THE INTERNATIONAL RESPONSIBILITY OF THE EUROPEAN UNION IN INTERNATIONAL ECONOMIC LAW

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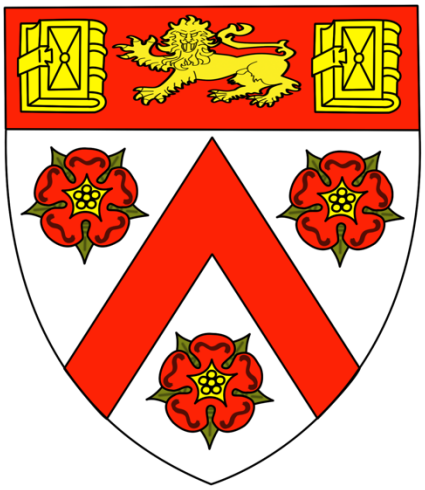

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PREFACE

This thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the Preface and specified in the text. It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. I further state that no substantial part of my thesis has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. It does not exceed the prescribed word limit for the relevant Degree Committee.

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SUMMARY

Emilija Leinarte

The International Responsibility of the European Union in International Economic Law

The International Law Commission's Draft articles on the international responsibility of organizations (DARIO) do not distribute international responsibility between the EU and its Member States. The DARIO framework determines whether a particular entity *is* internationally responsible. Responsibility in a multi-layered structure like the EU, where sovereignty is shared between separate legal persons, raises additional, important questions that fall outside the scope of DARIO.

While a state can transfer its competences to an international body, its international obligations are non-transferable. I argue that both the EU and its Member States are independently responsible for joint obligations, such as under mixed agreements. This principle of independent responsibility, however, provides only a partial answer to the question of shared responsibility. That the responsibility of the EU and its Member States can be invoked does not tell us whether the EU, its Member States, or both, will be responsible in a given situation. The complex task of distributing shared responsibility remains.

This study finds that in international economic law the focus of international dispute-settlement bodies is not on the responsible party, but on a party best placed to bear responsibility. Remedies for violations of international economic obligations have a restorative rather than corrective purpose. Accordingly, attribution of conduct is largely irrelevant for the distribution of shared responsibility between the EU and its Member States. Instead, shared responsibility typically raises the question of the proper respondent(s).

This thesis argues that whether the EU or its Member States, or both, are the proper respondent(s) in a given dispute to a large extent depends on the nature of the treaty regime in question. An extensive analysis of case law under the World Trade Organization (WTO) and the Energy Charter Treaty (ECT) regimes reveals the underlying rationales for the identification of the proper respondent(s). I suggest that the WTO Dispute Settlement Body follows the positive solution test under which the panels address their recommendations to the entity which is necessary to ensure compliance with WTO law. Under the ECT regime, where the primary remedy is compensation, arbitral tribunals focus on the entity which is the proximate cause of the alleged harm.

Building on the analysis of the nature of the WTO and the ECT regimes, I explain why the EU is the optimal respondent under the WTO regime, whereas Member States are the primary respondents in investment disputes. The findings of this thesis are then applied to the question of responsibility of the EU and its Member States under new-generation free trade agreements, such as the EU-Canada Comprehensive Economic and Trade Agreement (CETA). I suggest that investment chapters of new-generation treaties modify the usual patterns of the optimal respondents through procedural techniques which allow the EU to assume responsibility on behalf of its Member States.

In loving memory of my grandparents Salomėja and Jonas

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ABBREVIATIONS AND ACRONYMS

ACP States	African, Caribbean and Pacific Group of States (ACP)
AG	Advocate General
ARSIWA	Responsibility of States for Internationally Wrongful Acts
BIT	Bilateral Investment Treaty
CCP	Common Commercial Policy
CETA	Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
DARIO	Draft articles on the responsibility of international organizations
DSU	Dispute Settlement Understanding
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECT	Energy Charter Treaty
ECtHR	European Court on Human Rights
EEA	European Economic Area
EPA	EU-Japan Economic Partnership Agreement
EUSFTA	EU-Singapore Free Trade Agreement
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GCEU	General Court of European Union
ICJ	International Court of Justice
ICS	Investment Court System
ILC	International Law Commission
ILO	International Labour Organization
IMF	International Monetary Fund
INTERPOL	International Criminal Police Organization
ISDS	Investor-state Dispute Settlement
MIC	Multilateral Investment Court
PCIJ	Permanent Court of International Justice

REIO	Regional Economic Integration Organization
SHARES	Research Project on Shared Responsibility in International Law
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TPP	Trans-Pacific Partnership
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
WHO	World Health Organization
WTO	World Trade Organization

Court of Justice of the European Union

C-77/69 *Commission of the European Communities v Kingdom of Belgium* [1970] ECR 237

Case 22-70 *Commission of the European Communities v Council of the European Communities* [1971] ECR 273 (ERTA case)

C-21-24/72, *International Fruit Company NV et autres contre Produktschap voor Groenten en Fruit* [1972] ECR

C-104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* [1982] ECR 3641

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C-265/95 *Commission of the European Communities v French Republic* [1997] ECR I-6959

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T.I. v. The United Kingdom App no 43844/98 (ECtHR 7 March 2000)

Streletz, Kessler and Krenz v. Germany App nos 34044/96, 35532/97, & 44801/98 (ECtHR 22 March 2001)

S.A. Dangeville v. France, App no. 36677/97 (ECtHR 16 April 2002)

Dangeville SA v France App no 36677/97 (ECtHR 16 April 2002)

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CHAPTER I – INTRODUCTION

The question of the international responsibility of the European Union first sparked my interest in the Spring of 2012. Three years prior, after gaining an LLM degree in energy law from a university in the United States, I joined a Lithuanian law firm. I spent much of my legal practice assisting the government of Lithuania in the implementation of the so-called EU's Third Energy Package aimed at liberalising Member States' energy markets.[1] The Third Energy Package listed alternative methods of unbundling gas supply and generation from the operation of transmission networks in order to ensure fair competition. The Lithuanian government chose the strictest model under the EU directive – full ownership unbundling of integrated gas companies, which effectively meant that no supply or production company is allowed to hold a majority of shares or have any influence over the work of transmission system operator. The Russian company OAO Gazprom, which owned the majority of shares of a company providing gas services in the country, threatened to bring an investment claim against Lithuania. A question arose: if a Member State of the EU is implementing an EU directive, is the Union or its Member State responsible for a violation of an international obligation? What sounded like a narrow and practical question back in 2012 proved to be only a tiny edge of a much larger topic of the EU's international responsibility.

1. Relevance of the analysis

The relevance of the topic stems from the steady expansion of the Union's role in the global economy. While the EU has been a player in international trade since its inception in the form of the European Coal and Steel Community in 1951, a significant impetus for the its common commercial action was given in 2009 with the adoption of the Treaty of Lisbon. Among other things, competence in the field of foreign direct investment was transferred from Member States to the Union. Having acquired these new powers, the EU commenced the development of a European international investment policy by adopting a Communication entitled 'Towards a

[1] Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC and Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC.

comprehensive European international investment policy' of 7 July 2010 (Communication).[2] The European Commission set out two major goals for the new investment policy and is currently working along two parallel lines to achieve them. Firstly, the EU is seeking to ensure that EU investors abroad enjoy a level playing field, which assures both uniform and optimal conditions for investment through the progressive abolition of restrictions and protection of investors' rights. To this end the Union announced in the Communication that the EU would gradually replace bilateral investment treaties (BITs) concluded by its Member States and third countries with those of its own. The second goal indicated in the Communication is the enforcement of investment commitments. It is stated in Part 3(d) of the Communication that future EU agreements including investment protection should include a new investor-state dispute- settlement mechanism.

To achieve its goals the European Commission is currently negotiating a number of free trade agreements (FTAs) with third countries.[3] From 2016-2018 it has finalised negotiations with several partners. These FTAs include the EU-Canada Comprehensive Economic and Trade Agreement (CETA),[4] the EU-Singapore Free Trade Agreement (EUSFTA),[5] the EU-South Korea Free Trade Agreement, and the EU-Japan Economic Partnership Agreement (EPA).[6] In my analysis I shall refer to these treaties as 'new generation' FTAs, a term also employed by the European Commission.[7] The new agreements *inter alia* cover trade liberalisation and investment protection. They also establish dispute-settlement mechanisms to deal with trade and investment claims.

The expansion of the EU's external action in the global economy demands accountability. The issues of responsibility have not (yet) given rise to serious contention. That is so, because rather than looking for routes to escape responsibility, the EU has proved to be a willing respondent

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[2] European Commission, 'Communication: Towards a Comprehensive European International Investment Policy, COM 343'. In this thesis, I will refer to earlier bilateral investment treaties concluded by the Member States as first-generation treaties.

[3] For the status of current negotiations, see European Commission's document 'Overview of FTA and Other Trade Negotiations', available at http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf, last visited 2 Aug, 2018.

[4] CETA was signed on 30 October 2016. It entered into force provisionally on 21 Sept 2017. National/regional parliaments will have to approve CETA before it can take full effect. Canadian side ratified the treaty on 16 May 2017.

[5] The EU and Singapore completed the negotiations for a comprehensive free trade agreement on 17 October 2014, text available at trade.ec.europa.eu/doclib/press/index.cfm?id=961, last visited 2 August 2018. The treaty needs now to be formally approved by the European Commission and then agreed upon by the Council of Ministers and ratified by the European Parliament.

[6] The negotiations were finalised on 8 Dec 2017. After the legal verification and translation processes, the European Commission can then submit the agreement for the approval of the European Parliament and EU Member States.

[7] For example, see 2013 press release of the European Commission, available at http://europa.eu/rapid/press-release_MEMO-13-576_en.htm, last visited 2 Aug 2018.

in international economic disputes. That does not make the question of this thesis moot. On the contrary, it calls for an investigation into the EU's approach to international responsibility and whether this approach is compatible with international law.

2. Key doctrine on the international responsibility of organisations

It is undisputed that international organisations may have legal personality. In the landmark Opinion of the International Court of Justice (ICJ) on the *Reparation for Injuries* the ICJ concluded that the United Nations (UN) is an international person capable of possessing international rights and duties.[8] Leaving aside the debate on the rationales underlying the ICJ's conclusion and how it applies to different legal theories on international legal personality,[9] Klabbers notes a presumptive approach which holds that as soon as an organisation performs acts which can only be explained on the basis of international legal personality, it is presumed that it possesses international legal personality.[10] Since 2009 the presumption has been irrelevant in the case of the European Union since Article 47 of the Treaty of Lisbon expressly states that the Union shall have legal personality.

Stemming from this international legal personality is the capacity of organisations to assume international rights and obligations. Article 6 of the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations establishes that their capacity to conclude treaties is governed by the rules of that organisation. Article 3(2) of the Lisbon Treaty sets express and implied powers of the European Union to conclude international agreements.[11] The EU enjoys capacity to conclude international economic treaties which fall within its competence in the area of the common commercial policy.[12] It has become a usual practice in the EU to conclude international agreements

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[8] Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) [1949] ICJ Rep 174, 179.
[9] Two main theories can be noted – the will theory and the objective theory, see Jan Klabbers, *An Introduction to International Orgnizations Law* (CUP 2015), 46-50.
[10] Jan Klabbers, 'Presumptive Personality: The European Union in International Law' in Martti KOskenniemi (ed), *International Law Aspects of the European Union* (1997), 231-53.
[11] Art 3(2) TFEU provides that the EU "shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope". The implied power stems from the ERTA doctrine, see Case 22-70 *Commission of the European Communities v Council of the European Communities* [1971] ECR 273. The Court expanded the implied powers doctrine to include those areas where the EU has not yet legislated internally, see Opinion 1/76 *Pursuant to Article 228 (1) of the EEC Treaty - 'Draft Agreement establishing a European laying-up fund for inland waterway vessels'* [1977] ECR 754.
[12] Art 3(1)(e) TEU.

alongside its Member States when agreements also cover areas which fall outside the EU's exclusive competence. Treaties to which both the EU and some or all of the Member States are party are called 'mixed agreements'. Most of the EU's major economic and environmental treaties are mixed, including the World Trade Organization (WTO) Agreements, the United Nations Convention on the Law of the Sea (UNCLOS), the Kyoto Protocol to the Climate Change Convention, the EU's association agreements,[13] free trade agreements,[14] and the Agreement on the European Economic Area (EEA Agreement).

The power to conclude international agreements comes with responsibility. An early principle of international law, formulated by the Permanent Court of International Justice (PCIJ) in the famous *Chorzów Factory* case, is that a violation of international law entails responsibility and the obligation to make reparation.[15] Nevertheless, the question of the international responsibility of organisations has puzzled legal scholars since the middle of the 20th century. In his extensive work on international responsibility in the 1950s Eagleton, for example, did not consider that international organisations may incur international responsibility.[16] While the principle that organisations may be responsible for breach of their obligations is no longer seriously contested, the exact functioning of international responsibility of international organisations remains a matter of great confusion. Alvarez rightly notes that it is not clear how the traditional doctrine of state responsibility, if it is relevant at all, ought to apply to organisations.[17] The complexity of the question stems from the limited capacity enjoyed by international bodies – organizations may act only in those areas where they have been empowered to act by their founding members. A number of commentators have suggested that the 2011 International Law Commission's (ILC) Draft articles on responsibility of international organisations (DARIO) are inadequate to address the different types and forms of international organizations. The root of this criticism lies the fact that the draft articles are based on the 2001 Draft articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), ignoring that states and organisations are essentially different subjects of international law.

The question of the international responsibility of the European Union is particularly complex. On the one hand, unlike other organisations it is a supranational body with extensive, state-like

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[13] For example, the EU-Ukraine Association Agreement.
[14] For example, CETA.
[15] *Factory at Chorzów (Germany v Poland), Jurisdiction* [1927] PCIJ Series A – No. 8, para 55. The PCIJ held that "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form".
[16] Clyde Eagleton, 'Purchase Access International Organization and the Law of Responsibility', 1950 vol. 76(1) 316, 345.
[17] José E Alvarez, *International Organizations as Law-Makers* (OUP 2010), 129.

powers. On the other hand the EU's multi-level implementation system has its origins in the limited resources that its member states put at its disposal necessary to exercise its competences.[18] To overcome this imbalance between power and means the EU has adopted the so-called system of executive federalism whereas authorities of the Member States implement Union policies. In this system decisions which will often bind Member States can be taken by majority vote and so, as Klabbers rightly notes, it is entirely possible that a Member State will have to adopt a certain course of conduct which it itself vehemently opposes.[19] How then do we determine international responsibility for violations of joint obligations in such multi-layered governance structure? By the term 'joint obligations' I primarily mean obligations held by both the EU and its Member States under mixed agreements.

The European Union proposes its answers. The central idea is that the EU is a *sui generis* entity and so subject to a special regime of international responsibility.[20] The applicable *lex specialis*, according to the European Commission, must be based on the internal division of competences between the EU and its Member States.[21] The competence-based approach to international responsibility holds that the EU is responsible for violations of obligations in its areas of competence, irrespective of who carried out the conduct in question. Gaja, the Special Rapporteur for the DARIO project, seemed to agree with the European Commission on what he referred to as a 'problem' of determining responsibility in the EU by addressing the following example: "*Member State customs authorities follow a policy of tariff classification which is alleged to be contrary to the trade provisions of an agreement that has been concluded by the EC and its member States together. The question of apportionment of the obligation and of responsibility would have to be decided in favour of the EC, since trade policy is an exclusive competence of the EC which has been wholly transferred by the member States to it. It would seem to be impossible in such a situation to say that the action by member States' customs authorities should nonetheless lead to the attribution of the conduct to the member States, since they are not the carriers of the obligation any longer"*. Gaja suggested that the draft articles "*should probably make room for the internal rules of the organization*" as an element that is important not only to the question of the attribution of conduct, but also – and perhaps foremost – for the question of the apportionment of responsibility.[22]

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[18] Jan Klabbers, *An Introduction to International Institutional Law* (2nd edn, CUP 2009), 279.
[19] Klabbers, *An Introduction to International Orgnizations Law*, 26
[20] Comments and Observations Received from Governments and International Organizations, A/CN.4/556 (ILC 2005), 31.
[21] Comments, A/CN.4/556, 32.
[22] Comments and Observations Received from International Organizations, A/CN.4/545 (ILC 2004), 26.

Opinions which have emerged during the debate can be broadly divided into two groups. A first group of legal scholars suggests that the responsibility of the EU cannot be regulated solely on the basis of the rules of the organisation because these are internal rules. While the need to accommodate the special nature of the EU legal order is acknowledged, the argument is that rules of responsibility must sit comfortably within international law.[23] A second group of authors stress the *sui generis* nature of the EU, a one-of-a-kind supranational organisation. They suggest that law of international responsibility should provide space for the rules of the organisation which governs the division of competences between the EU and Member States.[24] To use the phrase of Kuijper and Paasivirta, this is the 'inside looking out' approach.[25]

While determining international responsibility on the basis of internal rules conveniently accommodates the special nature of the Union, there is nothing in international dispute-settlement practice which would indicate that courts and tribunals support or apply the competence-based responsibility of the EU. To the best of my knowledge there has been no international dispute where responsibility was allocated to the EU or its Member States solely on the basis of competence. International adjudicators do not engage in the complex task of untangling the internal institutional functioning of the EU. Rather, as I shall argue in this thesis, the EU and its Member States remain independently responsible for violations of their joint obligations, irrespective of the internal transfer of powers. The question then is what governs the distribution of international responsibility between the EU and its Member States?

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[23] For example, Stefan Talmon, 'Responsibility of International Organizations: Does the European Community Require Special Treatment?' in Maurizio Ragazzi (ed), *International Responsibility Today* (Martinus Nijhoff 2005), 415; Christiane Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility', ACIL Research Paper No 2011-03 (SHARES Series); Jean D'Aspremont, 'A European Law of International Responsibility? The Articles on the Responsibility of International Organizations and the European Union' in Vicky Kosta, Nikos Skoutaris and Vassilis Tzevelekos (eds), *The EU Accession to the ECHR* (Hart Publishing 2014); Joni Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and Its Member States* (Kluwer Law International 2001); Pieter Jan Kuijper, 'Amsterdam Center for International Law: Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?' (2010) 7 International Organizations Law Review 9; Andrés Delgado Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (CUP 2016); Malcolm Evans and Phoebe Okawa, 'Approaches to Responsibility in International Courts' in Panos Koutrakos and Piet Eeckhout (eds), *EU External Relations Law* (2nd edn, OUP 2011).

[24] For example, Esa Paasivirta, 'Responsibility of a Member State of an International Organization: Where Will It End? Comments on Article 60 of the ILC Draft on the Responsibility of International Organizations' (2010) 7 International Organizations Law Review 49; Pieter Jan Kuijper and Esa Paasivirta, 'EU International Responsibility and Its Attribution: From the Inside Looking Out' in Malcolm Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart Publishing 2013); Frank Hoffmeister, 'Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?' (2010) 21 EJIL 723.

[25] Kuijper and Paasivirta 2013.

3. Research aims

This thesis explores the allocation of international responsibility for violations of joint economic obligations in the context of a multi-layered structure where sovereignty is shared among different subjects of international law. By reference to 'shared sovereignty' I mean a common governance arrangement, whereas EU policies are implemented through authorities of Member States, a feature stemming from its limited resources. Analysis is primarily focused on the European Union and its Member States, but the normative findings of my research are relevant to the institutional law of international organisations and law of international responsibility more broadly.

I aim to answer three main questions: what, how and why.

Firstly, my aim is to identify *what* legal basis governs the allocation of international responsibility between the EU and its Member States. I search for the underlying rationales which guide international dispute-settlement bodies when faced with violation(s) of economic obligations held jointly by the EU and its Member States.

Secondly, I seek to extrapolate *how* international courts and tribunals apply this legal basis in practice. Does the reasoning of international courts and tribunals differ depending on the treaty regime in question? How do these differences correlate with the patterns of distribution of shared responsibility between the EU and its Member States?

Thirdly, the thesis aims to explain *why* the distribution of shared responsibility differs across treaty regimes. How can we explain the factors that shape the role of the EU and its Member States in international dispute-settlement practice?

It must be emphasised that this thesis explores the question of the international responsibility of the EU in international economic law only. To specify further, I explore the question in the context of joint economic obligations of the EU and its Member States, primarily under mixed agreements. I do not address responsibility for violations of obligations in other areas of international law, such as human rights, international humanitarian law or international criminal law. As I shall argue in this thesis, international economic obligations differ essentially from other types of international obligation because of their consensual nature and the restorative, rather than corrective, function of remedies that protect them.

Importantly, this thesis is limited to identifying and explaining the underlying rationales for the distribution of shared responsibility between the EU and its Member States. I do not evaluate

the normative findings of this thesis from a policy perspective. The purpose of my research is to provide a valuable contribution to a pivotal aspect of the law of international responsibility of international organisations, namely the relationship between the organisation and its member states. I nevertheless conclude this thesis by raising some critical questions which may assist further debate on policy implications of remedial international responsibility explored in this thesis.

4. Sources and research method

This thesis is heavily based on analysis of legal scholarship and the main primary sources:

i. ILC doctrine of the law on international responsibility, including *travaux préparatoires* of the ARSIWA and DARIO projects dating back to 1957;
ii. an extensive body of publicly available international economic dispute-settlement documents, including disputes under the WTO and the ECT regimes where the EU and its Member States have been respondents;
iii. qualitative data based on informal interviews.

I have employed the following research methods in my analysis: deductive (Part I), inductive (Part II) and qualitative semi-structured informal interview as an inter-disciplinary method (Chapter IX).

ILC documents

Part I of this thesis explores the commonly accepted hypothesis that answer to the question of the allocation of international responsibility in the multi-layered structure of the EU is governed by the ILC framework of international responsibility, primarily the rules of attribution. In my analysis I employ a deductive method to test this hypothesis by relying on the ILC framework of international responsibility as well as a large body of international dispute-settlement practice. I have analysed the *travaux préparatoires* of the ILC framework on responsibility for both the ARSIWA and DARIO projects, which include reports of special rapporteurs, ILC reports, reports by the drafting committees and summary records of ILC meetings.

Case-law

Part II of my thesis adopts an inductive approach. Leaving aside the above hypothesis, I delve into international dispute-settlement practice to extrapolate and explain the underlying rationales of the distribution of shared responsibility between the EU and its Member States. Identifying grounds for the distribution of shared responsibility of the EU and its Member States in international dispute-settlement practice was complex. The patterns formulated in this thesis are novel and, to the best of my knowledge, have not been identified in the existing literature. I have analysed 59 WTO disputes which involve the EU. While many cases have not (yet) resulted in panel reports, often reports exceed 500 pages. I have also analysed all publicly available procedural documents of investment arbitration under the ECT which involve the EU. Pinpointing the relevant elements and placing them in a systemic explanation was difficult for two main reasons. Firstly, my findings are counterintuitive in that dispute-settlement bodies do not allocate responsibility on some predetermined structural element. Secondly, applying an inductive method to WTO case-law and investment awards is particularly complicated. Distribution of shared responsibility between the EU and its Member States is rarely contentious and is almost never discussed directly, which made it difficult to locate the relevant elements scattered within hundreds of pages of technical reports and rulings, particularly in WTO law. Importantly, while the title of the case indicates parties to the dispute, it is not conclusive as to who the actual respondents in the dispute are. The exercise often resembled a painstaking task of finding a needle in a haystack. Panels are free to include or exclude persons from its recommendations, irrespective of the title of the dispute. Skimming through the documents was not possible because I was searching for an explanation of the adjudicators' determination of the proper respondent, rather than looking for statements which support/reject some preconceived legal basis. Instead of looking for proof for my hypothesis, I had to formulate a hypothesis by extrapolating invisible general patterns from detailed and technical documents.

Informal interviews

I have employed qualitative semi-structured informal interview as an inter-disciplinary method to collect data for Chapter IX which discusses the question of international responsibility in the context of new-generation FTAs. For this purpose I have received generous funding from the Arts and Humanities Research Council (AHRC) to conduct over 15 hours of semi-structured informal interviews with EU and third-party officials based in the US, Brussels and Geneva who participated in the negotiation of the discussed treaties. My interlocutors, whom I met in autumn 2017, include representatives of the Legal Service of the European Commission, the Directorate General for Trade, the EU Mission in the WTO, the Mission of Canada to the EU

and the United States Trade Representative. These meetings provided insight into the process of negotiation of the dispute-settlement mechanism under new FTAs and the approach to the distribution of shared responsibility of the EU and its Member States adopted by both the EU and its trading partners. I did not conduct my research in the form of formal interviews because the FTAs in question had not yet come into force at the time of research and so the information provided was sensitive.

5. Thesis structure

This thesis is divided into two parts. Part I explores the legal foundations of the international responsibility of the European Union. Building on the normative findings extrapolated in the first part of this thesis, Part II then lays out a theory of remedial international responsibility. Part I consists of chapters II, III and IV. Part II consists of chapters V, VI, VII, VIII and IX.

Chapter II of this thesis explores the ILC framework of international responsibility. The aim of the analysis is to identity rules which govern the allocation of international responsibility in a multi-layered structure where sovereignty is shared between different subjects of international law. I argue that the purpose of both DARIO and ARSIWA is to determine whether a subject of international law *is* internationally responsible. If the question of responsibility arises in the context of a multi-layered structure such as that of the EU, additional questions arise. I argue that the allocation of international responsibility within an international body falls outside the scope of the DARIO framework. Instead, I suggest looking for guidance in the rules of organisation and the international dispute-settlement practice in which these rules operate.

Chapter III looks at the rules of organisation. I conclude that the European Commission's claim that international responsibility follows the internal division of competences does not find support in international dispute-settlement practice. My findings reveal that the EU and its Member States are independently responsible for their joint obligations. My central argument is that while states are free to transfer their powers to an organisation, their international obligations are nontransferable.

The principle of joint responsibility takes me only halfway to solving the question of the international responsibility of the EU. That the EU and its Member States are independently responsible for their joint obligations does not necessarily mean that a breach will result in their joint and several responsibility. **Chapter IV** accordingly addresses the exclusive responsibility of the EU and its Member States. I explore the hypothesis suggested by the European Commission that authorities of the EU act as *de facto* organs of the Union when they implement

EU law. For this purpose I delve into the *travaux préparatoires* of the ILC rules of responsibility to search for the concept of an organ and agent. I suggest that while the ILC adopts a broad reading of these terms, international dispute-settlement practice does not support the European Commission's claim that conduct of Member States' organs is attributed to the EU when they carry out EU policies.

Part I thus concludes that: (i) the ILC framework does not govern the allocation of responsibility in the multi-layered structure of the EU and (ii) that the EU and its Member States are independently responsible for their joint obligations and (iii) there is no evidence which supports attribution of conduct of Member States' organs to the EU. Accordingly, I reject the hypothesis that the ILC rules of attribution of conduct (or breach in case of derived responsibility) allocate responsibility to the EU when a violation occurs in the areas of EU competence.

Having set aside the above hypothesis and using an inductive method, Part II examines international dispute-settlement practice in order to identify the basis for the allocation of exclusive responsibility within the EU. I approach the case-law, primarily that in the fields of trade and investment, with the following enquiry: is attribution of conduct or breach at all relevant to the determination of responsibility in international economic law and if it is not, what is relevant? My answer results in the formulation of what I call the theory of remedial international responsibility.

Chapter V explores the nature of international economic obligations. I suggest that remedies in international economic regimes have a restorative rather than corrective purpose. I argue that attribution of breach may not be relevant, or that relevant, in the international economic law context. I posit that what international courts and tribunals ask is not *who is responsible for a breach* but rather *who is best placed to bear responsibility*. In international economic law shared responsibility typically raises the question of the proper respondent(s).

Chapter VI then examines how tribunals determine the proper respondent in the trade and investment regimes. I focus on WTO law and the ECT regime because their mixed form provides a relevant context in which to explore responsibility of the EU and its Member States for joint obligations. In light of an extensive case-law analysis, I extrapolate patterns in the tribunals' reasoning. I argue that WTO dispute-settlement employs what I call 'the positive solution test' to identify the proper respondent. Arbitral tribunals operating under the ECT, on the other hand, allocate responsibility to the subject which is the proximate cause of harm.

The aim of **Chapter VII** is to explain the patterns identified in Chapter VI. In particular, I look into the characteristics of the WTO and the ECT treaty regimes to explain why the EU is the optimal respondent in trade disputes, whereas Member States are exclusive respondents in investment arbitration.

Chapter VIII adds to Chapter VII by examining the special WTO cases of multiple respondents. I argue that Member States act as co-respondents when their restorative actions are necessary for compliance purposes. That depends on the nature and scope of the claim which, in turn, defines the remedy.

Chapter IX attempts to apply the normative findings of this thesis to new-generation FTAs concluded by the EU, primarily to CETA. My analysis is based on the data gathered during the discussions with officials involved in the negotiation of these agreements. I explain how the new FTAs establish primacy of procedural rules which place the EU at the forefront of dispute resolution. Finally, in my conclusions, I propose some critical questions with the aim of opening further debate on the policy implications of remedial international responsibility.

In this thesis I refer to the European Union as the EU or the Union. Where appropriate I also refer to the European Communities or the EC.

PART I – THE LEGAL FOUNDATIONS OF THE INTERNATIONAL RESPONSIBILITY OF THE EUROPEAN UNION

It is intuitive to start the analysis of the allocation of international responsibility within the EU with the ILC's draft articles on rules of international responsibility. The DARIO framework governs attribution of conduct and breach to an international organization and determines whether an organization is responsible for a violation of its international obligations. However, attempts to identify the right legal basis for the delimitation of international responsibility between an organization and its member states in the ILC framework lead to an impasse. Whichever angle one tries to adopt in the analysis, failure is the inevitable outcome of every attempt to solve this legal Rubik's Cube.

The reason for an impasse is simple and yet identifying it proved to be a complex task. This thesis reaches a counterintuitive but highly significant conclusion regarding the governing law for the delimitation of responsibility between the EU and its Member States. Re-reviewing and re-analysing multiple times the ILC rules and their commentaries and, importantly, the extensive body of *travaux préparatoires* of both DARIO and ARSIWA dating back as early as 1957, led me to the conclusion that the ILC framework does not govern this question. While DARIO is often criticised for being insufficiently comprehensive to address the allocation of responsibility between various types of organizations and their member states, this chapter argues that the allocation of responsibility falls outside the scope of the ILC framework.

The purpose of Chapter II is to explain the reasoning behind this conclusion. I suggest that the purpose of both DARIO and ARSIWA is to determine whether a subject of international law *is* internationally responsible. If the question of responsibility arises in the context of a multi-layered structure where sovereignty is shared among separate subjects of international law, additional questions arise. As I mentioned in the introduction, by 'shared sovereignty' I mean a governance arrangement, such as that of the EU where competences are implemented through Member States' authorities. The 'interwovennes' of international organizations and their member states begs the question of who bears responsibility when institutional activity offends international law.[26] I conclude Chapter II with a suggestion to look at the rules of organization and how those rules operate in international dispute-settlement practice.

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[26] Ana Sofia Barros, Cedric Ryngaert and Jan Wouters, 'Member States, International Organizations and International Responsibility' in Ana Sofia Barros, Cedric Ryngaert and Jan Wouters (eds), *International organizations and member state responsibility : critical perspectives* (Brill Nijhoff 2017), 1.

Chapter III will then explore the EU's approach to the delimitation of international responsibility. I will suggest that the European Commission's claim for competence-based responsibility does not find support in international dispute-settlement practice. Instead, I will argue that both the EU and its Member States are independently responsible for their joint obligations. The main argument of Chapter III is that while states can transfer their powers to an international body, their international obligations are non-transferable. I will substantiate my argument with reference to an extensive case-law.

A finding that the EU and its Member States are independently responsible for their joint obligations provides only a half-way solution to the question of the international responsibility of the EU. That responsibility of both the EU and its Member States *can* be invoked does not tell us whether the EU, its Member States, or both, *will* be responsible in a given situation. Chapter IV thus explores the concept of an organ and agent with the aim of identifying exclusive responsibility of the EU and its members. I argue that the EU's claim that Member States act as *de facto* organs of the EU when they implement Union law does not find support in international dispute-settlement practice. I conclude Part I of this thesis with a suggestion that the answer may lie outside the rules of attribution of conduct (or breach, in case of derived responsibility). I introduce my hypothesis that allocation of responsibility may instead be remedy-based. On the basis of an extensive analysis of international trade and investment disputes and economic treaty regimes, Part II explains my thesis of remedial international responsibility.

