Plarent Ruka

The International Legal Responsibility of the European Union in the Context of the World Trade Organization in Areas of Non-Conferred Competences

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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.

Tirana, Albania Plarent Ruka

Table of Cases

Court of Justice of the European Union

European Court of Justice

Court of First Instance

T-113/96, *Edouard Dubois et Fils SA v Council of the European Union and Commission of the European Communities*, [1998] ECR I-0125

T-383/00 *Beamglow Ltd v European Parliament, Council of the European Union and Commission of the European Communities*, [2005] ECR I-5459

T-240/04 *French Republic v Commission of the European Communities*, [2007] ECR I-4035

Opinions and Rulings

Opinion 1/76 of the ECJ, [1977] ECR I-741, *Opinion given pursuant to Article 228 (1) of the EEC Treaty – 'Draft Agreement establishing a European laying-up fund for inland waterway vessels'*

Ruling 1/78 of the Court of Justice, [1978] ECR I-2151, *Ruling delivered pursuant to the third paragraph of Article 103 of the EAEC Treaty – 'Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports'*

Opinion 1/91 of the Court of Justice, [1991], ECR I-6079, *Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty – 'Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area'*

Opinion 2/91 of the Court of Justice, [1993] ECR I-1061, *Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the EEC Treaty – 'Convention Nº 170 of the International Labour Organization concerning safety in the use of chemicals at work'*

Opinion 1/94 of the Court of Justice, [1994] ECR I-5267, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty (re WTO Agreement)*

Opinion 2/00 of the Court of Justice, *Competence of the Community to conclude Cartagena Protocol*, [2001] ECR I-9713

Opinion 1/00 of the Court of Justice, *Opinion pursuant to Article 300(6) EC - Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area*, [2002] ECR I-3493

International Court of Justice

The Factory at Chorzów, Jurisdiction, 1927, PCIJ, Series A, No. 9

The Factory at Chorzów, Merits, 1928, PCIJ, Series A, No. 17

Monetary Gold Removed from Rome in 1943 (*Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America*), ICJ Reports 1954

The Corfu Channel Case (merits) (*UK v Albania*), 1949 I.C.J. Reports, Dissenting Opinion by Judge Azevedo, 78

Reparation for injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, 174

Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I. C.J. Reports 1980, 73

Elettronica Sicula S.p.A. (ELSI) (*United States of America v. Italy*), I.C.J. Reports 1989, 12

Certain Phosphate Lands in Nauru (*Nauru v. Australia*), Preliminary Objections, Judgment, I.C.J. Reports 1992, 240

GATT and WTO

European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins, GATT doc. C/M/222, 11 July 1988, Minutes of the Meeting of the Council of 16 June 1988

United States – Standards for Reformulated and Conventional Gasoline, WT/DS2AB/R, Report of the Appellate Body, 29 April 1996

Minutes of the Meeting of the DSB of 20 March 1997, WTO doc. WT/DSB/M/30 *(re Customs classification of certain computer equipment from United Kingdom and Ireland (items 6, 7 of the Agenda))*

Australia – Measures Affecting Importation of Salmon. Recourse to Art. 21.5 by Canada (WT/**DS18**), Report of the Panel of 20 March 2000

European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 DSU, WT/**DS27**/ARB/ECU, 24 March 2000, DSR 2000:V, 2237

Turkey – Restrictions on Imports of Textile and Clothing Products (WT/**DS34**), Panel of the Appellate Body of 31 May 1999

European Communities – Measures Affecting Trade in Commercial Vessels (WT/**DS301**), Report of the Panel of 22 April 2005

Permanent Court of International Justice

The 'SS' Wimbledon', 1923, PCIJ Series A, No. 1, 4

International Arbitral Awards

Affaire des biens britanniques au Maroc espagnol, Great Britain v. Spain, (1925) 2 R.I.A.A. 615

Island of Palmas, The Netherlands v. USA, 4 April 1928, 2 RIAA, 831

Estate of Jean-Baptiste Caire (France) v. United Mexican States, (1929) 5 RIAA, 516

