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

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EU Responsibility in the International System

Working Paper No. 4

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

Aliki Semertzi

March 2023

With the support of the Erasmus+ Programme of the European Union

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Kalliopi Koufa Foundation for the Promotion of International and Human Rights Law
Aristotelous 2, 54623, Thessaloniki

This project has been funded with support from the European Commission. This publication (communication) reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

4. GATT 1947: Dispute settlement cases and the international responsibility of the EEC/EC and its Member States

The GATT Dispute Settlement (DS) procedure may have been criticized for being too 'pragmatic' and accommodating Member States' (MS) discretion –as opposed to a certain conception of legality, that would focus on strong private rights and judicial review, as indicated above.[1] That criticism was advanced in particular for the period from 1963 to 1970, when the 'participation of the EEC and of an ever-larger number of less-developed GATT contracting parties sparked an anti-legalist movement within GATT, emphasizing the need for negotiations (for instance, during the Kennedy Round of multilateral trade negotiations 1964-67) and for pragmatic solutions to legal challenges against the EEC's common agricultural and preferential trade policies as well as to illegal trade barriers impeding developing country access to developed country markets'.[2] Since 1970, however, the number of GATT DS has steadily increased. The 1979 Tokyo Round agreements included an Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance codifying and developing GATT DS practices under Articles XXII and XXIII GATT.[3] Arguably, even if the system was seen as 'far from perfect', the post-Tokyo Round experience in resolving disputes within GATT has been considered as 'reasonably successful'.[4] In this vein, also the EEC, while until 1980 it had been a target in some 20 GATT complaints and an Article XXIII plaintiff in just 2 panel proceedings, during the 1980s it began to use article XXIII 'more actively and successfully'.[5]

In terms of the disputes in which the EEC had been respondent, these included 25 cases. Much in line with what has already been mentioned, most of those cases involved the EEC's common organization of its markets in agricultural products, as well as its preferential agreements, either with its neighbors, or with overseas territories – and preferential agreements that followed the independence of the former colonies of its MS, like the Lomé Convention. Thus, for instance, the EEC's common organization of the market in sugar formed the object of a complaint by Australia in 1979.[6] Australia complained that the common organization of

[1] 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.
[2] 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, 190-191.
[3] *Ibid.*
[4] W. J. Davey, 'Dispute Settlement in GATT' (1987) 11 Fordham International Law Journal 51.
[5] Petersmann (n 1) 1191-1193.
[6] Available at https://www.wto.org/english/tratop_e/dispu_e/gatt_e/78sugara.pdf.

the market in sugar which introduced a single system of internal prices and a common trading system at the external frontiers of the Community. The panel noted that the increase in Community exports, the impact on Australian sugar exports, and other developments in the world sugar market. Even if it remarked that the EEC's system had contributed to depress world sugar prices, it was not able to find a direct and quantifiable damage to Australia's exports. The EEC's agricultural policy formed again the object of a complaint by Chile in 1980 with regard to the EEC's common organization for the marketing of apples which included an internal price support, an intervention system, as well as a levy system on imports.[7] The EEC's common organization of the market in cereals was the basis of a complaint by the US in 1983,[8] and likewise, the EEC's common organization of the market for products processed from fruit and vegetables in 1985,[9] or the EEC's market for oilseeds in 1990 and 1992.[10] With regard to the EEC's preferential agreements, there are the beginnings of one of the most well-known cases also under the WTO, that is the disputes for the EEC's import regimes for bananas – challenged in 1993,[11] and again in 1994,[12] where at issue was the EEC's 4th Lomé Convention which favored the imports of bananas from ACP countries to the detriment of imports of bananas from Latin America. And the same with the EEC's preferential agreements with Mediterranean countries concerning the EEC's import regime for citrus – challenged by the US in 1985.[13] Not least, there was a prefiguration of the Airbus dispute as well, with a complaint by the US in 1992.[14] The relevant passages and how the respective panels have dealt with these disputes are provided in the manual accompanying this Working Paper.