Before I proceed to Chapter II, I should like to make a brief note regarding the terminology employed in this thesis. A number of verbs can be used to refer to the act of dividing responsibility for breach of joint obligations in the context of a multi-layered structure of an international body, such as allocation, distribution, delimitation, apportionment, or attribution. I have not identified a normative difference in meaning among these verbs, neither in the relevant legal literature, nor in the practice of international courts and tribunals, nor in the ILC's *travaux préparatoires*. Similarly, Nollkaemper and Jacobs suggest that the term 'distribution', on a basic level, refers to the 'allocation' or 'division' of something between multiple persons or entities. According to them, 'distribution' addressed the normative foundations for the actual choices that are made in terms of thinking of the allocation of responsibility among several wrongdoing entities.[27] Since differentiating these terms does not seem to add value, I will use

[27] André Nollkaemper and Dov Jacobs, 'Introduction: Mapping the Normative Framework for the Distribution of Shared Responsibility' in André Nollkaemper and Dov Jacobs (eds), *Distribution of Responsibilites in International Law* (CUP 2015) 2.

them interchangeably. I will not, however, employ the term 'attribution' to refer to the allocation of responsibility in a multi-layered structure of an organization in order to avoid confusion with a common usage of this word in the ILC's framework to refer to an act of prescribing conduct (or breach) to a legal person as an element of responsibility.[28]

[28] DARIO Art 4 and ARSIWA Art 2.

CHAPTER II – THE GOVERNING LAW

1. Introduction

Various international organizations and states have critised the ILC's DARIO project. A first central and recurring theme in the comments to the draft articles was that DARIO is insufficient to cater to the many structural and functional differences of various international organizations as it does not take into consideration their special orders.[29] A second main critique of the DARIO framework concerns its lack of clear general rules for 'member' responsibility, i.e. responsibility arising out of membership in an international organization.[30] There is an ongoing search for principles that govern the allocation of responsibility between an international organization and its member states. Third, many suggest that DARIO drafters followed ARSIWA too closely which resulted in the creation of rules for international organizations which were originally tailored for another subject of international law.[31] Because of the essential differences between international organizations and states, some members of the ILC were skeptical about overreliance on ARSIWA framework as a template for DARIO.[32]

This thesis does not aim at providing an evaluation of the ILC's rules of responsibility of international organizations *in toto*. The present chapter's more limited purpose is to address one central, contested issue – namely what law governs the complex question of delimitation of responsibility in a multi-layered structure where sovereignty is shared among separate legal entities. While the purpose of the current discussion is to shed light on the EU's international responsibility, findings of this chapter are relevant to other international organizations as well.

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[29] For example, for remarks of the European Commission, ILO, IMF and for the joint submission of other organizations, see Comments and Observations Received from International Organizations, A/CN.4/637 (ILC 2011), para 26. Some organizations suggested that the draft articles are tailored specifically to the UN and are inapt to address activities other than peacekeeping, see comments of the UNESCO, Comments and Observations Received from International Organizations, A/CN.4/568 (ILC 2006), 128; for comments of the IMF see Comments and Observations Received from International Organizations, A/CN.4/582 (ILC 2007), 20. Gaja himself noted, that "the main difficulty in reaching a satisfactory definition of international organizations is related to the great variety that characterizes organizations that are currently considered to be "international". One aspect of this variety concerns their membership", see 'First Report on Responsibility of International Organizations, by Mr. Giorgio Gaja, Special Rapporteur' (ILC 2003), 109, para 14.

[30] Barros, Ryngaert and Wouters 2017, 1.

[31] Some authors emphasize a lack of practice of international organizations, see Vincent-Joël Proulx, 'An Uneasy Transition? Linkages between the Law of State Responsibility and the Law Governing the Responsibility of International Organizations' in Maurizio Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Martinus N, Martinus Nijhoff Publishers 2013).; José Manuel Cortés Martín, 'European Exceptionalism in International Law? The European Union and the System of International Responsibility' in Maurizio Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff Publishers 2013).

[32] For example, see comments by Mr Matheson, Summary Record of the 2800th Meeting, 69, para 17.

Section 2 will define the concept of 'act of an organization'. Section 3 will analyse the subject-matter of the ILC's draft rules of responsibility of an international body in order to assess whether these rules govern the delimitation of responsibility according to the internal structure of the organization. I will suggest that the division of powers and an institutional structure of an organization – questions central to the concept of an act of an organization – fall outside the scope of the DARIO subject-matter. In Section 4 I will suggest that the rules of the organization should be taken into consideration for the distribution of responsibility among the EU and its Member States.

2. The ILC framework – (in)sufficient?

The crux of the debate as to whether DARIO takes sufficient regard of the differences of various international organizations lies in the essential difference between states and international organizations. While states are unitary subjects of international law with general competences, international organizations are not. Remarks by ILC member Pambou-Tchivounda on the DARIO project provide one of the many examples of this approach. According to him, international organizations differ from states in the manner in which they were established, their areas of competence and the degree of their powers, but especially by virtue of their means of implementing their policies as set out in the rules of organization.[33] As I shall explain in the following section, these aspects are important to the question of international responsibility, in particular to the application of the rules of attribution.

Responsibility of states is governed by the principle of unity which requires that actions or omissions of every individual or collective member of the state machinery be treated in the same way as actions or omissions of the state at the international level.[34] According to Crawford, the Special Rapporteur for ARSIWA, separate personality of territorial units does not prevent their actions from being attributed to a state.[35] Accordingly, ARSIWA is not preoccupied with determining the exact position of an organ in a state's institutional structure. Crawford's predecessor Ago considered the discussions on the exact delimitation of powers of state organs to be pointless, because irrespective of the conclusion, the conduct will still be attributed to the state.[36] States possess general capacity and so conduct which can be

[33] Summary Record of the 2801st Meeting, 75, para 21.
[34] First Report on State Responsibility, by Mr. James Crawford, Special Rapporteur (ILC 1998), 38, para 188.
[35] Crawford First Report, 38, para 188.
[36] Third Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur, the Internationally Wrongful Act of the State, Source of International Responsibility (ILC 1971), para 142.

characterized as governmental will in most cases be treated as state conduct. In practice, what becomes decisive is not the title or place of the organ in the state's institutional structure but whether or not that conduct breached one of the state's obligations.[37]

Since ARSIWA is not concerned with the internal institutional structures of a state, the question whether an individual in question is in fact an organ of the state becomes less important. Commonly, attribution to the state is established whenever the conduct in question breaches one of the state's international obligations. Of course, an individual who carried out the conduct in question must be part of the state's machinery – or otherwise related to it as discussed in other rules of attribution – but that will generally be the case. The position of such organ in the distribution of powers and in the internal hierarchy is irrelevant. Ago noted that since the state, as a legal entity, is not physically capable of conduct, it is obvious that all that can be imputed to a state is the act or omission of an individual, whatever its composition may be.[38]

The context when dealing with international organizations is essentially different. Amerasinghe rightly notes that states generally have international responsibility because their duties flow from the control they have over territory, airspace, persons or other, whereas international organizations generally have no control of such elements.[39] The question with respect to international organizations is not only whether an individual has acted in a governmental capacity but also in whose capacity: that of an organization or its member state. To give a fictional example, let us assume that the EU and its member state X have both signed an international treaty obliging not to discriminate against foreign workers. The EU adopts a directive which calls on Member States to implement legislation regarding retirement plans for foreign workers and provides Member States with alternatives, some of which are discriminatory. The Ministry of Social Affairs of the state X adopts the discriminatory policy under the directive. Multiple complex questions arise: does the Ministry, in implementing legislation of the EU, act as an organ or agent of the state X or of the EU? If the regulation of retirement policies is a competence of the EU, can the implementation of the discriminatory laws be attributed to the state X? Would the reply to this question change if one of the alternatives provided in the directive did not lead to a breach of international obligations but the state X nevertheless chose to adopt the discriminatory option? What if the competence is

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[37] Ago Third Report, para 161. Ago suggested that "The sole criterion in this matter is that the organ must be engaged, through its functions in an activity in which it can enter the field of an international obligation of the State, and possibly obligation by its conduct".

[38] 'Second Report on State Responsibility, by Roberto Ago, Special Rapporteur - the Origin International Responsibility, A/CN.4/233', para 37.

[39] CF Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn, CUP), 239.

shared? If the Ministry exceeded the competence, would it amount to an *ultra vires* act of an organization or turn into a competence of Member States? If Member States have transferred their competence in social affairs to the EU, does state X have an international obligation under the treaty or does the obligation belong to the EU alone? Who is to make reparation for violations of international obligations? Who is to act as respondent in a dispute?

These and other questions, which commonly do not arise when dealing state responsibility, dominate when faced with responsibility of international organizations. I shall return to these questions in Part II of this thesis. The following sections will first explore whether the ILC rules of international responsibility govern the above enquiries. I will argue that allocation of international responsibility falls outside the scope of the ILC framework.

3. Attribution v allocation of international responsibility

DARIO is based on ARSIWA because the latter codify general rules of international responsibility. The rationale of Special Rapporteur Gaja was to duplicate whatever aspect that did not call for a different regulation. However, as was suggested above, states and international organizations are essentially different subjects of international law. In addition, there is a high degree of variation between international organizations themselves. The *travaux préparatoires* to DARIO reveal that both international organizations and governments were doubtful that one, almost identical set of rules will effectively apply to all of these subjects.

The debate regarding the (in)sufficiency of the DARIO rules stem from the notion that draft articles govern, or should govern, the allocation of responsibility between international organizations and their member states. There is an expectation that rules of international responsibility must solve the conundrum of dividing responsibility in situations when the conduct in question is somehow related to membership in an organization, a puzzle which has so far remained unresolved. Some organizations have thus voiced a need for a more nuanced approach to attribution which would reflect the complexity of their institutional set-up. For example, International Criminal Police Organization (INTERPOL) noted that the draft rules should qualify the double-hatted functioning of the national central bureaus which, even though they are generally classified as organs or at least agents of INTERPOL, in some cases act as

local law enforcement authorities and thus in such situations do not constitute an act of INTERPOL.[40]

I question this expectation by addressing two points. First, the purpose and subject-matter of the rules of attribution is to determine whether an entity *is* internationally responsible. This is different from 'allocation' of responsibility according to the internal structure of an international body. Allocating responsibility is not about determining whether a subject of international law *is* responsible, but rather to establish *which* subject is responsible. Second, one should question whether the ILC framework governs the allocation of international responsibility between an international organization and its member state in the first place. If, for example, a court or tribunal is faced with a case of environmental damage and needs to determine whether an international organization or its member state, or both, bear responsibility, it would apply the ILC rules of international responsibility to determine whether, first, there exists responsibility of the member state and, second, whether there exists responsibility of the organization. Responsibility is not allocated to the subjects of international law but rather its existence is determined for each subject individually. If elements of international responsibility are present with respect to both, shared responsibility is established.

That does not mean, however, that allocation of responsibility is irrelevant – in order to determine whether X *is* internationally responsible, one first needs to identify X. All that I am suggesting here is that this latter enquiry falls outside the scope of the ILC draft articles. I will explain this point further by addressing the purpose and subject-matter of the ILC rules of attribution.

3.1 The purpose and subject-matter of the rules of attribution

For international responsibility to arise two main elements must be established:[41] (i) there must be an attribution of the wrongful conduct to a state or international organization and (ii) that conduct must constitute a breach of an international obligation of that state or international organization.[42] International responsibility in some cases can be indirect (derived), i.e. arise without attribution of conduct but on the basis of attribution of breach, for example if a state or

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[40] Comments and Observations Received from Governments and International Organizations, A/CN.4/556 (ILC 2005), 38.
[41] DARIO Art 4, ARSIWA Art 2.
[42] Crawford preferred using the 'attribution of conduct to the state under international law' instead of a less informative 'act of the state', see Crawford First Report, 147. During the early stages of ARSIWA project Ago used the word imputation to refer to what now is 'attribution' of conduct.

international organization aids or assists (Article 14), directs and controls (Article 15) or coerces (Article 16) another entity to commit an internationally wrongful act.

Except in cases of indirect responsibility, wrongful conduct must be attributed to a subject of international law for responsibility to arise. The meaning of the word *attribution*, both in legal and common dictionaries, is an act of ascribing a characteristic or quality.[43] If international legal person has a characteristic provided in the rules of attribution of conduct, the conduct in question will be considered as its own conduct. Thus, the purpose of the rules of attribution is to determine the existence of responsibility of a subject of international law, not to allocate it among several subjects. The process of attribution of conduct (or breach) does not determine the question of allocation of responsibility. I will now address the two points regarding the application of the rules of attribution which prove this statement.

3.1.1 Rules of attribution apply only to separate legal persons

International rules of responsibility apply only with respect to responsibility of subjects of international law with separate legal personality.[44] That is undisputed as it flows logically from the conditions for the existence of international responsibility. If for international responsibility to arise there needs to be a breach by an entity of its international obligation, that entity must be a separate legal person. That is so, because only subjects of international law may possess international obligations of their own.[45] Also, if rules of attribution only deal with the consequences of conduct carried out by the organs of such entities, it must be that these rules only deal with separate legal persons – a non-person can have no organs in the sense of the draft articles.[46] DARIO expressly notes this requirement in Article 2 (a) in its definition of an international organization.

States are generally separate legal persons and it has been recognized that international organizations can also have this status.[47] However, it is not sufficient for an international

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[43] For example, Bryan Garner, *A Dictionary of Modern Legal Usage* (2nd edn, OUP) defines attribution as "the act or an instance of ascribing a characteristic or quality". Another definition of the verb 'attribute' is to 'accredit with, assign, consider as belonging to', see William Burton, *Burtons Legal Thesaurus 5th Edition: Over 10,000 Synonyms, Terms, and Expressions Specifically Related to the Legal Profession* (5th edn, McGraw-Hill Education 2013).
[44] Gaja First Report, para 15.
[45] Gaja First Report, para 15.
[46] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, commentary to Art 57, para 2.
[47] *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, para 179.

organisation to simply *have* a status of a separate legal person listed in its constituent documents. What is important is that an international organization, in the exercise of the functions transferred to it by the constituent documents, may be considered as separate from its member states.[48] Otherwise its actions might be considered as actions carried out by the organs of the member states and would be attributed to the latter. In his First Report to the DARIO project Special Rapporteur Gaja emphasized this point by noting that "*[f]or an organization to be held potentially responsible it should not only have legal personality and thus some obligation of its own under international law. What is required is also that in the exercise of the relevant functions the organization may be considered as a separate legal entity from its members and that thus the exercise of these functions must be attributed to the organization itself*".[49] Existence of international personality is a question of fact – an international organization must be sufficiently independent from its member states so that it cannot be regarded as acting as an organ common to the members.[50]

Accordingly, for intergovernmental organizations like the EU, it is not enough to point to the Article 47 of the Treaty on European Union (TEU) which establishes its legal personality. A further enquiry into whether responsibility in a given situation is allocated to the 'legal person Member State' or the 'legal person the EU' is necessary. The same must be true of other states members of international organizations. These questions relate to the different positions of states in relation to their organizations.[51] I will address these questions in Chapter III. Suffice it to say now, both an international organization and its member states may have international personality, but they will each have capacity to act only in limited spheres – member states transfer to international organization only so much capacity and what they have transferred, they have lost.

3.1.2 Rules of attribution do not govern allocation of responsibility

The second point to be made relates to the subject-matter of the rules of attribution. According to Anzilotti, attribution of an act to a state is a process of linking an action or omission to its

[48] Gaja First Report, para 27.
[49] Gaja First Report, 15.
[50] Gaja First Report, para 19.
[51] Wessel and Dekker suggest to explore the question not through the lens of capacity, but through the idea that states may have different positions and identities in relation to its international organization, see Wessel and Dekker 2017.

author.[52] This exercise is necessarily a legal operation that has nothing in common with the link of natural causality because states are fictional categories which act through individuals.[53] Imputation is a process of determining what individual conduct can be attributed to the state for the purposes of responsibility and in what conditions such conduct must have taken place in order for that attribution to be possible.[54] An act so attributed is an 'act of a state'. The same reasoning applies to international organizations.

As a general rule, what is attributed to a state (and an international organization) are the acts of persons or groups of persons who form part of its 'organization', in other words acts of its organs or agents.[55] Acts of various types of individuals who are not part of the official state structure can also lead to attribution to the state, such as persons exercising elements of governmental authority (ARSIWA Article 5) and organs placed at the disposal of the state by another state or international organization (ARSIWA Article 6).

Rules of attribution do not tell us '*whether* an individual is an organ of the state' (or an international organization) but rather deal with the consequences '*if* that individual is an organ' by stating that such conduct is then attributed to the state for the purposes of international responsibility.

The implication of these two points is that the subject-matter of the rules of attribution is unrelated to the process of allocation of international responsibility between an organization and its member states. The ILC rules do not touch upon the delimitation of powers and institutional structures of an organization. This latter task must precede the application of the ILC framework. In order to apply the rules of attribution to determine whether an organization *is* in fact responsible in a given situation, one must first delimit the sovereignty of that organization from that of its member states in the exercise of their institutional activities.

The conclusion that ILC rules do not govern allocation of responsibility between an international organization and its member states begs a closer look at what exactly is allocation of responsibility.

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[52] Ago Second Report, para 37. Anzilotti also stressed that the meaning given to the term 'imputability' in international law by no means corresponds to that sometimes attached to it in municipal law, when imputability denotes the state of mind of the agent as a basis for responsibility, see Ago Second Report, para 37.
[53] Ago Second Report, para 38.
[54] Ago Third Report, para 58.
[55] Ago Third Report, para 107. DARIO Art 2 defines 'organ' as any person or entity which has that status in accordance with the rules of the organization. The draft articles define 'agent' as an official or other person or entity, other than an organ, who is charged by the organization with the carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts.

3.2 The notion of allocation of international responsibility

If wrongful conduct can only be attributed to separate legal persons, it must be true that at the time of attribution of conduct or breach a member state and an international organization are already institutionally detached from one another. That is, their conduct is regarded as that of separate entities as if they had no organizational ties (in those types of membership where such ties exist, as is the case in the EU). It seems then that responsibility must somehow be delimited between these interrelated subjects of international law. The purpose of the discussion below is to question whether such basis exists under international law or whether, instead, the governing law sits outside international law.

First, there is no general rule of international law which provides for the international responsibility of a state for the obligations of an international organization solely based on its membership in the organization.[56] The Commentary to DARIO Article 61 clearly states that membership does not as such entail for member states international responsibility when the organization commits an internationally wrongful act. The comments provided by various international organizations to the draft articles also reveal that organizations themselves do not consider member states to be responsible for the wrongful conduct of international organizations. According to the International Labour Organization (ILO), for example, while constituent instruments of certain international organizations do make provisions for the shared responsibility between an organization and its member states, this is not the case of the majority of them and there is no practice to show the existence of such concurrent or subsidiary responsibility.[57]

Other organizations were of a similar opinion.[58] In Chapter 3 of its 2006 report to the General Assembly, the ILC asked states whether members of an international organization that are not responsible for an internationally wrongful act have an obligation to provide compensation to the injured party, should the organization not be in a position to do so.[59] With only several

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[56] Rosalyn Higgins, 'The Legal Consequences for Member States of the Non-Fulfilment by International Organizations of Their Obligations toward Third Parties', *Yearbook of the Institute of International Law (Paris), part I (Session of Lisbon, Preparatory works)* (1995), 445: "there is no general rule of international law whereby States members are, and solely to their membership, liable concurrently or subsidiarily, for the obligations of an international organization of which they are members".

[57] Comments by ILO, see 'Comments and Observations Received from International Organizations, A/CN.4/568', 148.

[58] For example, UNESCO suggested that there is no member state responsibility as such, unless a specific provision exists, Comments A/CN.4/568, 144.

[59] Yearbook of International Law Commission, A/CN.4/SER.A/2006/Add.l (Part 2) (2006), 21, para 28 (a).

exceptions, the great majority of states responded negatively.[60] Of course, as noted by the ILO and other organizations, special provisions regarding member state liability can be envisaged in the constituent instruments and treaties, but that would constitute *lex specialis*.

Like with direct responsibility based on attribution of conduct, there is no general rule of international responsibility which would base indirect responsibility on membership in an organization. According to Gaja, it would be tantamount to denying separate personality of an international organization if responsibility for its conduct would be attributed to a member state because of the roles that a member state may have within the organs of an international organization.[61]

For indirect responsibility to arise, a state must act as a legal person that is separate from the organization.[62] As Gaja noted in his Fourth Report on the DARIO project, the state that aids or assists, or directs and controls, or coerces an international organization may or may not be a member state as long as it acts as a separate legal person.[63] For example, when a member state donates money to an international organization for technical assistance, indirect responsibility could arise in case that this money is used to carry out a wrongful conduct. For responsibility to arise, a state has to be a member of an organization because only a member can donate funds for technical assistance. However, responsibility, if to arise, in this case would be based on the wrongfulness of a donation, not on its membership in the organization. The wrongful acts of a state and an international organization in this case are different. As noted by Crawford, despite the nature of the coercion as a form of an imposition of will on the part of the coercing state, nonetheless the act of the coerced state remains its own act – an act of coercing and an act committed by a coerced state against a third state are not identical.[64]

DARIO provides for two cases in which a state's responsibility for acts of an international organization is expressly related to its membership. Article 62 states that a state member of an international organization is responsible for the wrongful conduct of that organization if it has

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[60] Gaja Fifth Report, para 27.
[61] Fourth Report on Responsibility of International Organizations, by Mr. Giorgio Gaja, Special Rapporteur (ILC 2006), para 67.
[62] Gaja Fourth Report, para 62.

[64] Eighth Report on State Responsibility by Mr. Roberto Ago, Special Rapporteur - the Internationally Wrongful Act of the State, Source of International Responsibility (1979) A/CN.4/318 and Add.1 to 4, para 205. Ago was of a somewhat different position - he suggested that there is no parallel responsibility. According to Ago, indirect responsibility assumed by one state for an internationally wrongful act of another state replaces the responsibility of that other state and is not additional to it, see 'Eighth Report on State Responsibility by Mr. Roberto Ago, Special Rapporteur - the Internationally Wrongful Act of the State, Source of International Responsibility', para 45.

accepted that responsibility towards a third party or it has led the injured party to rely on its responsibility.[65] Such responsibility is subsidiary. But here again, responsibility would arise not based on membership, but because of the state's own conduct towards the injured party. No allocation of responsibility takes place – an organization is still responsible for the wrongful conduct in question and a state carries a separate subsidiary responsibility for the conduct of an organization but that responsibility is based on the state's own acts.

A second case is Article 61 which addresses circumvention of international obligations of a state member of an organization.[66] A member state incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of a state's international obligations, it circumvents that obligation by causing an organization to commit an act that, if committed by a state, would have constituted a breach of the obligation. Similar to Article 62, a member state in this case incurs responsibility not because of its membership, but because of its own actions – the taking of disadvantage of a separate legal personality of an organization to avoid compliance with its own obligation.[67]

It is important to distinguish between the secondary rules of responsibility under the draft articles and international obligations set out in the primary rules.[68] Primary rules, which are not covered by DARIO, can and do state obligations for members of international organizations. That, however, is different from attribution of direct or indirect responsibility. To provide a simple example, let us assume that under the rules of organization X its member state Y has an obligation to provide technical assistance to that organization.[69] If the state Y fails to provide assistance its responsibility will be invoked but not because state Y is a member of organization X but because the breach of the primary rule will be attributed to it.[70]

I thus conclude that there is no general rule of international responsibility under which responsibility would arise solely on the basis of membership in an international organization. Under the general rules of international responsibility codified by the ILC a member state can

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[65] Assumption of responsibility as the basis for indirect responsibility was discussed during the early stages of the ARSIWA project, see Ago Eighth Report, para 44. According to Ago, a state is free to assume responsibility for the conduct of another state which serves as a kind of treaty guarantee towards third states.
[66] Circumvention by a member state will be addressed in Ch III.
[67] Gaja Fourth Report, para 117.
[68] Ago Second Report, para 7.
[69] There is a debate in the ILC whether breach of obligations under the rules of organization should be covered by the draft articles. It is clear from the comments of the international organizations that the status of the rules of organization is controversial, see Comments A/CN.4/568'. It has been agreed that the status of the rules of organization (internal as opposed to international) depends on the rules themselves, see 'Third Report on Responsibility of International Organizations, by Mr. Giorgio Gaja, Special Rapporteur', paras 18-24.
[70] For more discussion on this, see Gaja Second Report, paras 15-18.

be held indirectly responsible for the conduct of an international organization but in each case its responsibility would arise not because it is a member of an organization but because of its own conduct.

4. The rules of organization

The fact that DARIO does not govern the delimitation of powers and institutional structures within the internal order of an international organization, does not mean, however, that this question is moot.[71] In the context of international organizations where separate legal persons exercise shared sovereignty in a common institutional structure, some other rules outside the draft articles must trigger the application of the ILC framework.

It can be seen from the comments to DARIO that there is a general consensus among governments and international organizations that general rules of attribution should provide reference to the rules of organization.[72] Representatives of the Democratic Republic of the Congo, for example, noted the principle of specialty governing international organizations and claimed the need for reference to the rules of organizations.[73] The EC in turn suggested that the rules of organization define the powers and the scope of the 'organs' or 'institutions' of an international organization and of its officials or persons acting on its behalf.[74] According to the EC, reference to these rules are necessary for ensuring that an international organization, as a subject of international law, shall be held responsible for the conduct of all its organs, instrumentalities and officials which form part of the organization and act in that capacity.[75] The EC affirmed that the rules of organization are important for the attribution of a specific conduct to the international organization.[76]

Gaja also recognized the importance of the rules of organization. According to him, institutional rules are likely to affect, to a certain extent, the application of the rules of international

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[71] In its comments to DARIO, Italy provides a helpful account of domestic case-law which reveals the problem of identifying the organs of an international organization, see Comments and Observations Received from Governments, A/CN.4/547 (ILC 2004), para 25. In ft 20 Italy referred to *Cristiani v. Istituto italolatino-americano*, the Court of Cassation held that the organs of an international organization which is endowed with international legal personality are to be distinguished for legal purposes from the organs of member states, and at the same time they cannot be equated with joint organs of the member states.

[72] Comments and Observations Received from International Organizations, A/CN.4/545 (ILC 2004), paras 26-27, the International Atomic Agency, the IMF, the UN Secretariat, the WHO and other organizations unanimously suggested that the general rules of attribution should contain a reference to the rules of the organization.

[73] Comments A/CN.4/556, 46.

[74] Comments by the EC, see Commentsions A/CN.4/545, 26, para 1.

[75] See EC's comments, Comments A/CN.4/545, 26, para 1.

[76] Comments A/CN.4/545, 26, para 1.

responsibility in the relations between an international organization and its members.[77] Paragraph 2 of the general rule of attribution under Article 6 expressly states that the rules of organization apply in the determination of the functions of its organs and agents. In addition, Article 62 of the draft articles states that the applicable rules of international law continue to govern questions concerning the responsibility of an international organization or a state for an internationally wrongful act to the extent that they are not regulated by these draft articles. Rules of organization for the purposes of the application of the rules of attribution are to be defined in the broad sense, including practice of the organization.[78]

To briefly note for the purpose of clarity, there is a some confusion among organizations regarding the status of the rules of organization in the context of international responsibility. A majority of international organizations considers that the rules of organizations are *lex specialis* in relation to the ILC draft articles.[79] For example, the International Monetary Fund (IMF) remarked that the rules of organizations are *lex specialis* under international law in determining obligations of international organizations.[80]

Two misunderstandings appear in this approach. First, as has been stressed elsewhere in this chapter, the ILC draft articles are secondary norms whereas obligations are governed by primary rules.[81] Second, the ILC rules do not govern delimitation of powers within the organization. Therefore, in both cases rules of organization are not *lex specialis* to the draft articles because they govern questions falling outside the subject-matter of DARIO. This is of course not to say that the rules of organizations cannot be *lex specialis* in relation to DARIO. The rules of organization would gain special status in relation to the draft articles if they were to set out special rules of international responsibility, for example limited responsibility for a wrongful act carried out by the organs of the member states to the share of financial contribution.[82]

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[77] Gaja Seventh Report, para 123.

[78] For example, according to the WHO, the role of the practice of the organization in the delimitation or specification of attribution cannot be ignored and should be given forma status through inclusion in the concept of 'rules of the organization', see Comments A/CN.4/545, 27. The EC suggested that the concept of rules of organization should encompass court rulings, for example the CJEU's case-law which offers guidelines on the apportionment of responsibility as between the EC and its Member States, see Comments A/CN.4/545', 27, para 3.

[79] Comments A/CN.4/637, 9.

[80] Comments by the IMF, see Comments A/CN.4/582, 21.

[81] This point has been acknowledged by the World Bank, which noted that the draft articles should expressly state that they do not cover the content of obligations which is governed by the primary rules, see Comments A/CN.4/637', 14, paras 1-2.

[82] For example, under the IMF rules, member states' responsibility to third parties is limited to the amount of the financial contribution or guarantees of that member states, similarly to corporate shareholders' liability, see Comments A/CN.4/545, 24 para 3.

I leave aside the question of whether internal allocation of responsibility for joint international obligations should have been governed by the ILC's draft articles.[83] My conclusion is limited, namely that the ILC framework does not govern the delimitation of international responsibility within the EU. I suggest to look for answers in the rules of organization and dispute-settlement practice in which these rules are applied.[84]

5. Conclusion

A closer look at the rules of attribution under the draft articles reveals, that the purpose of the ILC framework is to determine whether a subject of international law *is* responsible for a violation of an international obligation. These rules do not regulate allocation of international responsibility between an organization and its member states. In fact, as the present chapter reveals, there are no general rules of responsibility which call for a direct or indirect responsibility based solely on a membership in an international body.

I suggest to examine whether rules of organization determine allocation of responsibility. I also note that rules of organization are *res inter alios acta* and it is therefore necessary to also examine how they are interpreted by international courts and tribunals.

The following Chapter III will thus look into the EU rules of organization for the delimitation of international responsibility. I will explain the European Commission's argument for competence-based responsibility. I will then provide an in-depth analysis of dispute-settlement practice to test whether and how these rules are applied in practice in relations to third parties.

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[83] Comments A/CN.4/568, 127. For the position of the EU, see Comments A/CN.4/556, p 43.
[84] For example, as noted by the North Atlantic Treaty Organization, it may be that the fundamental rule governing the functioning of the organization – that of consensus decision-making – is to be found neither in the treaties establishing NATO nor in any other formal rules and is rather the result of the practice of the organization, Comments DARIO Comments A/CN.4/637, 40.

CHAPTER III – INDEPENDENT RESPONSIBILITY OF THE EU AND ITS MEMBER STATES

1. Introduction

In the previous chapter, I took a closer look at the rules of attribution under the DARIO framework. I concluded that the questions of the allocation of responsibility within an international body fall outside the scope of the ILC framework.

The present chapter will explore the EU rules for allocation of international responsibility between the EU and its Member States. In Section 2 I will address the competence-based approach to responsibility under EU law. I will then argue in Section 3 that international dispute-settlement practice does not support this position. It is so, because competence-based responsibility calls for the transfer of international obligations within an internal legal order, which is not recognized under international law. Organizations and their members are individually responsible for their own conduct. The rule of non-circumvention prevents states and organizations from arbitrarily transferring their joint obligations in accordance with their internal division of powers.

