the EU and its MS. Article XI:1 of the WTO Agreement clearly reflects this by stating that the

[31] Petersmann, *ibid.*, 38.
[32] *Ibid.*, 39.
[33] *Opinion 1/94*, Competence of the Community to conclude international agreements concerning services and the protection oof intellectual property, Article 228(6) of the EC Treaty, 1994 I-05267.
[34] Eeckhout (n 13) 451-452.

'contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities (…) shall become original members of the WTO'.[35] Thus, the WTO is a mixed agreement. In terms of international responsibility, in mixed agreements the main question is who is responsible to third countries for the performance of a mixed agreement.

What this entails is the more controversial question of whether international responsibility should be apportioned between the EU and its MS according to their respective competences, or whether the Community and the MS could be regarded as jointly and severally responsible in international law for the whole agreement.[36] Arguably the apportionment / joint responsibility question is easier to approach when the international agreement is accompanied by declarations of competence.[37] Even with declarations of competence, however, the question remains, given the evolutionary character of the EU competences, and the fact that their relevant and up-to-date interpretation usually requires from third countries a very 'sophisticated understanding of EU law comparable to that of skilled European lawyers' –exacerbated by the fact that declarations of competences are usually not updated by the EU.[38] After all, even the more straightforward areas of EU's exclusive competence evolve –either through the adoption of further internal EU legislation in areas covered by WTO, due to the AETR principle; or, through the expansion of the scope of the EU's CCP.[39] And even then, as Cremona remarks, the best approach is not simply the expansion of the scope of the CCP itself, but, this should always be coupled with an analysis of whether each contested measure is linked with

[35] All WTO legal texts are available at the WTO website, *see* https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm#articleXI.

[36] M. Cremona, 'External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law' [2006] EUI Working Paper LAW No.2006, 22.

[37] *Ibid.*

[38] P. Olson, 'Mixity from the Outside: The Perspective of a Treaty Partner' in C. Hillion and P. Koutrakos (eds), *Mixed Agreements Revisited : The EU and Its Member States in the World* (Hart Publishing 2010) 331, 336-337. For Olson, 'such a declaration is not a particularly useful document from the point of view of the EU's treaty partners. Declarations of competence rarely, if ever, include something which would be far more informative: an article-by-article (or, even better, a clause-by-clause) analysis informing treaty partners clearly and in detail which entity will be exercising which rights and performing which obligations'. He doesn't contest that these are issues where 'genuine uncertainty' might exist on the allocation of competences. However, the fact that the declarations of competence are not updated, can also be an aggravating factor. As he notes, the UNCLOS declaration, 'has remained wholly unchanged over the third of a century since the UNCLOS declaration of competence was issued'. If the position of Olson could be sided as a legal adviser at the time the US State Department for Europe and Eurasia, positions about the unhelpfulness in practice of declarations of competences are also found in recent literature. Thus, Kaspiarovich and Wessel remark that the 'classic problem with declarations of competence is that they are hardly helpful in practice'; even if they are submitted following the understandable request of third parties 'confused by the division of competences in the EU', it is doubtful whether declarations of competence 'provide a fully correct picture of the division of competences', while they are 'hardly ever updated'. For the authors, 'any future role for this type of declarations should thus imply a more precise and dynamic description of the division of competences, based on legal criteria', in Y. Kaspiarovich and R. A. Wessel, 'Unmixing Mixed Agreements: Challenges and Solutions for Separating the EU and its Member States in Existing International Agreements', in Wessel *et al.* (n 18) 287, 298.

[39] Eeckhout (n 13) 452.

