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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. 3

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

Aliki Semertzi

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3. The longer historical trajectory of international trade regulation: inserting a political economy angle to approach the EU's responsibility before the GATT/WTO dispute settlement

It is a claim of this research paper that in order to grasp the distinctiveness of the question of the EU's responsibility within the GATT/WTO, a longer historical trajectory of international trade regulation, and the specific place that the GATT/WTO and the EU played within it, holds much more of an explanatory potential than the ILC's ARIO. Within such a longer historical trajectory, it is insightful to revisit the common roots that the GATT/WTO and the EEC/EC/EU shared. It is such common roots that led to the current practice of the EU's 'single voice' within the WTO[1] –a practice that, as it was mentioned above, goes back at least to the 1970s and the GATT Tokyo Round.[2] It is too upon this basis, that in the area of international economic law, the EEC/EC/EU has encountered much less obstacles to participate in international agreements and organizations –as, for instance, contrasted to its still today much less comprehensive presence within the UN system. Not least, the appearance of the MS in WTO DS cases– as targeted by third countries alongside the EU –evinces the changing face of international trade. It cannot be entirely accidental that most of the cases in which shared responsibility between the EU and its MS could arise involve disputes where market liberalization and regulation intersects with public interest. That is the case especially in public health –as in the *EC-Asbestos*,[3] or in the *EC-Biotech*[4] – but also recently increasingly in energy disputes –as in the

[1] 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; T. Perisin, 'World Trade Organization (WTO): The EU's Influential Role in Global Trade Policy' in R. A. Wessel and J Odermatt (eds), *Research Handbook on the European Union and International Organizations* (Edward Elgar Publishing 2019).

[2] E.-U. Petersmann, 'The EEC as a GATT Member – Legal Conflicts Between GATT Law and European Community Law' in M. Hilf, F. Geoffrey Jacobs and E.-U. Petersmann (eds), *The European Community and GATT*, vol 4 (Kluwer 1986) 25; 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.

[3] *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135.

[4] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291 (US); WT/DS292 (Canada); WT/DS293 (Argentina).

EU-Biodiesels,[5] *EU-Renewable Energy Generation Sector*,[6] *EU-Energy Sector*,[7] *EU-Palm Oil*.[8]

It is a changing face of international trade which captures the global tensions between liberalization and regulation. But even more specifically in the case of the EU, it captures latent tensions on the relation between the internal market and the CCP. Initially, the provisions of the EEC treaty on the customs union 'took pride of place in the establishment of the common market, whereas the provisions on a CCP were merely part of a series of economic policies'.[9] As it was remarked in 1985, 'in contrast to the detailed rules of the EEC Treaty on trade liberalization and competition within the Community, the EEC Treaty deals with the common commercial policy in only seven Articles (Articles 110-116), two of which are concerned with the transitional period (Articles 111 and 112).[10] The CCP was left 'incomplete', given that 'setting customs duties was one thing; removing national import restrictions, of all kinds, or replacing them with a common policy' was much more difficult to attain. In fact, it was only in the 1990s that this was achieved in the framework of the 1993 internal market program.[11] For Cremona, writing in 2002, it is a sign of a 'mature' single market which reflects 'not only the internal freedoms but also the place of market regulation in increasingly liberalized world markets as the Community, as a single market, looks beyond its internal borders and contributes to the global debate'.[12] That is so, because the 'greater the economic integration within the internal market –the closer it becomes to a single market– the greater the need for common rules in relation to external trade; hence the realization that the completion of the internal market would require –in addition to the common customs tariff– the completion of the common commercial policy: the removal of differential national policies on non-tariff barriers

[5] *European Union and a Member State (Spain) – Certain Measures Concerning the Importation of Biodiesels*, WT/DS443.
[6] *European Union and certain Member States (Italy, Greece) – Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS452.
[7] *European Union and its Member States – Certain Measures Relating to the Energy Sector*, WT/DS476.
[8] *European Union and certain Member States (France, Lithuania) – Certain Measures concerning palm oil and oil palm crop-based biofuels*, WT/DS600.
[9] P. Eeckhout, 'Linking Internal and External Trade in a Perfect Customs Union: Donckerwolcke' in G. Butler and R. A. Wessel (eds), *EU External Relations Law: The Cases in Context* (Hart Publishing 2022) 89, 93.
[10] E.-U. Petersmann, 'International and European Foreign Trade Law: GATT Dispute Settlement Proceedings Against the EEC' (1985) 22 Common Market Law Review 441, 446-447. As Petersmann continues, 'the few articles on the common commercial policy are vague in substance and have rightly been criticized as poorly drafter'; no less, the 'trade policy powers for industrial goods (articles 28, 113) and agricultural goods (articles 28, 43, 113) constitute exclusive Community competences for trade in goods and services without limiting this unprecedented delegation of powers by specifying the uniform principles (article 113) on which the common commercial policy shall be based', 447.
[11] Eeckhout (n 9) 90.
[12] M. Cremona, 'The External Dimension of the Single Market' in C. Barnard and J. Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (1st ed., Hart Publishing 2002) 351, 354.

which might justify internal frontier controls, to be replaced where necessary by Community-level restrictions'.[13] And tensions arise, given that the completion of the internal market during the 1990s has not entailed a consequent completion of external commercial policy. As Cremona stresses, there are 'still a number of ways in which commercial policy is not fully common, either because harmonization has in fact not taken place internally, or because new approach harmonization does not completely pre-empt Member State regulatory choice'.[14]

When the 1947 GATT was conceived, and throughout the 1940s and 1950s, the regulatory state was in its 'infant shoes' and 'non-tariff barriers hardly existed'; it was primarily 'customs duties and quotas which governed trade, and not much else'.[15] For the EU, liberalization – both internally within the internal and then the single market, and externally, within the CCP – was simply one policy goal, among others, like for instance development or market regulation for world commodities.[16] Mere or brute trade liberalization, arguably, was more akin to the international trade regime, and it was applied to the Eastern Europe following 1989. Within the EU, the 'internal market was uniformly thought to be a regime of singular sophistication', 'managing a political structure and industrial policy to build an internal market by careful government planning and regulation'.[17] Thus, if now, and in the same vein, following *Opinion 2/15*, sustainable development is an embedded objective within trade policy,[18] admittedly this gives a very different legal structure than the GATT article XX exceptions scheme.