2. Competence-based international responsibility

The functioning of the EU is based on the principle of conferral in accordance to which the Union is to act within the limits of the powers conferred upon it.[85] The Treaty of Lisbon introduced categories of competences, listing areas of exclusive EU competence which prevent Member States' action (e.g. trade),[86] competences shared with Member States (e.g. environment and transport),[87] and supporting, coordinating and supplementing competences (e.g. culture and tourism). Article 216 of the Treaty on the Functioning of the European Union (TFEU) establishes the power of the EU to conclude international agreements. Article 3(2) provides that Union enjoys treaty making powers not only with respect to expressly listed exclusive competences, but it also has implied exclusive treaty-making powers.[88] An in-depth analysis of the confusing and intertwined web of EU/Member States competences is beyond

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[85] *Opinion 2/94 Accession of the Community to the European Human Rights Convention* [1996] ECR I-1759, para 23.
[86] Art 3 TFEU.
[87] Art 4 TFEU.
[88] Art 3(2) TFEU codifies the ECJ's case-law on implied exclusive treaty-making powers. The so-called AETR doctrine establishes implied competences if the conclusion of the agreement in question 'may affect common rules or alter their scope'.

the scope of this thesis. Suffice it to say that Delgado Casteleiro is right to suggest that because of the complex competence system of the EU it is almost impossible to link the EU's responsibility to its division of competences.[89]

Nevertheless, the European Commission has on a number of occasions expressed its position that under the internal rules of the EU, the Union and its Member States each assume international responsibility with respect to their own competences.[90] In its comments on DARIO, the European Commission emphasized that the EU is regulated by a legal order of its own, establishing a common market and organizing the legal relationship between its members.[91] Responsibility is to follow the division of competences between the EU and its Member States rather than be based on the attribution of conduct. That is, the EU would bear exclusive responsibility in areas of its exclusive competences, whereas responsibility would be shared in areas of shared competences. For example, even though Member States carry out tariff classifications, the EU is responsible for breach of relevant international obligations since it holds exclusive competence with respect to the customs union.[92]

The European Commission's support for competence-based responsibility is evident from its statements in international disputes, for example in the WTO. Both the EU and its Member States are parties to the WTO Agreements. In *EC – Computer Equipment*, the European Commission took the view that the actions of customs authorities should be attributed to the Union and emphasized its readiness to assume responsibility for all measures within the particular field of tariff concessions, whether they are taken at EU or Member State level.[93] The European Commission declared that it was ready to assume (the entire) international responsibility on its own for all measures in the area of tariff concessions because it was exclusively competent for the subject matter concerned.[94] The European Commission used strong language to respond to the claimants' rebuttal that the internal division of competences is irrelevant with respect to the distribution of international responsibility.[95] It responded that

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[89] Andrés Delgado Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (CUP 2016), 30.
[90] Comments A/CN.4/545, 21, para 3.
[91] Comments A/CN.4/545, 21, para. 4.
[92] Comments A/CN.4/545, 26, para. 4.
[93] Oral pleadings; para 6. See also 'Replies to the Question' posed during the first substantive meeting of the Panel, 20 June 1997, in particular reply to question 1 of the WTO Panel Report, *European Communities – Computer Equipment*, WT/DS62/R, WT/DS67/R, WT/DS68/R, adopted 22 June 1998 (*EC – Computer Equipment*); see also Oral pleadings of the European Commission at the second substantive meeting of the Panel, 10 July 1997, paras 4 and 11.
[94] Comments A/CN.4/637, 24, comment to Art 8.
[95] WTO Panel Report, *EC – Computer Equipment*, para 4.13, the US claimed that "Moreover, the Commission appeared to suggest that a transfer of sovereignty within the internal legal framework of the EC had resulted in fewer rights and obligations being allotted to the member States. That might be the case in the internal legal

"*the transfer of sovereignty had been recognized by Members, and that the EC was more than a simple customs union. The EC was ready to assume its international obligations, but was not ready to allow an attack on its constitution in the WTO*".[96]

Similarly, in *EC – Geographical Indications* the European Commission suggested that the US was right in bringing the claim against the Union since the subject matter of the dispute fell within the exclusive competence of the EU.[97] In *EC and Certain Member States – IT Products*, the European Commission sought to assume full responsibility and stand as the sole respondent in proceedings because of its exclusive competence with respect to all tariff matters.[98] Similarly, in *EC – Large Civil Aircraft*, a case which concerned subsidy measures for civil aircraft, the European Commission claimed to be the sole respondent in the dispute[99] and stressed that it was not 'representing' its Member States but rather 'takes full responsibility' for their actions.[100] An analogous internal law-based approach was expressed in *EC – Commercial Vessels* which concerned the legality of subsidies.[101]

Similar to its stance in WTO dispute-settlement proceedings, the European Commission calls for competence-based responsibility in disputes under the ECT. Like the WTO Agreements, the ECT is also silent on the division of competences between the EU and its Member States. However, with its accession to the ECT the European Commission did provide a Declaration which calls for a competence-based approach to responsibility by stating that "*The European Communities and their Member States have both concluded the Energy Charter Treaty and are thus internationally responsible for the fulfilment of the obligations contained therein, in accordance with their respective competences*."[102] For example, in its written statement in *Electrabel v. Hungary*, an ICSID arbitration concerning Hungary's termination of power purchase agreement, the European Commission stated that the Union and Member States were

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framework of the Communities, but that framework was not at issue in this dispute. What was at issue were the WTO rights of the United States and the WTO obligations of the EC, Ireland and the United Kingdom".

[96] *EC – Computer Equipment*, PR, para 4.15.

[97] *EC — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (*EC — Geographical Indications*) WT/DS174, PR adopted 15 March 2005, First written submission of the European Communities, 25 May 2004, Annex B-2, B-69, para 255.

[98] Letter from the Delegation of the European Commission, 4 February 2009, reproduced in *EC and Certain Member States – IT Products*, WT/DS375/R, WT/DS376/R, WT/DS377/R, PR adopted 21 September 2010 (*EC and Certain Member States – IT Products*), 49, para 7.80.

[99] *EC – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, PR adopted 30 June 2010, Letter of the EC dated 23 May 2008 (*EC – Large Civil Aircraft*)

[100] *EC – Large Civil Aircraft,* Letter of the European Communities dated 6 October 2005.

[101] *Commercial Vessels*, WT/DS301/R, First submission of the EC, para 93, see *European Communities – Measures Affecting Trade in Commercial Vessel*s, WT/DS301/R, PR adopted 22 April 2005 (*EC – Commercial Vessels*).

[102] Statement submitted by the EC to the Secretariat of the ECT pursuant to Art 26. (3) (b) (ii) of the ECT, *OJ L 336, 23.12.1994*, 115.

responsible for breaches of the ECT "*in accordance with their respective competences*".[103] The European Commission submitted that responsibility for preventing unlawful state aid lies with the EU and not with Member States and therefore Spain is the wrong party named by the claimant for the termination of power purchase agreement.[104] According to the European Commission, the Communities and the Member States could, if necessary, determine among themselves who is the respondent party to arbitration proceedings.[105]

Thus, under the Union's internal rules international responsibility is to follow the division of competences between the EU and its Member States. But does international law accept such, to use Delgado Casteleiro's phrase, 'Europeanization' of an international agreement which entails the expansion of EU constitutional principles to that agreement?[106] The following section argues that the Union's internal rules on international responsibility are incompatible with the principle of independent responsibility and are not supported by international dispute-settlement practice.

3. The non-transferability of international obligations

The European Commission's call for competence-based responsibility relates international responsibility to the Union's constitutional architecture. The transfer of competences from a Member State to the Union, as understood by the European Commission, has the effect of transferring the respective international obligations.

This position ignores a disconnect under international law between the transfer of powers by a state to an international body and the transfer of obligations. I argue that while states are free to create international organizations for the latter to carry some of their functions, the corresponding obligations are non-transferable.[107] In other words, when a state assumes international obligations, these obligations remain the responsibility of that state even if the state later transfers these respective sovereign powers to an international body. States can only shift their powers, not their international obligations. The conclusion is the same irrespective

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[103] *Electrabel S.A. v. Republic of Hungary, Decision on Jurisdiction, Applicable Law and Liability* (Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012) ICSID Case No. ARB/07/19 (*Electrabel v. Hungary*), para 3.18.
[104] *Electrabel v. Hungary*, European Commission's Submission, para 41 as reproduced in Decision on jurisdiction, para 4.170.
[105] *Electrabel v. Hungary*, Decision on Jurisdiction, para 3.18.
[106] Delgado Casteleiro 2016 41.
[107] The thesis does not cover questions of transfer of obligations arising out of state succession and other cases and is limited to issues arising out of relationships between international organizations and their member states.

of whether an international organization has also assumed that same obligation. Separateness of the legal personality of an international organization stipulates that it can only have responsibilities which it has itself assumed. Thus, international law tolerates an arrangement where a state has obligations in a certain field of activity, but the power to act in that field is no longer within that state's autonomy. It is for states to ensure that they do not breach their obligations, whether they act on their own or through an international body.

I will consider the non-transferability of international obligations by addressing two rules of international law. First, the rule of non-circumvention shows that states and international organizations cannot escape their international obligations by acting indirectly through another entity. Second, unless expressly provided otherwise, both international organizations and their members are subject to all obligations under international treaties they sign (such as in the case of mixed agreements signed and ratified by both the EU and its Member States), irrespective of the internal division of competences and limits of their autonomy. I refer to such obligations as joint obligations.[108]

3.1 The rule of non-circumvention

The problem of circumvention of international obligations arises when subjects of international law breach their obligations but do so through the conduct of another legal person. Such situation may arise when states establish international organizations to which they transfer part of their sovereign powers. A two-way route for circumvention of obligations may open. States may acquire certain international obligations with regard to some of their functions and then transfer those functions to an international body which is itself free of associated obligations. An international organization, in turn, may acquire international obligations and then bind members to implement decision which can result in a breach of those obligations.

The problem of circumvention of international obligations thus arises when the entity which is empowered to act in a certain field of activity does so without breaching one of its international obligations. Gaja initially considered addressing this issue in DARIO Article 15 which governs a situation when an international organization directs and controls a state in the commission of an internationally wrongful act. Such an approach, however, appeared to be problematic.[109] For

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[108] See, for example, Joni Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and Its Member States* (Kluwer Law International 2001); Allan Rosas, 'Mixed Union – Mixed Agreements' in Allan Rosas and Martti Koskenniemi (eds), *International Law Aspects of the European Union* (Kluwer Law International, 1998) 142.
[109] Gaja Third Report, 35.

Article 15 to apply, the definition of control would have to cover normative control, which was rejected by the drafters of an analogous provision of ARSIWA[110] and was also seen as too complex to define by the ILC itself.[111] An additional limitation of Article 15 was that both the controlling organization and the controlled state must be bound by the same international obligation, which does not solve the problem of circumvention.[112]

Gaja noted the need to address the problem of circumvention in a separate provision.[113] Subject to criticism of some international organizations,[114] DARIO Article 17 provides that international organizations should be held responsible if an act that would be wrongful if committed by the organization directly was in fact committed by a member state on the basis of the organization's binding decision.[115] Support was also expressed for the current Article 61 which governs a reverse situation when a state that is a member of an international organization uses the separate personality of that organization to carry out conduct which breaches one of its obligations.[116] Though enshrined in separate provisions, the two rules are intertwined and embody the principle of non-circumvention which governs a circular relationship: a member state transfers competences to an international organization, which, in the exercise of those competence, makes binding decisions on that member state. The purpose is to avoid double circumvention of obligations. On the one hand, it prevents states from shielding themselves from their responsibilities by transferring their competences to an international body. On the other hand, it also prevents the latter from escaping responsibility for obligations it has assumed when it 'outsources' wrongful conduct back to its members. The core premise is that states and international organizations, being separate legal persons, assume obligations of their own and should be prevented from escaping those obligations by relocating competences or conduct to another body.

In its comments on DARIO, the European Commission expressed its reservation regarding the current Article 17, especially in cases when responsibility of an organization is interpreted to

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[110] Yearbook of the International Law Commission, A/CN.4/SER.A/2001/Add.1 (Part 2), 69, para. 7.
[111] Comments A/CN.4/568, 135. The EC illustrates the difficulty of defining normative control by describing its legal instruments (directives and regulations).
[112] Gaja Third Report, 36.
[113] Gaja noted that the fact of being able to require member states to take a certain act would otherwise put the organization in a position to achieve indirectly what is directly prohibited, Gaja Third Report, 36.
[114] For example, the IMF suggesting deleting the rule from the draft articles altogether, Comments A/CN.4/582, 23, sect I. See also comments by the International Criminal Police Organization, see Comments A/CN.4/556, 50, sect N.2.
[115] The Commentary to DARIO Article 17 states that the term 'circumvention' implies an intention on the part of the international organization to take advantage of the separate legal personality of its members in order to avoid compliance with an international obligation. Delgado Casteleiro suggests that the complexity of proving intent makes the provision hardly applicable with respect to the EU, see Delgado Casteleiro 2016.
[116] For example, Ireland – 13th meeting, para 33; Switzerland: 13th meeting, para 45, see A/C.6/60/SR.13.

arise out of recommendations made to the States.[117] It is unclear why the EU opposes the rule while at the same time it promotes an even broader principle of competence-based responsibility. After all, with respect to the EU's responsibility both principles would essentially have the same effect: non-circumvention and competence-based responsibility suggest that if, in the exercise of its competences, the EU assumes an obligation, it must be held responsible when it breaches that obligation, be it through its own actions or those of its Member States. The European Commission's negative reception of the reverse case – responsibility of states members of an international organization under Article 61 – is less surprising. Its call for competence-based responsibility eliminates the possibility of holding Member States responsible for any conduct in the areas of the Union competences, while Article 61 would prevent such arrangement by tying member states to their obligations even when they transfer respective powers to an international body.[118]

3.1.1 The ECtHR case-law

Whether consistent or not with the Union's internal legal order, the rule of non-circumvention is applicable law. The case-law of the European Court on Human Rights (ECtHR) supports the principle[119] non-circumvention.[120] In *Waite & Kennedy*, the Court refused to absolve states from their obligations under the European Convention on Human Rights and Fundamental Freedoms (ECHR) when they transfer their competences to an international organization.[121] The case

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[117] Comments A/CN.4/637, 28.

[118] ILO expressed concern that under the rule "the mere fact of adopting a decision binding on a member State of international organization to commit an act of the wrongful nature described, without the act actually being taken on the part of the member State", see Comments A/CN.4/568, 136. Similar concern was expressed by the European Commission, see Comments A/CN.4/582, 25, sect S. For more comments by the European Commission on the rule of non-circumvention, see Comments A/CN.4/568, 135. A similar concern was expressed by the IMF: "This proposition suggests that the act of taking a binding decision alone constitutes wrongful conduct. <…> As such, this proposition is inconsistent with the fundamental principle that there must be conduct constituting breach of an international obligation for responsibility to arise", see Comments A/CN.4/582, 23, sect I. This interpretation, however, conflates the difference between the primary and secondary rules. The responsibility in this case arises not because of the act of 'circumvention' as such, which would be subject to regulation by primary rules, but because of an indirect breach of an obligation which an organization owns.

[119] I refer to non-circumvention as a 'principle' rather than 'rule' because I have not found a direct reference to ILC draft articles which establish the rule of non-circumvention in the discussed case-law.

[120] It should be noted, that the case-law mainly concerns responsibility of the Member States and is silent on the responsibility of the EU, since only Member States and not the Union are parties to the ECHR. Even as a holder of transferred power, an organization is not itself held responsible under the ECHR for the decisions of its organs, as long as it is not a Contracting Party, see 'Third Report on Responsibility of International Organizations, by Mr. Giorgio Gaja, Special Rapporteur' 14, para 33. See also *Matthews v United Kingdom* App no 24833/94 (ECtHR, 18 February1999) (*Matthews v. the United Kingdom*), para 32; *M. & Co. v. the Federal Republic of Germany* App no 13258/87 (ECtHR 9 February 1990) (*M. & Co. v. Germany)*; *Confédération française démocratique du travail v the European Communities* App no 8030/77 (Commission decision 10 July 1978); *Dufay v. European Communities* App no 13539/88 (Commission decision 19 January 1989).

[121] *Waite & Kennedy* App no 26083/94 (ECtHR 18 February 1999) (*Waite & Kennedy*).

concerned employment rights of two German citizens who performed services to the European Space Agency at the European Space Operations Centre in Germany. Arguing that they were in an employment relationship with the Agency, they brought the Agency before the German Courts for the termination of their employment contract. The European Space Agency claimed immunity from jurisdiction, which the Federal Constitutional Court upheld. The applicants subsequently brought the case before the ECtHR. Though the Court finally rejected the applicants' claims, it nevertheless stated the principle of non-circumvention: "*The Court is of the opinion that where States establish international organizations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organizations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution*."[122] The Court re-stated the principle in another case under analogous circumstances, *Beer and Regan v. Germany*.[123]

Matthews v. the United Kingdom is another seminal ECtHR case on the principle of non-circumvention.[124] The dispute concerned the right of the Gibraltar citizen to vote at the elections to the European Parliament. The United Kingdom argued that it cannot be held responsible under the Convention for the lack of elections to the European Parliament in Gibraltar because the claim concerned elections to a constitutional organ of the Community itself over which UK had no control. The ECtHR observed that the Convention does not exclude the transfer of competences to international organizations, provided that Convention rights continue to be 'secured'. Member states' responsibility therefore continues even after such transfer.[125] The fact that UK may not have effective control over the conduct under examination was irrelevant in the determination of its responsibility.[126]

T.I. v. the United Kingdom provides yet another example of the ECtHR's affirmation of the principle of non-circumvention of international obligations. The case concerned an allegation that the United Kingdom violated Article 3 of the Convention by ordering the removal of the

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[122] *Waite & Kennedy*, para 67.
[123] *Beer and Regan v. Germany* App no 28934/95 (ECtHR 18 February 1999), 78, para 55.
[124] *Matthews v. United Kingdom*, see Ana Sofia Barros, '6 Responsibility, 6.3 Matthews v United Kingdom , ECtHR, App. no 24833/94, 18 February 1999' in Cedric Ryngaert and others (eds), *Judicial decisions on the law of international organizations* (OUP 2016).
[125] *Matthews v United Kingdom*, 265, para 32.
[126] *Matthews v. United Kingdom*, 265, para 34.

applicant to Germany from which he may be sent to Sri Lanka and be exposed to torture.[127] The United Kingdom based its decision on the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims. The ECtHR concluded that "*it would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution*".

In its decision as to the admissibility in *M. & Co. v. Germany*, the European Commission for Human Rights faced the question whether Germany could be held responsible for issuing a writ of execution of the judgment of the European Court of Justice (ECJ) which upheld its decision to impose a fine on the applicant for violations of the Community's antitrust law.[128] The European Commission for Human Rights refused to accept that by granting executory power to a judgment of the ECJ the competent German authorities acted quasi as Community organs and were to that extent beyond the scope of control exercised by the Convention's organs. According to the European Commission for Human Rights, member states are responsible for all acts and omissions of their domestic organs which violate the Convention regardless of whether the act or omission in question is a consequence of domestic law or of the necessity to comply with international obligations.[129]

While the ECtHR is clear on its stance on the non-circumvention of obligations, it also acknowledges the benefits of international cooperation, including that under EU law.[130] The Court employs the principle of 'equivalent protection' to balance the right of States to create international organizations and the need to prevent circumvention of their obligations. States are free to transfer their powers to international bodies as long as equivalent protection of the ECHR rights is secured. In *Waite & Kennedy*, the Court noted that a material factor in assessing immunity of the European Space Agency from the German jurisdiction was whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.[131] Similarly, in *Matthews v. The United Kingdom,* the Court analysed whether under the Union law the applicant had voting rights equivalent to those required under the Convention and concluded that the applicant as a citizen of Gibraltar was completely denied any opportunity to express her opinion in the choice of the members of the European

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[127] *T.I. v. The United Kingdom* App no 43844/98 (ECtHR 7 March 2000), Decision as to the Admissibility.
[128] *M. & Co. v. Germany*, 145.
[129] See also *Hess v. United Kingdom* App no 6231/73 (Commission decision 28 May 1975), 72.
[130] *S.A. Dangeville v. France*, App no 36677/97 (ECtHR 16 April 2002), paras 47 and 55.
[131] *Waite & Kennedy*, para 68.

Parliament.[132] In *M & Co. v. Germany* it was ruled that the transfer of powers to an international organization was not incompatible with the Convention provided that within that organization fundamental rights will receive equivalent protection.[133] The principle of equivalent protection was re-stated in *Heinz v. the Contracting Parties* and other cases.[134]

The most notable post-2000 case where the ECtHR articulated the criterion of equivalence in more general terms is its 2005 judgment in *Bosphorus*.[135] The Irish Government impounded an aircraft which the applicant leased from Yugoslav Airlines pursuant to the UN Security Council sanctions regime. The applicant maintained that the manner in which Ireland had implemented the sanctions regime was a reviewable exercise of discretion. The Grand Chamber stated that the approach expressed in earlier decisions that the Convention does not prohibit contracting parties from transferring sovereign power to an international organization in order to pursue cooperation in a certain field of activity.[136] According to the Court, the Community's judicial organs are better placed to interpret and apply Union law.[137] At the same time the Court kept its earlier line of reasoning and stated that absolving contracting states completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the object and purpose of the ECHR.[138] The Court noted that its role is confined in ascertaining whether the effects of Community adjudication are compatible with the Convention.[139] The Grand Chamber then re-stated the principle of equivalent protection as set out in *M. & Co. v. Germany*. According to the Court, if "*such equivalent protection is considered to be provided by the organization, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organization.*"[140]

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[132] *Matthews v. The United Kingdom*, para 64.
[133] At the same time, the European Commission for Human Rights noted that it would be contrary to the very idea of transferring powers to an international organization to hold a member State responsible for examining, in each case before issuing a writ of execution for a judgment of the European Court of Justice, whether Art 6 was respected in the underlying proceedings.
[134] *Heinz v. Contracting States and Parties to the European Patent Convention* App no 21090/92 (ECtHR 16 Dec 1992), 125.
[135] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland* App no 45036/98 (ECtHR 30 June 2005) (*Bosphorus*).
[136] *Bosphorus*, para 152.
[137] *Bosphorus*, para 143.
[138] *Bosphorus*, para 154. In its Opinion AG Jacobs noted that Community law cannot release Member States from their obligations under the ECHR and that the essential question was whether the interference with the applicant company's possession of the aircraft was a proportionate measure in the light of the aims of general interest that the Regulation sought to achieve.
[139] See also *Streletz, Kessler and Krenz v. Germany* App nos 34044/96, 35532/97, & 44801/98 (ECtHR 22 March 2001).
[140] *Bosphorus*, para 156.

3.1.2 The ECT case-law

Investment tribunals dealing with cases under the ECT also support the principle of non-circumvention. As a rule, they approach the question of non-circumvention through conflict of law principles. I will analyse how investment tribunals deal with the distribution of responsibility in disputes involving the EU in Part II of this thesis. The following paragraphs are limited to providing examples of how tribunals apply the principle of non-circumvention.

In *AES Summit v. Hungary*, the investor argued that reintroduction of administrative pricing for electricity breached its rights under the investment treaty. One of Hungary's defences was an initiation by the European Commission of an investigation of the power purchase agreement based on a concern that it contained unlawful state aid.[141] The tribunal agreed with the claimant that the Community law was not an excuse for Hungary's breaches of the ECT.[142] It refused to analyse Hungary's obligations under the EU law and concluded that the dispute was about the conformity or non-conformity of Hungary's acts and measures with the ECT.[143] The tribunal noted that the question of "*whether Hungary was, may have been, or may have felt obliged under the EU law to act as it did, is only an element to be considered when determining the "rationality", "reasonableness", "arbitrariness" and "transparency" of the reintroduction of administrative pricing*".[144]

Similarly, in *Micula v. Romania*, Romania argued that its obligations under EU law and, eventually, the EU-Romania Accession Treaty, were relevant in the evaluation of its conduct because *inter alia*, they were binding under Romanian law.[145] The Tribunal rejected this view and noted that the relevant BIT did not contain reference to EU accession and "*the Tribunal cannot therefore assume that by virtue of the EU, either Romania, or Sweden, or the EU sought to amend, modify or otherwise detract from the application of the BIT*".[146] The Tribunal further noted that there is no reason to assume that Sweden and Romania had any intent to defeat their obligations under any applicable treaties when they entered into the Accession Treaty.[147]

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[141] *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary* (Award 23 Sept 2010) ICSID Case No. ARB/07/22 (*AES Summit v. Hungary*), para 10.2.3.
[142] *AES Summit*, Award, para 7.3.1.
[143] *AES Summit*, Award, para 7.6.9.
[144] *AES Summit*, Award, para 7.6.9.
[145] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania* (Final Award 11 Dec 2013) ICSID Case No. ARB/05/20 (*Micula v. Romania*), para 3.15
[146] *Micula v. Romania*, para 321.
[147] *Micula v. Romania*, para 326.

In another case under the ECT, *RREEF Infrustructure v. Spain*, the claimant rejected Spain's invocation of for the supremacy of EU law where EU Member States have transferred their competences to the EU.[148] The tribunal found that the ECT binds both the EU and its Member States on the one hand, and non-EU States on the other hand, and the EU law is *res inter alios acta* which cannot prevail over the ECT.[149] Refusing to accept Spain's defence that EU law shields it from responsibility under the ECT, the Tribunal referred to the ECT as its 'constitution' and concluded that it prevails over any other norm (apart from *ius cogens*).[150]

In some cases tribunals avoid the question of non-circumvention by focusing on Member State implementation of the binding decision of the EU. The Tribunal in *Electrabel v. Hungary* did not pronounce on non-circumvention and left open the question of responsibility of the EU for violating investors' rights by adopting decisions which bind its Member States. The Tribunal noted that the ECT accepts that the Union can make binding decisions on the Member States in which case investors rights would not be protected *as against that Member State*.[151] However, according to the Tribunal, the dispute is not about the binding character of an EU decision itself, but about the alleged incorrect enforcement of that decision by the Member State within its permitted margin of appreciation under EU law.[152] Therefore, according to the tribunal, the analysis "*leaves open the responsibility of the European Union under the ECT*".[153]

Similarly to the balancing exercise undertaken by the ECtHR which I addressed above, investment tribunals also seek to establish an equilibrium between the "*protection of rights of foreign investors and the economic integration of the EU Member States*".[154] In somewhat similar tone to the principle of equivalent protection, investment tribunals apply the rule of 'harmonious interpretation', though emphasizing that it applies specifically and uniquely when dealing with the Member States' implementation of Community law. In *Electrabel v. Hungary* the European Commission called for the application of the *Bosphorus* test to evaluate whether EU law afforded equivalent protection to investors to that under the ECT, in which case Hungary's termination of the power purchase agreement would have been in conformity with

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[148] *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain* (Decision on Jurisdiction 6 June 2016) ICSID Case No. ARB/13/30 (*RREEF Infrastructure v. Spain*), para 59.
[149] *RREEF Infrastructure v. Spain*, para 74.
[150] *RREEF Infrastructure v. Spain*, para 75.
[151] *Electrabel S.A. v. Republic of Hungary, Decision on Jurisdiction, Applicable Law and Liability* (Decision on Jurisdiction, Applicable Law and Liability 30 Nov 2012) ICSID Case No. ARB/07/19 (*Electrabel v. Hungary*), para 4.169.
[152] *Electrabel v. Hungary*, para 4.169.
[153] *Electrabel v. Hungary*, para 4.170.
[154] *Electrabel v. Hungary*, para 4.113.

the ECT.[155] The Tribunal rejected that there exists a general principle of international law compelling the harmonious interpretation of different treaties.[156] However, the Tribunal noted that "*the situation here is somewhat special, with the European Union and its Member States so closely involved in and parties to the ECT. In the Tribunal's view, the ECT's historical genesis and its text are such that the ECT should be interpreted, if possible, in harmony with the EU*".[157] Drawing on the historical analysis of the common goals of the EU and the ECT, the Tribunal concluded that foreign investors in the EU Member States cannot have acquired any legitimate expectations that the ECT would necessarily shield their investments from the effects of EU law as regards anti-competitive conduct.[158] Contrary to the position in *Electrabel v. Hungary*, the Tribunal in *RREEF Infrastructure v. Spain* established that the principle of harmonious interpretation applies not only with respect to the EU, but generally whenever there is a conflict between an obligation under the ECT and those under other treaties.[159]

3.1.3 Binding decisions of an organization

The rule of non-circumvention applies with respect to breaches of obligations through *binding* decisions of an organization which leave *no discretion* to the member state.[160] Gaja noted that if member states have discretion so that they may comply with the decision without breaching an international obligation, the organization cannot be held responsible.[161] With respect to non-binding decisions, such as recommendations and authorizations, Gaja suggested that the organization's responsibility could be invoked if such authorizations and recommendations are made in furtherance of the organization's own interest[162] and, more ambiguously, based on the extent of its involvement in the act.[163] Gaja noted that responsibility would be justified only if the recommended or authorized act was actually taken and would be in breach of an organization's obligation.[164] While some international organizations rejected the possibility that

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[155] *Electrabel v. Hungary*, para 4.102.
[156] *Electrabel v. Hungary*, para 4.130.
[157] *Electrabel v. Hungary*, para 4.130.
[158] *Electrabel v. Hungary*, para 4.141.
[159] *RREEF Infrastructure v. Spain*, para 76.
[160] The commentary applies both with respect to DARIO Art 17 and a reverse rule under DARIO Art 61, i.e. both with respect to circumvention of obligations by organizations and States. However, as noted by Gaja, it is unlikely that states authorize or recommend organizations to carry out acts and therefore the discussion here is more relevant with respect to Art 17 – circumvention by international organizations, see Gaja Fourth Report, 117, para 68.
[161] Gaja Third Report, 14, para 30. See comments of the INTERPOL and the WHO supporting this limitation of non-circumvention rule, Comments A/CN.4/568, 136, sect I.
[162] Gaja Third Report, 16, para 41.
[163] Gaja Third Report, 16, para 41.
[164] Gaja Third Report, 16, para 41. The IMF rejected this interpretation suggesting that states are independent actors and it makes its own determination whether to carry out recommendations and authorizations, see

in certain cases they could be responsible for an authorization issued to its members,[165] other states nevertheless supported such reasoning.[166] The French representative, for example, suggested that the extent of latitude the state was allowed by the organization's request was of relevance in such cases.[167]

In *Bosphorus*, the ECtHR considered the responsibility of Member States arising out of mandatory EU law. The Court also noted that if a Member State was acting outside its strict legal obligations under the Union law, it would be fully responsible under the Convention.[168] It was, however, not the case in the present dispute. The Court agreed with the European Commission that the Supreme Court of Ireland had no real discretion and had to implement the ECJ ruling.[169] *Cantoni v. France* provides another relevant example. The case concerned criminal proceedings brought against the applicant for unlawfully selling pharmaceutical products. The Court agreed with the applicant's position that the notion of medicinal product, as defined in the provision on which his conviction has been based, was not sufficiently clear to enable him to determine with accuracy what acts would incur criminal liability.[170]

The qualification that only binding decisions call for responsibility of an organization is also confirmed by investment tribunals. In *Electrabel v. Hungary*, the Tribunal noted that the claimant alleged incorrect enforcement of the EU decision within the permitted margin of appreciation under EU law.[171] According to the Tribunal, the EU's responsibility would be invoked if the claim concerned the Union's decision itself, whereas in this case claims related only to certain measures by Hungary, some resulting from the Union law and some with no link to it.[172] In *AES Summit v. Hungary*, Hungary argued that one of the reasons for the introduction of disputed price decrees was the pressure of the European Commission's investigations and foreseeable obligation to recover state aid that the decision would impose. The Tribunal replied

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Comments A/CN.4/582, 23, sect I. INTERPOL also expressed concern over the possibility to hold an international organization responsible for authorizing or recommending a state to carry out conduct,

[165] For example, the IMF illustrated its criticism with an example: when a member state requests to use IMF resources, the IMF may indicate that the member needs to reduce the net present value of its sovereign debt. While the member might decline to do so or might do so in a variety of ways, one of the choices being to unilaterally default on its debt thereby breaching the member's international obligations. The IMF's concern was that responsibility in this case could be interpreted from the fact that the member is pursuing an objective of the IMF, see Comments A/CN.4/556, 51, sect N.3. It is questionable whether the IMF's concerns are well placed, since in this case the IMF itself does not hold the obligation against debt holders and therefore its responsibility would not arise under Art 17, in the example provided by the IMF.

[166] See Gaja Third Report, ft 61.

[167] Summary Record of the 22nd Meeting, A/C.6/59/SR.22 (ILC 2004), 3 para 13.

[168] *Bosphorus*, para 157.

[169] *Bosphorus*, para 147.