international trade, and to look for the 'presence (or absence) of effects on trade'.[40] That is, even with the CCP's current expanded scope in Article 207 TFEU, it is argued that the test on specific links and effects on international trade, is a more valid method of approach over trying to delimitate 'specific conceptual definitions of trade in goods or services, the commercial aspects of intellectual property, or foreign direct investment'.[41] For example, trade in services in article 207 TFEU maps onto international instruments, in particular the WTO agreements, in terms of both sectors and modes of supply. Thus, article 207 TFEU is 'capable of covering all four of the GATS modes', and, yet, as, article 207(5) TFEU expressly states, the field of transport is excluded from the CCP, falling under the TFEU title on transport policy. Or, in the field of TRIPS, in *Daichii Sankyo,* the Court agreed with the Commission's observation that the 'TRIPS Agreement as a whole relates to the commercial aspects of intellectual property within the meaning of article 207(1) TFEU', and thus, to regard article 27 TRIPS as falling within the CCP 'correctly reflects the fact that the context of those rules is the liberalization of international trade, not the harmonization of the laws of the Member States of the EU'.[42] However, the CJEU also observed, that, with regard to the EU rules adopted in the field of intellectual property, it is 'only those with a specific link to international trade' which are 'capable of falling within the concept of commercial aspects of intellectual property in article 207(1) TFEU',[43] and hence the field of CCP. And the CJEU reaffirmed its position on requiring a specific link to international trade as derived from the purpose of the given EU measure in its *Opinion 3/15*. In this case, the Commission had asked the CJEU if the EU has exclusive competence to conclude the Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired, or otherwise print disabled. According to the Court, 'in order to determine whether the Marrakesh Treaty falls within the CCP, it is necessary to examine both the purpose of that treaty and its content'. What followed in its findings, is that the 'purpose of the Marrakesh Treaty is to improve the position of beneficiary persons by facilitating, through various means the access of such persons to published works'; as the CJEU emphasized, it is 'not to promote, facilitate, or govern international trade in accessible format copies'.[44] Eventually though, the CJEU ruled in favor of the EU's exclusive competence on the

[40] M. Cremona, 'Defining the Scope of the Common Commercial Policy', in M. Hahn and G. van der Loo (eds), *Law and Practice of the Common Commercial Policy: The First 10 Years after the Treaty of Lisbon* (Brill Nijhoff 2020) 47, 49-50.
[41] *Ibid.*
[42] CJEU, C-414/11, *Daiichi Sankyo Co. Ltd, Sanofi-Aventis Deutschland GmbH v DEMO Anonimos Viomikhaniki kai Emporiki Etairia Farmakon*, ECLI:EU:C:2013:520, para 43, 60.
[43] *Ibid.*, para 52.
[44] *Opinion 3/15*, ECLI:EU:C:2017:114, paras 62, 82.

basis of article 3(2) TFEU, in its last limb, that is, that the case concerned a situation in which the conclusion of an international agreement 'may affect common rules or alter their scope'.[45]

What the above show, is a glimpse into the ambit of the highly sophisticated –and no less highly politically contested– issues that arise were one to delineate in each specific case the apportionment of the international obligation in question between the EU and its MS. The ILC's ARIO –much like the ILC's Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)[46] upon which the ARIO are tailored– they leave open the questions of whether international responsibility is exclusive or shared, or 'how contribution to the injury should be taken into account'.[47] The question of the apportionment of obligations between the EU and its MS –which is among the most contested issues in this regard– is not specifically addressed by the general rules of international responsibility in ARIO. The European Commission's position, as advanced in its submission on the ARIO to the ILC, has been that the question of apportionment of international obligations should be 'entirely determined by the rules of the organization, since these rules define the tasks and powers of the organization which possesses its own international legal personality, *vis-à-vis* those of the MS'.[48] Not least, for the European Commission, the question of apportionment of obligations and responsibilities 'should in principle be clearly distinguished from the question of attribution of conduct', given that the 'latter can only arise once the first one has been answered in the affirmative'.[49] It is with regard to the attribution of conduct, and in particular, with regard to Article 7 ARIO (conduct of organs of a state or organs or agents of an international organization placed at the disposal of another international organization), that the often-cited criterion of 'normative control' has been advanced.[50] And much like with the question of the apportionment, the EU considers that 'attribution of conduct should equally reflect the internal division of competences'.[51]

All these issues that the application of ARIO raises –joint/several liability, apportionment, attribution, division of competences, rules of the organization– have led to a lively debate

