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The form of co-operation between the EU and the WTO, as it is at this point in time, is an outcome of two parallel processes – one occurring among the European countries, gradually leading them towards the final stage of economic integration, and the other that has been taking place within the GATT/WTO system. Because of that, the EU's participation in the WTO is a complicated issue, both on the grounds of EU law as well as on the grounds of international trade law.

In order to examine the relationship between the EU and the GATT/WTO, it is necessary to briefly describe the integration process that has been taking place in Europe for more than 60 years now. It will help show the difference between the shape of the European integration structure when this relation started, and how it functions as a part of the GATT/WTO system nowadays.

According to the Hungarian economist Béla Balassa, there are six stages of development of every economic integration structure (Balassa, 1961: p. 1–18). The first is a Preferential Trading Area (PTA), achieved by giving preferential market access to certain products from certain countries, usually by reducing tariffs without eliminating them completely. The European Union (EU) has such agreements with approximately 70 countries of the ACP (Africa, the Caribbean and the Pacific). The majority of those countries are former colonies of EU member states. Usually in those PTA agreements there are also special provisions regarding access to funds created to maintain price stability in the agricultural and mining markets of those countries. These provisions guarantee regular supplies of raw materials to the EU (Nacewska-Twardowska, 2010: p. 160).

The second stage is a Free Trade Area (FTA). It is based on an international treaty between at least two countries in which they agree on trading goods (usually industrial and highly processed products, rather than agricultural produce) freely between themselves. At the same time, the way they trade with third countries (countries from outside the FTA) is not regulated by the agreement, so in those trade relations they are allowed to keep the national tariffs. There are many examples of FTAs around the world, including the North American Free Trade Agreement (NAFTA) between Canada, the US and Mexico; the European Free Trade Association (EFTA) existing between Iceland, Norway, Switzerland and Liechtenstein; the Latin American Free Trade Association (LAFTA), concluded by Argentina, Brazil, Chile, Mexico, Paraguay, Peru, and Uruguay, which later transformed into the Latin American Integration Association which now has 12 member states; or the Baltic Free Trade Area (BAFTA) which existed between Estonia, Latvia and Lithuania until 2004 when those countries became member states of the EU. The EU itself has never been a classic FTA, 'leaping' this particular stage in a way, as its predecessor, the European Economic Community (EEC) was founded as a customs union. Nevertheless, the EU has concluded FTA agreements with many

third countries, such as Chile, Colombia, Peru and South Africa. Very often FTAs between the EU and the third countries are also created by Associated Agreements, e.g. with Algeria, Egypt, Morocco, Montenegro, Albania and Serbia.

The third step for economic integration organisation is a customs union (CU). It can be defined as an FTA in which countries agree to adopt common external barriers. This means that, unlike in an FTA, countries bound by a CU cannot keep national tariffs for products from third countries, but that those products, while entering a CU, regardless of which country, are subjected to the unified tariff. While an FTA is usually only an international agreement, a CU has to have some sort of organisational structure (in order to divide income from collected duties between the countries of the CU), and very often takes the shape of an international organisation. Current examples of a CU are the Andean Community (CAN) among Bolivia, Colombia, Ecuador and Peru; the Southern African Customs Union (SACU) comprising Botswana, Lesotho, Namibia, South Africa and Swaziland, and the Southern Common Market (Spanish: *Mercado Común del Sur* – Mercosur) existing between Argentina, Bolivia, Brazil, Paraguay, Uruguay and Venezuela. Since every common market and customs and monetary union is also a CU, the EU itself is a customs union as well. Since its creation, the European Economic Community (EEC) was supposed to become a CU. The legal grounds for it were made by Article 9 of the Treaty of Rome concluded in 1957 which provided that "*the Community shall be based upon a customs union covering the exchange of all goods and comprising both the prohibition, as between Member States, of customs duties on importation and exportation and all charges with equivalent effect and the adoption of a common customs tariff in their relations with third countries.*"[1] The EEC became a customs union in 1968 (Edward, Lane, 2013: p. 446). However, according to some scholars, the EEC became a customs union much later, when all the legal instruments that form the Common Trade Policy came into force (Lasok, 1998: p. 2–4).