[170] *Cantoni v. France* App no 17862/91 (ECtHR 15 Nov 1996), para 26.

[171] *Electrabel v. Hungary*, para 4.168.

[172] *Electrabel v. Hungary*, para 4.171.

that as long as the European Commission's state aid decision was not issued, Hungary had no legal obligation to act in accordance with what it believed could be the result of that decision.[173]

Though dealing with the internal law of the Union rather than international obligations, the position of the Court of Justice of the European Union (CJEU) also supports that the determining factor in deciding the question of responsibility of the EU and its Member States is whether the European Commission's instruction was binding or whether it left a degree of discretion to the Member State.[174] In *Krohn & Co.*, an action for damages suffered as a result of the refusal of the Bundesanstalt,[175] acting on instructions given by the European Commission to grant import licences, the ECJ found that "*the unlawful conduct alleged by the applicant in order to establish its claim for compensation is to be attributed not to the Bundesanstalt, which was bound to comply with the Commission's instructions, but to the Commission itself*".[176] A similar principle was applied by the Court of First Instance in *Dorsch Consult v. Council*, only this time with regard to the relations between the European Community and the United Nations. The Court said that *"[T]he alleged damage cannot, in the final analysis, be attributed to Regulation No. 2340/90 but must, as the Council has in fact contended, be attributed to United Nations Security Council Resolution No. 661 (1990) which imposed the embargo on trade with Iraq*".[177]

With respect to the ECtHR case-law, the European Commission's stance on the principle of non-circumvention is unknown because the Union is not a party to the Convention and has therefore not been a party to the disputes in cases when breaches related to its decisions. The European Commission did express a positive attitude to the principle of equivalent protection as formulated by the ECtHR in *Bosphorus* in some of its *amicus curiae* briefs in the disputes

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[173] *AES Summit v. Hungary*, paras 10.3.15-10.3.16.
[174] Moshe Hirsch, *The Responsibility of International Organizations Toward Third Parties: Some Basic Principles* (Martinus Nijhoff Publishers 1995), 83. See also Jean Groux and Philippe Manin, *The European Communities in the International Order* (Office for Official Publications of the European Communities 1995), 143–144. Giorgio Gaja, 'Some Reflections on the European Community's International Responsibility' in Henry G Schermers, Ton Henkels and Philip Mead (eds), *Non-Contractual Liability of the European Communities* (Martinus Nijhoff Publishers 1988), 172.
[175] The German Federal Office for the Organization of Agricultural Markets.
[176] C-175/84 *Krohn & Co Import-Export GmbH & Co KG v. Commission* [1986] ECR 753, 768, para 23. The approach of the Court in apportioning liability either to the European Community or to a member State, but not to both, even when there are reasons for holding responsibility to be concurrent, was underlined by Manuel Perez Gonzalez, 'Les Organisations Internationales et Le Droit de La Responsabilité' (1998) 92 RGDIP 63, 89. Interestingly, differently from its stance on international responsibility in disputes under the WTO system, in C-175/84 *Krohn & Co Import-Export GmbH & Co KG v. Commission* [1986] ECR 753, the European Commission contended that the authority of national decisions is not weakened by the fact that the European Commission is empowered to give instructions regarding them, see p 767, para 16.
[177] T-184/95 *Dorsch Consult Ingenieurgesellschaft mbH v. Council of the European Union and Commission of the European Communities* [1998] ECR II-667, 694, para 73.

under the ECT.[178] At the same time the European Commission notes the difficulty of drawing a line between binding decisions of the EU and discretion left to the Member States. The Commission explains that under the Community law, secondary Community legislation may be binding in its entirety and directly applicable in all Member States (regulations) or only binding as to the result to be achieved (directives) or binding only upon those to whom it is addressed (decisions). It is suggested that an obligation of result (such as in a directive) comes very close to a binding decision, but nevertheless may leave a certain discretion to the Member State.[179]

Following the above case-law analysis I conclude that the principle of non-circumvention does not sit comfortably with the European Commission's call for competence-based responsibility. Human rights law practice as well as investment arbitration do not support the European Commission's approach that international responsibility follows the transfer of competence from member states to an international body. The following section addresses the rule of joint obligations which further undermines the EU's claim that responsibility is to be allocated in accordance to the division of competences between an organizations and its members.

3.2 The principle of joint obligations

The rule of non-circumvention ensures accountability for breaches of international obligations when states and organizations act indirectly through another state or organization. The latter may or may not be bound by that same obligation, though in practice the rule is usually triggered when the acting entity is not itself a holder of an obligation. Thus, in practice the question of circumvention arises either under EU-only or Member State-only agreements.

With respect to cases when both the EU and their Member States are parties to a treaty, two types of arrangements can be observed. Some treaties provide a declaration of competences, in which case obligations are allocated (vis-à-vis third parties) to the EU and its Member States. For example, with respect to UNCLOS, the EU and its Member States have expressly stated

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[178] In its comments the European Commission stated that "At the very least, it would have to be clarified that there is no "circumvention" if a State transfers powers to an international organization which is not bound by the State's own treaty obligations, but whose legal system offers a comparable level of guarantees", see Comments A/CN.4/582, 28. Also, the European Commission's support for the principle of equivalent protection expressed in its third-party submission in *Bosphorus*, para 122. The European Commission's support seems to be based on its willingness to free Member States from a requirement to review for Convention compliance an act of the Union before implementing it, as this would pose a threat to the very foundation of the Community, para 124. For endorsement of principle of equivalent protection in investment cases, see European Commission's statement in *Electrabel v. Hungary*, paras 4.103, 4.144.

[179] Comments A/CN.4/568, 135, sect I.

that they are bound by the obligations to the extent of their respective competences, a limitation which was stressed both during the accession process,[180] as well as in the text of the UNCLOS itself.[181] A similar division is prescribed with respect to rights in order to prevent double benefitting.[182] In some cases, even when a treaty requires an organization to deposit a declaration of competences, it still allows the organization to decide internally the respective responsibilities for the performance of their obligation.[183] Third parties are not always fully comfortable to enter into treaties with an organization which lacks full autonomy with respect to the fulfilment of obligations, even if a declaration of competences is in place.[184]

With respect to mixed agreements without declarations of competences, the position of the European Commission and third parties regarding international responsibility diverges. Following its competence-based approach to responsibility, the European Commission often seeks to assert itself as the sole respondent claiming that the measure in question falls under its field of competence, irrespective of whether that measure was implemented by the organs of the Union or its Member States. Third-parties, on the other hand, are often unwilling to leave the matter to the internal division of powers. This trend can be observed in the WTO case-law. I will address these cases in detail in Part II of this thesis and I will therefore only refer to the relevant parts in the present discussion. It must be noted that the CJEU has itself ruled that the Union and its Member States are jointly liable to the third states for the fulfilment of every obligation arising from the commitments undertaken.[185]

3.2.1 The WTO case-law

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[180] Letter dated 10 Sept 1976 from the representative of the Netherlands to the President of the Conference, see Letter Dated 10 Sept 1976 from the Representative of the Netherlands to the President of the Conference, 14 Sept 1976. See André Nollkaemper, 'The European Community and International Environmental Co-Operation: Legal Aspects of External Community Powers' (1987) 14 LIEI 55, 68; Albert Koers, 'Participation of the European Economic Community in a New Law of the Sea Convention' (1979) 73 AJIL 426, 437.

[181] Declaration concerning the competence of the European Community with regard to matters governed by the UNCLOS of 10 Dec 1982 and the Agreement of 28 July 1994 relating to the implementation of Part XI of the Convention states that 'By depositing this instrument, the Community has the honour of declaring its acceptance, in respect of matters for which competence has been transferred to it by those of its Member States which are parties to the Convention, of the rights and obligations laid down for states in the Convention and the Agreement'.

[182] Heliskoski 2001, 135.

[183] For example, Art 14 and 13(2) of the *Vienna Convention for the Protection of the Ozone Layer*, signed 22 March 1985.

[184] See John Lang Temple, 'The Ozone-Layer Convention: A New Solution to the Question of Community Participation in "Mixed" International Agreements' (1986) 23 CML Rev 157, 163.

[185] C-316/91 *Parliament v Council of the European Union* [1994] ECR 661; Opinion of AG Jacobs delivered on 10 Nov 1993, para 29.

In *EC and Certain Member States – IT Products*, the complainants (US, Japan and Chinese Taipei) called for the participation as respondents of both the EU and certain Member States.[186] The case concerned customs classification of certain information technology products and the claimants considered that both the EC and certain Member States played a role in the application of customs duties. The European Commission, on the other hand, wished to be a sole respondent and bear full responsibility because the role of the Member States was reduced to the application of measures previously enacted by the EU.[187]

Similarly, in *EC – Computer Equipment* the European Commission argued that is it the only respondent in the dispute because Member States have transferred their powers in this area to the Union.[188] The United States, however, disagreed with such position and required that both Ireland and the United Kingdom participate in the dispute as respondents.[189] According to the United States "*As independent Members, Ireland and the United Kingdom hid behind no other Member. Nothing in the text of the GATT 1994 or the DSU limited the scope of application of the provisions of these two agreements with respect to either Member as to its status in a dispute brought under these agreements*."[190] According to the United States, the internal legal framework of the EU could in no way result in fewer rights and obligations being allotted to the Member States.[191]

Similarly, in *EC – Commercial Vessels*, a WTO case which concerned subsidization measures of the EC and certain Member States affecting trade in commercial vessels, Korea argued that its claim was against both the EC and certain Member States.[192] The European Commission, on the other hand, asserted that it "*considers that it is the "proper respondent" for the measures at issue and states that it "takes full responsibility under international law" for measures taken by EC member States pursuant to the TDM Regulation, and that for the purposes of WTO law, such measures are taken by the European Communities as a Member of the WTO*"[193]. In *EC – Large Civil Aircraft*, a WTO case which concerned a US claim that the EC's so-called launch aid was in breach of the WTO obligations, the European Commission too stated that the claim

[186] *EC and Certain Member States – IT Products*, PR, para 7.81.
[187] *EC and Certain Member States – IT Products*, PR, para 7.80.
[188] *EC – Computer Equipment*, PR, para 4.9-4.10, also 4.15.
[189] *EC – Computer Equipment*, PR, para 4.12.
[190] *EC – Computer Equipment*, PR, para 4.13.
[191] *EC – Computer Equipment*, PR, para 4.14.
[192] *EC – Commercial Vessels*, PR, para 4.32.
[193] *EC – Commercial Vessels*, PR, para 7.32, ft 163, referring to First submission of the EC, 93.

related to matters for which the EC bears responsibility in the WTO and thus the EC is a proper respondent.[194]

A similar pattern can be observed under the ECT regime. In *Electrabel v. Hungary* the claimant argued that it was Hungary that violated the ECT.[195] The European Commission, in its *amicus curiae*, submitted a jurisdictional objection stating that the Power Purchase Agreement termination claim should have been brought against the Community rather than Hungary.[196] According to the Commission, the fact that there is no declaration of competences under the ECT, does not mean that Member States have competence for all areas under the ECT.[197] The European Commission stated that "*the responsibility for preventing unlawful State aid lies with the European Union and not with EU Member States; and therefore the Respondent is the wrong party named by the Claimant for its PPA Termination Claim. However, as the Commission asserts, it "would trigger the [European Union's] responsibility if contrary to the ECT*".[198]

International courts and tribunals reject the competence-based approach advocated by the Commission in support of the principle of joint obligations. In *EC – Computer Equipment*, the Panel stressed that while it was not clear in this initial phase which exact measures were at issue, the Panel found that "*the European Communities, Ireland and the United Kingdom are all bound by their tariff commitments under Schedule LXXX, our examination will focus, in the first instance, on whether customs authorities in the European Communities, including those located in Ireland and the United Kingdom, have or have not deviated from the obligations assumed under that Schedule*"[199].

In the *EC and Certain Member States – IT Products* dispute, the Panel also agreed with the complainant that Member States are individually bound by the obligations under the WTO Agreements.[200] In a similar line of reasoning, the Panel in *EC – Large Civil Aircraft* first rejected the European Commission's submission that the violations alleged all relate to matters for which the EC bears responsibility under the WTO and instead stated that each Member State is a member of the WTO in its own right, with all rights and obligations stemming from this treaty.[201] According to the Panel, "*whatever responsibility the European Communities bears*

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[194] *EC – Large Civil Aircraft*, PR, para 7.172, ft 2037.
[195] *Electrabel v. Hungary*, para 4.52.
[196] *Electrabel v. Hungary*, para 5.10.
[197] *Electrabel v. Hungary*, para 5.20.
[198] *Electrabel v. Hungary*, para 4.170, referring to para 41 of the European Commission's Submission.
[199] *EC – Computer Equipment*, PR, para 8.16.
[200] *EC and Certain Member States – IT Products*, PR, para 7.86.
[201] *EC – Large Civil Aircraft*, PR, para 7.174.

for the actions of its member States does not diminish their rights and obligations as WTO Members, but is rather an internal matter concerning the relations between the European Communities and its member States".[202] The fact that these states are members of the European Communities was irrelevant in the Tribunal's conclusion that Member States hold an individual status as members of the WTO against whom another member has brought a claim.

Though I will address the EU representation of Member States in WTO disputes in detail in Part II of this thesis, it is useful to note that WTO panels suggest that whether Member States are represented by the Union in a given dispute or whether they participate themselves has no impact on their rights and obligations. In *EC – Large Civil Aircraft*, in which a claim was brought against the Community and certain Member States, the Panel noted that whether Member States participate in the dispute themselves or whether they are represented by the European Commission, is irrelevant to their rights and obligations.[203] The Panel indicated that the title and participation in the dispute proceedings does not affect Member States obligations under the WTO: "*We need not and do not decide whether the European Communities "represents" the member States in this dispute in some formal sense. Nor does the title given to the dispute have any legal significance with respect to the rights and obligations of Members against whom claims are made, or with respect to their individual or direct participation in the dispute*"[204]. According to the Panel, the fact that Member States have chosen not to participate in this dispute does not affect their status as respondent parties to this dispute.[205] In fact, the Panel provided a list of cases where the title of the case did not correspond to the actual respondent parties.[206] To illustrate its refusal to provide a legal status to the concept of 'representation' in the WTO dispute-settlement system, the Panel noted that it is unaware of any dispute involving claims against the EC and one of more of its Member States in which a Member State has made submissions and representations separate or in addition to those made by the EC.[207] An analogous approach by the Panel can be observed in *EC – Computer Equipment*. Here the US had requested that the title of the Panel be changed to read 'European Communities, Ireland and the United Kingdom – Increases in Tariffs on Certain Computer Equipment' to reflect the status of Member States as respondent parties.[208] The Panel refused to do so for practical reasons but noted that "*title of a particular dispute is given for the sake of*

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[202] *EC – Large Civil Aircraft*, PR, para 7.175.
[203] *EC – Large Civil Aircraft*, PR, para 7.174.
[204] *EC – Large Civil Aircraft*, PR, para 7.176. See ft 2047 for a list of case-law.
[205] *EC – Large Civil Aircraft*, PR, para 7.176.
[206] *EC – Large Civil Aircraft*, PR, para 7.176, ft. 2047.
[207] *EC – Large Civil Aircraft*, PR, para 7.176, ft. 2047.
[208] *EC – Computer Equipment*, PR, para 8.17.

convenience in reference and in no way affects the substantive rights and obligations of the parties to the dispute".[209]

3.2.2 The CJEU case-law

Interestingly, the case-law of the CJEU itself supports the approach of third states rather than one advocated by the European Commission. It should be noted, however, that the Court's case-law conflates the concepts of joint obligations and joint responsibility, the difference between which is addressed below. In any case, since there can be no joint responsibility without joint obligations, the case-law is relevant to the current discussion.

The cases are well known and will be only briefly summarised. The case-law of the CJEU adheres to the position that both the EU and its Member States assume responsibility for all obligations within the agreement they sign, irrespective of the internal allocation of competences. In *Ruling 1/78*, the Court said that it is not necessary to set out and determine, as regards other parties to the IAEA Convention on the Physical Protection of Nuclear Materials, Facilities and Transports the division of powers in this respect between the Community and the Member States, particularly as it may change in the course of time.[210] It is sufficient for the Union to communicate to the other contracting parties that the matter gives rise to a division of powers within the Community, whereas the exact nature of the division is a domestic question in which third parties have no need to intervene. In *Demirel*, the Court noted that in ensuring respect for commitments arising from an agreement concluded by the Community institutions, the Community had assumed responsibility for the due performance of the agreement.[211] In *Kupferberg*, the Court also stated that the effect of provisions of an agreement cannot vary according to who is responsible for the implementation of the treaty.[212]

The CJEU has affirmed its position in later cases. In *Parliament v. Council*, which concerned financial assistance under the fourth Lomé Convention, the Court noted the bilateral nature of the Convention and concluded that in the absence of express derogations in the Lomé Convention, the Community and its Member States as partners of the African, Caribbean and Pacific Group of States are jointly liable to those latter States for the fulfilment of every obligation arising from the commitments undertaken, including those relating to financial

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[209] *EC – Computer Equipment*, PR, para 8.17.
[210] *Ruling 1-78 re Convention on the Physical Protection of Nuclear Materials, Facilities and Transports* [1978] ECR 2151, para 35.
[211] C-12/86 *Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR 3719, para 11.
[212] C-104/81 *Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A.* [1982] ECR 3641, para 12.

assistance.[213] The Court followed Advocate General (AG) Jacobs's opinion that under a mixed agreement the Community and the Member States are jointly liable unless the provisions of the agreement point to the opposite conclusion.[214] Even though AG Jacobs appeared to call for joint responsibility with respect to all mixed agreements, it is not clear whether the Court adhered to such a broad interpretation because the Court referred specifically to the Lomé Convention. Furthermore, the case concerned development aid which is a shared competence.

Similarly, in *Hermès International* AG Tesauro noted that Member States and the Community constitute, *vis-à-vis* contracting non-member states, a single contracting party or at least contracting parties bearing equal responsibility in the event of failure to implement the agreement.[215] According to AG Tesauro, the line dividing the competences of the Member States and the EU is often not easy to establish and the provisions are often interconnected.[216] An exception to this trend is AG Mischo Opinion in *Commission v Ireland*, where he suggested that "*very fact that the Community and its Member States had recourse to the formula of a mixed agreement announces to non-member countries that that agreement does not fall wholly within the competence of the Community and that, consequently, the Community is, a priori, only assuming responsibility for those parts falling within its competence*".[217] AG Mischo's reasoning, however, disregards the interests of third parties. If the very purpose of mixity is to avoid the express delimitation of competences between the EU and its Member States, then it would be illogical, if not unfair, to require third parties to draw a line which the European Commission itself is unable or unwilling to determine.

The prevailing view in the legal scholarship also supports the default position that both the organization and its member states are bound by all obligations within a treaty they sign, irrespective of the internal division of powers.[218] Bartels notes the distinction between autonomy and responsibility and suggests that Article XI:1 of the WTO Agreement, which allows for the possibility that original WTO Members will not have autonomy in all matters covered by the WTO Agreements, is unrelated to the question of responsibility.[219] Nollkaemper also supports the majority opinion, that from the international law perspective, both the EU and

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[213] C-316/91 *Parliament v. Council of the European Union* [1994] ECR 661 (*Parliament v Council*), para 29.
[214] *Parliament v. Council*, Opinion of AG Jacobs, para 69.
[215] C-53/96 *Hermès International v. FHT Marketing Choice BV* [1998] ECR I-3603 (*Hermès International*) Opinion of AG Tesauro, para 14.
[216] *Hermès International*, Opinion of AG Tesauro, para 20.
[217] C-13/00 *Commission of the European Communities v. Ireland* [2001] ECR I-02943, para 30.
[218] See Eric Stein, 'External Relations of the European Community: Structure and Process' in Andrew Clapham (ed), *European Community Law* (1990), vol. I-1, 162.
[219] Lorand Bartels, 'The UK's Status in the WTO after Brexit' [2016] Available at SSRN: https://ssrn.com/abstract=2841747, 4-5.

its Member States are bound by all obligations under mixed agreements, except where declaration of competences or an alternative scheme is laid out.[220] Similarly, Tomuschat reasons that if the European Commission and Member States refrain from publicizing the demarcation line between their respective areas of jurisdiction, their partners cannot be expected to make necessary inquiries themselves.[221] Dolmans suggests that in such cases, it is preferable for third parties to regard the Community and its Member States as jointly liable.[222] For example, during the negotiations of the Galileo/GPS Agreement between the US and the EU, the US argued for joint and several liability, because the internal allocation of competences was unknown to it.[223]

In sum, international obligations are assumed by states and organizations in their capacity as independent legal persons. The internal division of competences and transfer of powers do not affect the status of international obligations. States and international organizations are prevented from escaping (even unintentionally) their international obligations by transferring powers or outsourcing conduct to another entity. The rule of non-circumvention and the principle of joint obligations find extensive support in international human rights and economic law dispute-settlement practice. I thus conclude, that international organizations and their members are independently responsible for breaches of their international obligations.

4. The principle of independent responsibility

The fact that both an organization and its member states are bound by all obligations under a treaty they enter, does not mean that a breach of that treaty will result in their joint and several responsibility.[224] Joint responsibility arises in cases when several entities are responsible for the same internationally wrongful act, for example when two or more states together carry out an internationally wrongful act in circumstances where they may be regarded as acting jointly in

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[220] André Nollkaemper, 'Joint Responsibility between the EU and Member States for Non-Performance of Obligations Under Multilateral Environmental Agreements' in Elisa Morgera (ed), *The External Environmental Policy of the European Union* (CUP 2012). 22-23 Nollkaemper suggests that in addition to mixed agreements, joint responsibility may arise in cases when conduct of the EU and its Member States is so closely intertwined that it is impossible to allocate responsibility between them, for example in case of the EU financing of a construction project which resulted in damage, 304.

[221] Christian Tomuschat, 'Liability for Mixed Agreements' in David O'Keeffe and Henry G Schermers (eds), *Mixed Agreements* (Kluwer Law & Taxation Publishers 1983), 130.

[222] Maurits JFM Dolmans, *Problems of Mixed Agreements: Division of Powers Within the EEC and the Rights of Third Parties* (Asser Instituut 1985), 82.

[223] Peter M Olson, 'Mixity from the Outside: The Perspective of a Treaty Partner' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and Its Member States in the World* (Hart Publishing 2010), 343.

[224] It seems that Delgado Casteleiro arrived at a similar conclusion, see Delgado Casteleiro 2016, 66.

respect of the entire operation.[225] Joint responsibility refers to situations when persons that are jointly and severally liable for obligations, are each responsible for the whole damage caused to third parties. In that case the injured party can hold each responsible state to account for the wrongful conduct as a whole. Other cases where responsibility may be joint is when several states establish a joint organ or when an international organization and one of its members participate in a common endeavour, such as a peacekeeping operation.[226] The rules of international responsibility provide for joint responsibility,[227] even though these have attracted criticism for lack of clarity.[228] In his reports, Gaja has indicated on a number of occasions that attribution is not exclusive and conduct can result in the responsibility of several entities.[229]

According to Gaja, joint responsibility can also arise when both the organization and its members have jointly undertaken the same obligation towards a third party and the obligation is breached.[230] In his reports, Gaja expressly noted that breach of the EU's mixed agreements, which is silent on the declaration of competences, can result in joint responsibility of the EU and its Member States.[231] Gaja's statement that joint obligations under mixed agreements can result in joint responsibility is certainly correct. There could be situations, where conduct is attributed both to the EU and its Member States or where they both contribute to a common endeavour. According to Nollkaemper joint responsibility can result in the rare cases of undivided injury when the EU and the Member States both contribute to an injury and it is not possible for third parties to determine who caused what.[232]

However, notwithstanding such cases, the general principle in international law is that in the absence of agreement to the contrary, each state or international organization is independently responsible for conduct attributable to it.[233] The general rule in international law is that of separate responsibility of a state for its own wrongful acts. In fact, Nollkaemper provides practical examples which suggest that joint responsibility often results in individualised

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[225] Yearbook of the International Law Commission, A/CN.4/SER.A/2001/Add.1 (Part 2), 124, para 2.
[226] Gaja Second Report, 4, para 7.
[227] ARSIWA Art 47, DARIO Art 48.
[228] André Nollkaemper, 'Introduction' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2014), 14. Nollkaemper even notes that in some respects, the law even complicates or even impedes application of shared responsibility, ibid. 3.
[229] Gaja Second Report, 4, para 6. See also Summary Record of the 2802nd Meeting, A/CN.4/SR.2802 (ILC 2004), 84, para 21 for comment by Economides and p 82, para 3 for comment by Kolodkin. Pellet represented a minority position by suggesting that the very purpose of the rules of attribution was to avoid joint responsibility, see Summary Record of the 2801st Meeting, A/CN.4/SR.2801 (ILC 2004), 74, para 12.
[230] Sixth Report on Responsibility of International Organizations, by Mr. Giorgio Gaja, Special Rapporteur, 23, para 24.
[231] Gaja Second Report, 5, para 8; Gaja Sixth Report, 23, para 24, ft 31.
[232] Nollkaemper 2012, 310.
[233] Yearbook of the International Law Commission, A/CN.4/SER.A/2001/Add.1 (Part 2), 124, para 3.

responsibility.[234] As Noyes and Smith rightly note, even in situations of joint responsibility there is a tendency to make a single assertion of responsibility against the most blatant and perhaps politically accessible or responsive wrongdoer.[235]

Furthermore, the principle of joint obligations means that obligations are binding on all parties to the treaty. However, as Talmon and Nollkaemper note, being bound to the same obligation is a necessary but not a sufficient condition for responsibility to arise.[236] The second condition under the ILC rules of international responsibility is the attribution of a wrongful conduct.[237] As the majority of the EU's mixed agreements do not provide an express statement on joint, or joint and several, responsibility of the EU and its Member States, the default rule is independent responsibility.[238]

5. Conclusion

To recap the above discussion, the non-transferability of international obligations when states create international organizations and transfer to them part of their sovereign powers has two important implications for the international responsibility. First, states and international organizations are not allowed to circumvent their obligations by acting indirectly. States are not relieved from their obligations solely on the basis that they were merely carrying out the decisions of an international organization whose member they are. Organizations are also prevented from escaping accountability when they make binding decisions on their members who carry out the unlawful activity. In cases when both a state and an international organization assume international obligations, such as under mixed agreements, both an organization and its members are bound individually by all obligations under that agreement, unless expressly noted otherwise. I concluded that the EU and its Member States are independently responsible for their joint obligations, irrespective of their internal division of competences.

The principle of independent responsibility, however, provides only part of the answer to the conundrum of the responsibility of the EU and its Member States because independent

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[234] Nollkaemper 2012, 304.
[235] John E Noyes and Brian D Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1988) 13 Yale J. Int'l L. 225, 232.
[236] Stefan Talmon, 'Responsibility of International Organizations: Does the European Community Require Special Treatment?' in Maurizio Ragazzi (ed), *International Responsibility Today* (Martinus Nijhoff 2005); Nollkaemper 2012, 330.
[237] DARIO Art 4; ARSIWA Art 2.
[238] Heliskoski 2001, 150. There are exceptions, e.g. the Declaration of the EU to the Kyoto Protocol states that the EC and its Member States will fulfil the commitments jointly.

responsibility does not necessary result in joint responsibility. If an organization and its members are independently responsible for their joint obligations, how does one determine which subject is responsible in a given situation?

This follow-up question is particularly complex in the context of the EU. Under the constitutional architecture of the Union, Member States often implement decisions and policies of the Union. In case Member States' measures result in a violation of a mixed agreement, how does one determine whose conduct was in breach of their joint obligations. Are Member States acting independently and so their actions must be attributed to them? Or are they, acting as organs or agents of the Union in which case the EU is solely responsible? Or are they, instead, jointly responsible for a breach to which they both contributed? The following section thus addresses the concept of an organ and agent for the purpose of determining exclusive responsibility in the EU's multi-layered structure.

CHAPTER IV – THE CONCEPT OF AN ORGAN AND AGENT OF THE EU

1. Introduction

In Chapter II I argued that the ILC framework does not determine the allocation of responsibility in a multi-layered structure such as that of the EU. I suggested instead that the legal basis for the allocation of responsibility is found in the rules of the organization and the international dispute-settlement practice in which those rules operate.

Accordingly, Chapter III looked into the EU's rules for the allocation of international responsibility. Based on an extensive analysis of international trade, investment and human rights case-law, I argued that the European Commission's claim for competence-based responsibility lacks support in international law. Instead, I suggested that both the EU and its Member States are independently responsible for breach of their joint obligations, irrespective of the internal division of competences.

In Chapter III I also noted that the principle of independent responsibility for joint obligations does not necessarily mean that a breach will result in joint and several responsibility. That both the EU and its Member States *may* be held responsible for a breach of their joint obligations does not tell us which of them (or both of them) *will* be responsible in a given situation.

How then do we determine exclusive responsibility in situations where the EU and its Member States exercise shared sovereignty in a common governance arrangement whereas the EU competences are implemented through Member States' authorities? In the context of such complex institutional structure, how do we separate the conduct of the EU from that of its Member States? As Wessel and Decker rightly note, states members of an international organization possess different identities and it is difficult to identify "*where the State ends and the member State of an organization begins*".[239] Klabbers suggests that one cannot approach this question "*in terms of a zero-sum game between the organization and its members, where powers exercised by the members on Monday may be transferred to the organization on Tuesday only to flow back again to the members on Wednesday, and so on and so forth.*"[240]

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[239] Ramses A Wessel and Ige F Dekker, 'Identities of States in International Organizations' in Ana Sofia Barros, Cedric Ryngaert and Jan Wouters (eds), *International organizations and member state responsibility : critical perspectives* (Brill Nijhoff 2017), 12.
[240] Jan Klabbers, *An Introduction to International Institutional Law* (2nd edn, CUP 2009), 309.

I return to the ILC framework to search for guidance on the attribution of conduct. A significant nuance must be explained. The ILC rules of attribution refer to broad *categories*[241] of individuals, i.e. organs and agents. The general rule of attribution laid down in DARIO Article 6 states that "*the conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization*". DARIO does not specify which entity is an organ or agent of an organization. In other words, DARIO tells us that *if* agent X is an organ of organization Y, that organization will be responsible for a breach committed by X. It does not tell us whether agent X is in fact an organ of Y. The DARIO framework is silent on this latter question because, as I argued in Chapter II, the ILC rules do not deal with the internal institutional arrangements and sovereignty sharing in the institutional structure of an international body. The *allocation* of responsibility within the EU is outside the DARIO framework.

While the ILC framework does not define an organ or agent of an international organization, the ILC's *travaux préparatoires* provide significant guidance on the concept of an organ and agent. Accordingly, in the following analysis I will examine the ILC rules as a source of international law to define the concept of an organ or agent of an international organization. I will thus not *apply* the ILC rules of attribution but will use this framework as guidance on how international law defines organic relationships within an organization. My aim is to determine when authorities of an EU Member State act as organs or agents of the EU or that Member State.

2. ILC doctrine

States and international organizations act through individuals. The most common category – an organ – is a person who belongs to the formal structure of a state or an organization. An agent, on the other hand, is not part of the official machinery but acts on behalf of a state or an organization. As noted by the ILC member Reuter, an organ is a person that a statute formally established to be part of a state, whereas an agent possesses that status 'functionally'.[242] The ILC has employed conceptually different approaches with respect to the organic relationships

[241] Ago himself refers to the term 'categories', see Ago Third Report, 233.
[242] Summary Record of the 1212th Meeting, A/CN.4/SR.1212 (ILC 1973) 53, paras 46.

between states and international organizations, for the purposes of attribution of conduct. I will examine them in turn.