[45] *Ibid.*, para 104.
[46] Articles on Responsibility of States for Internationally Wrongful Acts, ILC Yearbook, 2001(II(2), available at https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.
[47] Flett (n 3) 851.
[48] Responsibility of International Organizations, Document A/CN.4/545, Comments and observations received from international organizations, 26.
[49] *Ibid*.
[50] F. Hoffmeister, 'Litigating against the European Union and Its Member States - Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?' (2010) 21 European Journal of International Law 723.
[51] G. Marín Durán, 'The EU and its Member States in WTO Dispute Settlement: A 'Competence Model' or a Case Apart for Managing International Responsibility?', in M. Cremona, A. Thies and R. A. Wessel (eds), *The European Union and International Dispute Settlement* (Hart Publishing 2017) 237, 245.

among legal scholars.[52] Focusing specifically on the WTO, though, and even if –given the fact that the WTO is signed by both the EU and its MS, each on its own, as original members– cases may be brought against either the EU alone, or against the EU and individual MS – the 'Commission likes to see the EC (now EU) as the first port of call', and it tends to 'assume lead responsibility for all WTO, consulting MS through the article 133 (now 207) Committee'.[53]

As it has already been indicated to above, in the specific case of the WTO, it is not so much the ARIO and the fine distinctions between apportionment, attribution, rules of the organization, etc., that are decisive. Instead, what is decisive and plays a central role in considering the EU's WTO responsibility, is the distinct legality that the WTO obligations entail –a legality interweaved with economic considerations, and a DS system likewise designed with such economic considerations in mind. The practice in the WTO, as well, appears to accept that the EU is responsible for violations, even by its MS. The EU 'is keen on accepting its responsibility', while the EU itself has suggested that MS 'authorities act as agents of the EU, when implementing, e.g., EU customs law'. Not least, the EU also 'acknowledges and adopts MS conduct as its own'.[54] Such a keenness has been seen by scholars as having the 'potential disadvantage' that 'by accepting responsibility for measures by its MS, the EU exposes itself to suspension of concessions pursuant to article 22 DSU'.[55] And yet, it is doubtful whether the EU could have any other option or shield itself from such an inevitable exposure. The exposure is inevitable from the fact that the EU is an internal market, and, as a result, 'the effects of dispute settlement are difficult to confine to a particular national jurisdiction within the single European market'.[56] It is true that in the case of sanctions, in particular cross-sanctions, 'measures may well be targeted to that particular economy; yet, they are likely to spill over to other MS and may affect them and the EC at large'.[57] For some authors, it is not exactly a matter of choice for the EU to assume responsibility before the WTO. Rather, it is that because the EU is an internal market, 'separate action by MS is no longer possible',[58] and that MS's non-

[52] *See* a selection: Marín Durán, *ibid*; Flett (n 3); Eeckhout (n 13); Andrés Delgado and Joris Larik, 'The 'Odd Couple': The Responsibility of the EU at the WTO', in M. Evans and P. Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart Publishing 2013) 233; P. J. Kuijper, 'International Responsibility for EU Mixed Agreements', in Hillion and Koutrakos (n 38); Andrés Delgado Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (CUP 2016).
[53] Cremona (n 36) 23.
[54] Eeckhout (n 13).
[55] *Ibid.*
[56] T. Cottier, 'Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European Union' (1998) 35 Common Market Law Review 325, 355.
[57] *Ibid.*
[58] *Ibid.*

compliance with the WTO, 'risks triggering liability for the entire Union'.[59] The CJEU, no less, implied as much, when in *Daiichi Sankyo*, it expressly connected the 'specific character of the link with international trade' to the fact that article 22(3) DSU authorizes the cross-suspension of concessions between the principal multilateral agreements of which the WTO consists.[60] It is this line of reasoning, that leads then back to the distinct legality of the GATT/WTO obligations. A distinct legality reflected especially in the design of the DS system, which diverges from the traditional legal concepts of 'legality of acts' and 'state responsibility' for 'internationally wrongful acts', and which builds upon earlier international agreements – and most notably, the 'pre-war bilateral trade agreements of the USA' which 'had attempted to protect the competitive benefits from reciprocal tariff liberalization from being undermined by non-tariff measures, even if the latter were not prohibited (such as production subsidies).[61] It is for these reasons then, that the next sections makes a turn, and adopts a political economy angle, in order to better grasp the question of the EU's responsibility before the GATT/WTO.

[59] Hoffmeister (n 4).
[60] *Daiichi Sankyo*, para 54.
[61] Petersmann (n 17) 1171.