The next step of economic integration is a common market. As already stated, every common market is a customs union where there is also the free movement of goods, services, capital and labour, as well as common policies on product regulation (common standards). Apart from the EU, another example of a common market is the Caribbean Community (CARICOM) established by Barbados, Jamaica, Guyana and Trinidad & Tobago, and now associates 15 Caribbean nations and dependencies. The European Coal and Steel Community (ECSC), which was established by the Treaty of Paris signed in 1951, was another example of a common market, but limited only to two products – coal and steel. The EEC set the goal of becoming an internal market (which is more advanced than a common market, as trade barriers between member states are reduced almost completely) in the Single European Act,[2] adopted in 1986. In Article 13 it was stated that "*The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992.*" The goal was

[1] The Treaty establishing the European Economic Community signed on 25 March 1957 in Rome. The original version of the Treaty can be found on the EU website (http://eur-lex.europa.eu/) in authentic languages: French, Italian, German, Dutch or, in English, on the Centre for European Studies website (French: *Centre virtuel de la connaissance sur l'Europe*) (http://www.cvce.eu/).

[2] Single European Act, signed at Luxembourg on 17 February 1986 and at The Hague on 28 February 1986 , OJ L 169 of 29.6.1987.

indeed achieved within the stated period of time, and from 1993 the EU functioned as an internal market.

The fifth step of integration is an economic and monetary union, which is a common market with a common currency. There are a few examples of economic and monetary unions made on bilateral relations, like the one existing between Switzerland and Lichtenstein. A good example of an economic and monetary union consisting of several countries is the Eastern Caribbean Currency Union (ECCU), composed of Antigua and Barbuda, Dominica, Grenada, St. Kitts and Nevis, St. Lucia, and St. Vincent and the Grenadines, and using a common currency – the East Caribbean dollar. As for the EU, the Eurozone is also an example of an economic and monetary union, though the EU has not properly reached this stage of integration yet, since only 18 of the 28 member states use the Euro as their currency so far. Moreover, it is uncertain whether the EU will reach this stage any time in the future, as three countries – the UK, Denmark and Sweden – have decided not to use the Euro.[3] The other countries are obliged to join the Eurozone once they meet the criteria to do so.

The final stage would be complete economic integration, at which point there would be full monetary union and complete harmonisation of economic policy, which means that it would not be under the control of the member states anymore. This stage is purely theoretical, as no integration organisation in history has ever achieved it.

Bearing in mind the steps that the EEC (and then the EU) had to take in order to reach its current level of the integration, it is clear that when the GATT was signed in 1947, the EEC (and not even the ECSC) had not been established yet. On the other hand, in 1951 when the Treaty of Paris was signed, all six countries – Belgium, Italy, Luxemburg, Netherlands, Germany and France – had already signed the GATT. What is even more, there was a customs union existing between three Benelux countries at that time. This customs union was explicitly listed in Annex C to Article 1.2(b) as territories that were an exemption to the duty of eliminating any preferences that were against the most-favoured-nation clause. The most-favoured-nation clause obliged the states to accord any advantage, favour, privilege or immunity that they have granted to any product from one country to a like product originating in or destined for the territories of all other contracting parties (Puślecki, Skrzypczyńska, 2011, p. 11–12). Naturally, free trade areas and customs unions are, by definition, inconsistent with the most-favoured-nation clause, as a reduction of trade barriers takes place only within the area or the union.

Despite the historical exceptions to the most-favoured-nation clause, such as the customs union between the Benelux countries, the GATT anticipates another type of exception. Article XXIV (5) states that "*the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area*." One of the conditions for a customs union to fall within the scope of Article XXIV is that duties and other restrictive regulations of commerce will be eliminated with respect to substantially all the trade (SAT) between the constituent territories of the union, or at least with respect to substantially all trade in products originating in such territories. According to this provision, the ECSC could not be considered as a customs union forming an exception to the most-favoured-nation clause under

[3] The UK and Denmark negotiated the permanent derogation in this field, while Sweden did not join the ERM II (because of the negative result of the referendum) and thus failed to fulfill the criteria for introducing euro.

Article XXIV, because it was limited only to coal and steel, thus it did not meet the SAT condition. The ECSC had to use another possibility, provided for in Article XXV. Under this article, it is possible, in exceptional circumstances not elsewhere provided for in the GATT, to waive an obligation imposed by the GATT upon a contracting party, particularly the most-favoured-nation clause. In order to obtain such a waiver, the decision has to be approved by a two-thirds majority of the votes cast of the contracting parties. The ECSC was granted a waiver in 1952.[4]