2.1 The ARSIWA framework

In the early days of the ARSIWA project, the terms agent and organ were used interchangeably to refer to persons who form part of the internal machinery of the state.[243] A lack of a clear definition of the term organ has been noted by Ago and other members of the ILC.[244] In his Third Report on ARSIWA, Ago listed a number of earlier cases which defined an act of the state as one carried out by its agents, without making a distinction between different types of individuals who act on behalf of the state.[245]

At the time of the drafting of ARSIWA Article 4, which provides a general rule of attribution of acts of its organs to the state, the term 'organ' was not yet defined and the opinions of the ILC members differed on the matter.[246] Ago himself initially did not make a distinction between the two categories of 'organ' and 'agent'. He used the terms interchangeably to refer to persons who participate in the organization of the state and who are considered state organs according to the internal legal order.[247] Several ILC members suggested to differentiate between formal and *de facto* state organs.[248]

During the consideration of Ago's Third Report it was agreed to exclude the term 'agent' from the draft Article 5 as it seems "*to denote, especially in English, a person acting on behalf of the State rather than a person having the actual status of an organ*".[249] Though without using the word 'agent', the latter category of persons was covered by what at the time was draft Article 8. The latter rule of attribution addressed persons to which Ago referred as *de facto* officials, in other words persons who in principle where not state officials but who in special circumstances where called upon to perform state functions.[250] Ago's successor Crawford maintained the distinction between the categories of organ and agent based on whether or not a person is part

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[243] Ago Third Report, 238, para 122.
[244] Summary Record of the 1261st Meeting, A/CN.4/SR.1261 (1974) 50–51, paras 11-23.
[245] Ago Third Report, 329, para 124.
[246] Summary Record of the 1226th Meeting, A/CN.4/SR.1226 (ILC 1973) 121, paras 17-19.
[247] Summary Record of the 1210th Meeting, A/CN.4/SR.1210 (ILC 1973) 45, paras 54.
[248] Summary Record of the 1258th Meeting, A/CN.4/SR.1258 (ILC 1974), 34, para 18, for comments by Tammes; Summary Record of the 1255th Meeting, A/CN.4/SR.1255 (ILC 1974) 19, para 24, for comments by Ushakov.
[249] Report of the International Law Commission on the Work of Its Twenty-Fifth Session, 7 May - 13 July 1973, Official Records of the General Assembly, Twenty-Eighth Session, Supplement, A/9010/Rev.1, 193, para 13.
[250] Summary Record of the 1258th Meeting, A/CN.4/SR.1258, 32, para 3.

of the structure of the state (organ), or whether they are acting on behalf of the state by reason of some mandate or direction (agent).[251]

States supported the inclusion of *de facto* agents of the state in the rules of attribution of conduct. The United States noted that a relationship between a person and a state may exist *de facto* even where it is difficult to pinpoint a precise legal relationship.[252] Austria was also of an opinion that rules of attribution sufficiently cover acts of natural persons and juridical persons, who, at the time of committing a violation of international law, do not act as state organs but nevertheless act under the authority and control of the state.[253] Similarly, Germany[254] and Mongolia[255] noted the importance of taking into account the fact that states increasingly entrust persons outside the structure of the state with activities normally attributable to a state.

To summarize, the general rule of attribution under ARSIWA Article 4 is based on a person's formal status as an 'organ' in the official structure of the state. Situations when a person who is not part of the state machinery, nevertheless acts on behalf of the state are addressed in other articles. Conduct of persons who act on behalf of the state but are not part of its formal structure, are only attributed to the state if there is some additional element: empowerment to carry governmental authority by the State (Article 5) or direction and control by the state (Article 8). According to Crawford, there can be substantive differences between the two cases. For example, unauthorized acts of organs are to be attributed to the state, whereas different considerations may apply to unauthorized acts of agents.[256]

2.2 The DARIO framework

DARIO, which otherwise closely follows the structure of ARSIWA, provides a conceptually different approach to attribution of conduct. While the general rule of attribution under ARSIWA is based on the structural relationship between a person and a state, DARIO employs

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[251] Crwaford First Report, 35, para 162. Per Crawford, direction and control of a state as the basis for attribution, which was initially noted by the ICJ in *Military and Paramilitary Activities in and against Nicaragua*, is to be treated as a general principle, ibid, 43, para 213. As for the term 'effective control', which was employed by the ICJ, Judge Ago required nothing less than specific authorization of the wrongful conduct itself, ibid, 40, para 200.
[252] Yearbook of the International Law Commission, A/CN.4/SER.A/1998/Add.1 (Part 1), 108, United States' comment to Article 8 (Attribution to the State of the conduct of persons acting in fact on behalf of the State).
[253] Official Records of the General Assembly, Fifty-second Session, Sixth Committee, 23rd meeting (A/C.6/52/SR.23), and corrigendum), p. 6, para. 31.
[254] See Yearbook of the International Law Commission, A/CN.4/SER.A/1998/Add.1 (Part 1), 105, for Germany's comment to ch II as a whole of the draft.
[255] See Yearbook of the International Law Commission, A/CN.4/SER.A/1998/Add.1 (Part 1), 107, for Mongolia's comment to Article 8 (Attribution to the State of the conduct of persons acting in fact on behalf of the State).
[256] Crawford First Report, 35, para 162.

a functional approach. The source of the functional test employed by the ILC is the advisory opinion in *Reparations for Injuries* case, where the ICJ stated that what matters for a person to be regarded as an agent is not his or her character as an official but the fact that he is a "*person through whom [the organization] acts*".[257] According to Gaja, when a person was entrusted by an organization in his or her official capacity with a mission, that person acted for the organization.[258]

Making a U-turn from the approach held by both Ago and Crawford with respect to states, Gaja maintained that there is little reason for distinguishing between persons who had the formal status of an 'organ' and other persons who did not have that official status. Gaja referred to 'organs, agents and officials' without differentiating between them and stressed the importance for attribution of external boundaries rather than the internal boundaries between those categories.[259]

In line with Gaja's approach and in accordance with the ICJ's interpretation of agent in the *Reparations for Injuries* case "*in the most liberal sense*",[260] the Drafting Committee adopted a broad concept of the general rule of attribution. The Drafting Committee preferred the term 'agent' on account of the importance attached to it by the Advisory Opinion of the ICJ.[261] According to the Drafting Committee, the reason for including the latter element was to ensure that the draft articles do not exclude the possibility that an organization could confer certain functions on an organ or agent without clear statement to that effect in the organization's rules as well as cases of 'apparent authority'.[262] The term 'agent' provided in DARIO is thus wide enough to cover situations enshrined in Articles 5 and 8 ARSIWA.[263]

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[257] Yearbook of the International Law Commission, A/CN.4/SER.A/2004/Add.1 (Part 2) (ILC 2004), 49, para 5, commentary to Article 4. The ILC cites p 177 of the Advisory Opinion in the *Reparations for injuries suffered in the service of the United Nations*.

[258] Summary Record of the 2800th Meeting, A/CN.4/SR.2800, 67, para 5. The phrase to express the link between a person and an international organization, as chosen by the Drafting Committee, was "conduct of an organ or agent in the performance of the functions of that organ or agent" as opposed to an alternative "in the performance of their official functions". The chosen phrase had to solve the problem of the burden of proof since the solution was that a complainant simply had to prove that the conduct of the organ or agent had occurred in the performance of its functions, and not that the function was also the function of the organization, 'Summary Record of the 2800th Meeting, A/CN.4/SR.2800', 136, para 8.

[259] Summary Record of the 2803rd Meeting, A/CN.4/SR.2803 (ILC 2004), 92, para 49.

[260] Advisory opinion in the *Reparations for injuries suffered in the service of the United Nations*, 177.

[261] Comment by Cedeño, Chairperson of the Drafting Committee, Summary Record of the 2810th Meeting, A/CN.4/SR.2810 (ILC 2004), 136, para 6. At the outset the Committee also considered the term 'official' but it was later agreed to refer to 'organs and agents' only since the latter term covered officials.

[262] Summary Record of the 2810th Meeting, A/CN.4/SR.2810, 136, para 11.

[263] Yearbook of the International Law Commission, A/CN.4/SER.A/2004/Add.1 (Part 2), 49, paras 12-13, commentary to Art 4.

Some international organizations met the general rule of attribution with apprehension and noted that they have no practice of external persons acting on their behalf. The WHO and the WTO remarked that their internal rules contained no provisions regarding persons acting on behalf of the organization.[264] The ILO similarly expressed a concern over a wide scope of the definition of the term 'agent' which "*includes officials and other persons or entities through whom the organization acts*".[265]

Nevertheless, the drafters of DARIO adopted a broad functional approach to the general rule of attribution according to which acts of any organ, agent or official, whether part of the official structure of the organization or as *de facto* agents, can be attributed to the organization if they carry one of its functions.

To re-iterate the introductory point made above, the ILC framework speaks only in the language of general categories. That the ILC has adopted a broad concept of organ and agent is useful to the present analysis but does not allow to definitively differentiate between organs/agents of the EU and its Member States for the purposes of determining exclusive responsibility. In the following sections, I thus look at how the concept of an organ and agent is defined by the EU itself and whether its approach finds support in international dispute-settlement practice.

3. A *de facto* organ of the EU

Separating the conduct of the EU and its Member States in situations when there is a breach of joint obligations through the exercise of their shared sovereignty is complex. To provide an illustration of the many scenarios that may arise: are Member States' customs authorities acting as EU organs when they implement EU customs decisions, resulting in attribution of conduct to the EU? Should the EU, rather, be attributed responsibility because it adopts decisions binding its Member States? If so, what about Member States' discretion? Klabbers rightly notes that a breach of an international agreement will usually stem from the conduct of an organ of the EU or Member State in compliance with some sort of EU regulation.[266] But that does not tell us all that much. Putting aside official EU institutions like the European Commission and the Council, juridical categorization of the EU's executive governance is not straightforward. Attempts have been made to disentangle this complex relationship. A comprehensive analysis

[264] Comments A/CN.4/545, 34, sect 4 para 1 for comment by the WHO and sect 5 for comments by the WTO.
[265] Comments A/CN.4/568, 130, sect E.
[266] Jan Klabbers, *An Introduction to International Institutional Law* (2nd edn, CUP 2009), 279.

on the topic can be found in the recent work of Wessel and Dekker who provide insight into the many identities of a state which is a member of an international organization.[267]

In its comments during the drafting of DARIO, the European Commission took the view that when implementing a binding act of the EU, Member States act as *de facto* organs of the EU, so that "*the conduct of the organ of a member State would be attributed [to the EU]*".[268] The EU's approach relates to the doctrine of *dédoublement fonctionnel*, which may be interpreted as meaning that Member States' authorities perform a dual role.[269] Member States implement their own law and at the same time they are functionally organs of the EU. This, according to Delgado Casteleiro, is the main consequence of the adoption of executive federalism within the EU.[270] The argument may be traced to an obligation of the Member States to fulfill all measures of national law necessary to implement legally binding Union acts stated in Article 291(1) of TFEU.

Talmon interprets the general rule of attribution laid down in DARIO Article 6 as being wide enough to accommodate the EU's claim that Member States' authorities act as *de facto* organs or agents of the EU when they exercise Community functions.[271] A number of scholars, however, doubt as to whether the EU's approach sits comfortably with Article 6. Kuijper and Paasivirta, for example, suggest that Article 6 "*does not capture the core features of the EU action, since the Member States are seen as remaining sovereign and not constituting organs of the organization in a formal sense. Consequently, the Member States would always be responsible, as the immediate actors, should acts be attributed on purely organic lines*."[272] Delgado Casteleiro, whose recent book provides the most extensive analysis on the normative control of the EU to date, also concludes that Article 6 does not deal with EU normative control scenarios.[273]

To re-iterate my earlier argument, however, the question of who are the EU's organs should not be interpreted through the prism of whether they are covered by Article 6 – the general rule of attribution does not tell us who should be considered as EU organs. They only tell us that *if* an

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[267] Wessel and Dekker 2017.
[268] Seventh Report on Responsibility of International Organizations, by Mr. Giorgio Gaja, Special Rapporteur, 12.
[269] Higgins 1995.
[270] Andrés Delgado Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (CUP 2016), 43.
[271] Stefan Talmon, 'Responsibility of International Organizations: Does the European Community Require Special Treatment?' in Maurizio Ragazzi (ed), *International Responsibility Today* (Martinus Nijhoff 2005), 412.
[272] Pieter Jan Kuijper and Esa Paasivirta, 'EU International Responsibility and Its Attribution: From the Inside Looking Out' in Malcolm Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspective* (Hart Publishing 2013), 54.
[273] Delgado Casteleiro 2016, 71.

organ is an EU organ, its conduct is attributed to the EU. The content of 'if' is not addressed in the ILC framework. In this context, we may only look at the ILC framework as a source of general legal theory, not as governing law.

Given that the drafters of DARIO interpreted the term agent and organ broadly and did not consider it necessary that they be part of the official structure of the organization, the ILC doctrine of international responsibility does not prevent the EU's claim that Member States' authorities may act as its d*e facto* organs for the purposes of attribution of conduct. But does the EU's approach find support in international practice?

Some interpret the WTO Panel's report in the *EC — Geographical Indications* dispute as a landmark decision which established the principle that the EU bears international responsibility on behalf of its Member States because the latter act as *de facto* organs of the EU when they implement Union decisions.[274] In paragraph 7.269 of its Report, the Panel noted that "*Community laws are generally not executed through authorities at Community level but rather through recourse to the authorities of its member States which, in such a situation, "act de facto as organs of the Community, for which the Community would be responsible under WTO law and international law in general".*[275]

It is true that under the WTO dispute-settlement regime, the general practice is that the EU represents its Member States. That, however, is based on the nature of their joint participation in mixed agreements which I will address in detail in Part II of this thesis. To the best of my knowledge, there is nothing in the WTO case-law which suggests that the DSB allocates international responsibility to the EU *because* it considers that Member States act as organs of the EU when implementing its decisions.

Reliance on the cited passage in *EC — Geographical Indications* to address the question of shared responsibility is questionable. The Panel's conclusion on the principal/agent relationship between the EU and its Member States is unrelated to the issue of responsibility. The Panel addressed a substantive, not a procedural, aspect of the case.

The issue under consideration was whether the application procedure for registration of geographical indications subjected holders of names of agricultural products and foodstuffs located in a third country outside the EC to a less favourable treatment than that afforded to

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[274] For example, Francesco Messineo, 'Attribution of Conduct' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2014), 75, ft 57.
[275] *EC — Geographical Indications*, PR, para 7.269.

nationals of Member States. Under the disputed regulation, all applicants were required to submit their applications in the country in which the geographical area was located, that is to the authorities either of an EC Member State or a third country. If authorities which received an application considered that it satisfied the requirements of the regulation, they were to forward it to the EC Commission. The question before the Panel was whether the filing of an application to a Member State authority was equivalent to applying directly to the EC. If this was the case, the argument of the claimant followed, holders of names located in third countries were disadvantaged because their application process included an additional step of review by an intermediary third country authority.

To answer this question, the Panel had to determine whether Member State authorities act as organs of the EC in which case the filing of an application through a Member State authority would mean filing to the EC itself. In that same paragraph 7.269, the Panel thus concluded that "*any application relating to a geographical area located in an EC member State is filed directly with a "de facto organ of the Community" which also carries out the initial examination. An application relating to a geographical area located in a third country cannot be filed directly, but must be filed with a foreign government. This is a formal difference in treatment"*. The remark, however, is entirely unrelated to the question of international responsibility and instead addressed a wholly separate issue of the process of registration of geographical names.[276]

The cited statement that Member States can act as organs of an EU has been reiterated in another WTO case, *EC – Selected Customs Matters*. It is true that the DSB acknowledges that in some cases organs of Member States may perform *dédoublement fonctionnel.* The Panel noted that the courts of the Member States may be assigned a dual role – when determining a dispute governed by national law, they form part of the national legal order; however, according to the Panel, the same national courts assume the status of Community courts when determining a case governed by Community law.[277]

The statement, however, was once again unrelated to the question of attribution of conduct. The dispute arose as to whether the EC's obligation under Article X:3(b) of the General Agreement on Tariffs and Trade (GATT) 1994 to maintain judicial procedures for the prompt review and correction of administrative action relating to customs matters can be satisfied through the

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[276] In a similar manner, the Panel refers to the EU/Member State agency relationship with respect to other substantive issues, for example, in paras. 7.725-7.726 to conclude that to the extent that advantages are granted under the disputed regulation by the EC and Member States' authorities exercising powers under the regulation, to the EC's own nationals, those advantages are not granted to the nationals of any other country.

[277] *European Communities – Selected Customs Matters*, WT/DS315/R, PR adopted 11 December 2006 (*EC – Selected Customs Matters*), para 2.23.

Member States' institutional structures. The EC referred to *EC — Geographical Indications* to argue that the judicial authorities of the EC Member States fulfilled that requirement, because Member State courts are EC courts when it comes to the application and interpretation of EC law.[278] The US disagreed with the analogy,[279] but the Panel concluded that the EC may comply with its obligations through organs in its Member States[280] because authorities in the Member States act as organs of the EC when they review and correct administrative action taken pursuant to EC customs law.[281] Once again, the statement here relates to a substantive issue, that is whether an obligation to ensure judicial review can be fulfilled through Member State courts. It is unrelated to the question of international responsibility.[282]

Furthermore, it is questionable whether attributing conduct of Member States' organs to the EU when they implement EU competences is compatible with the principle of independent responsibility. If the EU and its Member States are independently responsible for violations of their joint obligations irrespective of the internal division of competences, how then could conduct of a Member State's organ be attributed to the EU on the basis that is carrying an EU function? The DSB makes this point as well. It refuses to acknowledge that violations by Member States' organs may be attributed to the EU based on its internal law. The DSB does not release Member States from responsibility for conduct of their organs, irrespective of the internal law of the EU. For example, in *EC – Large Civil Aircraft* the Panel noted that "*[w]hatever responsibility the European Communities bears for the actions of its member States does not diminish their rights and obligations as WTO Members, but is rather an internal matter concerning the relations between the European Communities and its Member States*".[283]

EC and Certain Member States – IT Products provides another example of the DSB's refusal to release Member States from responsibility when their organs implement or apply EU law. Instead, the Panel confirmed that EC Member States are WTO Members in their own right and that, like all WTO Members, they are bound to act consistently with their WTO obligations.[284] According to the Panel "*if one or more EC member States were found to have applied WTO inconsistent measures, be they enacted by the States themselves or by the European*

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[278] *EC – Selected Customs Matters*, PR, para 4.385.
[279] *EC – Selected Customs Matters*, PR, para 4.705.
[280] *EC – Selected Customs Matters*, PR, para 4.552.
[281] *EC – Selected Customs Matters*, PR, para 4.553.
[282] The EU's reference in para. 4.708 of the PR to the ILC rules of responsibility which state that the responsibility for internationally wrongful acts extends not only to organs of the central government, but also to organs of territorial units is misplaced – the EU is using ARSIWA as a general institutional law of international organizations, which falls outside the scope of the draft articles.
[283] *EC – Large Civil Aircraft*, PR, para 7.175.
[284] *EC and Certain Member States – IT Products*, PR, para 8.2.

Communities, it could be appropriate to find that the member States have acted inconsistently with their WTO obligations".[285] The Panel stated so irrespective of the European Commission's submission that the EC attests that Member States would be required under Community law to apply the implementing measures taken by the EC to meet the Panel's recommendation.[286]

EC – Computer Equipment provides yet another example where the DSB refrains from endorsing the view that authorities of Member States act as organs of the EU when they implement Union law. The case concerned tariff application for certain computer technology by the EU, as well as the customs authorities of the United Kingdom and Ireland. The Panel's reference to 'customs authorities in the European Union' could be read as endorsing the EU's proposition that Member States's customs authorities act functionally as EU organs when implementing EU law, and thus responsibility for their conduct should be attributed to the EU.[287] However, such interpretation is unlikely given that the Panel unequivocally states that "*the European Communities, Ireland and the United Kingdom are all bound by their tariff commitments under Schedule LXXX*" and that "*[t]he respondents in these documents are the European Communities, the United Kingdom and Ireland, respectively*".[288] The Panel thus refuses to allocate exclusive responsibility to the EU on the basis that Member States' customs authorities act as *de facto* EU organs. Flett similarly suggests that the Panel did not state that the EU had exclusive responsibility for such matters, but rather that the EU and its Member States would concurrently bear the obligations contained in the WTO Agreements.[289]

Direct application of the reference in *EC — Geographical Indications* to '*de facto* organs of the EU' as a legal basis of EU's exclusive responsibility is even less convincing given the ambiguous and inconsistent interpretation of this organic relationship by EU itself. The case law analysis reveals that the EU characterizes its principal/agent relationship with the Member States in accordance with its defence strategy on a case-by-case basis.

For example, in some cases, the EC denies the existence of any degree of Member States' independence with respect to customs administration. In *EC — Geographical Indications*, the

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[285] *EC and Certain Member States – IT Products*, PR, para 8.2.
[286] *EC and Certain Member States – IT Products*, European Communities' response to the Panel's Question No. 17. See also the statements of the European Communities at the Panel's organizational meeting of 4 February 2009; Letter from the Delegation of the Commission (4 February 2009).
[287] Gracia Marín Durán, 'The EU and Its Member States in WTO Dispute Settlement: A "Competence Model", or a Case Apart, for Managing International Responsibility?' in Marise Cremona, Anne Thies and Ramses A Wessel (eds), *The EU and International Dispute Settlement* (Hart Publishing 2016).
[288] *EC – Computer Equipment*, PR, para 8.16.
[289] James Flett, 'The Practice of Shared Responsibility in Relation to The World Trade Organization and the European Union and Its Member States in the WTO' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2016), 890.

EC argued that the disputed regulation was a measure of the Community and not of its Member States and therefore only the views of the EC institutions, and not the individual views of the Member States were relevant for the interpretation of that same regulation.[290] According to the European Commission, it is unclear what the United States means when it says that Member States are "*acting pursuant to an EC*" to the disputed regulation.[291] The European Commission maintained that the EC was the only respondent in this dispute, despite the fact that "*[u]ndoubtedly, the Member States have certain responsibilities in the implementation and execution of [the disputed] Regulation*".[292] The European Commission's submission thus denies the existence of any degree of Member States sovereignty when they implement Union law. Similarly, in *EC – Selected Customs Matters* the EC argued that under international law it was allowed to discharge its obligations through its Member States.[293] It maintained that Member States do not apply their own interpretation of the tariff classification and there can be no inconsistency in the system of the EC's customs administration due to a number of mechanisms which ensure the uniform interpretation and application of its customs laws.[294]

On other occasions, however, the EC has argued in favour of an opposite position that Member States remain responsible for the implementation or application of Union law. For example, in *EC and Certain Member States – IT Products*, the EU refused to release Member States from international responsibility by stating that while the EC is exclusively competent to decide the duty applicable to each product at issue, the 'application' of such duty "*is the sole responsibility of the EC member State customs authority*".[295] Similarly, in *EC – Selected Customs Matters* the European Commission alluded to GATT Article XXIV:12 which calls for observance of the provisions of GATT by regional and local governments and authorities, thus suggesting that it considered the dispute to be about the observance of the uniform application of customs laws by the Member States, not by itself.[296] In *EC – Geographical Indications* it also submitted that implementation of the disputed regulation is not only the responsibility of the Community, but

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[290] *EC — Geographical Indications*, Replies to questions of the European Communities after 1st Meeting, Question No. 70, para 173.
[291] *EC — Geographical Indications*), Second written submission of the EC, 22 July 2004, Annex B-5, B-210, para 255.
[292] *EC — Geographical Indications*), Second written submission of the EC, 22 July 2004, Annex B-5, B-210, para 255.
[293] *EC – Selected Customs Matters*, PR, para 4.705.
[294] *EC – Selected Customs Matters*, PR paras 4.757-4.763, also para 4.756.
[295] *EC and Certain Member States – IT Products*, PR, para 6.11.
[296] *EC – Selected Customs Matters*, PR, para 4.454. The US disagreed, stating that the article is not applicable because the dispute did not concern observance of GATT provisions by regional and local governments and authorities in the EC, but by the EC itself.

also of its Member States, who, for instance, are responsible for the transmission of applications and objections regarding the registration of geographical names to the Commission.[297]

Similarly, in *EC – Computer Equipment*, the EC asserted that Member States have transferred to the Union their sovereignty with respect to customs matters and therefore the EC has assumed full responsibility for obligations in this field.[298] However, the European Commission at the same time rejected that incorrect classification of customs tariffs by Member States could be considered as its own conduct. According to the Commission "*it was clear that the EC was not bound vis-à-vis its trading partners by any actions of national authorities which were inconsistent with the EC's position <...>".*[299] Similarly, the EU refused to accept that the issuance of binding tariff information (BTI)[300] by Member States authorities could have created a legitimate expectation for importers as against the EC because "*BTIs did not represent classification decisions of the EC*".[301]

In *EC – Commercial Vessels* too, the EU separated its conduct from that of the Member States, even though Member States acted in the EU's area of competence. The European Commission disputed that Korea's challenge of the EU state aid scheme in the shipping sector covered individual instances of financing by the Member States. The European Commission stated that "*the member State measures are not implementing measures of the TDM Regulation. They are autonomous decisions on whether or not to make use of the derogation from the prohibition under EC law of contract-related operating aid in the shipbuilding sector*".[302] The European Commission did not consider Member States' measures to be part of its domain of activity. Importantly, the European Commission stressed that the challenged EU regulation had the nature of a limited derogation form a general prohibition of subsidization. It was not a specific authorization. According to the European Commission, Member States' measures were thus not 'implementing' measures.[303] It concluded that Member States' measures were not covered by the claim against the EU. In this particular dispute, the European Commission thus suggests that unless Member States are given specific authorizations to implement an EU policy, they

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[297] *EC – Geographical Indications*, EC's Request for Preliminary Ruling, 24 Feb 2004, para 31.
[298] *EC – Computer Equipment*, PR, para 4.15.
[299] *EC – Computer Equipment*, PR, para 5.39.
[300] Under EU law, a natural or legal person wishing to know how goods for export or import are classified by the national customs authorities of the Member States through which the goods will enter the EU market, may request a Binding Tariff Information (BTI). A BTI constitutes a commitment of the relevant customs authorities vis-à-vis the individual applicant.
[301] *EC – Computer Equipment*, PR, para 5.47.
[302] *EC – Commercial Vessels*, PR, para 4.22.
[303] *EC – Commercial Vessels*, PR, para 4.23.

are not implementing EU law. Such approach contradicts the EU's claim on other occasions that it is responsible for all activities in its area of competence.

Finally, I question whether the European Commission's claim that Member States' authorities act as *de facto* organs of the EU when they implement Union law for the purposes of allocating international responsibility is compatible with EU law itself. Particularly, I query whether the European Commission's position is consistent with the doctrine of direct actions before the EU Courts against the Member States. Article 258 TFEU provides that the European Commission can start infringement proceedings if it considers that "*a Member State has failed to fulfil and obligation under the Treaties*". In this context, the CJEU interprets the notion of 'state' broadly.[304] The Court's case-law shows that Member States may incur liability under Article 258 TFEU "*whatever the agency of the State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution*".[305] Accordingly, under EU law the failure to fulfil a Treaty obligation by a state agent is attributed to the Member States. For the purposes of infringement proceedings implementation of EU law is interpreted as a Member States' obligation, contradicting the European Commission's claim that international responsibility follows the division of competences. For example, in the landmark *Commission v France (Strawberries)* case, the French government was held responsible for disruption to free movement of agricultural produce because the French authorities failed to prevent destruction of Spanish and Belgian harvest.[306] Trade in goods is an exclusive EU competence. Under EU law Member States are held liable for the conduct of their organs and agents which violates Treaty obligations in the areas of EU competences. It is thus not clear how the European Commission's claim that Member States' authorities act as *de facto* organs of the EU when they implement Union law is compatible with the CJEU's case-law on the attribution of conduct to the Member States in the context of Article 258 TFEU. While I acknowledge that Article 258 TFEU is an internal rule the purpose of which is to ensure that Member States implement Union law, there nevertheless seems to be a contradiction in the European Commission's position in (some) international disputes that Member States have no sovereign control over the implementation of EU law.

In sum, international dispute-settlement practice does not support the European Commission's claim that conduct of Member States' authorities is attributed to the EU when they implement

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[304] For example, the notion of 'state' has been given a broad definition in the case-law on direct effect of directives, see C-188-89 *A. Foster and others v. British Gas plc.* [1990] ECR I-3313, para. 20.
[305] C-77/69 Commission of the European Communities v Kingdom of Belgium [1970] ECR 237, para 15.
[306] C-265/95 *Commission of the European Communities v. French Republic* [1997] ECR I-6959.

Union law. The position is even less convincing given the inconsistent application of this suggested basis of attribution by the EU itself. Finally, I also question whether a claim that Member States' authorities act as *de facto* organs of the EU is consistent with the doctrine of direct actions under EU law.

4. Conclusion

The Panel's statement in *EC – Geographical Indications* that Member States act as *de facto* organs of the EU indicates the DSB's overall approach to the EC's organizational arrangement. However, as I will explain in detail in Chapter VII below, this approach stems from the nature of joint EU/Member State participation in the WTO, not from the EU's claim that Member States' organs act on the EU's behalf. It is unconvincing to extrapolate a legal basis for exclusive responsibility from the Panel's remarks in *EC – Geographical Indications*. Nothing in the case-law of the WTO support the EU's claim that Member States' act as its organs when they implement Union law.

The EU's claim that member States act as *de facto* organs of the EU is further questionable given that the EU itself is not consistent in this approach. Instead, it tends to adapt its arguments depending on the defense strategy, in some cases suggesting that Member States' authorities act as its organs while on other occasions claiming that implementing acts are independent acts of the Member States.

Direct reliance on the cited paragraph in *EC – Geographical Indications* to qualify Member States' authorities as organs of the EU is even less convincing given that, to the best of my knowledge, there is no decision in international economic law where international responsibility of the EU was determined on the basis of the agency relationship between the EU and its Member States.

If then international dispute-settlement practice does not support the EU's claim that responsibility is to be exclusively allocated to the EU on the basis that Member States' authorities act as *de facto* organs of the EU, there must exist some other rationale for allocating responsibility between an organization and its Member States. After all, Gaja saw no need to devise special rules on attribution in order to assert the organization's responsibility in situations when authorities of Member States implement Union law. According to him, rationales other than attribution of conduct may guide the allocation of responsibility. He noted that "*[the] responsibility of an organization does not necessarily have to rest on attribution of conduct to that organization. It may well be that an organization undertakes an obligation in*

circumstances in which compliance depends on the conduct of its member States. Should member States fail to conduct themselves in the expected manner, the obligation would be infringed and the organization would be responsible. However, attribution of conduct need not be implied".[307]

Part II of this thesis explores whether, for the purposes of determining exclusive responsibility, (i) attribution of conduct or breach is in fact the legal basis for the allocation of responsibility in a multi-layered structure of an international organization and, if not (ii) what is the appropriate legal basis.

[307] Gaja Second Report, 6, para 11.

PART II – REMEDIAL INTERNATIONAL RESPONSIBILITY

In Part I of this thesis I examined the legal foundations of the international responsibility of the EU and its Member States. Reasoning deductively I explored the common hypothesis that it is in the ILC's rules of attribution of conduct (direct responsibility) or attribution of breach (indirect responsibility) that these foundations lie.

My findings do not support this hypothesis. I suggested in Chapter II that the ILC rules of attribution do not determine the allocation of responsibility in the internal structure of a multi-layered body like the EU. The subject-matter of rules of attribution serves to establish whether an entity *is* internationally responsible, not to identify the responsible entity in a composite structure where sovereignty is shared among different subjects of international law. This latter task must precede the application of the ILC framework.

Chapter III looked at the rules of organisation. That the allocation of responsibility is governed by the rules of the organisation accords with the preferences of the European Commission, which has pushed the idea of the European Union as a *sui generis* entity. According to the European Commission, the international responsibility of the EU is competence-based. The EU is internationally responsible for all breaches in areas of its exclusive competence, irrespective of who carried out the conduct in question. I argued, however, that this approach is not supported by international dispute-settlement practice. Both the EU and its Member States remain independently responsible for their international obligations, irrespective of whether Member States have transferred that competence to the EU. This is so because while a state or group of states can transfer authority to an international/supranational organisation, international obligations are nontransferable. Thus if both the EU and its Member States are parties to a treaty (i.e. a mixed agreement), they both remain bound by all treaty obligations, even if a Member State has transferred part of its powers to the EU.