It is then, in this sense, that section 3.3 advances the argument about the EU's outgrowth over WTO in the way of international trade regulation. What this means in terms of the EU's responsibility, most probably it won't upset the EU's single voice within the WTO DS –for reasons, probably, of path dependency, 'costly national representations' or 'financial constraints'.[19] However, responsibility – at least in Western philosophical thought – stems from individual autonomy, presence, voice and representation. Given the changing texture of international trade disputes, and the societal choices involved, one could imagine possibly an internal, within the EU, reconfiguration of the preparation of the EU's legal defense in WTO disputes. After all, as Cottier remarked earlier, it is true that in WTO fact-intensive cases, the EU's preparation was 'handled by well-structured and well-led task forces', with 'significant

[13] *Ibid.,* 354.
[14] *Ibid.,* 359.
[15] Eeckhout (n 9) 93.
[16] Cremona (n 12); Cremona (n 2).
[17] D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press 2004) 173-174.
[18] Cremona (n 2).
[19] Hoffmeister (n 1).

involvement and engagement of Member States and support of the private sector'.[20] It is argued here that such an approach is also a more fruitful way to address the EU's responsibility within a legal setting, which is politically and economically informed.

With these considerations in the outset, this section proceeds as follows. **Section 3.1** looks into the root-convergence between the 1947 GATT and the 1957 EEC, to their divergence in the 1960s-70s, and to their re-convergence in the 1980s. **Section 3.2** focuses into how international economic law has been a case apart, and the EEC/EC/EU enjoyed a relative ease in its participation in international agreements and organizations. **Section 3.3** takes up the question of the changing face of international trade, and the EU's outgrowth in surpassing the WTO in the way of international trade regulation – especially in the EU's expansive reading of trade policy as entailing not only trade liberalization, but also in recently treating the 'objective of sustainable development as an integral part of trade policy, as a trade objective'.[21]

3.1 From root-convergence between the 1947 GATT and the 1957 EEC, to the GATT-EEC divergence in the 1960s-70s, to the re-convergence in the 1980s-90s

It was the GATT 1947 that provided the 'conceptual and legal framework within which the negotiations on the core of the EEC, i.e., on the common market, took place.[22] Both the GATT and the EEC shared the 'obvious feature' that were 'established to promote trade between states'. The EEC's common market was 'modelled partly on the GATT, and many of the EC treaty provisions clearly reflect this'.[23] Both were also underpinned by a foreign policy rationale captured in the premise that 'flourishing trade reduces conflict among nations' and promotes world peace – a recurring idea from Baron de Montesquieu and Immanuel Kant in the 18th century, to 19th century liberal thinkers, such as Richard Cobden and John Stuart Mill, to 20th century Cordell Hull, a key figure in the GATT negotiation figure and Nobel Peace Prize laureate in 1945.[24]

Not least, for both the GATT/WTO and the EEC/EC/EU, law was and is a central feature throughout their respective historical trajectories in trade regulation. As it had been noted in

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[20] T. Cottier, 'Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European Union' (1998) 35 Common Market Law Review 325, 353.
[21] Cremona (n 2) 66.
[22] P. Pescatore, 'Introduction' in Hilf/Jacobs/Petersmann (n 2) xv.
[23] 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).
[24] D. A. Irwin, P. C. Mavroidis and A. O. Sykes, *The Genesis of the GATT* (Cambridge University Press 2008) 191-193, 10. Also *see* the WTO website, https://www.wto.org/english/tratop_e/gatt_e/clash_gatt_negotiators_e.htm.

the 1980s, ‘an important function is attributed to the law as the force of order for the Community as a whole and also for its external relations’.[25] Or, as it is remarked today, ‘it is as a legal order that the EU relates to the outside world’, it is law that ‘mediates between the EU and its external partners’, and there is a ‘centrality of law to the EU’s international actorness’.[26]

However, the evocation simply of ‘law’ in both GATT/WTO and the EU entails very different connotations and understandings of what ‘law’ is. Such understandings diverge, capturing specific episodes within the larger historical shifts that connect legal thought with the regulation of trade, or, even more general, with economic thinking and development.[27] As it was referred to above, it was the controversies of the EEC’s compatibility with article XXIV GATT that diluted an earlier more formal understanding of law within GATT. It was argued that it was the EEC’s controversies and especially its association of overseas territories that triggered a ‘turning point in the viewpoint of law in GATT’, from an earlier more formal understanding, toward a more pragmatic one, responsive to actual circumstances and beyond ‘legal technicalities’.[28] Later, in the 1980s, it was the EEC’s ‘efforts to insulate its protectionist agricultural policy’, together with its ‘long history of preferential trade agreements’ that led a former Deputy Director-General of GATT to characterize the EC as a ‘threat to the present trading system’.[29] And that, even if, in terms of agriculture, the US had obtained an agricultural waiver in GATT which gave the US ‘broad discretion to protect its domestic agriculture market’, following the fact that in the late 1940s and 1950s, the US Congress refused to abide by GATT agricultural obligations.[30] These were all developments that contributed to an understanding of law within GATT that in the 1960s reflected more of a ‘pragmatic attempt to accommodate GATT to the EEC and to the new majority of less developed GATT contracting parties without undue legalism’ – an understanding that started to change and shift again only

