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European Union in the
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Preface

The topic of this book was identified during the pre-Lisbon era, while I was working on a research project about the legal challenges that regional trade agreements pose for the World Trade Organization (WTO) agreement. Essentially, from the WTO perspective, the European Union (EU) is deemed to be a preferred art of regionalism as long as the EU common market constitutes an advanced state of economic integration. However, the joint membership of the EU and its member states in the WTO agreement triggers significant legal challenges for this latter in terms of the distribution of the international responsibility for violations of WTO disciplines by the EU or its member states in areas of non-conferred competences. In a more practical level, a question arises about the EU sole participation in the dispute settlement proceedings of the WTO for disputes emerging outside the areas of conferred EU powers. This participation of the EU could provoke significant questions of legality related to the assumption of responsibility for wrongful actions committed by the EU member states while acting within their scope of residual competences. This issue constitutes the main research question of the book. The central assumption is that the way in which the international responsibility of the EU and its member states is distributed sits uneasily with conventional modes provided in international agreements in general. As such, this causes a certain degree of uncertainty for other trading partners, which, by not grasping the constitutional nature of the EU polity, rely on a conventional way of management of the international responsibility. The same problem could be conceived also in light of other international mixed agreements, particularly those operating in the area of international economic law.

The Treaty of Lisbon tackled this issue by consolidating further the common commercial policy of the EU and its member states. As this book was written during the first years of the post-Lisbon era, I explored whether the treaties' amendments truly exhausted the issue of the legitimate assumption by the EU of its member states' responsibility. The more I delved into the legal literature as well as in discussions with EU legal practitioners on this matter, the more I was convinced that the Treaty of Lisbon did not actually settle the question of distribution of

international responsibility between the EU and its member states in the context of their joint membership in international mixed agreements for matters of non-conferred competences. Hence, this issue persists even after the redefinition of the common commercial policy in a more advanced format.

Against this background, the book reviews the constitutional fundamentals of the issue of international responsibility of the EU and its member states from the joint participation in the WTO not merely from a theoretical perspective. Rather, the issue of joint responsibility is scrutinized in the context of dispute settlement mechanism of the WTO. With this methodological consideration in mind, the book discovers the failure of the EU's common commercial policy to terminate the state of mixity from practical domain. The main assumption underlying the book is that the joint responsibility regime of the EU and its member states is fallacious. This regime fails to endorse a fair devolution of responsibility to the proper wrongdoer. The book was written with the aim of deconstructing the fallacious model of shared responsibility regime emerging from the joint membership of the EU and its member states in mixed agreements. To that effect, the book proposes a normative model of participation of the EU and its member states in the dispute settlement mechanism of the WTO, which ensures a proper devolution of responsibility to the relevant wrongdoer. This model is conceived on the basis of a constructive approach of integration of the participating legal orders. The book is structured in a comprehensive manner allowing the reader to identify the most relevant predictions from these legal orders which in turn serve to construe the normative model. Accordingly, the book offers firstly a comprehensive overview of the law of international responsibility, the WTO law and the law of mixed agreements, as well as the EU constitutional framework of principles. Only then is the book able to endorse the normative model for addressing the issue of international responsibility of the EU and its member states. Such a normative solution is conceived on the basis of the premises of the WTO agreement. At the same time, to the extent that parallel lines could be drawn with other international mixed agreements without a declaration of powers, this normative solution could be extrapolated to other international agreements, wherever the issue of the fallacious way of devolution of international responsibility arises. Considering the wide scope of matters dealt herein, the book can assist legal practitioners and academics who deal with issues of responsibility in mixed agreements and for which the EU and its member states are apart. The theoretical arguments in the book are discussed by taking into consideration a real case scenario, being the evidence of the practical relevance of the matter.

The book was written during my research at the Albrecht Mendelssohn Bartholdy Graduate School of Law, Faculty of Law, University of Hamburg, Germany. I would like to thank all those who have supported me in this project. My wholehearted gratitude is dedicated to my learned supervisors, Professor Armin Hatje and Professor Stefan Oeter from the Faculty of Law of the University of Hamburg. With their renowned areas of competence, namely, EU law, public international law, and WTO law, Professor Hatje and Professor Oeter have guided me with an immense incitement. Our discussions were always pleasant, inspiring,

and productive. In addition to the library of the Faculty of Law at the University of Hamburg, the Max Planck Institute for Comparative and International Private Law in Hamburg, and the German National Library of Economics, I benefited from the kindness of the librarians of Bucerius Law School in Hamburg, who provided me with relevant doctrinal materials and a comfortable place in their library.