The principle that an international organisation and its member states are independently responsible for the discharge of their joint obligations does not, however, answer the question of which entity is exclusively responsible in a given situation. One needs to then determine whether the EU, its Member States or both are responsible for a breach of international economic obligations in a particular case. In Chapter IV I attempted to determine the basis for exclusive responsibility of the EU and its Member States by analysing the concept of an organ and agent of an international organisation. While the analysis of the ILC *travaux préparatoires* suggests that the drafters of DARIO interpret these terms broadly, I did not find support in the

international dispute-settlement practice for the EU's claim that authorities of Member States' act as *de facto* organs of the EU when they implement EU law.

In Part II of this thesis I shall examine the extensive international economic dispute-settlement practice which involves the EU and/or its Member States as respondents, primarily WTO disputes and investment arbitration under the ECT. In my analysis I employ an inductive approach. I identify the underlying rationales that international courts and tribunals take into consideration when solving economic disputes involving the EU. My findings lead me to question whether the determination of international responsibility of the EU and its Member States requires a prior allocation of responsibility for a breach through attribution of conduct or breach, a hypothesis which was central to my analysis in Part I above.

Drawing on analysis of the case-law, in Part II of this thesis I shall suggest a remedial approach to international responsibility. I shall argue that allocation of responsibility for breach to the EU and its Member States is largely irrelevant in the international economic context due to the restorative, as opposed to corrective, function of remedies in this area of international law. International courts and tribunals ask not *who is responsible for a breach* but rather *who is best placed to bear responsibility*. These are essentially different questions. While the former requires identification of a rule of attribution based on some predetermined internal element like competence or normative control, the latter employs an external approach. Accordingly, it is the characteristics of a treaty regime in question that underlie the question of international responsibility of the EU and its Member States. Whether the EU or its Member States are best placed to bear responsibility largely depends on the nature of obligations in question and the system of remedies that protect them. The approach employed here is thus of looking in from outside.

I start my analysis by considering the nature of remedies in international economic law, which is the focus of Chapter V.

CHAPTER V – THE NATURE OF REMEDIES IN INTERNATIONAL ECONOMIC LAW

1. Introduction

The question 'who is responsible?' considers the concepts of guilt and punishment: who acted in a particular case or who ordered another to act on his behalf, whose behaviour requires correction, who deserves restriction of rights. The approach stems from domestic criminal law theory where justice is served by the determination of personal fault and imposition of an adequate punishment. The ILC framework of international responsibility, even though it negated the need for an element of fault in attribution of responsibility, retains a vestige of the orthodox approach that requires an answer to the question '*Who is responsible for the breach?'*.

While responsibility is focused on breach and fault, even if in this abstract form, in international economic law the term 'responsibility' has a different connotation. Unlike physical and corporate persons under domestic law, states and international organisations are generally not bound by international obligations unless they have expressly consented to them. To follow Vattel's concept of 'voluntary law of nations', states are free to take up international commitments just as they are, in most cases, free to reject them.[308]

As international organisations are composite structures, the intuitive solution is to analyse their independent parts following some fixed normative framework within which to identify the 'responsible' entity. As I discussed in Part I, the topic has often been approached from this internal angle, that is by attempting to delimit responsibility for a breach of an international obligation between the EU and its Member States in accordance with an internal scheme and power dynamics.

Though logic, this approach misses the point. It fails to raise a question which should precede efforts to extract rules of attribution. One should first ask whether the allocation of international responsibility for a breach is practically significant. The answer to this question lies in the nature of remedies in international economic law to which this chapter now turns.

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[308] Emer de Vattel, *The Law of Nations* (Indianapolis: Liberty Fund, 2008), p. 75-76, reprint from Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (1758). The PCIJ in SS Wimbledon famously stated that "The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.", see *The SS 'Wimbledon', United Kingdom and ors v. Germany*, Judgment, [1923] PCIJ Series A – No. 1, para 35.

That nations participate in international economic relations voluntarily is crucial to understanding the character of international responsibility for violations of economic treaties. In fact a lack of consideration of the nature of international economic obligations has resulted in a confusing state of affairs on the issue of international responsibility of the EU and its Member States.

Proceeding from general to specific, this chapter will first discuss remedies in international law, drawing on ILC doctrine (Section 1). It will then specify the nature of remedial regimes in international economic law, primarily those under the WTO Agreements (Section 2) and the ECT (Section 3). Chapter V will put forward assumptions about the international responsibility of the EU and its Member States which will then be tested in Chapters VI-VIII.

2. Remedies in international law

A remedy is a judicial response to a breach and so discussion of remedies should start by considering the concept of responsibility. The drafters of the ILC rules of international responsibility have defined 'responsibility' as a consequence of a wrongful act which creates a duty of reparation.[309] Citing the principle articulated by the PCIJ in the *Phosphates in Morocco* case, Ago stated that whenever a state is guilty of an internationally wrongful act against another state, international responsibility is established "*immediately as between two states*".[310] Ago further noted the various opinions on the nature of this relationship. On the one hand, the wrongful act creates a bilateral relationship in which an obligation of a state which committed an act is set against the subjective rights of the injured state.[311] From another point of view, it creates an authorisation to use a sanction against the state in breach.[312] Moreover, it creates different kinds of consequences such as a right to claim reparation or the ability to impose sanctions.[313]

Ago concluded that the commentary to ARSIWA should indicate that the ILC uses the term 'international responsibility' to mean all forms of new legal relationships which may be established in international law by a state's wrongful act, irrespective of whether they are centred on a state's obligation to restore the rights of the injured state and to repair the damage

[309] Report on International Responsibility by Mr. F.V. Garcia-Amador, Special Rapporteur, A/CN.4/96 (ILC 1956), 180, para 37.
[310] Ago Second Report, p. 179, para 12, see also para 32, fts 20-21.
[311] Ago Second Report, 180, para 15.
[312] Ago Second Report, 182, para 17.
[313] Ago Second Report, 182, para 18.

caused, or also involve the ability to impose sanctions.[314] Riphagen, Ago's successor, also supported a wide interpretation of the concept of responsibility.[315] The nature of the new legal relationship established by a wrongful act is determined by the content of an international obligation, not its source.[316] The ILC used the term 'reparation' to refer to all forms of such legal relationship in the early stages of the ILC project.

In sum, all forms of legal relationship created by wrongful conduct are covered by the concept of 'responsibility'. Responsibility, in turn, calls for a remedy. What, then, are the remedies in international law? Special Rapporteur Arangio-Ruiz introduced the term 'remedy' in his reports in the ARSIWA project. In the following discussion I shall use the terms 'remedy' and 'reparation' interchangeably.

2.1 The system of remedies in international law

The primary purpose of reparation, as set out in *Chorzów Factory* case, is that "*reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed*".[317] The duty to make good the damage as a primary consequence of international responsibility has also been recognised by legal scholars.[318]

The function of wiping out all the consequences of an unlawful act can be achieved through various responses. The ILC distinguishes two main types of reparation – reparation *stricto sensu* and satisfaction.[319] Reparation *stricto sensu* is understood as restitution in kind (restitution *in integrum*) or pecuniary damages,[320] if restitution is impossible.[321] Though the distinction is not formally stated in the commentary to the ILC rules, restitution can be either material (most

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[314] Ago Third Report, 211, para 43.
[315] Preliminary Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles on State Responsibility), by Mr. Willem Riphagen, Special Rapporteur, A/CN.4/330 and Corr.1, 2 (French Only) and 3 (ILC 1980), 112, para 28. Riphagen drew three parameters in his attempt to categorize these relationships: new obligations of a guilty State, new rights of injured State and position of third states.
[316] Report by Mr. R. Ago, Chairman of the Sub-Committee on State Responsibility, A/CN.4/291 and Add.1 & 2 and Corr.1 (ILC 1963), 8 and 10, also p. 13, para. 32.
[317] *Factory at Chorzów (Germany v Poland)*, Merits, Claim for Indemnity, Judgment No. 13, [1928] PCIJ Series A – No. 17, 47.
[318] For example, Clyde Eagleton, 'The Responsibility of States in International Law' (1928) 22 APSR 1004; Dionisio Anzilotti, *Corso Di Diritto Internazionale* (3rd edn, Rome 1928), vol I, p 416; 'First Report on State Responsibility, by Mr. James Crawford, Special Rapporteur' (n 33). Crawford Third Report, 40.
[319] Garcia-Amador Report A/CN.4/96, 209, para 193.
[320] Also referred to as compensation, indemnification, reparation by equivalent.
[321] Garcia-Amador Report, A/CN.4/96, 209, para 197.

common in cases of injury to property belonging to an alien) or legal,[322] depending on the nature of the injury in question.[323]

Pecuniary damages differs from restitution in kind – its aim is to compensate for all the consequences of an act or omission contrary to international law and can include interest, expenses and costs as an integral part of indemnity.[324] Cessation, which can be described as restitution by performance, is another form of reparation, though the distinction from other types is not always clear.[325] Cessation may give rise to a continuing and non-derogable obligation, even when return to the *status quo ante* is hardly possible.[326]

Satisfaction is punitive.[327] It differs from restitution in that it is intended to make good a 'political and moral' injury, not as a compensation in its strict sense.[328] Since satisfaction can in some cases take the form of pecuniary damages, just like restitution, the main difference lies in its punitive function.[329] According to Special Rapporteur Garcia-Amador, international law traditionally drew no distinction between civil and criminal responsibility (the idea of reparation proper and the idea of punishment), because strictly speaking they were an integral part of one and the same duty to make reparation.[330] International criminal law emerged as a distinct regime after the Second World War. Thus, since 1945 the distinction between punishable acts properly so called and acts or omissions which are merely wrongful has become more pronounced. The international law of responsibility covers both wrongful acts whose remedy is restitution in kind or compensation as well as punishable acts which call for sanction (satisfaction), though the majority of violations of international law are of the former type.

2.2 The function of remedies in international law

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[322] For example, abrogation or modification of a specific provision of an international agreement, see Sixth Report on International Responsibility by Mr. F.V. Garcia Amador, Special Rapporteur, A/CN.4/134 and Add.1 (ILC 1961), 17, para 68.
[323] Third Report on State Responsibility, by Mr. James Crawford, Special Rapporteur, A/CN.4/507 and Add. 1–4, 41, para 127, Garcia Amador Sixth Report, 17, para 67.
[324] Garcia Amador Sixth Report, 18, para 72; see also Crawford Third Report, 57.
[325] Crawford Third Report, 43, para 131.
[326] Crawford Third Report, 43, para 130. To note a nuance, the objective is to place parties in the *status quo ante*, leaving aside the question of what would the situation have been if the wrong act had not been committed, Crawford Third Report, 40, para 125.
[327] Garcia Amador Sixth Report, 19.
[328] Garcia Amador Sixth Report, 14, para 55.
[329] International Responsibility. Second Report by F. V. Garcia Amador, Special Rapporteur, A/CN.4/106 (1957), 32, para 108.
[330]Report on International Responsibility by Mr. F.V. Garcia-Amador, Special Rapporteur, A/CN.4/96, 182, para 48.

The ILC placed the different forms of reparation in a hierarchical structure. It has been undisputed among the special rapporteurs for the ARSIWA project that sanctions with elements of punishment can be imposed for certain violations of international law.[331] Article 34 of ARSIWA states that reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction. Though, according to Crawford, reparation by equivalent, i.e. compensation, is the most frequent form of reparation in practice, restitution in kind has primacy over compensation.[332] Pecuniary damages are available when restitution in kind is no longer possible or feasible.[333] Hindelang also notes that restitution is the very first remedy to be sought among the three forms of reparation (restitution in kind, compensation and satisfaction) as it most closely conforms to the general rule of the law of responsibility according to which the author state is obliged to 'wipe out' all consequences with a view to re-establishing the original situation.[334]

The ILC endorsed the principle stated in the *Lusitania* case that restitution, whether in kind or in a form of compensation, must be adequate and balance, as nearly as may be, the injury suffered.[335] Article 51 of ARSIWA states that countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question. Countermeasures under the ILC rules are thus balanced with the harm resulting from the violation. They are not designed to achieve absolute or maximum deterrence of violation.[336] As to compensation, Crawford supported the view that in principle the amount of

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[331] Ago Second Report, 179, para 12 and Ago Fifth Report, 43, para 128; Second Report on State Responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur, A/CN.4/425 & Corr.1 and Add.1 & Corr.1 (ILC 1989), 41, para 143; Report on International Responsibility by Mr. F.V. Garcia-Amador, Special Rapporteur, A/CN.4/96, 219, para 241 and para 220; see also International Responsibility. Second Report by F. V. Garcia Amador, Special Rapporteur, A/CN.4/106 (ILC 1957), 105, para 1 to Art 1. While admitting that reparation can in some cases have elements of punishment in the form of sanctions, Garcia-Amador firmly rejected the possibility of injured states imposing such sanctions unilaterally, see Sixth Report on International Responsibility by Mr. F.V. Garcia Amador, Special Rapporteur, A/CN.4/134 and Add.1, 2, para 6.

[332] Crawford Third Report, 43, para 135. Arangio Ruiz advocated for a more strict rule under which injured states could insist on restitution in kind, but this approach was rejected by the members of the ILC as too rigid and inconsistent with practice; see also Christine Gray, 'The Choice Between Restitution and Compensation' (1999) 10 EJIL 413.

[333] Crawford Third Report, 40, para 125. Garcia Amador notes, that pecuniary damages are used when restitution *in integrum* is not possible for material or legal reasons, or when it is not of itself sufficient to repair all the consequences of the act or omission imputable to the State, see Sixth Report on International Responsibility by Mr. F.V. Garcia Amador, Special Rapporteur, A/CN.4/134 and Add.1, 18, para 70.

[334] Steffen Hindelang, 'Restitution and Compensation - Reconstructing the Relationship in Investment Treaty Law' in Hofmann Rainer and Tams Christian (eds), *International investment law and general international law : from clinical isolation to systemic integration?* (Nomos 2011).

[335] Third Report on State Responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur, A/CN.4/440 and Add.1 (1991), 20.

[336] Eric A Posner and Alan O Sykes, *Economic Foundations of International Law* (Harvard University Press 2013), 133.

compensation payable is precisely the value the injured state would have received, if restitution had been provided.[337]

The restorative rather than corrective nature of remedies in international economic law explains the flexible rules for the admissibility of claims under the WTO regime. Bartels notes that the requirement of 'substantial interest' to bring a WTO claim includes not only commercial, but also systemic interests, which means that in reality all WTO Members have a *de facto* right to participate as third parties in WTO dispute-settlement proceedings.[338] Furthermore, in WTO law it does not matter whether the WTO has a legal interest; as long as there is a potential interest, or a future opportunity to compete, the WTO member may initiate consultation.[339] The Appellate Body in the *EC – Bananas III* dispute noted that there is wide discretion whether to bring a case against another WTO member.[340]

It seems then that punitive sanctions, while available, are secondary measures under the general law of international responsibility. The main function of remedies is to restore the *status quo ante*, not to bring about corrective justice. Restitution, a primary remedy under international law, must be proportional and carefully calculated so that it is not excessive. Emphasis on restitution, rather than corrective justice, indicates that the primary task of international tribunals is to tailor a response that rebalances the consequences of breach and restores the situation *quo ante*.

The breach must be identified in order to determine whether a subject of international law is internationally responsible.[341] But if the primary function of international adjudicators is restoration rather than corrective justice, attributing that breach in the internal structure of an organisation may not be necessary. This gives an indication, though at this point of analysis only in a form of an assumption, that allocation of responsibility for a breach between the EU and its Member States may be irrelevant, or largely irrelevant, to purposes of adjudication in international economic law. This proposition is further supported by the character of the liability rule under international economic law which the next section will consider.

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[337] Crawford Third Report, para 148.
[338] Lorand Bartels, 'Procedural Aspects of Shared Responsibility in the WTO Dispute Settlement System' (2013) 4 JIDS 343, 354, ft 64. Bartels notes that from 1996-2012, 170 of 182 panel proceedings and 102 of 109 Appellate Body proceedings included third parties.
[339] Andrés Delgado Casteleiro and Joris Larik, 'The "Odd Couple": The Responsibility of the EU at the WTO', *The International Responsibility of the European UNion: European and International Perspectives* (Hart Publishing 2013), 246.
[340] WTO Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/RW/USA, and WT/DS27/AB/RW/USA and Corr.1, adopted 9 Sept 1997 (*EC –Bananas III*), para 132.
[341] ARSIWA Art 4, DARIO Art 4.

2.3 The liability rule in international economic law

In the above section I have discussed remedies from a functional perspective. I suggested that the primary role of responsibility for violation of international economic obligations is to restore the *ex ante* (pre-breach) status. The next question is how restoration is to be achieved in international economic law. I shall address this question through liability and property rules, a distinction articulated by the law and economics literature.[342] The protection of international obligations under international economic regimes in most cases reflects the liability rule under which parties are in effect allowed to pay their way out of international obligations. Because most economic obligations are not punishable acts properly so-called but merely wrongful acts or omissions, the ordering of 'pay-outs' is as far as international courts and tribunals can often go in their quest to restore balance. In investment treaties the clearest example of a liability rule is to be found in expropriation provisions, where states are allowed to seize assets from foreign investors in certain circumstances.[343]

The property rule is associated more closely with the 'European' school of international law which maintains that the optimal level of protection is the strongest, whereas the 'US' school considers the maximum level of freedom of action to be the most desirable way to organise international obligations (the liability rule).[344] Under the property rule the court issues an injunction ordering the infringing party to desist.[345] Under the liability rule the tribunal allows continuance of infringement so long as the party pays compensation. Schwartz and Sykes employ contract theory to explain the division. According to them, under the liability rule performance is induced through the mechanism of expectation damages when it is efficient and breach when it is not.[346]

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[342] The distinction between the property and the liability rules was noted in the study related to domestic law by Calabresi and Melamed, see Calabresi Guido and Douglas A Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 Harv. L. Rev. 1089. The distinction was later adopted by international economic lawyers, for example, see Joel P Trachtman, *The Economic Structure of International Law* (Harvard University Press 2008), 138.

[343] Jonathan Bonnitcha, Poulsen Lauge and Michael Waibel, *The Political Economy of the International Investment Regime* (OUP 2017), 16.

[344] For the difference between liability and property rules, see Bonnitcha, Lauge and Waibel 2017, 16. See also Joost Pauwelyn, *Optimal Protection of International Law: Navigating between European Absolutism and American Voluntarism* (CUP 2008), 16-24. Pauwelyn refers to the European thought as 'European absolutism' and American as 'American voluntarism' while himself arguing for the middle path between the two schools, see p 45.

[345] Carl Shapiro, 'Property Rules vs. Liability Rules for Patent Infringement' [2016] Available at SSRN: https://ssrn.com/abstract=2775307 or http://dx.doi.org/10.2139/ssrn.2775307, 1.

[346] Alan O Sykes and Warren F Schwartz, 'The Economic Structure of Renegotiation and Dispute Resolution in the WTO/GATT System' (2002) 143 John M. Olin Program in Law and Economics Working Paper, 4.

The distinction between measures which are directly and immediately capable of involving reparation *stricto sensu* and those which constitute a right in a state to act contrary to its obligations subject to paying compensation, has been noted by Garcia-Amador at the early stages of ARSIWA project.[347] According to him, the first type of measure constitutes an unlawful act in the true sense of the word, whereas the second is merely an arbitrary act for which the only remedy is compensation in the proper amount and form.[348] For example, if a state has an obligation that is qualified by an alternative performance, such as to refrain from polluting or clean up the pollution, it cannot be said that there is a strict obligation to refrain from pollution.[349] In some cases the primary rule itself may indicate the legal consequences of certain conduct. For example, the primary rule that expropriation must be accompanied by appropriate compensation suggests that it is the non-payment of the compensation, not the act of expropriation itself, that creates legal consequences.[350]

Under the liability system a party wishing to deviate from its commitments may do so without the need to secure the permission of any adversely affected party but is liable for resulting damage.[351] Most trade and investment treaties provide for compensation or an equivalent remedy, but an injunction is not available. For example, investment standards under most investment treaties are enforced through compensation which is then merely a 'price' for doing what is regulated.[352] Compensation is also typically a remedy for noncompliance with trade obligations in the association agreements between the EU and its neighbours, for example the Moldova-European Union Association Agreement[353] and the EU-Ukraine Association Agreement.[354] The WTO system similarly protects its commitments through another 'price' measure, compensation (and, in some cases, retaliation). I shall return to trade and investment regimes in the following sections. Property rules, on the other hand, call for specific performance by the promisor.[355]

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[347] Garcia Amador Sixth Report, 39, para 154.
[348] Garcia Amador Sixth Report, 154 and 156.
[349] The example was provided by Trachtman 2008, 138.
[350] Preliminary Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles on State Responsibility), by Mr. Willem Riphagen, Special Rapporteur, A/CN.4/330 and Corr.1, 2 (French Only) and 3, 124, para 81-82; Crawford Third Report Crawford, 42, para 128. This relates to the distinction of lawful and unlawful expropriation – only expropriation which is not accompanied by adequate compensation is unlawful.
[351] Sykes and Schwartz 2002, 4.
[352] Pauwelyn 2008, 172.
[353] Art 393.
[354] Art 315.
[355] Sykes and Schwartz 2002, 4.

The discussion of why states agree to liability-type treaty regimes where promisors can simply pay their way out of obligations is extensive and will thus be noted here only briefly. According to Posner and Sykes, the primary interest of states is cooperation, which reduces international externalities.[356] They argue that the welfare of each state is affected by the policies of other states and thus without cooperation each would adopt policies to maximise its own welfare, creating a noncooperative equilibrium.[357] As a result a state of affairs will arise in which all nations are worse off than they would be if the externalities were addressed through cooperation.[358] A good illustration of noncooperation drawn from a domestic setting are the pictures of numerous oil rigs crammed next to each other during the Pennsylvania oil rush and other oil booms in the late nineteenth century where, due to a lack of regulation, private parties rushed to over-extract oil.[359] The same result would likely be seen on the high seas, if there were no rules governing mineral extraction at sea.

In international economic law there is thus a strong self-enforcement element instigated by interest in a community-wide order. States may 'leave' international law when they consider that it no longer serves their interests. That international rules are based on voluntary adherence of states has been particularly apparent in recent years with a series of withdrawals from multilateral treaties announced in the recent years, including that of the US withdrawal from the Paris Climate Agreement adopted under the United Nations Framework Convention on Climate Change (UNFCCC), withdrawal by a number of Latin American states from their BITs, the UK's referendum vote to leave the EU. Crawford notes that "*it is a question of policy rather than law whether or not to withdraw*".[360]

What keeps the international system intact is, then, not a legal code but collective interest. Multilateral treaties can only remain in force to the extent that they are able to convince its signatories that 'nation first' will benefit from 'community first'. If the treaty regime fails to do so, the thin ice of the international legal order will break, especially so with respect to international trade regimes.

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[356] Trachtman, for example, suggests other reasons for compliance, such as fear of reputational damage, see Trachtman 2008, 140.
[357] Posner and Sykes 2013, 19.
[358] Posner and Sykes 2013, 19.
[359] Daniel Yergin, *The Prize: The Epic Quest for Oil, Money, and Power* (Simon & Schuster, 1990).
[360] James Crawford, 'The Current Political Discourse Concerning International Law' (2018) 81(1) MLR 1, 6.

Often the greatest incentive for state compliance is the threat of reciprocal deviation from commitment.[361] For example, a state might retaliate by overfishing if another violates an agreement governing access to their adjacent pools. Such deviation must be calibrated carefully so that it is neither too high not too low. Somewhat reminiscent of Vattel's concept of 'voluntary law of nations', Goldsmith and Posner argue that states enter into international obligations out of self-interest and without such interest international law would be unable to pull states into compliance.[362] They are skeptical that genuine multinational collective action problems can be solved by treaty, especially when a large number of states are involved.

To Goldsmith and Posner, multilateral treaties reflect multilateral prisoner's dilemmas rather than coordination games because rules themselves are insufficient to ensure compliance.[363] They go as far as to suggest that "*the strength of a state's commitment to an agreement is not a function of its legality, but of the strength and uniformity of public and elite preferences*".[364] A party which loses a GATT adjudication will not invariably bring its trade policy into compliance with GATT rules – that will depend on the reason for which it violated GATT.[365] If the reason or motive was not merely that of 'cheating' but that of changed circumstances or the domestic, political gains from non-compliance, they argue, the defendant might not bring its behaviour into compliance even if the injured state retaliates. For example, European countries ignored the GATT adjudication system in the decade after the creation of the EC Community and the US circumvented the system in the 1980s when it preferred to use unilateral methods of enforcement.[366] The current trade war between the United States and China is yet another example of how swiftly states may change their international trade policies.

The need for cooperation is especially clear in international trade and investment law. The primary role of an international trade agreement is to avoid high tariffs, or other non-tariff barriers, which can result from unilateral trade policies. Multilateral trade agreements which set

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[361] Posner and Sykes 2013, 128. Goldsmith and Posner suggest that fear of retaliation is the simplest explanation why a state might comply with a treaty, Jack L Goldsmitch and Eric A Posner, *The Limits of International Law* (OUP 2005), 100.
[362] Goldsmitch and Posner 2005, 7. Trachtman criticizes this position calling it too romantic. According to him, it is not true that in order for a rule to be called law, individuals must comply with it for intrinsic, internalized reasons. Instead, Trachtman argues that the formal binding nature of treaty derives from the customary law rule of *pacta sunt servanda*, see Trachtman 2008, 122. Anne van Aaken also identifies some of the limits to the Goldsmith and Posner's approach, including a narrow definition of state preferences, see Anne van Aaken, 'To Do Away with International Law? Some Limits to 'The Limits of International Law' (2006) 17 EJIL 289.
[363] Goldsmitch and Posner 2005, 87.
[364] Goldsmitch and Posner 2005, 95.
[365] Goldsmitch and Posner 2005, 154.
[366] Goldsmitch and Posner 2005, 154.

an optimal trade tariff are thus self-enforcing.[367] Goldsmith and Posner suggest that multilateral bargaining may be superior to bilateral cooperation because states gain from trade agreements only if they obtain concessions in return for their commitments and thus every trade deal is vulnerable to a subsequent trade agreement that results in trade diversion.[368]

If international economic relations are interest-driven, the primary function of treaty dispute resolution must be to keep those interests intact. Since the 'social contract' underpinning international economic relations is an equilibrium of interests, the institution of responsibility serves as a set of scales which balances national policies against the benefits of collective order. Dispute settlement bodies must apply a complex algorithm which calculates the effects of a state's conduct on the global order protected by international law. The purpose of remedies is not corrective justice, but the restoration of balance to the order. Accordingly, remedies are not predetermined but are carefully crafted and adjusted on a case-by-case basis. A number of international economic treaties, including CETA[369] and the EU's association agreements such as that with Moldova[370] and the EEA Agreement,[371] specify that remedies for non-compliance must be proportionate and temporary.

If, then, international economic commitments are mostly self-enforcing and if remedies for breach stop short of injunctions, it seems that international actors abide by their economic commitments so long as they deem it beneficial to remain within the realm of a system of reciprocal commitment. If that is no longer the case, they may choose to dishonour their commitments and pay a proportionate price instead, or withdraw from the treaty altogether. If they fail in the latter, the ultimate detriment is to reputation and reciprocity of commitment from trading partners.

This brings me to another important distinction. If liability-type systems in effect allow breaches subject to some form of a pay-out, it must be true that responsibility is focused not on the breach but on the pay-out itself. This is still *responsibility* – pay-outs *are* remedies. That breaches of international economic obligations have a 'price tag' does not mean that they result

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[367] Kyle Bagwell and Robert W Staiger, *The Economics of the World Trading System* (MIT Press 2002). They argue that the optimal trade tariff is set through a repeated game of reverting to Nash equilibrium whenever the other party is cheating until the limits of on the amount of tariff cooperation that is self-enforcing are set.
[368] Goldsmitch and Posner 2005, 145.
[369] CETA Art 29.14.
[370] Art 381 of the EU-Ukraine Association Agreement calls for temporary compensation or suspension of obligations at a level equivalent to the nullification or impairment caused by the violation.
[371] Art 112(2) of the EEA Agreement provides that "safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation".

in impunity. As Ago correctly noted, whichever form of feedback is created, they are all part of the same general concept, that of 'reparation'.[372]

While we are still in the realm of responsibility and remedies, one may nevertheless question whether *allocation of responsibility for breach* between the EU and its Member States has practical relevance in the international economic context. If breaches are, while recognized as wrongful, effectively permitted, is it necessary to engage in the complex task of identifying the violator in the multi-layered structure of an international body? What is perhaps more important in international economic law is that 'pay-outs' are delivered, be it by an organisation itself or its member states. But that is a different question. It is unrelated to the allocation of responsibility for breach in the sense of some pre-determined structural basis like attribution of conduct, normative control or division of competences, say within the EU. To illustrate this point with the analogy of a joint loan to two borrowers: if one borrower fails to pay due to the actions of the other borrower, a bank will not bother to determine who defaulted. It will focus on securing payment, whoever delivers it.

I am speaking here in the language of assumptions because the discussion so far is based on theory, not practice. The decisions of international courts and tribunals will be the focus of the following chapters. For now, the remaining sections will specify the above discussion on the nature of remedies in international economic law by considering in more detail the remedial systems under the WTO Agreements and investment treaties.

3. Remedies under the WTO regime

Before and after the Uruguay Round negotiation, debate on the most effective WTO remedial system was and has been extensive. Some suggest, for example, that WTO decisions, the imposition of fines and membership sanctions would prove to be efficient remedies.[373] Others argue that sanctions should be replaced by a compensation mechanism.[374] Mavroidis and Brimeyer, by contrast, suggest that for violations of WTO rules punitive measures should be available.[375] Yet others are content with the existing regime. For example, Pascal Lamy, the

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[372] Ago Fifth Report, 27, para 82.
[373] Steve Charnovitz, 'Rethinking WTO Trade Sanctions' (2001) 95 AJIL 792, 824.
[374] For example, Andrew T Guzman, 'The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms' (2002) 31 J. Legal Stud. 303; Steve Charnovitz, 'Should the Teeth Be Pulled? An Analysis of WTO Sanctions' in Daniel LM Kennedy and James D Southwick (eds), *The Political Economy of International Trade Law Essays in Honor of Robert E. Hudec* (CUP 2002).
[375] Petros C Mavroidis, 'Petros Mavroidis, Remedies in the WTO Legal System: Between Rock and a Hard Place' (2000) 11 EJIL 763; Benjamin L Brimeyer, 'Bananas, Beef, and Compliance in the World Trade Organization :

then Trade Commissioner of the EU – one of the several repeat players against whom retaliation has been used in practice – supports the current system.[376] Evaluation of the remedies available under the WTO system is beyond the scope of this thesis. The following discussion will analyse the regime as it currently stands without engaging in the debate on the optimal remedy under the WTO dispute settlement system.

3.1 The WTO's liability rule

Article 19.1 of the WTO Dispute Settlement Understanding (DSU) provides that where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement it shall recommend that the member concerned bring the measure into conformity with that agreement. If, after a reasonable period,[377] the member does not so comply, compensation and the suspension of concessions and other obligations are available against that member.[378] Thus the WTO dispute-settlement system sets a two-step process: a recommendation to comply and, if compliance is not forthcoming, retaliation. A number of recently concluded economic treaties have adopted a near identical or similar dispute-resolution mechanism to that established in the WTO dispute settlement system, for example Chapter 29 of CETA and Chapter 28 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

Scholars agree that the WTO remedial system reflects the liability rule.[379] The primary goal of the WTO dispute-settlement system is to induce compliance and promote distributive rather than corrective justice.[380] The system aims to restore the balance of concessions, not to punish the violator.[381] Since the interest of WTO members is to maximize their mutual gains from trade, the system of adjudication allows deviation from obligations without the permission of affected parties whose only available response is the withdrawal of substantially equivalent

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The Inability of the WTO Dispute Settlement Process to Achieve Compliance from Superpower Nations' (2001) 10 Minn J Global Trade 133.

[376] Pascal Lamy's speech 'US-EU: The Biggest Trading Elephants in the Jungle – But will they Behave?', delivered at the Economic Strategy Institute, June 7 2001.

[377] DSU Art 21.3. According to Posner and Sykes, the system even allows a so-called 'three-year free pass', that is a violator can cheat for some time, get caught, drag out litigation, slowly correct its behaviour and ultimately pay no price, see Posner and Sykes 2013, 184.

[378] DSU Art 22.1.