[25] U. Everling, ‘The Law of the External Economic Relations of the European Community’, in Hilf/Jacobs/Petersmann (n 2) 85, 105.
[26] M. Cremona and J. Scott, ‘Introduction: EU Law Beyond EU Borders’ in J. Scott and M. Cremona (eds), *EU Law beyond EU Borders: The Extraterritorial Reach of EU Law* (1st edn, Oxford University Press 2019) 4.
[27] D. Kennedy, ‘The ‘Rule of Law’, Political Choices, and Development Common Sense’ in D. M. Trubek and A. Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006) 95-173.
[28] 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.
[29] G.Patterson, ‘The European Community as a Threat to the System’ in W. R. Cline (ed), *Trade Policy in the 1980s* (MIT Press 1983) 223.
[30] Jackson (n 28) 718.

in the late 1970s and 1980s which 'brought an ever increasing number of GATT DS proceedings'.[31]

Convergences and divergences between the GATT/WTO and the EU do arguably play out upon such different understandings of 'law', and what the centrality of law means. Looking back from today's perspective, it is rather intriguing to read the GATT/EEC controversies against the rise of neoliberal legal thinking in the 1980s. Jackson – a leading WTO expert – was highly concerned in the late 1970s about the 'crumbling institutions of the liberal trade system', and he blamed inter alia European policies for that effect. As he wrote, 'at a time when major economic thought in the US is influencing a reduction in government control and participation in the economy – manifested by moves to deregulate segments of the economy such as airline travel, to reduce or restructure taxes, and to introduce user charges for many types of governmental services, Europeans appear to be moving in a contrary direction as manifested by the establishment of significant industrial policy and regional aids, pressure for further nationalization, and continued toleration of a much higher degree of government ownership'.[32] It was a period when a clear break was starting to get formed against more pragmatic approaches to law in the 1960s – even if, rather intriguingly, Franck writing in the same time as Jackson, was remarking that 'even in that hypothetical bastion of laissez-faire, the US, we find that agricultural production, transportation and other facets of industrial production and services are only to a very limited extent operating according to free market rules; instead, other considerations of public policy are increasingly given priority through tax, credit, and price support programs'.[33]

Still, the orthodoxy about law within the GATT that seemed to prevail was that the 'international trading system is one primarily of decentralized economic decision-making sometimes described as 'free enterprise'.[34] Petersmann, reflecting in 1985 on the 'relationship between GATT law and Community law', stressed that this relationship raised 'questions which are of importance not only for the interpretation and application of the foreign trade law of the EEC, but also for the future of the liberal non-discriminatory trading system (based upon GATT)'.[35] Law required the 'protection of individual freedoms and property rights, rule law

[31] 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, 1187.
[32] J. H. Jackson, 'Crumbling Institutions of the Liberal Trade System, The' (1978) 12 Journal of World Trade Law 93.
[33] T. M. Franck, 'Minimum Standards of Public Policy and Order Applicable to Collective International Commodity Negotiations (Volume 160)', *Collected Courses of the Hague Academy of International Law* (Brill 1978) 410.
[34] Jackson (n 32).
[35] Petersmann (n 10) 450.

(including observance of international law binding on the EEC), legal certainty and limited delegation of powers, non-discrimination, undistorted competition and judicial protection'.[36] It encapsulated the distinctive neoliberal vision of law, which shifted the focus from the public to the private, to 'private rights, constitutional procedures, judicial review'.[37] It is a vision of law that places emphasis on 'private rights which the courts must protect', and where 'courts represent the most secure form in which an international commitment can be given: private societies themselves will enforce the commitment, if necessary, on reluctant governments'.[38] Such debates were central not only for the relationship between the GATT and the EEC, but were also at the core of the negotiations for the Single European Act –whose success has attributed in the literature in the 'convergence of policy preferences in the mid-1980s (…) either pro-European or neoliberal, of the three major European leaders of the times, Mitterand, Kohl, and Thatcher'.[39] And they did reach as well the ECJ, like, for instance, in the *Chinese toys* case, when the ECJ remarked that trade liberalization in the form of the 'abolition of all quantitative restrictions for imports from non-member countries is not a rule of law which the Council is required in principle to observe, but the result of a decision made by that institution in the exercise of its discretion'.[40]

Today, in the aftermath of the financial crisis of 2008, neoliberal ideas do not enjoy the same prevalence, either in their legal or in their economic terrain.[41] The CJEU reads sustainable development as an 'integral part of the common commercial policy',[42] while the WTO, no less, is claimed to be 'finally opening-up' to taking 'stakeholder engagement in international policy-making seriously', and to establish a number of Member-led informal discussions and dialogues, especially the Trade and Environmental Sustainability Structured Discussions (TESSD) and the Informal Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade (IDP), both launched in November 2020.[43] And arguably, these developments shift understandings both of law, and the relationship of the EU and the WTO, and it is against

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[36] *Ibid.*
[37] D. Kennedy, 'Law and Development Economics: Toward a New Alliance' in D. Kennedy and J. E. Stiglitz (eds), *Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty-First Century* (Oxford University Press 2013) 19, 46.
[38] J. Tumlir, 'GATT Rules and Community Law – A Comparison of Economic and Legal Functions', in Hilf/Jacobs/Petersmann (n 2) 1, 10.
[39] A. Moravcsik, 'Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community' (1991) 45 International Organization 19, 50.
[40] Case C-150/94, *UK v Council (import quotas for toys from China)* (1998) ECR I-7235, para 34. *See also*, Cremona (n 12) 382-383.
[41] D. Kennedy and J. E. Stiglitz, 'Introduction' in Kennedy/Stiglitz (n 37) 9.
[42] *Opinion 2/15*, ECLI:EU:C:2017:376, para 147.
[43] J. Pauwelyn, 'Taking Stakeholder Engagement in International Policy-Making Seriously: Is the WTO Finally Opening-Up?' (2022) 26 Journal of International Economic Law 51.

such a background, of closely interweaved, economic and legal thinking, that the EU responsibility before the GATT/WTO is to be read.