The 'Rainbow Warrior', *(France v. New Zealand),* (1990), 20 RIAA, 215

German Jurisprudence

BVerfGE 37, 271 2 BvL 52/71 (Solange I), English version available at http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=588 (last visited on 24.06.2013)

Brunner v The European Union Treaty (Maastricht Judgment) Cases 2 BvR 2134/92 & 2159/92

Lisbon Treaty Judgment BVerfG, 2 BvE 2/08 of 30.6.2009, available at http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html (last visited on 25.06.2013)

Honeywell, BVerfG, 2 BvR 2661/06 of 06.07.2010, English translation available at http://www.bundesverfassungsgericht.de/en/decisions/rs20100706_2bvr266106en.html (last visited on 24.06.2013)

Table of Legislative Instruments

European Union

Treaties Establishing the European Coal and Steel Community in 1951 (ECSC Treaty), the European Economic Community in 1957 (EEC Treaty), and the European Atomic Energy Community in 1957 (EUROATOM Treaty)

Council Directive 76/769/EEC of 27.07.1976 on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations, OJ L 262, 27.9.1976

Council Resolution of 29.06.1978 on action programme of the European Communities on safety and health at work. Official Journal of the European Communities (OJ) No. C 165, 11.07.1978

Council Directive 80/1107/EC of 27.11.1980, OJ No. L 327, 03.12.1980

Council Directive 83/477/EC of 19.09.1983 on the protection of workers from the risks related to exposure to asbestos at work (second individual Directive within the meaning of Article 8 of Directive 80/1107/EC), OJ No. L 263, 24.09.1983

Council Decision 94/800/EC (of 22 December 1994) concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986–1994) [1994] OJ L336/1

Commission Directive 1999/77/EC of 26 .07.1999, OJ L 207, 06.08.1999

Presidency Note of the Conference of the Representatives of the Governments of the Member States on the Intergovernmental Conference (IGC 2000) – Extension of the Qualified Majority Voting, Document CONFER 4789/00 of 26 October 2000

Summary of the Progress Report in the Intergovernmental Conference on Institutional Reform, Document CONFER 4790/00 of 3 November 2000

Council Regulation (EC) No 1515/2001 of 23 July 2001, on the measures that may be taken by the Community following a report adopted by the WTO Dispute

Settlement Body concerning anti-dumping and anti-subsidy matters, Official Journal L 201, 26/07/2001

Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, OJ 2007/C 306/01

Regulation (EU) 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, OJ L 257, 28.8.2014

Regulation (EU) 2015/476 of the European Parliament and of the Council of 11 March 2015 on the measures that the Union may take following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters, OJ L 83, 27.3.2015

International Instruments

The Statute of the International Court of Justice, 26 June 1945, 15 UNCIO 355

Vienna Convention on the Law of the Treaties (VCLT) 22 May 1969, 1155 UNTS 331

United Nations Convention on the Law of the Sea (UNCLOS), 10 December 1982, 1833 UNTS 3

International Law Commission Yearbook of the International Law Commission, 1973, Volume II, Documents of the twenty-fifth session including the report of the Commission to the General Assembly

Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986, A/CONF.129/15

International Law Commission Report on the work of its fifty-second session (2000) – Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-fifth session prepared by the Secretariat, [UN Doc. A/CN.4/513], 15 February 2001

International Law Commission Articles on Responsibility of States for the Internationally wrongful acts (2001), adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly, which adopted with the resolution 56/83 of 12 December 2001, and corrected by document A/56/49 (Vol. I)/Corr.4. Available at http://legal.un.org/ilc/texts/9_6.htm

International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001, adopted by the International Law Commission at its fifty-third Session (Doc. A/56/10). The report, which also contains commentaries on the draft articles, appeared in the Yearbook of the International Law Commission, 2001, Volume II, Part Two, Documents of the fifty-third session including the report of the Commission to the General Assembly [UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2)], New York and Geneva, 2007, p. 30, para. 77