[379] For an example of a minority view, John H Jackson, 'The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation' (1997) 91 AJIL 60.

[380] Nicolas DiMascio and Joost Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' (2008) 102 AJIL 48, 53-54.

[381] DiMascio and Pauwelyn 2008, 53-54. See also Reto Malacrida, 'Towards Sounder and Fairer WTO Retaliation: Suggestions for Possible Additional Procedural Rules Governing Members' Preparation and Adoption of Retaliatory Measures' (2008) 42 JWT 3.

concessions after the lapse of reasonable time.[382] The only type of reparation that WTO panels can award is cessation, that is, they can recommend a member comply with its WTO obligations.

According to Trachtman, states that violate WTO obligations are not subject to enforceable specific performance-type remedies, nor do they suffer any penalty beyond the possible authorisation or withdrawal of equivalent concessions.[383] Similarly, Schwartz and Sykes suggest that a party found to be in violation of its obligations may, if it so chooses, continue to violate them, the ultimate price being suspension of equivalent concessions to its detriment.[384] They may, similarly, choose to delay implementation of policies the WTO recommends in an attempt to support, for example, influential economic sectors. To Hudec the ultimate 'remedy' which made the GATT dispute-settlement procedure successful is the force of community pressure.[385] Another feature of the WTO regime, which reflects the liability rule, is that Article 12.2 DSU allows parties to a dispute to suspend proceedings at any time if they decide to return to the negotiation table, thus avoiding adjudication.

3.1.1 Compliance

Due to the liability-type nature of WTO obligations, its dispute-settlement system gives maximum autonomy to the member concerned in ensuring compliance with panel recommendations, leaving it up to them to choose the way in which they bring their measures into conformity with the WTO rules.[386] Though under Article 21.5 of the DSU the panel may later decide whether the member in question has in fact complied with the ruling, it cannot direct how a respondent is to modify its trade practices.

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[382] Sykes and Schwartz 2002, 2. See also, Brooks E Allen, 'The Use of Non-Pecuniary Remedies in WTO Dispute Settlement: Lessons for Arbitral Practitioners' in Michael E Schneide and Joachim Knoll (eds), *ASA Special Series No. 30: Performance as a Remedy: Non-monetary Relief in International Arbitration* (JurisNet, LLC 2011), 288. It should be noted, that Art 4.7 of the SCM Agreement refers to withdrawal of inconsistent measures without delay, while the DSU uses somewhat different language, i.e. bringing a measure into conformity. In *EC – Commercial Vessels*, Korea noted that the language in the SCM Agreement is simply a particular application of DSU Art 19.1 in the context of prohibited subsidies case which is in contrast with Art 7.8 of the SCM Agreement which provides for an additional remedy of removal of the adverse effects, see WTO Panel Report, *EC – Commercial Vessels Commercial Vessels*, para 4.14, ft 9.

[383] Joel P Trachtman, 'Building the WTO Cathedral' [2006] Available at SSRN: https://ssrn.com/abstract=815844 or http://dx.doi.org/10.2139/ssrn.815844, 23.

[384] Sykes and Schwartz 2002, 11.

[385] Robert A Hudec, 'Broadening the Scope of Remedies in the WTO Dispute Settlement' in Friedl Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the Practice of Other International Courts & Tribunals* (Cameron May 2000), 376.

[386] Under Art 21.5 panels may later review whether the member in question has in fact complied with the ruling.

That the DSB leaves it to the respondent party to choose the method of compliance explains why, in most cases, it does not engage in allocation of responsibility for breach to the EU or its Member States. Panel reports rarely specify whether the EU or its Member States should take remedial action. EU law, not the WTO Agreements, dictates that in most cases the EU is the representative of the bloc in WTO dispute settlement. While the WTO Agreement is a mixed treaty with both the EU and its Member States formally and independently responsible for all WTO obligations, the EU's internal arrangement that it holds exclusive competence in trade translates into its exclusive external competence in trade matters and disputes. The EU and its Member States participate in the WTO system as one bloc. The usual arrangement during the meetings of the Ministerial Conference and the General Council is for Member States and the EU to have their delegates seated in a cluster, with the Union speaking on behalf of the Member States, the latter rarely intervening. The WTO system affords wide discretion to the EU in representation of the Member States in dispute-settlement proceedings as well. The practice of EU members states and the EU is such that representatives of the Member States concerned form part of the EU delegation and can be designated as 'Approved Persons' with access to Business Confidential Information and Highly Sensitive Business Information submitted in the dispute. Submissions and communications themselves are invariably made by the officers of the Legal Service of the Commission.[387] Thus from the Union's perspective its participation in WTO Agreements is of a *de facto* bilateral nature, with duties and benefits owned by the EU/Member State bloc as against third parties. That the DSB defers to such internal arrangement supports the claim that WTO dispute settlement is a liability-based system.

I shall examine the underlying reasons for the primary role of the EU under the WTO dispute-settlement system in Chapter VII. Suffice it to note here that under the WTO regime the method of compliance is left to be decided by the respondent, which is consistent with the liability rule. If compliance is not secured, an injunction is not available. Instead, retaliation is the next response available to the claimant.

3.1.2 Retaliation

Article XXIII GATT provides for a system of compensation and retaliation under the WTO regime. Article 22.1-22.2 DSU foresees the possibility of negotiating compensation in lieu of

[387] Such was the arrangement, for example, in *EC – Large Civil Aircraft Large Civil Aircraft*, PR, para 7.173.

retaliation within the twenty-day period following the expiration of the reasonable period of time.

The system of compensation and retaliation under Article XXIII GATT supports the purposes of the liability rule. The parties are not burdened with specific performance obligations and compensation and retaliation are 'pay-outs' from their obligations.[388] The GATT drafters typically avoided using the term 'sanction' – the standard portrayal of Article XXIII was as a rebalancing of concessions, which reflects the restorative function of remedies in the international economic context.[389]

According to Trachtman, through the system of cross-retaliation WTO Agreements have an embedded political linkage to the dispute-settlement system. For example, in case of a breach of TRIPS, if the complaining state cannot satisfactorily retaliate by withdrawing TRIPS concessions, it may be permitted to withdraw concessions in other areas, such as in market access to agricultural products.[390]

The essential feature of compensation and retaliation under the WTO regime, which gives a clear indication that it is based on liability, is that retaliation must be equivalent to the harm caused. The need to ensure correspondence of response and avoid punishable sanctions was a driving force in the elimination of the so-called 'consensus' rule. Under this rule GATT panel recommendations were not adopted unless all parties agreed to them, including the party against whom that decision was made. Accordingly, the injured party was left with self-help in the form of unilateral retaliation.[391] According to Posner and Sykes, the elimination of the 'consensus rule' was aimed at reducing rather than increasing the penalty for cheating.[392] It eliminated unilateral retaliation and any sanctions must now be authorised and approved by the DSB. The primary purpose of the sanctions' review process is to avoid excessive responses and ensure that 'pay-outs' are adequate. As Schwartz and Sykes put it, "*instead of having to buy their way out in a world of unilateral threats and counter- threats unconstrained by central oversight, the*

[388]It is unclear when the term 'retaliation' was adopted in relation to the WTO remedial system. Initially there was an intention to use the word 'sanction' but some countries, for example those belonging to the Arab League, were opposed to the term, see Charnovitz 2001, 801-802.
[389] Charnovitz 2001, 801-802. For specification of retaliation with respect to individual commitments, see Pauwelyn 2008, 134.
[390] Trachtman 2008, 198.
[391] In fact Schwartz and Sykes argue that violations have been more often caused by good faith clashes over ambiguous terms of the bargain rather than interest in flagrant cheating, see Sykes and Schwartz 2002, 24; see also Posner and Sykes 2013, 272.
[392] Posner and Sykes 2013, 284.

new system ensures that the price for non-compliance will be set by an honest and unbiased effort to assess harm".[393]

The elimination of the consensus rule with the establishment of the WTO thus further supports the restorative, rather than corrective nature of remedies under the WTO regime. A tribunal's role in limiting excessive sanctions was revealed, for example, in the *EC – Bananas III* dispute where the EU challenged US sanctions as excessive. Replying to the US argument that the purpose of sanctions was to enforce the property rule and that careful calibration of sanctions was unnecessary, the Arbitrators stated that "*it is the purpose of countermeasures to induce compliance. But this purpose does not mean that the DSB should grant authorization to suspend concessions beyond what is equivalent to the level of nullification or impairment. In our view there is nothing in 'the relevant provisions [of the DSU] that could be read as a justification for countermeasures of a punitive nature*".[394] According to Schwartz and Sykes, excessive sanctions reminiscent of punishment are detrimental to the system because any greater level of reciprocal withdrawal of concessions would raise the price of non-performance above the costs to the disadvantaged promises.[395]

The purely compensatory nature of retaliation under the WTO regime explains why the DSB is not preoccupied with the allocation of responsibility, a finding that I will address in detail in the following chapter. Instead, it focuses on ensuring that concessions are re-balanced. When it comes to retaliation, the territory of the EU in its entirety, not only of a specific Member State, can be a target of countermeasures. Even if an inconsistent measure is linked to a particular Member State, the WTO member whose rights have been impaired or nullified can direct its retaliation towards commitments of any EU Member State. In case of cross-retaliation, a so-called 'carousel retaliation' applies – goods and Member States which are targeted by cross-retaliation rotate so that consequences are not concentrated in one Member State and with respect to one product.[396]

Another reason why allocation of responsibility for a breach is less, if at all, relevant under the WTO regime is that remedies are forward-oriented. The relief afforded by the WTO panels is

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[393] Sykes and Schwartz 2002, 28.
[394] *EC –Bananas III*, WT/DS27/ARB, Decision of the Arbitrators adopted April 9, 1999, para 6.3.
[395] Sykes and Schwartz 2002, 10.
[396] Anne Thies, International Trade Disputes and EU Liability (CUP 2013), 168.

prospective in nature and calls for consistent behavior in future. The emphasis is not on compensation for past injury but the inducement of compliance going forward.[397]

3.2 The primacy of compliance over retaliation

The arbitrators in *United States — Continued Dumping and Subsidy Offset Act of 2000* said that "*it is not completely clear what role is to be played by the suspension of obligations in the DSU and a large part of the conceptual debate that took place in these proceedings could have been avoided if a clear 'object and purpose' were identified*".[398]

To-reiterate the point already made, the liability-type system of the WTO remedies means that breaches of WTO commitments are not punishable acts properly so called but are merely wrongful measures. WTO members can in effect choose to breach their commitments and suffer proportionate retaliation without encountering a punitive response. Retaliation and compensation have, however, rarely been used under the WTO regime.[399] GATT and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) cases generally result in the timely withdrawal of inconsistent measures.[400] While two members – the EU and the US – have been subject to retaliation, there is a clear primacy of compliance over retaliation under the WTO dispute settlement system. [401]

Article 3.7 DSU establishes primacy of compliance over other forms of remedies by noting that "*in the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any covered agreement*". The role of retaliation as a

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[397] DSU Art 3.7 provides that the provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement, whereas suspension of concessions should be a measure of last resort; see also Allen 2011, 288.

[398] Recourse to Arbitration by Brazil under Article 22.6 of the DSU – Decision by the Arbitrators (31 August 2004) WT/DS217/ARB/BRA, 6.4. See also Gregory Shaffer and Daniel Ganin, 'Extrapolating Purpose from Practice: Rebalancing or Inducing Compliance' in Chad P Bown and Joost Pauwelyn (eds), *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement* (CUP 2010). See also Joost Pauwelyn, John H Jackson and Alan O Sykes, 'The Calculation and Design of Trade Retaliation in Context: What Is the Goal of Suspending WTO Obligations?' in Chad P Bown and Joost Pauwelyn (eds), *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement* (CUP 2010); Charnovitz 2001.

[399] According to the 2009 data presented by Davey, in 75 per cent of trade remedy cases, the typical result has been the modification of the measure, see William J Davey, 'Compliance Problems in WTO Dispute Settlement' (2009) 42 Cornell Int'l L J 119, 120.

[400] Davey 2009, 120.

[401] The EU has been subject to retaliation in *EC – Bananas III*; *US – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R; the US has been subject to retaliation in *US – Foreign Sales Corp*, WT/DS108/ARB; *US – Byrd Amendment*, WT/DS234/ARB/CAN.

compliance-inducing tool is clear from Article 22.8 DSU which states that the suspension of concessions shall be temporary and shall be applied until such time as the measure found to be inconsistent has been removed. The purpose of the WTO dispute settlement system is, however, to avoid these types of pay-outs and bring an inconsistent measure into compliance with WTO obligations. Retaliation, by raising barriers to trade, is detrimental to the injured party as well.[402]

Accordingly, in the WTO system compensation and retaliation is a subordinated remedy to compliance.[403] Though the liability rule helps attract international cooperation in the field of international economic law and prevents holdout problems, pay-outs from commitments which call out retaliation are disfavoured under the DSU.[404] According to John Jackson, the DSU creates a strong preference for changing the offending measure over compensation.[405] Though compensation and reparation[406] serve as a form of monetization of a breach, their primary aim is to induce compliance.[407] The ultimate role of compliance, as stated in Article 21.1 DSU, is to ensure effective resolution of disputes to the benefit of all members.

Article 22.1 DSU suggests that 'compliance' means the bringing of a measure into conformity with the covered agreement. Accordingly, the primary remedy under the WTO dispute settlement system is the modification of a member's legal framework in a way that it becomes compliant with its WTO obligations. Positive actions are often necessary to achieve this purpose, for example reclassification of a customs tariff, suspension of subsidies, the amendment of a procedure for the registration of trademarks and geographical indications, the elimination of a regulatory restriction.

I shall return to the significance of compliance as a primary remedy in the following chapter of this thesis. At this point I will only assume that compliance-oriented remedial systems must

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[402] Bernard Hoekman and Petros C Mavroidis, 'WTO Dispute Settlement, Transparency and Surveillance' (2000) 30 World Economy 527.
[403] DSU Art 3(7) provides that a "solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement".
[404] DSU Art 22.1 expressly states that "neither compensation not the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with covered agreements".
[405] Jackson 1997.
[406] Compensation and retaliation under the WTO regime is often referred to as 'sanction'. According to Charnovitz, when a trade measure is used against a country to change its behaviour toward conformity with international obligations, that is properly called a 'sanction', see Charnovitz 2001, 804.
[407] The impact of retaliation in inducing compliance has been questioned, for example, by Davey who suggests that the overall good record of the system is due mainly to the good faith desire of WTO members to see the dispute settlement system work effectively, see Davey 2009, 125.

focus on the overall regulatory framework rather than *application* of that framework in a particular case. As I have noted above, the purpose of the WTO dispute settlement system is future-oriented compliance rather than elimination of an isolated past injury which suggests that the target of the dispute settlement must typically be the EU-wide regulatory regime. That goal cannot be fulfilled by removing specific instances of application of an inconsistent measure at the Member States' level but leaving the inconsistency in the EU-wide framework intact. This feature of the remedial system under WTO law differentiates it from remedies under investment treaties to which this chapter now turns.

4. Remedies under investment treaties

The difference in remedial regimes under investment treaties and the WTO dispute settlement system stems from the difference of rights protected under these two frameworks. As Demirkol notes, investment treaties do not protect the essence of the right.[408] He suggests that they establish an additional layer of protection that precludes the host state from acting in a certain manner.[409] Because the role of investment tribunals is limited to evaluating the behaviour of the host state rather than national laws themselves, they do not have the power to order revocation or modification of those laws. Investment treaties are thus not rules-based legal frameworks in that they do not establish a regulatory regime as such. Instead, they set standards of behaviour when a state exercises its regulatory powers.

Remedies under the investment treaty regime, similarly to the WTO system, are based on the liability rule. In most cases, an injunction is not available and host states which violate rights of foreign investors are subject to pay adequate compensation. However, while both regimes are liability-type, the system of remedies for breaches of investors' rights differs from the one for violations of trade rules. The primary remedy under investment treaties is compensation as opposed to regulatory compliance under the WTO system.

Restitutio in integrum is often divided into two categories, legal (order by a tribunal for the repeal or alteration of a measure) and material (an order for the restoration or repair of property unlawfully seized). First-generation investment treaties[410] rarely specify either type of *restitutio*

[408] Demirkol 2015, 413.
[409] Demirkol 2015, 413.
[410] By 'first-generation' investment treaties I mean BITs concluded by the Member States as opposed to investment chapters under the recently concluded EU FTAs.

in integrum in arbitration agreements but leave open a possibility to award them.[411] Article 54 of the ICSID Convention allows a claimant to have only pecuniary obligations recognized and enforced in national courts as final judgments. The ECT allows the disputing party to elect to pay monetary damages in lieu of any other remedy granted.[412] Article 1135(1) of NAFTA limits the choice of remedies to pecuniary damages and restitution of property (and even then, monetary damages may be paid in lieu of restitution).

Similarly to the first-generation treaties,[413] pecuniary damages are also a central remedy under the new-generation investment treaties. Monetary damages are listed as a primary remedy under the recently concluded EU FTAs. For example, Article 8.39 of CETA provides that tribunals may only award monetary damages (and interest) and/or restitution of property, in which case the respondent may still opt to pay monetary damages representing the fair market value of the property. Monetary damages and restitution of property as the only available remedies are similarly indicated in Article 9.24 of the EUSFTA and, to refer to a non-EU example, Article 9.29(1) of CPTPP. In addition, while first-generation treaties were silent on this point, new-generation treaties typically expressly state that punitive damages are not available.[414]

Whether the choice of remedies is limited to compensation or not, in practice compensation is the primary remedy under investment regimes. Gray notes that remedies other than damages for injury to foreign nationals are rare.[415] Hindelang also observes that the vast majority of arbitral awards do not discuss – indeed, fail to even mention – different forms of reparation but turns straight to compensation.[416] His explanation is that investment arbitration is commercial in nature and by the fact that claimants frequently ask the tribunal to award compensation only and hence de-select any other form of reparation.

To note for the purposes of precision, non-pecuniary remedies in the form of specific performance have been afforded in some investment disputes under first-generation investment treaties.[417] For example, in *ATA Construction v. Jordan*, the respondent was ordered to terminate the on-going municipal court proceedings initiated following the wrongful extinguishment of an arbitration agreement by a national law provision and determined the

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[411] Christine Gray, *Judicial Remedies in International Law* (Oxford: Clarendon Press 1987), 13. Gray suggests that legal restitution raises the problem of the relationship between international and municipal law.
[412] ECT Art 26(8).
[413] Martins Paparinskis, 'Investors' Remedies under EU Law and International Investment Law' (2016) 17 JWIT 919, 923.
[414] A prohibition of punitive damages is established, for example in Art 9.29(6) of CPTPP.
[415] Gray 1987, 11.
[416] Hindelang 2011.
[417] For an in-depth analysis of non-pecuniary remedies in investment law, see Berk Demirkol, 'Remedies in Investment Treaty Arbitration' (2015) 6 JIDS 229.

entitlement of the investor to proceed to commercial arbitration.[418] In *Desert Line v. Yemen*, the tribunal declared that a settlement agreement between the investor and the host state was concluded under duress and was thus declared to have no international effect.[419] *Nykomb v. Latvia* serves as another example.[420] The case concerned the alleged loss of sales income on electric power due to changes of the purchase price. The Tribunal noted that the potential loss by the investor was too uncertain and speculative to form the basis for an award of monetary compensation.[421] Accordingly the Tribunal concluded that it would be "*a continuing obligation upon the Republic to ensure the payment at the double tariff for electric power delivered under the Contract for the rest of the eight-year period*".[422] Most notably, the Tribunal in *CMS v. Argentina*, noted that restitution was "*by far the most reliable choice to make the injured party whole as it aims at the reestablishment of the situation existing prior to the wrongful act*".[423] Though the Tribunal ultimately decided to award compensation, it did note that renegotiation of contractual relations between the parties was the proper remedy.[424]

Irrespective of these cases, the award of non-pecuniary damages in investment claims is an exception rather than a rule. Accordingly, unlike trade disputes where regulatory compliance is the purpose of adjudication, investment tribunals typically neither recommend nor order compliance with a specific regulatory scheme. In most cases investment tribunals order the host state to compensate an investor when its rights are affected.

One may argue that arbitral tribunals cannot order a host state to modify national rules because they lack jurisdiction. Though investment treaties are signed between states (and the EU in case of new-generation FTAs), the primary obligation is owed to a non-state entity.[425] This in itself makes rights private in nature. An investor can only require certain conduct from a host state and, if a host state violates this commitment, it can request compensation. An investor cannot, however, call for modifications of general rules because those concern rights and obligations of other persons.

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[418] ATA Construction v The Hashemite Kingdom of Jordan (Award, 18 May 2010) ICSID Case No ARB/08/2.
[419] *Desert Line Projects LLC v. The Republic of Yemen* (Award, 6 February 2008) ICSID Case No ARB/05/17, para 194.
[420] *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, (Award, 16 December 2003), SCC (*Nykomb v. Latvia*).
[421] *Nykomb v. Latvia*, Award, 41, sect 5.2.
[422] *Nykomb v. Latvia*, Award, 41, sect 5.2.
[423] CMS Gas Transmission Company v. Argentina, (Award 12 May 2005), ICSID Case No. ARB/01/8 (CMS Gas v. Argentina), para 406.
[424] *CMS Gas v. Argentina*, Award, para 407.
[425] Para 4 of the Commentary to Art 33. The Commentary notes that while a situation when a primary obligation is owed to a non-state entity falls outside the scope of the ILC rules, such protection is possible under special rules, such as investment treaties.

This explains why remedies for violation of the same right may differ depending on whether the holder of that right is a state or private person. For example, remedies for violation of the most favoured nation clause differ under the WTO regime and investment treaties. A member of the WTO can request (though short of requesting an injunction) another member to modify its framework so that it does not discriminate against foreign actors. A foreign investor, on the other hand, cannot do so under investment treaties. New-generation FTAs, which cover both state-to-state and investor-to-state obligations, highlight this difference by setting out separate dispute-resolution mechanisms. For example, Chapter 29 of CETA establishes a dispute-resolution mechanism for state-to-state claims which closely resembles that of the WTO two-step regime of compliance and retaliation. Investor-to-state dispute resolution, set out in Chapter 8, by contrast, focuses on compensation.

The difference in remedies depending on whether they are available to a person or a state has been known since early international cases. In the *Chorzów Factory* case the PCIJ stated that "*[r]ights or interests of an individual the violation of which causes damage are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State*".[426] Non-pecuniary obligations are not enforceable under investment protection regimes, one reason being, according to Douglas, that the adoption of specific judicial acts to comply with a tribunal's order may be complicated by the constitutional norms of the host state or by competing rights of third parties.[427]

Given that compensation is central to investment arbitration, it follows that the focus of tribunals must be on the damage caused by the unlawful conduct of the host state. This is essentially different from the WTO regime, which places regulatory compliance at the heart of its dispute-settlement system. At least in most cases the WTO DSB focuses on the regulatory framework as such, whereas investment tribunals are tasked with calculating damages arising from the unlawful conduct of the host state.

5. Conclusion

[426] *Factory at Chorzów (Germany v Poland)*, Merits, Claim for Indemnity, Judgment No. 13, [1928] PCIJ Series A – No. 17, 28.
[427] Zachary Douglas, *The International Law of Investment Claims* (CUP 2009), 101.

Two findings follow from the above analysis of the nature of remedies in international economic law in relation to the question of international responsibility of the EU and its Member States.

Firstly, liability-type remedies under trade and investment treaties indicate that the allocation of responsibility for breach between the EU and its Member States may not be relevant in the international economic law context. A state may in effect choose to dishonor its international economic obligations and pay adequate damages. Preference for compliance under the WTO system is consistent with the liability rule – compliance cannot be enforced, it can only be recommended. The choice whether to comply rests with the WTO member. If breaches of economic obligations are, while wrongful, subject to adequate pay-outs, determining *who* breached an obligation is not relevant. The focus is not on the attribution of breach, but on the pay-out.

While pay-outs are primary remedies under investment treaties, they are secondary (though ultimate) remedies under the WTO regime. Compliance is the preferred outcome of WTO adjudication. By contrast, compensation is a central remedy under investment arbitration.

Accordingly, investment tribunals and WTO panels perform different tasks. The former focus on calculation of compensation in accordance to the damage caused, whereas the latter must address inconsistencies in a regulatory framework as such. Upon finding a breach the WTO panels must analyse the overall regulatory framework with the aim of bringing it into compliance with WTO rules. Investment tribunals, on the other hand, seek to identify adequate compensation in relation to a specific instance of application of a general rule. To perform its role the DSB must zoom out its analysis, whereas investment tribunals must zoom theirs in.

Thus the second finding is that the different tasks performed by trade and investment dispute-settlement bodies are reflected in their treatment of international responsibility of the EU and its Member States. As the purpose of investment law is to compensate investors for violation of their rights caused by the conduct of the host state, the focus of tribunals will be restricted to a particular instance of the application of an unlawful measure. A quest for regulatory compliance under the WTO system, on the other hand, requires investigation and modification of the overall legal framework.

The following Chapter VI will explore these findings in detail by looking into trade and investment dispute-settlement practice. The aim of the analysis is to identify the rationales underlying the reasoning of international courts and tribunals when dealing with the responsibility of the EU and its Member States.

CHAPTER VI – IDENTIFICATION OF THE PROPER RESPONDENTS

1. Introduction

In this chapter I shall examine how international courts and tribunals identify the proper respondents in international economic disputes. My aim is to determine the underlying rationales which guide tribunals in international economic adjudication when faced with situations of shared responsibility.

In Chapter II I argued that the ILC rules on international responsibility do not determine the allocation of international responsibility. The ILC framework determines only whether a particular entity *is* internationally responsible. If responsibility is addressed in the context of a multi-layered structure like the EU, where sovereignty is shared between separate legal persons, additional questions arise. Chapter III argued that the EU and its Member States are independently responsible for their joint obligations, as in the case of mixed agreements.[428]

This, however, is only a starting point in addressing the question of the allocation of international responsibility within the EU. Nollkaemper and Jacobs rightly note that the principle of independent responsibility in itself provides no basis for the apportionment of responsibility and, in particular, it does not *answer* the question of who has to pay reparation.[429] That responsibility of both the EU and its Member States *can* be invoked does not tell us whether the EU, its Member States, or both, *will* be responsible in a given situation. We are faced with the complex task of determining exclusive responsibility.

It is often assumed that shared responsibility is distributed in accordance with the attribution of breach. In Chapter IV, however, I argued that there is no support in international dispute-settlement practice for the European Commission's claim that authorities of Member States' act as *de facto* organs of the EU when they implement Union law. I then suggested in Chapter V that attribution of conduct or breach, or allocation of responsibility for a *breach* more generally, is unnecessary in international economic law. This is because the liability-type nature of remedies under international economic regimes carries a restorative rather than corrective

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[428] To specify, mixed agreements which do not provide a declaration of competences and which contain no 'carve out' of the agreement by allocation responsibility for areas to the EU and Member States. Accordingly, agreements like UNCLOS and the EU's participation in the Food and Agricultural Organization are outside the scope of discussion.

[429] André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 Mich. J. Int'l L. 359, 391. André Nollkaemper, 'Joint Responsibility between the EU and Member States for Non-Performance of Obligations Under Multilateral Environmental Agreements' in Elisa Morgera (ed), *The External Environmental Policy of the European Union* (CUP 2012), 330.

function. The focus is not on the party *responsible*, but on a party *best placed to bear responsibility*. In international economic law, shared responsibility typically raises the question of the proper respondent(s). I argue that whether the EU or its Member States, or both, are the proper respondents depends on the nature of the treaty regime in question, particularly the system of remedies designed to protect treaty obligations.

Identification of the rationales that underlie the distribution of shared responsibility of the EU and its Member States in international dispute-settlement practice is a complex task. As I have mentioned in the introduction, the patterns discussed below are novel and have been extracted from an extensive analysis of international case-law. I have analysed around 60 WTO disputes which involve the EU. While many cases have not (yet) resulted in panel reports, often reports and party submissions are of 500 pages. I have also analysed all publicly available procedural documents of investment arbitration under the ECT which involve the EU. Identification of the rationales underlying the tribunals' decisions on the proper respondent was complicated because my findings are counterintuitive. International courts and tribunals do not allocate responsibility on some static institutional basis, such as normative control or division of competences. In Part I of this thesis I have concluded that international courts and tribunals do not distribute shared responsibility among the EU and its Member States on the basis of attribution of conduct (or breach) and there is no basis to support the view that the EU is responsible for the conduct of Member States when they implement Union law. Having determined what tribunals do *not do*, I will next examine how they in fact *do* distribute shared responsibility.

The aim of the present chapter is to identify the underlying bases for the identification of the proper respondent(s) in trade and investment disputes, while relying on the characteristics of the remedial systems outlined in Chapter V above. Section 2 explores the normative grounds for distributing shared responsibility between the EU and its Member States in international economic law. In Section 3 I develop 'the positive solution' test for WTO panels to identify the proper respondent(s). In Section 4 I argue that shared responsibility arising under the ECT is distributed by placing responsibility on the entity which is the proximate cause of the damage to the investor.

2. Mapping the normative framework

Section 2 introduces the normative considerations informing the law of shared responsibility. In addition to other sources the analysis builds on some of the concepts offered by contributors to the Research Project on Shared Responsibility in International Law (SHARES).

I use the term 'distribution of responsibility' rather than 'distribution of responsibilities'. The SHARES project uses the latter. The term 'responsibilities', however, has a connotation of power or competence. To avoid confusion with competence-based or normative responsibility in the context of the EU and its Member States, I refer to 'responsibility'.

The majority opinion is that the question of international responsibility in the context of the EU's executive federalism where Member States implement Union law involves shared responsibility.[430] To borrow Nollkaemper's definition, shared responsibility refers to situations where a multiplicity of actors contributes to a single harmful outcome, and legal responsibility for this harmful outcome is distributed among or deemed to be shared by more than one of the contributing actors.[431] Though the terms 'shared responsibility' and 'joint and several liability' are often used interchangeably, the latter refers to situations when two or more persons who are jointly and severally liable for obligations are each responsible for the whole damage caused to third parties: 'joint' because they take responsibility for each other's wrongs; 'several' because they can be separately sued.[432] Joint responsibility is narrower than shared responsibility because the former stems from 'the same wrongful act', whereas the latter might not.[433]

DARIO leaves open the possibility of shared, including joint responsibility. The primary basis for joint responsibility under the ILC rules is attribution of conduct and/or responsibility.[434] In

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[430] See inter alia, Giorgio Gaja, 'The European Community's Rights and Obligations under Mixed Agreements' in David O'Keeffe and Henry G Schermers (eds), *Mixed Agreements* (Kluwer Law & Taxation Publishers 1983); Eleftheria Neframi, 'International Responsibility of the European Community and of Member States under Mixed Agreements' in Enzo Cannizzaro (ed), *The European Union as An Actor in International Relations* (Kluwer Law International 2002); Marise Cremona, *External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law* (European University Institute 2006); Joni Heliskoski, 'Joint Competence of the European Community and Its Member States and the Dispute Settlement Practice of the World Trade Organization' 2 CYELS 80.

[431] André Nollkaemper, 'Introduction' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2014), 7. Nollkaemper and Jacobs define shared responsibility by four main features: responsibility of multiple actors, which contribute to a single harmful outcome, where contributions cannot be attributed to individuals based on causation and responsibility is distributed to them separately, see Nollkaemper and Jacobs 2013, 368.

[432] Crawford Third Report, 74, para 272.

[433] ARSIWA Art 47(1) provides "[w]here several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act". See also Nollkaemper in Nollkaemper and Plakokefalos 2014, 10. See also Lewis A Kornhauser, 'Incentives, Compensation, and Irreparable Harm' in André Nollkaemper and Dov Jacobs (eds), *Distribution of Responsibilities in International Law* (CUP 2015), 132.