But before elaborating more in detail how the EU has outgrown the WTO in international trade regulation, the next section provides a brief capture, of how for the EU, it has traditionally been relatively easier to participate in international economic law and institutions. This ease is part of the distinctive character of both its presence and responsibility in international economic matters – in line with the fact that, after all, it was as an 'active market player in the global market that the Union has played its first and still most high-profile role'.[44]

3.2. International economic law a case apart: the relative ease for the EEC/EC/EU to participate in international agreements and organizations

The common historical roots shared by the GATT and the EEC can explain why the GATT/WTO is a case apart vis-à-vis the efforts of the EU to participate in other international agreements and organizations – and whereby, for instance, the most notable example is that the EU is not a member of the United Nations (UN) or of any of the major UN organizations.[45] In fact, beyond the area of trade, it was only after the 1982 United Nations Convention on the Law of the Sea (UNCLOS) that the participation of the European Community in subsequently many treaties, was facilitated and allowed. And that was so, precisely because UNCLOS was the first multilateral instrument to contain rules on declarations of competence – a mechanism devised because the EU was required by its treaty partners to clarify which party was responsible for the implementation of the international agreement in question.[46] So, after UNCLOS, declarations of competence allowed the EU to participate at the UN's Food and Agriculture Organization (FAO), whereby, again, under the General Rules of the FAO the EU was explicitly required to submit a declaration of competence in order for it to accede to FAO.[47]

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[44] M. Cremona, 'The Union as a Global Actor: Roles, Models and Identity' (2004) 41 Common Market Law Review 553, 555-556.

[45] The EU is not, for example, a member of the International Labor Organization (ILO), nor of the International Monetary Fund (IMF) or the World Bank, *see* C. Kaddous, 'Introduction: The European Union in International Organizations – Functional Necessity or General Aspiration?' in Kaddous (n 1).

[46] L. Lijnzaad, 'Declarations of Competence in the Law of the Sea, a Very European Affair' in M. W. Lodge and M. H. Nordquist (eds), *Peaceful Order in the World's Oceans: Essays in Honor of Satya N. Nandan* (Brill Nijhoff 2014) 186, 188. Heliskoski, as well, remarks that in the case of UNCLOS, it was the EU's treaty partners that 'insisted on clarity as to the distribution of competence between the Community and the Member States', and a declaration of competence was the mechanism devised in order to respond to such 'demands for an ex ante delimitation of competence', and, consequently, for the demands by EU's treaty partners for legal certainty, *see* J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and Its Member States* (Brill Nijhoff 2001) 14, 17-18.

[47] J. Wouters *et al.*, 'Improving the European Union's Status in the United Nations and the UN System: An Objective Without a Strategy?' in Kaddous (n 1) 45, 63-64.

By contrast then –and given that also today the EU's participation in international agreements and organizations remains a controversial topic-[48] it is notable that the EU did not encounter such difficulties in the area of international trade. Within the framework of GATT 1947, since the 1973/79 Tokyo Round, the results of the negotiations, embodied previously in various schedules of the then individual EEC states, were merged into one single document designated as 'Schedules LXXII and LXXII *bis* – European Communities'.[49] Since that Tokyo Round too, and with the exception of protocols of accession and the 1979 Tokyo Round agreements on Technical Barriers to Trade and on Trade on Civil Aircraft, most trade agreements negotiated within GATT were concluded on behalf of the EEC as 'Community agreements' without additional direct acceptance by individual EEC Member States.[50]

Moreover, and even if not usually pronounced in its own right, the EU – and long before the UNCLOS's innovations in the form of declarations of competence – did not encounter many difficulties in participating in agreements regulating trade in international commodities. Thus, the 1975 International Cocoa Agreement provided in its article 4 for 'membership by intergovernmental organizations', and was signed and concluded by the EEC;[51] the 1976 International Coffee Agreement, even more explicitly, provided in its article 4(3) for membership by the EEC,[52] or, most famously, the 1979 International Natural Rubber Agreement provided in its article 5(1) that 'any reference in this agreement to a "government" shall be construed as including a reference to the European Economic Community'.[53] And most famously, given that it was the International Rubber Agreement which was the object of the well-known *Opinion 1/78* of the CJEU which remarkably recognized that the EEC's international role through its competences within the Common Commercial Policy (CCP) were not confined in GATT and the field of trade liberalization, but the EEC's international action

[48] Beyond the comprehensive edited volume by Kaddous in 2015, in *ibid.*, *see* most recently R. A. Wessel *et al.* (eds), *The EU and Its Member States' Joint Participation in International Agreements* (First edition, Hart Publishing, Bloomsbury Publishing 2022).
[49] E.-U. Petersmann, 'The EEC as a GATT Member – Legal Conflicts between GATT Law and European Community Law' in Hilf/Jacobs/Petersmann (n 2) 34.
[50] *Ibid.*, 37.
[51] International Cocoa Agreement, 1975, UN Treaty Series, vol. 1023, p 253, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XIX-14&chapter=19&clang=_en.
[52] International Coffee Agreement 1976, UN Treaty Series, vol. 1024, p 4, available at https://treaties.un.org/doc/Publication/UNTS/Volume%201024/volume-1024-I-15034-English.pdf. According to Petersmann the EEC was also a party to the following international commodity agreements: the 1971 International Wheat Agreement, the 1977 International Sugar Agreement, the 1979 International Rubber Agreement
[53] International Natural Rubber Agreement 1979, UN Treaty Series, vol. 1201, p 192, available at https://treaties.un.org/doc/Publication/UNTS/Volume%201201/volume-1201-I-19184-English.pdf .