In the case of the EEC, since it had a general character, not limited only to some categories of products, it became an exemption to the most-favoured-nation clause based on Article XXIV. According to this particular issue it is worth to be mentioned that, apart from the SAT condition fulfilled by the EEC, Article XXIV states that, with respect to a customs union, the duties and other regulations of commerce imposed at the institution of any such union will not, on the whole, be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of the union. Taking this provision into account, the EEC established the common external tariff (CET) based on the arithmetic mean of the tariffs of six countries. Among those countries, Belgium, Luxemburg and the Netherlands had much higher tariffs than the rest of the member states of the EEC (France, Italy and Germany), whereas their share in trade was rather insignificant in comparison to the share of the latter three. As a result, from the perspective of the third countries, the tariffs for most goods became higher than they had been before (Czubik, 2002: p. 276–278). However, such a solution could not be considered as a violation of the GATT, as Article XXIV states that the CET shall not, on the whole, be higher than tariffs prior to the creation of the union. Nonetheless, there was a conclusion drawn from that case. In the Interpretation to the GATT, it was been stated that "*the general incidence of the duties applied before and after the formation of a customs union shall be based upon an overall assessment of weighted average tariff rates and of customs duties collected*." Such a weighted average should be calculated taking into consideration the share in trade of all the countries that are parties of the given customs union.

Usually when one international organisation wants to co-operate with another one, the co-operation is done by taking administrative or diplomatic measures, and when an international organisation wants to participate in the work of another international organisation, it does so by gaining the formal status of an observer (MacLeod, Hendry, Hyett, 1998: p. 165–170). The situation where one international organisation is a regular member of another international organisation is rather unique, although there are many examples[5] of international organisations of which the EU is a member, equal to states. Such a situation exists due to EU law, and is strictly connected with the issue of the EU's external competence. External competence means taking such actions as negotiating and concluding international agreements with non-member states and other international organisations. This competence can be exclusive of the EU, when exer-

[4] Document L/66 – European Coal and Steel Community – Presentation of Waiver of 18/11/1952, available on the WTO website http://www.wto.org/.

[5] E.g. the Food and Agriculture Organisation of the United Nations (FAO), the European Bank for Reconstruction and Development (EBRD), the Hague Conference on Private International Law (HCCH), the International Tropical Timber Organisation (ITTO), the International Coffee Organisation (ICO), the International Cocoa Organisation (ICCO), and the International Olive Oil Council (IOOC).

cised entirely by the EU, or shared between the EU and the member states, when exercised either by the EU or by the member states. After the reform made by the Treaty of Lisbon, it is precisely stated in the treaties in which areas the EU has which kind of competence.[6] If the range of activities of the international organisation falls into a field of EU exclusive competence, the member states should not maintain relations with it individually, but it should be the EU doing it instead. Such a rule, called the principle of parallelism between internal and external powers (Leal-Arcas, 2004: p. 10–11), was formulated by the Court of Justice of the European Union (CJUE) in its famous ERTA ruling[7] from 1971.

When the EEC became a customs union, it was clear that, for some crucial areas of international trade, it was the EEC that became responsible, not the member states. In other words, in those areas that belonged to the competence that the EEC took over from the member states, it became entitled to represent them within the GATT system (Nowak-Far, 2008: p. 11), as was clearly stated by the CJEU in many rulings.[8] Nothing changed in that matter in 1992 when the EU was created, because it was not granted legal personality, thus, under international law, it could not signed treaties or be a member of international organisations.[9]

With EU membership in the WTO, the problem is that the EU does not have exclusive external competence in all the areas covered by the GATT/WTO legislation. To some of those areas, like public auction, common agriculture policy or environmental protection, the shared competence between the EU and member states applies. Because of that, the EU membership in the WTO is somehow mixed – both the EU and 28 member states are members of the WTO, making 29 WTO members altogether (Steinberger, 2006: p. 839–840).

There is also another, historical, reason for this solution. As has been already noted, the EU is a customs union. Even though it was states that were signatories to the GATT, the rights and the duties are given to the separate "customs territories".[10] Of course, those "customs territories" usually coincide with the territories of states, but not always. For example, the Faroe Islands,[11] which are a part of Denmark, are a separate customs territory and are able to negotiate their own trade agreements within the GATT/WTO system, as well as Hong Kong, which is formally a part of China, but was a signatory of the GATT and has been a member of the WTO long before China joined it in 2001 (Czubik, Kuźniak, 2004: p. 68). The same rule applies for a group of states that are integrated on the basis of a customs union, like the EEC and now the EU. Later, when the WTO was created, a provision was added to the Marrakesh Agreement (Article XII) which explicitly said that "*any State or separate customs territory possessing full autono-*

[6] The areas of exclusive competence of the EU are listed in Article 3 of the Treaty on the Functioning of the European Union (TFEU) and the areas of shared competence are listed in Article 4 of the TFEU.

[7] C-22/70 Commission v. Council, 1971.