Articles on the Prevention of Transboundary Harm from Hazardous Activities, 11 May 2001

International Law Commission Second Report on Responsibility of International Organizations, UN Document A/CN.4/545 re Comments and observations received from international organizations, 25 June 2004

International Law Commission Third Report on Responsibility of International Organizations, by Mr. Giorgio Gaja, Special Rapporteur, [UN Doc. A/CN.4/553], 13 May 2005

International Law Commission Fourth Report on Responsibility of International Organizations, by Mr. Giorgio Gaja, Special Rapporteur, [UN Doc. 2006, A/CN.4/564/, Add.1-2], 28 February, 12 and 20 April 2006

Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, 2 June 2006

International Law Commission Draft Articles on the Responsibility of International Organizations, 2011, adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10, para. 87). Available at http://legal.un.org/ilc/texts/9_11.htm

International Law Commission Draft Articles on the Responsibility of International Organizations, with Commentaries, 2011, adopted by the International Law Commission at its sixty-third session (Doc. A/66/10). The report, which also contains commentaries to the draft articles (para. 88), will appear in Yearbook of the International Law Commission, 2011, vol. II, Part Two

International Law Commission, Responsibility of International Organizations, Comments and Observations Received from International Organizations, UN Doc. A/CN.4/637 of 14 February 2011

World Trade Organization/General Agreement on Tariffs and Trade 1947 (GATT)

Agreement Establishing the World Trade Organization, 15 April 1994, 1867 UNTS I-31874 (WTO Agreement)

General Agreement on Tariffs and Trade, 30 October 1947 (GATT 1947) (Annex II-5 of the WTO Agreement)

Agreement on Technical Barriers to Trade (TBT Agreement) (1994) (Annex II-11 of the WTO Agreement)

General Agreement on Trade in Services (1994) (Annex II-16a of the WTO Agreement)

Trade Related Aspects of Intellectual Property Rights (1994) (Annex II-17a of the WTO Agreement)

Understanding on Rules and Procedures Governing the Settlement of Disputes (1994) (Annex II-18 of the WTO Agreement)

Minutes of the Meeting of the Dispute Settlement Body of 7 April 2000, DSB Doc. WT/DSB/M/78, 12 May 2000

National Legislation

Décret no. 96-1133 *relatif à l'interdiction de l'amiante, pris en application du code de travail et du code de la consummation*, published in the Official Journal of the French Republic on 26.12.1996, 19126 and entered into force on 01.01.1997

Décret n°2001-1316 du 27 décembre 2001 modifiant le décret n° 96-1133 du 24 décembre 1996 *relatif à l'interdiction de l'amiante, pris en application du code du travail et du code de la consommation*, published in the Official Journal of the French Republic on 29.12.2001, 21281 and entered into force on 27.12.2001

Décret n°2002-1528 du 24 décembre 2002 modifiant le décret n° 96-1133 du 24 décembre 1996 *relatif à l'interdiction de l'amiante et le décret n° 96-98 du 7 février 1996 relatif à la protection des travailleurs contre les risques liés à l'inhalation de poussières d'amiante*, published in the Official Journal of the French Republic on 28.12.2002, 21860 and entered into force on 24.12.2002

Gesetz über die Wahrnehmung der Integrationsverantwortung des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union (Integrationsverantwortungsgesetz—IntVG) of 2 September 2009 (BGBl. I S. 3022), amended through the Article 1 of the Law of 1 December 2009 (BGBl. I S. 3822)

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List of Abbreviations

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 Parties[2] 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]

[1]The 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.

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

[3]Article II:1 of the WTO Agreement.

[4]The 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'.

[5]Antoniadis (2004), p. 336.

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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

[6]As 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.

[7]The 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.

[8]These 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

[9] Antoniadis (2004), p. 322.

[10] See also Antoniadis (2004), p. 343.

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

[12] See 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.

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