also entailed its active participation in the global regulation of the world market for certain products.[54]

That is to say that in the field of international economic law –either in trade liberalization through GATT, or in trade regulation in international commodities– the EU's participation, not only was it not hindered, but, from an international perspective, the EU was rather expected to participate and conclude international agreements, either alone or alongside its Member States. For the 1979 International Rubber Agreement, that was so, given that, in economic terms, the EU was one of the world's major importers of natural rubber. Not least, in political and historical terms, the EU's special relationship with the former colonies of certain Member States, also advocated for the EU's participation as a factor to promote the effectiveness of the international commodity agreements – concluded within the context of UNCTAD and the latter's 1976 Nairobi resolution which envisaged these commodity agreements as part of the North-South Dialogue and as crucial for the economy of developing countries.[55] Internationally, the EU's participation was also not questioned in the agreement that first triggered the CJEU's advisory function for the conclusion of international agreements – that is, an agreement on a local standard for export credit schemes within the OECD, in *Opinion 1/75*.[56] Here too, even if there was some disagreement about the extent of the EEC's involvement in the negotiations, the possibility of the EEC's participation was discussed and accepted.[57]

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[54] *Opinion 1/78 (re International Agreement on Natural Rubber)* (1979) ECR 2871. As the CJEU observed at paragraph 44: 'Following the impulse given by UNCTAD to the development of this type of control it seems that it would no longer be possible to carry on any worthwhile common commercial policy if the Community were not in a position to avail itself also of more elaborate means devised with a view to furthering the development of international trade (…) Although it may be thought that at the time when the Treaty was drafted liberalization of trade was the dominant idea, the Treaty nevertheless does not form a barrier to the possibility of the Community's developing a commercial policy aiming at a regulation of the world market for certain products rather than at a mere liberalization of trade'. Beyond the agreements on the international commodities just cited, Petersmann refers to: the 1971 International Wheat Agreement, the 1977 International Sugar Agreement, the 1979 International Olive Oil Agreement, and the 1981 6th International Tin Agreement, in E.-U. Petersmann, 'Participation of the European Communities in the GATT: International Law and Community Law Aspects', in D. O'Keeffe and H. G Schermers (eds), *Mixed Agreements* (Kluwer Law and Taxation Publishers 1983) 167, 171.

[55] Per Cramér, 'Defining the Scope of the Treaty-Making Competence for the Formulation of the Common Commercial Policy: Opinion 1/78 (Natural Rubber) in Butler/Wessel (n 9) 123. The EU's special relationship with the former colonies of certain of its Member States was regulated within the framework of the ACP-EEC Convention of Lomé (Lomé, 28 February 1975), 1976, OJ L25/3. It was later replaced by the Cotonou Agreement which is the backbone of the partnership between the EU, EU countries and 79 African, Caribbean and Pacific countries, *see* https://eur-lex.europa.eu/EN/legal-content/summary/cotonou-agreement.html.

[56] *Opinion 1/75 (Arrangement OCDE – Norme pour les dépenses locales)* (1975) ECR 1359.

[57] M. Cremona and J. Kukavica, 'Common Commercial Policy and the Determination of Exclusivity: Opinion 1/75 (Local Cost Standard) in Butler/Wessel (n 9) 45. As the authors cite, the Chair of the Group on Export Credits and Credit Guarantees reported to the OECD Council that the text of the Understanding had been agreed by all delegations and that 'As regards the Draft as a whole, there only remains to be clarified the form of participation in the Understanding by the European Economic Community, whose decision on the subject is to be made very soon'.

In the same vein, the common roots shared by the GATT/WTO and the EEC/EC/EU also advocate for a distinctive approach in the context of dispute settlement (DS), and on how issues of the international responsibility of the EU and its Member States are addressed. This GATT/WTO DS distinctive approach diverges from general international law – as well as from the ILC's Draft articles on the responsibility of international organizations of 2011.[58] This divergence is not so much due to the 'systemic design of the WTO' in the abstract.[59] Rather, the WTO DS system – and already the DS under GATT 1947 – diverges from general international law because it was not built upon the 'traditional legal concepts of "legality of acts"' or of 'state responsibility for "internationally wrongful acts"'. Instead, it was designed and 'inspired by earlier international trade agreements', and, notably the 'pre-war bilateral trade agreements of the US', whereby the latter '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'.[60] It is for that, that the focus of article XXIII:1 GATT is on the 'unusual notions' of 'nullification or impairment of any benefit accruing directly or indirectly under this Agreement', and on the 'attainment of any objective of the Agreement being impeded'.[61]

Moreover, given again that the object of the GATT/WTO is the regulation of international trade, and that the EU participates as a single market, another factor that underpins the divergence from general international law on responsibility, is that, the 'effects of dispute settlement are difficult to confine to a particular national jurisdiction within the single European market'.[62] As it is observed, even if, in the case of sanctions, and, in particular cross-sanctions, measures may well be targeted to a particular economy, yet, 'they are likely to spill over to other Member States and may affect them and the EU at large'.[63] In other words, this means that separate action by or against Member States is deemed as, in objective economic terms,

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[58] Adopted by the International Law Commission at its sixty-third session in 2011, and submitted to the General Assembly as part of the Commission's report covering the work of that session (A/66/10, para 87), available at https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf.