[8] E.g. joined cases C-21/72 & C-24/74 International Fruit Company NV v. Produktschap voor Groenten en Fruit, 1972; case C-38/75 Douaneagent der NV Nederlandse Spoorwegen v. Inspecteur der invoerrechten en accijnzen, 1975; case 70/87 Fédération de l'industrie de l'huilerie de la CEE (Fediol) v. Commission of the European Communities, 1989.

[9] Although some scholars point to that in fact the EU signed some treaties before it gained legal personality. Because of that they say about the "implied legal personality" of the EU. *Vide* Raluca, 2010: p. 7–18.

[10] *Understanding the WTO*, handbook at WTO official website, www.wto.org/, p. 3.

[11] In addition, EU law does not apply on this territory.

my in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO."

In 1995 when the WTO was created, according to the provisions of the Marrakesh Agreement, all signatories to the GATT automatically became member states of the WTO,[12] according to the general rules of public international law considering succession. The issue of the European Communities (EC)[13] membership in the WTO has been regulated by Article XI and Article XIV, which made it clear that both the member states and the EC itself could become members of the WTO. In addition, according to Article IX, the EC was granted a number of votes equal to the number of member states that are members of the WTO, which was a very beneficial solution from the European Communities' point of view. The EC became a member of the WTO under a decision of the Council of 22 December 1994.[14]

In 2009, after the Treaty of Lisbon came into force, the EC was abolished and the EU "replaced and succeed it"[15] which, among other things, means that the EU became a party of all the international treaties that were signed by the EC, and replaced the EC in all the international organisations in which the EC was a member, including the WTO. At the moment, after 1 July 2013, when Croatia became the 28th member state, the EU has 28 votes in the WTO. Moreover, the number of votes is the same regardless of the matter that is put to a vote. This means that when the EU exercises its exclusive competence in the WTO forum, a common position is agreed upon at the EU level, the EC presents it and all the EU member states vote unanimously (Leal-Arcas, 2007: p. 84). However, in theory it is possible for the EU member states to vote differently when the matter that is put to a vote belongs to the area of competence shared between the EU and the member states (Hernando Sanz, 2013: p. 4). Because of that, it is extremely important for the member states to work out a common position, not only in this first case, but also in the second one.

In the Ministerial Conference, which is the highest decision-making body within the WTO, meeting at least every two years, the EU is represented by the EU Trade Commissioner. In the General Council of the WTO, which has a permanent character and meets on a regular basis, the EU is represented by the European Commission. The European Commission also acts on behalf of the EU in the Trade Policy Review Body and the Dispute Settlement Body (where it initiates and handles all complaints raised by the EU or against the EU), and also in all subsidiary WTO bodies (such as the Committee

[12] Article XI: "The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO."

[13] The Treaty of Maastricht changed the name of the European Economic Community (EEC) to the European Community (EC). With the European Atomic Energy Community (EAEC or Euratom) and the European Coal and Steel Community (ECSC), which existed until 2002 when the Treaty of Paris expired, they were called "the European Communities".

[14] Council Decision 94/800/EC 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), OJ L 336, 23.12.1994.

[15] According to Article 1 of the Treaty on European Union (consolidate version after the Treaty of Lisbon).

for Trade and the Environment or the Council for Trade in Goods). When the negotiations of trade agreements during the rounds are taking place, the EU is also represented by the European Commission, which is authorised to conduct such negotiations by the Council and the European Parliament. All the time the Commission has to coordinate all its actions with the EU member states. There is a special committee[16] responsible for that. It is appointed by the Council and is made up of trade experts from all the member states. It is chaired by the member state that holds the EU presidency at the moment (Woolcock, 2010: p. 24–25). The European Parliament is also involved in this process, as the European Commission is obliged to regularly provide information regarding outgoing issues in the WTO forum to the Committee on International Trade (INTA), which works within the Parliament (Bendini, 2013: p. 3–4).

As has already been stated, the situation whereby one international organisation is a member of another international organisation is rather unique. An attempt to describe the manner in which the EU and the WTO co-operate in the field of international trade has to lead to the creation of a complicated network of relations falling within the scope of the GATT/WTO law and the EU law at the same time. Nevertheless, the past decades shows that, although such a solution is uncommon and complicated, it should be assessed positively, as it seems to work quite well, although not always completely smoothly, as could be observed in the case of famous "Banana War" or the GMO Dispute (van Well, Reardon, 2011: p. 14–16).

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[16] Formerly known as The Article 133 Committee. The name of this committee came from Article 133 from the Treaty of Amsterdam, which regulated the issues concerning the common trade policy.

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