Finally, I would like to dedicate this book to my beloved wife, Jola, as a sign of gratitude for accompanying me throughout this project with unconditional patience and care, as well as to my parents and my brother for their support and confidence.

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List of Abbreviations

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| ARSIWA | International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts |
| DARIO | International Law Commission Draft Articles on the Responsibility of International Organizations |
| dCoC | Draft of the new protocol on detailed rules for participation by the European Union (European communities and member states) in WTO proceedings |
| DSB | Dispute Settlement Body |
| DSM | Dispute settlement mechanism |
| DSP | Dispute settlement proceedings |
| DSU | Dispute Settlement Understanding |
| ECJ | European Court of Justice |
| ECSC Treaty | The treaty establishing the European Coal and Steel Community (1951) |
| EEC Treaty | The treaty establishing the European Economic Community (1957) |
| EU | European Union |
| EUROATOM Treaty | The treaty establishing the European Atomic Energy Community (1957) |
| ILC | International Law Commission |
| ILO | International Labour Organization |
| PCG | PVA (polyvinyl alcohol), cellulose, and glass fibers |
| TEU | Treaty on European Union |
| TFEU | Treaty on the Functioning of the European Union |
| UNCLOS | United Nations Convention on the Law of the Sea (1982) |
| VCLT | Vienna Convention on the Law of Treaties (1969) |

- VCLTIO Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986)
- WTO World Trade Organization

Chapter 1

Introduction

I. An Introduction to the Membership of the European Union and Its Member States in the WTO

The World Trade Organization (WTO)¹ serves as a common institutional framework for the conduct of trade relations among its Contracting Parties² in matters determined in the WTO Agreement and its annexes.³ The WTO is mainly composed of states, and all the Member States of the European Union (EU)⁴ are part of the WTO. In addition, the EU, in its quality as a customs union, is also an original Member of the WTO by having accepted the WTO Agreement and the Multilateral Trade Agreements with the respective Schedules of Concessions and Commitments annexed thereto (Article XI:1 WTO Agreement). Being equally subject to rights and obligations, the EU and its Member States exercise jointly their attributes from the WTO membership. This constitutes one of the major difficulties inherent in the WTO legal system, inasmuch as not all aspects of this joint membership are regulated.⁵

¹The World Trade Organization (WTO) is an international organization founded on the basis of the Agreement Establishing the World Trade Organization (WTO Agreement), which was signed in Marrakesh, Morocco on 15 April 1994. The WTO Agreement is a result of the Uruguay Round of Negotiations (1986–1994), held under the premises of the General Agreement on Tariffs and Trade (GATT) 1947, which has been subsequently integrated in the WTO Agreement. Unless otherwise indicated, the term ‘WTO Agreement’ in this work shall include all the Multilateral Trade Agreements referred to in Article II:2 of the WTO Agreement.

²The concept ‘Contracting Party of the WTO Agreement’ shall be referred in this work as ‘WTO Member State’, or as ‘WTO Member’.

³Article II:1 of the WTO Agreement.

⁴The term ‘European Union’, referred to as the ‘EU’ or the ‘Union’ are used interchangeably in this work with the term ‘European Communities’, referred to as the ‘EC’.

⁵Antoniadis (2004), p. 336.

Although the WTO and EU legal orders are both part of public international law, and as such, they share common features, in essence they remain very dissimilar and generally pursue different objectives and interests. While the WTO is built upon the traditional model of international organizations, the EU deviates from this idea, inasmuch as it is considered a new legal order of public international law.⁶ In the lenses of public international law, the main differences between the EU and the WTO consist in their respective relationships with their Member States. One of these differences concerns the double representation of the EU Member States in the WTO both as direct Members of the WTO and through the EU. This provokes legal uncertainties in terms of decision-making processes and dispute settlement processes. The former are of a political-decisional nature and accommodate the economic and trade interests of the Union polity.⁷ The latter have a judicial-normative character and take place when WTO Members request consultations on trade-related measures in the Dispute Settlement Mechanism (DSM).⁸

The legal uncertainty is mainly due to the atypical political and constitutional nature of the EU polity, which creates confusion in terms of the representation of Member States in the Dispute Settlement Proceedings (DSP). Due to its unclear distribution of powers, the Union polity is unable to determine in a definite way the relevant entity that is competent to defend a disputed measure. This is the main reason for the Union to assume answerability for WTO inconsistent measures that

⁶As the Dispute Settlement Body (DSB) has confirmed, the WTO legal order cannot be seen in clinical isolation from public international law, inasmuch as the interpretation of the WTO Agreement by DSB takes into account also customary rules of public international law (Article 3 (2) DSU). See in relation with this statement *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2AB/R, Report of the Appellate Body, 29 April 1996, 17. See also Stoll (2012), para. 18. For considerations on the EU legal order see Case C-26/62 *N.V. Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen*, [1963] ECR I-001, 12, para. 4.