[59] A. Delgado Casteleiro and J. 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, whereby, in the opinion of the authors, four salient features single out: (i) the emphasis on, and prioritization of, mutually agreed solutions; (ii) the inclusiveness of the rules of standing; (iii) the interlinkages between the different WTO agreements; and, (iv) the enforcement mechanism through suspension of concessions. All four features, however, are explained through a different historical and economic trajectory, as it will be explained further on this research paper.

[60] Petersmann (n 31) 1171.

[61] *Ibid.*

[62] 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.

[63] *Ibid.*

'no longer possible'.[64] It is because the EU is internally a single market, that the assumption of international responsibility by the EU as a whole is prescribed – and sometimes this assumption functions irrespectively of the intra-EU division of competences, or the intra-EU attribution of the wrongful act. That is, the EU as a single market, is, quasi de facto, obliged to participate in its own right and to step in in all disputes, either when directed against the EU itself or against one or more of its Member States, or both. It is because of the EU's internal market that trade disputes and their effects cannot be isolated, neither can they be territorially confined. And this is also the reason, that as it is remarked, the EU 'carries an open flank' when it assumes responsibility within the GATT/WTO, even for actions which are basically decided at Member State level.[65] Because, 'if the Member State does not comply with the WTO decision, it risks triggering liability for the entire Union', whereas the 'Commission does not have any leverage over the Member State (or even companies) to deliver'.[66]

3.3. EU's outgrowth: the gradual expansion of the EU's CCP and the EU surpassing the WTO in the way of international trade regulation

Of course, the question of the EU's participation within the GATT/WTO is usually approached as the gradual extension of the scope of the EU's CCP.[67] A CCP that started off with 'only seven articles (Articles 110-116 of the EEC Treaty), two of which concerned with the transitional period'; a CCP of just a 'few articles on the common commercial policy vague in substance and rightly criticized as poorly drafted' – and so the CCP was claimed to stand in stark contrast to the 'detailed rules of the EEC Treaty on trade liberalization and competition within the Community'.[68] Yet, since the early days, already in *Opinion 1/75* and with regard to the Community's participation within the OECD –as it was referred to above– the CJEU declared the CCP to belong to the EU's exclusive competence.[69] At the same moment in time, with regard to the Community's participation in GATT, the CJEU articulated the well-known

[64] *Ibid.*
[65] Hoffmeister (n 1) 132.
[66] *Ibid.* As Hoffmeister adds, 'here, infringement procedures remain the only tool, which are in themselves cumbersome and not prone to prevent retaliation against the EU quickly'.
[67] For instance, *see* most recently, A. Rosas, 'Mixity and the Common Commercial Policy after Opinion 2/15', in Hahn/Loo (n 2) 27.
[68] Petersmann (n 10) 447.
[69] *Opinion 1/75 (Arrangement OCDE – Norme pour les dépenses locales)* (1975) ECR 1359, 1363 on the 'exclusive nature of the Community's powers' and its succinctly famous finding that 'The Community has exclusive power to participate in the Understanding on a Local Cost Standard referred to in the request for an opinion', 1365.

doctrine of 'functional succession or substitution'[70] – articulated in the often-cited excerpts from *International Fruit Company* ('The Community has assumed the functions inherent in the tariff and trade policy'; and thus, it has also 'assumed the powers previously exercised by Member States in the area governed' by GATT)[71] and *Nederlandse Spoorwegen* ('the Community has replaced the Member States' in commitments arising from GATT).[72] Then again in connection to the upcoming conclusion of the WTO Agreement and the EC's participation, the CJEU in *Opinion 1/94* clarified the scope of the EC but focused 'solely on the question' of the EC's exclusive competence to conclude the WTO Agreement.[73] In *Opinion 1/94*,[74] the CJEU confirmed that all the multilateral agreements on trade in goods provided for in Annex 1A of the Marrakesh Agreement establishing the WTO, fell under the CCP. As to the trade in services and the trade aspects of intellectual property rights, the CJEU ruled that matters dealt with in the WTO General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) fell, as a general rule, outside the realm of the CCP.[75]

The Treaty of Lisbon, however, enhanced substantively the treaty provisions of the CCP.[76] According to article 3(1)(e) TFEU, the CCP is now listed as one of the areas in which the EU has exclusive competence, whereas article 207 TFEU expanded its scope to cover also trade in services, the commercial aspects of intellectual property, and foreign direct investment (FDI). Following further jurisprudence of the CJEU, in *gatt Sankyo*, the Court found that the TRIPS agreement now, as a whole, falls within the scope of the 'commercial aspects of intellectual property' and thus within the CCP.[77] Further, *Opinion 2/15* confirmed that article 207(1) TFEU

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[70] As Petti and Scott write, it was the 'intricate passages of the Court's judgement – in the *International Fruit Case* – that are today regarded as providing the foundation for the doctrine of 'functional succession' (or 'sustitution'), in A. Petti and J. Scott, 'International Agreements in the EU Legal Order: International Fruit' in Butler/Wessel (n 9) 21, 26.

[71] *C-21/72, International Fruit Company and Others v Produktschap voor Groonten en Fruit*, (1972), ECR 1220.

[72] *C-38/75, Douaneagent der Nederlandse Spoorwegen v Inspecteur der Invoerrechten en Accijnzen*, (1975), ECR 1440.

[73] As Eeckhout observes 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, 451.

[74] *Opinion 1/94, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property – Article 228(6) of the EC Treaty*, (1994), I-5389.

[75] Rosas (n 67) 27-28.