With regard to the MS appearing along as respondents during the GATT years, first it is noted that during the 1950s there were interestingly a number of disputes between the –not yet EEC MS– MS. After this period, the MS appear again most notably in 1981, when the US targeted the income tax legislation of Belgium, France, and the Netherlands. What is interesting in these disputes and has been documented in the Manual, is that the Commission does not appear to have participated –or at least, its role is not referred to in the adopted panel reports. This non-EEC involvement can be explained on the basis of the internal allocation of

[7] Available at https://www.wto.org/english/tratop_e/dispu_e/gatt_e/79apples.pdf.
[8] Available at https://www.wto.org/english/tratop_e/dispu_e/gatt_e/81wheflr.pdf .
[9] Available at https://www.wto.org/english/tratop_e/dispu_e/gatt_e/82canned.pdf.
[10] Available at https://www.wto.org/english/tratop_e/dispu_e/gatt_e/88oilsds.pdf and https://www.wto.org/english/tratop_e/dispu_e/gatt_e/91oilsds.pdf.
[11] https://www.wto.org/english/tratop_e/dispu_e/gatt_e/93banana.pdf
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[13] https://www.wto.org/english/tratop_e/dispu_e/gatt_e/82citrus.pdf
[14] https://www.wto.org/english/tratop_e/dispu_e/gatt_e/82citrus.pdf.

competences –even if again, it contrasts with the Commission's practice during the WTO years to intervene in all disputes involving MS.

5. WTO: Dispute settlement cases and the international responsibility of the EC/EU and its Member States

Turning to the WTO years, the disputes involving the EU and its MS have been documented in detail in both the literature,[15] as well as in the detailed extracts provided for in the Manual. In terms of general observations, it is true that the Commission has been eager to assume 'full responsibility under international law' – as its phrase employed in *EC-Commercial Vessels*,[16] even if Korea in its complaint had requested consultations both with the EC and certain EC MS, while Korea also targeted specific MS measures in its complaint (Germany, Denmark, Netherlands, France, Spain). The same wording on 'full responsibility' – and emphatically not representation – was repeated by the Commission in *Civil Aircraft*,[17] in that it is the EC which 'bears responsibility in the WTO and the EC is therefore the only proper respondent'.[18] Third countries have tended to target both the EU and member states, whenever they identify specific MS measures – like in the case of the *EC-Commercial Vessels*, but also in the recent complaint by Malaysia on palm oil, which targeted both France and Lithuania, and identified in its complaint the specific MS regulatory measures. In terms of how WTO panels have dealt with the question, their approach can be characterized as a mixture of deference for the EU's constitutional particularity, together with judicial economy and pragmatic considerations – while also admitting that the MS remain WTO contracting parties in their own right. Arguably, the case where deference is best illustrated is in the case *EC – Selected Customs Matters* in which the US challenged –no less– the whole EU internal constitutional structure in the 'manner in which the EC administers its laws, regulations, decisions, and rulings of the kind described in Article X:1 of GATT 1994, pertaining to the classification and valuation of products for customs purposes and to requirements, restrictions or prohibitions on imports' under Article X:3(a) GATT.[19] At the same time, the WTO Panel report in *Large Civil Aircraft*,

[15] *See* in particular the systematization by Flett, in J. Flett, 'The World Trade Organization and the European Union and its Member States in the WTO', in A. Nollkaemper and I. Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press 2017) 849; and 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.
[16] *European Communities – Measures Affecting Trade in Commercial Vessels*, WT/DS301.
[17] *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316.
[18] *Ibid*, Para 7.172.
[19] *European Communities – Selected Customs Matters*, WT/DS315.

despite the extensive exchanges on whether it is the EU alone, or the EU together with the MS targeted, eventually addressed its recommendations to both the EC, as well as to France, Germany, Spain, and the UK 'to the extent that they have acted inconsistently with the SCM agreement'.[20]

A case somewhat distinctive is the Russian complaint against the EU on the EU's Third Energy Package.[21] What is intriguing in this dispute – and worthy for further reflection – is that it was contested the level at which the unbundling measure of the EU regulatory measures were to be assessed. In this case, the EU argued that the 'regulatory jurisdiction of the unbundling measure is each individual EU MS'.[22] The Panel, however, agreed with Russia, that even if an EU directive only has effects once implemented in the individual MS, nevertheless it does 'create a legal obligation for the EU MS to implement the rules on unbundling', while the Directive also 'determines the conditions for selling natural gas or supplying pipeline transport services'.[23] Interestingly also, the Panel, as well rejected the EU's argument on the discretionary nature of the Directive, and it stressed that there is 'no reason for concluding that in principle non-mandatory measures cannot be challenged as such', especially, since in the case in question, the 'unbundling measure in the Directive applies in and has regulatory effects throughout the entire EU territory'.[24] The Panel stressed that in deciding the 'relevant level for assessing the WTO consistency of the Directive's unbundling measure' it would take into account the '*sui generis* nature of the EU and its MS in the WTO'.[25] And eventually, it addressed its recommendations where appropriate, both against the EU, but also in –as it formulated it– the 'national implementing laws of Croatia, Hungary, and Lithuania', and recommended both the EU and its MS to bring the measures into conformity with their obligations under the GATS and GATT 1994.[26]