⁷The WTO Agreement is characterized of a contract-type rapport between the Members of the club. This informs for a cooperative rather than for a subordination order of relationship between the WTO institutions and its Member States. The fact that the Dispute Settlement Mechanism (DSM) is based on the arbitration model of the settlement of disputes serves as evidence for this kind of relationship. The diverse legal instruments embodied in the WTO Agreement provide for the participating actors the necessary space to exercise political influence for accomplishing their interests. These instruments also play an instrumental role in defending economic interests of WTO actors not only through the decision-making process, but also through the DSM. In this way, the WTO offers a political forum for addressing trade interests, and a dispute settlement forum for providing judicially normative solutions to conflicts among Members.

⁸These proceedings, which often are followed by the establishment of a Panel, may be appealed before the Appellate Body on points of law. The reports have to be approved by the DSB in order to become enforceable, unless it consensually disapproves their conclusions. The WTO Agreement has successfully institutionalized the settlement of disputes. The DSM is considered one of the most successful achievements in public international law; the latter depends upon the willingness of the states, given that any supranational enforcement mechanisms are missing.

are attributed to Member States. The EU has found the way to represent in the DSP the interests of all Member States with one voice.⁹ It remains however questionable whether this way is valid for producing legitimate consequences. This question is explored in the following Sections by means of a case study, where it is argued that the WTO membership represents for the EU an uneasy relationship that could become a source of internal tensions, which yet remain virtual.¹⁰ However, these concerns raise questions of both theoretical and practical relevance for the constitutional relations in the Union polity.

The complicated relationship of the legal orders of the WTO, EU and its Member States can be further analyzed from the perspectives of the participating legal orders. From the WTO law perspective, although the EU, as a customs union, constitutes a discriminatory regime for other WTO Members, it still represents a successful and preferred model of regionalism. This is due to the value it has added to international trade in terms of increasing economic welfare, which subsequently offers an additional guarantee for peace, prosperity and political stability. This is the rationale behind Article XXIV GATT, which allows for a closer integration between the economies of the countries, without however increasing trade barriers to other WTO members.

From the EU law perspective, the WTO Agreement can be classified as a mixed agreement, due to the fact that both the EU and its Member States are signatory parties. As such, this Agreement is incorporated simultaneously into the legal orders of the EU and its Member States. The WTO membership of the EU triggers significant constitutional issues in doctrinal and jurisprudential terms. The EU Treaties have awarded a binding value to international treaties. This reflects the monistic line of hierarchy, supported from the argument that international agreements constitute an integral part of the EU legal order and do not, in principle, require any acts of transposition to become effective, depending of course on the nature and the content of the agreement.¹¹ Additionally, the jurisprudence of the Court of Justice of the European Union ('the ECJ' or, 'the Court') has conceived a higher rank for international agreements concluded by the Union vis-à-vis the secondary legislation; hence endorsing a monistic approach on the relationship.¹² Nevertheless, the ECJ, inspired by a dualistic view on the matter, has rather reserved only a position equivalent to secondary law for the WTO Agreement in the EU legal order by denying the supremacy or any direct effect of this Agreement, and by preserving the autonomy of EU law.¹³ Furthermore, any expansionary effect

⁹Antoniadis (2004), p. 322.

¹⁰See also Antoniadis (2004), p. 343.

¹¹Eeckhout (2011), pp. 326–327 and Cremona (2012), p. 288.

¹²See for example Joined Cases C-21-24/72 *International Fruit Company NV et al. v Produktschap voor Groenten en Fruit*, [1972] ECR I-1219, paras. 7, 8 and Case C-61/94 *Commission of the European Communities v Federal Republic of Germany*, [1996] ECR I-3989, para. 52. See also Tomuschat (2002), p. 186.

¹³Uerpmann-Witzack (2010), p. 147. See also Eeckhout (2011), pp. 326–327 and Kuijper and Bronckers (2005), p. 1315.