[76] The consolidated text of the Treaty on the Functioning of the European Union is available at https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_2&format=PDF, and is published at the Official Journal of the European Union, C 326/47 (26.10.2012).

[77] *C-414/11, Daiichi Sankyo and Sanofi Aventis Deutschland*, (2013), ECLI:EU:C:2013:520. It is important to note, however, as Cremona remarks, that 'not commercial measures of intellectual property rights are excluded from the CCP. As the CJEU ruled in its Opinion 3/15, it is not the type of intellectual property which is categorized as non-commercial, but rather, it is the purpose of the measure – which the Court found, was not intended to

covers now all four modes of services.[78] With regard to FDI, the Court also confirmed that the CCP is not limited to market access commitments, but held that the CCP may also cover investment protection.[79] Moreover, portfolio investments, either fall within the CCP when they 'serve to establish or maintain lasting and direct links' between the investor and the undertaking', according to the criteria set out by the Court in its *Opinion 2/15* – or, otherwise portfolio investments are governed by the treaty provisions on capital movements, which also cover movements between the EU and third countries.[80]

Not least, in *Opinion 2/15*, the Court adopted a broad interpretation of the EU's competence in trade and sustainable development, which arguably 'reflects a reorientation of the common commercial policy', in that trade liberalization should be pursued in a manner that 'preserves and improves the quality of the environment and sustainable management of global natural resources'.[81] At point in *Opinion 2/15* was the conclusion of the Free Trade Agreement (FTA) between the EU and Singapore, and the CJEU pronounced itself with regard to international trade and sustainable development, when examining the provisions of Chapter 13 of the FTA pertaining to the social protection of workers and environmental protection. As the Court interestingly noted, even if article 3(1)(e) on the CCP does not prevail over other provisions of the TFEU, and in particular over article 3(1)(d) – conservation of marine biological resources under the common fisheries policy – and 3(2), neither over 4(2)(b) and (e) – shared competence over social policy and the environment – given that the intended FTA is 'intended not to regulate the levels of social and environmental protection in the Parties' respective territory, but to govern trade', the FTA falls within the CCP. The significant import then of the FTA's Chapter 13 on social and environmental protection is that of now 'making liberalization of that trade subject to the condition that the Parties comply with their international obligations concerning social protection of workers and environmental protection'.[82]

What the above developments on the CCP indicate is that the EU outgrew the GATT/WTO not only in terms of political integration: in growing into a 'unique transnational polity, with a legal system broadly federal in nature', whose policies 'long surpassed the limited domain of

promote, facilitate, or govern international trade, *see* Cremona (n 2) 47, 51. For the *Opinion 3/15* (2016), ECLI:EU:C:2016:657, para 82.

[78] *Opinion 2/15* (2017) ECLI:EU:C:2017:376.

[79] *Ibid.*, paras 94-95. *See also* Cremona (n 2) 56.

[80] *Opinion 2/15*, paras 84, 227. *See also* Cremona, *ibid.*, 52.

[81] E. Zelazna, 'The External Dimension of the Principle of Conferral: Division of Competences in International Trade' in K. S. Ziegler, P. J. Neuvonen and V. Moreno-Lax (eds), *Research Handbook on General Principles in EU Law: Constructing Legal Orders in Europe* (Edward Elgar Publishing 2022) 593, 602.

[82] *Opinion 2/15*, para 166.

trade', and, in general, the EU growing to become a prime 'example of what the establishment of a customs union may lead to'.[83]

What especially *Opinion 2/15* indicates, and of more immediate relevance with regard to the WTO, is that the 'face of international trade that has now changed'.[84] That is, if the GATT 1947 reflected a 'distinct legalism' in providing for 'specific commitments, often unusually detailed, precise and unconditional rules that are capable of direct application', in a quasi 'self-executing' manner,[85] today, this is not so straightforward. Quite to the opposite, the distinction between 'trade measures and some non-trade policies such as environmental or health policy have always been a source of controversy', with the line of delimitation between the two becoming increasingly even more blurred and giving rise to significant litigation before the CJEU[86] – especially if one takes into account the CJEU's case law on measures affecting international trade in goods and yet escaping the realm of the CCP when the predominant objectives and components of the agreement could be located elsewhere, notably in the protection of the environment.[87] That is to say, that if GATT's self-executing legalism – at the time of its conclusion in 1947 – corresponded to a certain trust in legal formalism and in a sort of necessity to lift out, and to dis-embed the economy from the broader political and social dynamics, today, this type of GATT's legalism is not so immediately defensible. In fact, GATT's legalism appears to have corresponded, at the international plane, to a legal formalism akin to the form of law espoused by classical liberalism. This legal formalism entailed an emphasis on the protection of individual freedoms and property rights, rule of law, legal certainty and limited delegation of powers, non-discrimination, undistorted competition, and judicial protection.[88]

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[83] In the words of Piet Eeckhout, in Eeckhout (n 73) 449.

[84] M. Damestoy and N. Levrat, 'The Mixed Nature of the EU-Canada FTA: Between Competences Distribution and Democratic Legitimacy' in Wessel *et al.* (n 48) 77, 79.

[85] Petersmann (n 10) 459-460.

[86] A. Rosas, 'Exclusive, Shared, and National Competence in the Context of EU External Relations: Do Such Distinctions Martter?' in I. Govaere *et al.* (eds), *The European Union in the World: Essays in Honour of Marc Maresceau* (Brill Nijhoff 2014) 17, 22.