What general conclusions can be drawn after the detailed exposition of the cases in the Manual –which is not reproduced here– as well as the general political economy framing that this three-part Working Papers aspired to contribute –is that, given the texture of the WTO disputes, MS cannot be fully disassociated. Sometimes, they have been targeted alongside the EU on the basis that the particular MS had been the biggest export markets of the complaining party. That was the case, for instance, for Canada's challenging of the French ban in *EC-*

[20] *Ibid.,* Para 8.5.
[21] *European Union and its Member States – Certain Measures Relating to the Energy Sector,* WT/DS476.
[22] *Ibid.,* Para 7.378.
[23] *Ibid.,* Para 7.387.
[24] *Ibid.,* Paras 7.393-7.394.
[25] *Ibid.,* Para 7.397.
[26] *Ibid.,* Para 8.1 – 8.3.

Asbestos,[27] or, for the US in the *EC-Computer Equipment* bringing the case also individually against the UK and Ireland, as the 'major export market' for US LAN equipement and ADP machines.[28] Or, it could also be a means to exercise pressure and ensure implementation, like in the case of the *EC-Biotech*, and the large controversy in that dispute, of whether there was a 'moratorium' of a concerted effort by certain MS –Denmark, Greece, France, Italy, and Luxembourg– to take all necessary steps to suspend any new authorizations for growing and placing on the market genetically modified organisms.[29] In any event, and as the analysis so far has tried to argued, possibly the most apposite approach would be that it depends each time on the specific texture of the dispute –and there might well be good reasons, at least for the current reconfiguration of the preparation of the EU's DS position, and its current moves for a prior broader consultations with not only business stakeholders, but also civil society.

6. Conclusions

In 1983, in the first edited volume on the EEC's mixed agreements, Philipp Allott remarked that the problem of the problem of the mixed agreements was primarily a 'methodological problem of how to set about solving it'. It was a problem of frontiers, and like all problems at the frontier it raised an acute methodological difficulty. 'Was it a problem of extrapolation from Community law to international law?', he asked. Or, rather, a problem of 'interpolation' of international law into Community law? And he set rather hastily aside, that in fact, it could also be a 'tri-frontier' between national law, Community law, and international law.[30] Indeed, the framing of the EU's responsibility is often approached as a dual dilemma –if the EU is 'Volkerrechtsfreundlich' enough.[31] It might as well be something for picking up a German term to capture the dilemma, connecting with the fact that –from an EU law perspective– the literature is often under the heading of EU's external relations. External relations –a term that for Koskenniemi is reminiscent of German legal theory at the close of the 19th century when international law was viewed as an extension of the nation-state's municipal law, as *äusseres Staatsrecht*.[32] But, of course, today, the frontier has arguably exploded, and the respective

[27] *Ibid.,* Para 3.20: 'Before the Decree, more than two thirds of French imports of chrysotile came from Canada; the Decree has eliminated the French market for chrysotile'.
[28] *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62, para 8.60.
[29] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products,* WT/DS291 (US Complaint); DS292 (Canada); DS293 (Argentina).
[30] P. Allott, 'Adherence to and Withdrawal from Mixed Agreements' in D. O'Keeffe and H. G Schermers (eds), *Mixed Agreements* (Kluwer Law and Taxation Publishers 1983).
[31] J. Klabbers, 'Volkerrechtsfreundlich? International Law and the Union Legal Order' in P. Koutrakos, *European Foreign Policy: Legal and Political Perspectives* (Edward Elgar Publishing 2011).
[32] M. Koskenniemi, 'International Law Aspects of the Common Foreign and Security Policy' in M. Koskenniemi (ed), *International Law Aspects of the European Union* (Kluwer Law International 1998) 27, 39.

spheres are not so easily identifiable. The EU is a powerful actor, not only responding to international law, and, here, international trade regulation within the WTO, but impactfully shaping it itself.[33] The texture of the trade regulation has changed – in both the WTO and the EU level, and the two intersect. Possibly, today, a more insightful approach would be to move away from the monist/dualist perspective toward a more globalized political economy one. At least, these Working Papers aspired to provide some determinants in that direction – hoping to contribute with some angles that may remain not that often – or expressly – addressed in the current debate.

[33] M. Cremona, 'Shaping EU Trade Policy Post-Lisbon: Opinion 2/15 of 16 May 2017: ECJ, 16 May 2017, Opinion 2/15 Free Trade Agreement with Singapore' (2018) 14 European Constitutional Law Review 231.