[87] Rosas (n 67) 27, 28. And especially the CJEU jurisprudence in *Opinion 2/00* (Cartagena Protocol), EU:C:2001:664 (where the Court found that the Protocol's main purpose was the protection of biological diversity against the harmful effects which could result from activities that involve dealing with live modified organisms, in particular from their transboundary movements – and thus, trading in such organisms was therefore merely one of the aspects governed by that protocol); Case C-281/01, *Commission v Council* ('Energy Star'), EU:C:2002:761 (where the Court concluded in favor of the CCP) and Case C-94/03, *Commission v Council*, EU:C:2006:2 (where, with regard to the Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade, the Court found that the Convention included two indissociably linked components, one falling within the scope of the CCP, and the other within that of protection of human health and the environment, para. 51).

[88] Petersmann (n 10) 451. As Petersmann illustratively writes: 'in international trade, as in road traffic, observance of general rules enhances everyone's freedom of action and, due to the reduction of uncertainty as well as

Nowadays, however, the form of law and legal regulation has developed to respond to the 'social deficit of classical liberalism', and there is an increasing acknowledgement of the 'law's social functions'.[89] The CJEU's case law above on trying to delimitate and discern the primary objective of regulatory measures – and often times having to perform an intricate balancing between trade objectives vis-à-vis social and environmental ones – is such an expression of the changing face of international, as well as intra-European, trade regulation. The fact that many recent decisions of the WTO's Appellate Body (AB) have been analyzed as instances of transnational trade governance and social regulation is yet another expression of the changing face of international trade.[90] It is remarked that article 207(6) TFEU may confer exclusivity to the EU to act internationally without this implying that internally Member States are automatically completely excluded from adopting internal rules over such fields.[91] At the same time, it is equally argued that recent controversies with regard to the conclusion of the EU's new generation comprehensive FTAs, and in particular the conclusion of the CETA (Comprehensive Economic and Trade Agreement) with Canada, and the debate over the latter's provisions on investment protection, have simply shown that the 'latest shift of competences has not been the outcome of genuine willingness on the part of the Member States or by an in-depth political debate'.[92] It is, then, 'now – during the implementation phase and the negotiations of the 'new generation' free trade agreements – that the debate occurs, leading the Union being at risk of losing its much sought-after single voice'.[93]

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transaction costs, also the economic value of property rights; compliance with GATT rules promotes non-discriminatory and undistorted market competition which, according to economic theory, has the particular property of maximizing both the private advantage of individual suppliers and consumers as well as the social welfare of every state, unless there are inherent 'market imperfections' (such as monopoly power, 'externalities', and 'public goods') or policy-induced 'market distortions' (such as inflation or trade protectionism). Legal theory has concluded from this that undistorted competition depends not only upon legal guarantees of economic freedoms, private property rights and contract law but also upon legal rules which prevent the abuse of these rights for the acquisition of monopoly power and protect competition against both private and governmental restraints', 444.

[89] C. Joerges and J. Falke, 'Introduction: The Social Embeddedness of Transnational Markets: Introducing and Structuring the Project' in C. Joerges and J. Falke, *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Hart Publishing 2011) 1, 3-4.

[90] C. Gerstetter, 'The Appellate Body's 'Response' to the Tensions and Interdependencies Between Transnational Trade Governance and Social Regulation' in C. Joerges and E.-U. Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart Publishing 2006) 111.

[91] Cremona (n 2) 62-63. As Cremona explains, article 207(6) TFEU 'ensures that the exercise of the EU's *external* powers under article 207 TFEU in fields such as intellectual property and FDI, and the exercise of its regulatory competence in relation to goods and services in an external context, does not in itself imply exclusivity in those fields when the EU acts *internally*. External (exclusive) action does not result in the displacement of Member State competence internally through pre-emption (…) Article 207(6) thus confirms that although exclusive *external* competence (via the CCP) extends into fields which are not yet covered by internal EU rules, this does not mean that the Member States are automatically completely excluded from adopting internal rules over such fields, nor that internal rules adopted at EU level should necessarily be based on article 207 TFEU).

[92] Damestoy/Levrat (n 84).

[93] *Ibid.*, 79.

Even if the EU does not lose its WTO DS single voice – for reasons of path dependency, logistics, economic, or political considerations, as it was referred to above – in, any event, it appears that already that there are moves internally to achieve a reconfiguration of preparing for its single voice, following a much broader internal consultation. Much like in the early 1990s, when the changing texture of international trade disputes, and the increased fact-intensity of the WTO cases, led the EU to enact its first Trade Barrier Regulation (TBR) of 1994 which allowed industries and enterprises to bring complaints to the Commission when illegal foreign trade measures or actions were taken by the EU's trading partners – enacted, arguably, in a sort of belated followed up with its US counterpart, Section 301 of the US Trade Act of 1974.[94] Thus, now, in November 2020, the European Commission launched a new complaints system for reporting market access barriers and breaches of Trade and Sustainable Development commitments in the EU's trade agreements and under the Generalized Scheme of Preferences. It is illustrative of the above, that now the complaints procedures is open not only to MS, individual companies, and business/trade associations, but also to civil society organizations and citizens from the EU.[95] In line with the approach followed throughout this paper, these developments indicate how legal questions of the EU's responsibility before the WTO form part of a much larger legal, economic, and political process – which cannot be captured, and whose distinctiveness – single voice externally, a much more plural process internally – cannot be grasped, unless a more comprehensive lens is taken – which takes into account changing legal forms of international trade regulation, as well as the shifting and sophisticated legal processes of multi-actor participation.

[94] 'Interim Evaluation of the European Union's Trade Barrier Regulation (TBR)', Prepared by Crowell & Moring, for the European Commission, DG Trade, June 2005, available at https://trade.ec.europa.eu/doclib/docs/2005/october/tradoc_125451.pdf.
[95] For relevant information, *see* https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2134.