[434] The Commentary states that the fact than an international organization is responsible for an internationally wrongful act does not exclude the existence of parallel responsibility other subjects, for example, in case of conduct which is simultaneously attributed to an organization and a state.

fact the Commentary to Article 48 of DARIO calls for joint responsibility in case of the EU's mixed agreements.[435] Bartels suggests that an act can be attributable both to an organisation and one (or more) of its member states, resulting in a multiple attribution of act(s).[436] Similarly, Messineo notes that international law has no difficulty in treating the same conduct as the act of an individual and of a collective entity.[437] Fry discusses shared responsibility based on a multiple attribution of responsibility rather than conduct. According to him, under mixed agreements the EU or its Member States may be jointly responsible even if breach can be attributed to the other, without determining the attribution of conduct.[438]

As I argued in Chapter IV above, however, we are unable to distribute shared responsibility among the EU and its Member States based on the attribution of conduct (or breach, in case of indirect responsibility), because the line separating the conduct of EU organs and Member States' organs is not clear. In any case it is unlikely that any international dispute-settlement body would be willing to engage in the analysis of the complex web of institutional ties within the Union. To the best of my knowledge no tribunal has so far attempted to carry out such an analysis.

Leaving aside the unitary understanding of international responsibility, I suggest that there can be an alternative basis for the distribution of shared responsibility other than attribution of conduct and/or responsibility. This thesis supports the differentialist approach to shared responsibility expressed by various scholars who contributed to the SHARES project. This project does not aim to provide a single normative or conceptual approach to the distribution of shared responsibility in international law, but rather to identify possible approaches to distribution of responsibility, such as moral, political, economic or normative.[439]

In particular, this thesis finds that the strict distinction between primary and secondary norms is unhelpful[440] and instead adopts, to use the language of Nollkaemper and Jacobs, a holistic

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[435] DARIO Art 48 addresses responsibility of an international organization and one or more states or international organizations.
[436] Bartels 2013. According to Bartels, while it is possible that an act adopted by a WTO Member could be defended on the basis that the WTO Member is merely implementing an act properly attributed to another international organization, we do not have WTO dispute settlement practice on this matter.
[437] Francesco Messineo, 'Attribution of Conduct' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2014), 62.
[438] James D Fry, 'Attribution of Responsibility' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2014), 99.
[439] Nollkaemper in Nollkaemper and Plakokefalos 2014, 8.
[440] The distinction between primary and secondary norms can be useful, for example in the context of adopting the ILC draft articles on responsibility. Crawford noted that the distinction was of a functional nature rather than grounded in a comprehensive theoretical argument, see James Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 AJIL 874, 876-77.

and pluralist approach.[441] I suggest that for the purposes of distributing responsibility between the EU and its Member States in the international economic context, identification of a 'guilty' party through attribution of conduct or breach is irrelevant to the deliberation of dispute settlement bodies and even to complaining parties. Drawing on my analysis of the nature of international economic obligations in Chapter V, I argue that the focus is rather on the party best placed to remedy the harm.[442] As Miller rightly notes, it may not matter so much from a plaintiff's point of view, which particular entity is held responsible – there may be many agents who are able to remedy harm and what matters is that one such agent, or group of agents, provides redress.[443]

The question is not *who is responsible for a breach* but *who is best placed to bear responsibility*. While counter-intuitive, this approach is practical. Miller, who in his philosophy of responsibility refers to this approach as the principle of capacity, suggests that remedial responsibilities ought to be assigned according to the capacity of each agent to discharge them. His justification for this view is that if we want to put a bad situation right, we should give the responsibility to those who are best placed to do the remedying.[444] Using the SHARES terminology, this proposition reflects the consequentialist approach, in which the starting point of analysis is the harm to be repaired.[445] The other side of the spectrum is the deontological vision which focuses on the duty and the moral blame of the perpetrator. As Nollkaemper and Jacobs rightly note, the adoption of a consequentialist approach may lead to an altogether different set of consequences in terms of distribution of responsibility from that of a more orthodox approach which links responsibility to attribution of conduct.[446]

The consequent question is then: How does one identify 'the party best placed to remedy harm', whether it be the EU or its Member States, or both?

Drawing on my analysis of international dispute practice, I argue that the answer to this question lies in the nature of the primary norms underlying the treaty regime in question. By the 'the

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[441] André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Concept Paper' (2001) ACIL Research Paper No 2011-07 (SHARES Series), 7.
[442] Kornhouser refers to the identification of actors who must 'remedy' the harm as legal responsibility, see Kornhauser 2015, 121. While he distinguished legal responsibility from causal and financial responsibility as other bases for distribution, this author is unsure what this categorization adds since legal and financial responsibility are likely to direct to the same actor.
[443] David Miller, Distributing Responsibilities' (2001) 9 J. Political Philos. 453, 468.
[444] Miller 2015, 460.
[445] André Nollkaemper and Dov Jacobs, 'Introduction: Mapping the Normative Framework for the Distribution of Shared Responsibility' in André Nollkaemper and Dov Jacobs (eds), *Distribution of Responsibilites in International Law* (CUP 2015), 16.
[446] Nollkaemper and Jacobs in Nollkaemper and Jacobs 2015, 17.

treaty regime in question' I mean the nature of obligations and remedies, and the dispute-settlement mechanism in which the two operate.

Relying on the characteristics of the remedial systems under trade and investment regimes discussed in Chapter V, the following section will identify the underlying rationales which govern the choice of proper respondent(s). I shall start with the WTO dispute-settlement system and suggest that the DSB adopts 'the positive solution test' that I develop. I shall then proceed to investment practice which reveals that tribunals operating under the ECT focus on the proximate cause of harm.

3. The positive solution test in WTO disputes

The WTO dispute-settlement system is open to shared responsibility.[447] Contentions about shared responsibility of the EU and its Member States have arisen in a number of WTO disputes.[448] I shall consider these cases in detail in Chapter VIII below. Suffice it here to note that in these cases WTO panels did not engage in the allocation of conduct or breach to the EU or its Member States but rather focused on the party best placed to restore order, in line with the hypotheses advanced above.

As a general rule, indeed, WTO law avoids addressing questions of distribution of responsibility. Flett rightly notes that WTO law is well suited to avoiding issues of shared responsibility altogether, and, in practice, this is what has been happening.[449] According to Flett, the drafting of the WTO Agreement suggests that attribution will not generally be an issue, and this is confirmed by the case law.[450] Bartels further explains that since WTO membership is almost universal and comes with compulsory submission to the WTO dispute- settlement procedure, it will usually be possible to direct the complaint to the party in question.[451]

But which party is the 'party in question'?

My analysis of WTO dispute-settlement practice reveals that in order to answer this question the DSB employs what I call 'the positive solution test'. This term of art is novel and has not been identified in legal scholarship. It has, however, been expressly referred to by WTO panels.

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[447] See also, Flett, 'The Practice of Shared Responsibility in Relation to The World Trade Organization and the European Union and Its Member States in the WTO' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2016), 852
[448] Bartels 2013, 347.
[449] Flett 2016, 859.
[450] Flett 2016, 859.
[451] Bartels 2013, 346.

The test stems from the primary aim of the WTO dispute-settlement regime which is to ensure regulatory compliance with WTO law.

As I have explained in Chapter V above, compliance is central to the WTO dispute-settlement regime. To ensure regulatory compliance the DSB must identify inconsistencies in the overall regulatory regime. Attribution of conduct (or causation) are largely irrelevant for compliance purposes because the focus of adjudicators is not on identifying the violator, but more broadly to evaluate the compatibility of the member's regulatory regime with WTO law. In fact WTO dispute-settlement proceedings are available not only for violations of WTO law, but also for 'non-violation' and 'situation' complaints (though these are rare in practice).[452]

The restorative function of the DSB is set out in Article 3.7 of the DSU. The provision states that the aim of the dispute-settlement mechanism is '*to secure a positive solution to a dispute*'. The language employed by the DSU suggests that the objective of dispute resolution can be reached in various ways, for example through 'prompt settlement',[453] 'satisfactory settlement',[454] 'mutually agreed solution',[455] or 'mutually acceptable solution'.[456] Whatever form is chosen, the goal is to bring the state's conduct into regulatory compliance.

Positive solution to a dispute does not invariably require addressing the DSB's recommendations to all entities involved in the breach. As the primary aim of the WTO dispute-settlement system is compliance rather than corrective justice, the DSB limits its rulings and recommendations to the EU in some cases even when an inconsistency on the part of the Member States has been (or could be) established. In the following sections I shall illustrate this point with case-law.

One may argue that such remedy-focused approach reflects the theory of efficient breach in that it does not sanction breaches that are irrelevant to restorative purposes.[457] The simplified version of the theory, the origins of which can be traced to contract law, holds that expectation damages give parties a reason to perform when and only when performance will increase overall social welfare. To follow Oliver Wendell Holmes reasoning "*[t]he duty to keep a contract at*

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[452] Bartels 2013, 344, ft 4: Art XXIII:1 of the General Agreement on Tariffs and Trade (GATT 1994) and equivalent provisions in the other WTO Agreements. Special rules apply to the latter two types of complaint: art DSU Art 26. There have been few decisions on 'non-violation' complaints, and, so far, none on 'situation' complaints.
[453] DSU Art 3.3.
[454] DSU Art 3.4.
[455] DSU Art 3.6.
[456] DSU Art 3.7.
[457] Joel P Trachtman, *The Economic Structure of International Law* (Harvard University Press 2008), 144. See also Alan O Sykes and Warren F Schwartz, 'The Economic Structure of Renegotiation and Dispute Resolution in the WTO/GATT System' (2002) 31 J. Leg. Stud. 179, 180.

common law means a prediction that you must pay damages if you do not keep it – and nothing else."[458] The theory concerns the distinction noted by Calabresi and Melamed between the property rule and the liability rule, which I addressed in Chapter V above.[459] When the net cost of compliance is higher than the net cost of breach, breach must be tolerated, even promoted, as it serves the social function of maximising overall welfare.[460] The focus is on those whose action will be required to ensure compliance. In this sense the DSB allows efficient breach and targets only those responsibility-sharing entities that are necessary to achieve a positive solution to the dispute.

The WTO case-law analysis reveals three main features of the WTO dispute-settlement regime which reflect the remedy-based distribution of shared responsibility. Firstly, panels address their recommendations only to those persons and cover only those measures which are *necessary* to achieving a positive solution, reflecting the efficient breach doctrine. Secondly, the DSB postpones determination of the proper respondent until the final stages of adjudication, which allows it to define what is necessary for compliance purposes. Thirdly, there are a number of procedural techniques which enable the DSB to distribute responsibility on a remedial basis without attributing breach.

3.1 Efficient breach

The DSB does not engage in the attribution of breach to the EU or its Member States. Rather, it focuses its analysis on what is necessary to achieve a positive solution to the dispute. Accordingly, shared responsibility is shifted (and limited) to those *persons* whose actions are relevant to compliance purposes. Also, it restricts its examination to those *measures* which have not yet expired, disregarding breaches that are irrelevant to remedial purposes. I have structured the following analysis according to these two points.

3.1.1 Limitation to necessary persons

EC and Certain Member States – IT Products illustrates the application of the positive solution test to determine whether the EU or its Member States, or both, are the proper respondents in

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[458] Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harv. L. Rev. 457, reprinted in 110 Harv. L. Rev. 991, 995 (1997).
[459] Guido and Melamed (n 388).
[460] Joost Pauwelyn, *Optimal Protection of International Law: Navigating between European Absolutism and American Voluntarism* (CUP 2008), 8.

the dispute.[461] The case, which was brought by the US, Japan and Chinese Taipei concerned the tariff treatment that the EC afforded to certain information technology products. The issue before the Panel was whether a series of EC measures was inconsistent with Article II:1(a) and (b) of GATT because they resulted in less favourable treatment accorded to imports of certain products than is provided in the EC schedule.[462] The claimants disputed duties imposed by the customs authorities of Member States on certain IT products. They listed EU regulations through which Member States impose the allegedly wrongful duties. A dispute arose between the EC and the claimants whether the panel's findings should cover Member States' actions, or whether the case concerned the EC alone.

According to the EC it was the sole respondent in the dispute.[463] The claimants disagreed, stating that both the EC and its Member States are independent members of the WTO and both play a role in the application of customs duties.[464] The Panel stated that it faced the question whether it should make findings with respect to the actions of the EC Member States and address recommendations to them in this dispute.[465]

The Panel first noted that both Member States and the EU are independently responsible for violations of the WTO obligations, in line with the principle of independent responsibility suggested in Chapter III.[466] The question then was that of exclusive responsibility, that is, whether the EU alone or its Member States as well were respondents in *this* dispute. The Panel laid out the guiding principle of its analysis.

The Panel referred to Article 3.7 DSU, which states that the aim of the dispute-settlement mechanism is to secure a positive solution to a dispute and noted that its task is to make such findings as will assist the DSB in making the recommendations.[467] The Panel concluded that analysis of Member States' conduct was not necessary because "*findings with respect to the measures adopted by the European Communities will provide a positive solution to the dispute*".[468]

The Panel's determination as to whether the EU or its Member States are the proper respondents in this dispute rests on the need to achieve a positive solution to the dispute. The Panel places

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[461] *EC and Certain Member States – IT Products*, WT/DS375/R, WT/DS376/R, WT/DS377/R, PR.
[462] The products under the dispute covered flat panel display devices, set-top boxes with common function and multifunctional digital machines.
[463] *EC and Certain Member States – IT Products*, PR, para 7.80.
[464] *EC and Certain Member States – IT Products*, PR, para 7.81.
[465] *EC and Certain Member States – IT Products*, PR, para 7.82.
[466] *EC and Certain Member States – IT Products*, PR, para 7.86.
[467] *EC and Certain Member States – IT Products*, PR, para 7.87.
[468] *EC and Certain Member States – IT Products*, PR, para 8.2.

responsibility on the EC because it is the conduct of the EC that will have to be corrected to achieve compliance. The Panel stops short of addressing its recommendations to the Member States, even though their conduct might also have violated the commitments, because (in this particular case) ruling against the EC was sufficient for remedial purposes.

The *EC – Computer Equipment* case provides a second example of the application of the positive solution test to distribute shared responsibility within the EU. The dispute concerned a US challenge of tariff re-classification by the customs authorities of the EC as well as the United Kingdom and Ireland of Local Area Network (LAN) equipment and PCs with multimedia capability. The US maintained that not only the EC but also Ireland and the UK were parties to the dispute. In its request for the establishment of the panel the US also requested that the Panel specify which of those parties was responsible to the US for the nullification or impairment.[469] The EC requested that the Panel reject claims against the UK and Ireland, claiming they were not engaged in tariff binding.[470]

Again, the Panel addressed its rulings and recommendations to the EC alone. The Panel referred back to the US complaint which challenged the following measures: (i) the EC's reclassification of LAN equipment[471]; (ii) the UK's and Ireland's reclassification of LAN equipment[472]; (iii) the EC's reclassification of multimedia PCs[473] and (iv) the UK's reclassification of multimedia PCs.[474] The Panel's reasoning was remedy-focused. It noted that since it found that the tariff treatment of LAN equipment by the EC was incompatible with its WTO obligations, it was *unnecessary* to rule on reclassification by the UK and Ireland.[475] The Panel refrained from ruling on the Member States' reclassification because finding that the EC's reclassification was incompatible with the WTO obligations was sufficient to determine that the classification needed correction. As in the *EC and Certain Member States – IT Products* discussed above, the Panel's reasoning likewise reflects elements of efficient breach.

The Panel avoided engaging in the allocation of responsibility for breach with respect to the tariff reclassification of multimedia PCs. On this point the Panel noted that since it did not find a violation, there was no need to decide which of the defending parties (the EC, Ireland or the UK) was or were responsible for the alleged nullification or impairment of benefits to the US.[476]

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[469] *EC – Computer Equipment*, PR, para 3.2.
[470] *EC – Computer Equipment*, PR, para 3.3.
[471] *EC – Computer Equipment*, PR, para 8.5 (a) and (b).
[472] *EC – Computer Equipment*, PR, para 8.5 (d) and (f).
[473] *EC – Computer Equipment*, PR, para 8.5 (c).
[474] *EC – Computer Equipment*, PR, para 8.5 (e).
[475] *EC – Computer Equipment*, PR, para 8.72.
[476] *EC – Computer Equipment*, PR, para 8.72.

The Panel's approach to the question of international responsibility of the EU and its Member States was thus functional: the Panel was guided by what is necessary to achieve a positive solution rather than a quest to identify the wrongdoer(s).

EC –Large Civil Aircraft is a more unusual case in that the EC itself, not the complainant, requested that the Panel identify the proper respondent, departing from the EC's usual approach to assert rather than question its exclusive responsibility.[477] The case concerned a challenge of the incentivisation scheme for Airbus companies allegedly launched by the EU and applied by Member States. The analysis follows the patterns observed in the previous cases. The EC claimed that it was the proper respondent in this dispute.[478] The US, which filed a request for consultations not only with the EC but also the governments of Germany, France, the United Kingdom and Spain, maintained that the EC and its Member States had provided unlawful subsidies to Airbus companies.[479] In the usual manner the EC asserted that it "*was the only respondent*" in this dispute and asked the Panel to drop the reference to the Member States in the title of the case.[480]

The Panel's position was that there was in fact no issue to be solved, thus refusing to allocate responsibility for breach.[481] Once again, in line with the principle of independent responsibility, the Panel noted that Member States and the EC are independent members of the WTO with all the rights and obligations under this regime. According to the Panel, the four Member States indicated in the request for the establishment of the panel were respondents in this dispute, whether or not they were represented by the EC in accordance to its internal arrangements.[482] The Panel concluded that a decision on whether the Panel would address recommendations to the Member States involved in this dispute would be known only when it had completed the decision-making process.[483] Once again the Panel avoided prior distribution of shared responsibility based on attribution of breach.

Distribution of shared responsibility on the basis of what is *necessary* to achieve a *positive solution* to the dispute is also reflected in the *EC – Commercial Vessels* dispute. Here, as in the cases discussed above, the claimant also argued that Member States should be respondents

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[477] *EC –Large Civil Aircraft*, PR, para 7.174 referring to the Letter from the European Communities dated 23 May 2008.
[478] *EC – Large Civil Aircraft*, PR, para 7.1769 referring to the Letter from the European Communities dated 23 May 2008.
[479] *EC – Large Civil Aircraft*, PR, para. 7.170.
[480] *EC – Large Civil Aircraft*, PR, para 7.172 referring to the Letter from the EC dated 23 Nov, 2005.
[481] *EC – Large Civil Aircraft*, PR, para 7.174.
[482] *EC – Large Civil Aircraft*, PR, para 7.175.
[483] *EC – Large Civil Aircraft*, PR, para 7.176.

because there were independent members of the WTO and that internal EC constitutional issues could not adversely affect the rights of Korea or any other WTO member.[484] According to Korea, the dispute covered both the EC regulation and Member States' measures and thus the Panel had to make findings in relation to the EC and its Member States and recommend that they both bring their measures into conformity with their WTO obligations.[485] The EC followed its usual position and maintained that it was the proper respondent and that it took full responsibility under international law for measures taken by the EC Member States pursuant to the challenged regulation.[486]

The Panel adopted a remedial approach to the international responsibility of the EU and its Member States.[487] It first noted the EC's full assumption of responsibility for the challenged measures, including the Member States' measures. This, according to the Panel, meant "*that the European Community accepts responsibility for any actions that may be required to bring into conformity the measure at issue*".[488] Placing remedy at the centre of its focus, the Panel concluded that it found "*it sufficient, in the circumstances of this case, to address our recommendation to bring the measures at issue into conformity to the European Communities*". Use of the term 'sufficient' indicates that the Panel's decision on the proper respondent was guided by the needs of the remedy in question, irrespective of allocation of responsibility for a breach.

Though unrelated to the EU, *China – Payment Services* confirms that the DSB's reasoning reflects elements of efficient breach when dealing with international responsibility of separate but related subjects of international law. In this dispute China contended that there was no legal basis for the claims advanced by the US in relation to the services supplied in Hong Kong or Macao. According to China, Hong Kong and Macao were separate customs territories and each maintained its own rights and obligations under the WTO.[489] The Panel considered that China's commitments covered not only supply of services in China, but also to clients in the territory of other WTO Members.[490] The Panel's decision not to consider whether Hong Kong and Macao might also have had obligations in respect of these services was based on the reasoning that such determination could not affect China's own responsibility.[491]

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[484] *EC – Commercial Vessel*s, PR, para 4.24.
[485] *EC – Commercial Vessel*s, PR, para 7.32, referring to the Response of Korea to Panel Question 4.
[486] *EC – Commercial Vessel*s, PR, para 93, referring to the First submission of the EC, para. 93.
[487] *EC – Commercial Vessel*s.
[488] *EC – Commercial Vessel*s, PR, para 7.33.
[489] *China – Payment Services*, WT/DS413/ R, PR, adopted 31 August 2012, para 7.608.
[490] *China – Payment Services*, PR, para 7.619.
[491] Bartels 2013, ft 18.

3.1.2 Limitation to necessary measures

The DSB rules only on those measures which are necessary to achieve a positive solution to the dispute, disregarding 'irrelevant' violations. This point can be seen in the DSB's reasoning on the temporal scope of the claims. The DSB tends to exclude measures which have expired or were not yet in force at the time of an establishment of a panel, if ruling on them is insignificant for compliance purposes.

The DSB has ruled that while the termination of a measure before the commencement of panel proceedings does not deprive it of the authority to make findings on that measure, it will only rule on that measure if it its necessary to secure a positive solution to the dispute.[492] An obligation of the DSB to rule on all matters before it would be incompatible with the principle of judicial economy,[493] whose exercise enables panels to refrain from making multiple findings that the same measure is inconsistent with various provisions when a single or a certain number of findings of inconsistency suffice to resolve the dispute.[494] It is in a panel's discretion to make findings on those measures that are necessary to fulfil the dispute-settlement objective of securing a positive solution to the dispute.[495]

The positive solution test to determine the temporal scope of the claim was applied in the *EC – Biotech Products* dispute. Here the Panel had to decide whether it was to rule not only on the legal framework for biotech product approval as such – in which case the EC alone would be a sufficient respondent – but also to rule on the *de facto* general moratorium in 2003 caused by the conduct of certain Member States.

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[492] *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207, PR adopted 3 May 2002, para 7.115. In *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and other Items*, WT/DS56, PR adopted 25 November 1997, para 6.15, the Panel decided not to make findings on WTO-consistency of measures which had been revoked eleven days before the establishment of a panel. Also, in *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2, PR adopted 29 January 1996, para 6.19, the Panel noted that it had not been the usual practice to rule on measures that, at the time of panel's terms of reference, were fixed, were not and would not become effective.

[493] *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276, ABR adopted 30 August 2004, para 133.

[494] The source of the principle of judicial economy is linked to *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33, ABR adopted 25 April 1997. The DSB noted that "if a panel found that a measure was inconsistent with a particular provision of the GATT 1947, it generally did not go on to examine whether the measure was also inconsistent with other GATT provisions that a complaining party may have argued were violated", para 339.

[495] *EC – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291, PR adopted 29 September 2006 (*EC — Biotech Products*), para 4.617.

The Panel concluded that ruling on the general moratorium itself was not necessary and that a qualified recommendation would safeguard and preserve the rights and interests of all parties, thus securing a positive solution to the dispute.[496] The Panel stated that it was "*not convinced, in view of the findings and conclusions offered by us, that a decision on whether the general moratorium ceased to exist would be necessary to enable the DSB to make sufficiently precise recommendations to the European Communities.*" The Panel then explained that its determination on whether it should rule on the general moratorium was guided by the positive solution test. According to the Panel, "*in the circumstances of this case a qualified recommendation would safeguard and preserve the rights and interests of all Parties and hence would be consistent with the aim of securing a positive solution to the dispute*". In relation to product-specific marketing bans adopted by certain Member States the Panel was not persuaded that a product-specific finding "*is necessary to "secure a positive solution to [the] dispute" between Argentina and the European Communities*" because these applications had been withdrawn prior to the establishment of a Panel.[497] It was unnecessary to distribute responsibility to the Member States despite the fact that their conduct might have been inconsistent with WTO law.

The distribution of shared responsibility through the application of the positive solution test to determine the temporal scope of a dispute is also reflected in *EC – Selected Customs Matters*.[498] Here the EC argued that expired customs measures and those not yet in force could not be part of the claim because they were irrelevant to the purpose of reaching a positive solution to the dispute.[499] The US disagreed with the EC and suggested that measures of Member States' customs administration that predated or postdated the establishment of the panel remained relevant to the panel's analysis inasmuch as they provided context for the examination of particular instances of alleged violation.[500]

The Panel first stated that it was competent to make findings and recommendations on Member States' measures in existence at the time of its establishment.[501] The latter time is thus critical in relation to the scope of judicial scrutiny. According to the Panel, expired measures might properly be subject to findings and recommendations by a panel "*only to the extent that they affect the operation of a covered agreement at the time of establishment of a panel*".[502] The

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[496] *EC – Biotech Products*, PR, para 7.1318.
[497] *EC – Biotech Products*, PR, para 7.1653.
[498] *EC – Selected Customs Matters*, PR, para 5.158.
[499] *EC – Selected Customs Matters*, PR, para 6.18.
[500] *EC – Selected Customs Matters*, PR, para 6.19.
[501] *EC – Selected Customs Matters*, PR, para 6.20.
[502] *EC – Selected Customs Matters*, PR, para 6.20.

Panel further stressed its functioning approach to the scope of its analysis, emphasising that its analysis covers inconsistencies "*particularly if such findings and recommendations are necessary to secure a positive solution to the dispute*".[503] Thus from a temporal perspective Member States' conduct is covered inasmuch as it is relevant to ensure compliance with WTO obligations. Whether Member States' measures are covered by a dispute directly correlates with whether Member States shall be respondents in a particular dispute.

I observed a similar line of reasoning regarding the inclusion of Member States as co-respondents in *EC – Commercial Vessels*. Here the question was whether expired Member States' aid schemes for certain shipyards were covered by the claim. The Panel first noted that it was inappropriate to make a recommendation within the meaning of Article 19 of the DSU in respect of a measure that no longer existed.[504] At the same time the Panel noted the difficulty of determining the exact meaning of the term 'exists' and considered all possibilities for noncompliance had it made no ruling against Member States' measures.[505] According to the Panel, where national aid schemes have expired, no new application for aid can be submitted. On the other hand, however, the Panel noted that it cannot be determined with certainty whether and to what extent it is possible that subsidies continue to be provided pursuant to applications made before the expiry of those schemes. The Panel thus considered that its recommendation did not apply to the Member States' schemes that had expired, except to the extent that those schemes continued to be operational.[506] Once again responsibility follows the remedy: Member States are responsible for bringing their measures into compliance to the extent that their schemes may prevent a positive solution of the dispute.

The positive solution test to determine whether Member States' measures fall within the scope of the claim – and accordingly whether Member States are proper respondents in a dispute – is also applied in relation to *amendments* to challenged measures. In the *EC –Boneless Chicken* dispute, the Panel refused to include an amendment to the challenged measure because the measure identified in the request for the establishment of a panel was specific and narrow and did not appear to anticipate inclusion of any measures in addition to those expressly identified.[507] At the same time the Appellate Body in *Chile – Price Band System* identified two conditions which were necessary for an amendment to be covered by a dispute, namely that the

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[503] *EC – Selected Customs Matters*, PR, para 7.36, referring to *US – Subsidies on Upland Cotton*, WT/DS267, PR, para 261; *Chile – Price Band System*, ABR, paras 126-144; *EC –Boneless Chicken*, ABR, para 156.
[504] *US – Import Measures on Certain Products from the European Communities*, WT/ DS165, ABR, para 129.
[505] *EC – Commercial Vessels*, PR, para 8.4.
[506] *EC – Commercial Vessels*, PR, para 8.4.
[507] *EC – Boneless Chicken*, ABR, para 6.13.

measure at issue is defined broadly and that ruling on an amendment is necessary to secure a positive solution to the dispute.[508] In a similar manner, in the *EC and Certain Member States – IT Products* case the Panel applied the positive solution test to determine whether amendments to the challenged measures where included in the dispute.[509]

3.1.3 Timing of the determination of the proper respondent

Another feature which attests to the DSB's remedial approach to international responsibility is its tendency to leave the decision on the proper respondents to the final stage of adjudication. That the WTO panels often postpone identification of the proper respondent until the final stages of its analysis supports my hypothesis that the they are not preoccupied with the allocation of international responsibility for a breach between the EU and its Member States but rather seek to identify the party best placed to ensure compliance.

For example, in *EC and Certain Member States – IT Products* the Panel concluded that it did "*not consider it necessary to determine at the outset whether to rule on the claims directed against the EC member States*". The Panel maintained that it would consider the extent to which the EC and its Member States had failed to comply with obligations in the context of EC commitments set forth in the EC Schedule. According to the Panel, to the extent that Member States apply a WTO measure inconsistent with another enacted by the EC, there is a reasonable basis to conclude that they have acted inconsistently.[510] The Panel then stated that it refrains from "*ruling at the outset whether findings against a particular EC member State would be necessary to secure a positive solution to the dispute*".[511]

Similarly, in *EC – Computer Equipment* the Panel first noted that not only the EC but also Ireland and the UK are bound by their tariff commitments under Schedule LXXX, irrespective of the internal transfer of power.[512] The Panel refrained from establishing at the outset the addressee of its rulings and recommendations and noted it would "*revert to this issue in light of the conclusions of that examination*".[513]

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[508] *Chile – Price Band System*, ABR, para 144. The AB noted, that "If the terms of reference in a dispute are broad enough to include amendments to a measure—as they are in this case—and if it is necessary to consider an amendment in order to secure a positive solution to the dispute—as it is here—then it is appropriate to consider the measure as amended in coming to a decision in a dispute".
[509] *EC and Certain Member States – IT Products*, PR, para 7.139.
[510] *EC and Certain Member States – IT Products*, PR, para 7.89.
[511] *EC and Certain Member States – IT Products*, PR, para 7.90.
[512] *EC – Computer Equipment*, PR, para 8.16.
[513] *EC – Computer Equipment*, PR, para 8.16.

The *EC – Large Civil Aircraft* Panel followed a similar approach. It noted that the decision as to whom its recommendations would be addressed "*will be known only when we have completed our decision-making process*".[514]

The remedial approach to shared responsibility set out above operates through procedural techniques embedded in the WTO dispute-settlement regime which I shall now address. These techniques concern the joinder of co-respondents, indispensable party rule and the application of countermeasures.

3.2 Procedural techniques

The remedial approach to responsibility, as opposed to responsibility based on attribution of conduct or breach, is reflected in some of the system's procedural rules. There is no limit to the number of possible substantial causes of injury nor to the number of candidates sharing responsibility. Nevertheless, Flett concludes that "*that there are certain aspects of WTO law capable of giving rise to issues of shared responsibility, and equally capable of resolving them; but also certain aspects of WTO law that lend themselves nicely to avoiding issues of shared responsibility. In practice, the latter is what is happening, and this is likely to continue*".[515] I list a number of procedural techniques that allow the DSB to decide disputes without engaging in questions of attribution.

An important feature of the WTO dispute-settlement regime, which distinguishes it from investment arbitration, is that compliance is prospective. That restorative measures are forward-looking explains why panels do not focus on allocation of breach which is backward- looking. The causing of an adverse impact is subject to a rebuttable presumption under Article 3.8 DSU. The test is that of genuine and substantial nexus of cause and effect.[516] The presumption, however, has never been successfully challenged.

A second feature of WTO dispute resolution which gives flexibility to panels when dealing with distribution of shared responsibility concerns the WTO rules on co-respondents. WTO law does not expressly provide for a plurality of respondents. Bartels notes, however, that while DSU Article 6.2 on the establishment of panels is silent on identifying the party(ies) to whom acts are attributed, practice supports multiple co-respondents.[517] The possibility of joinder of co-

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[514] *EC – Large Civil Aircraft*, PR, para 7.177.
[515] Flett 2016, 850.
[516] *EC – Large Civil Aircraft*, ABR, n 170, paras 1231-3.
[517] Bartels 2013, 351.

respondents exists, even without consent of respondents, both under standard and non-standard terms of reference.[518] Removing a co-respondent is also unlikely to pose problems as panels are able to exclude parties from their rulings and recommendations at any stage of proceedings. In fact the title of a dispute neither indicates nor limits its respondents. Equally, citing co-respondents does not imply shared responsibility in WTO law. It seems that consent of the parties to a dispute is equally unnecessary either to adding or removing a respondent from proceedings. The Panel's approach in *EC and Certain Member States – IT Products* suggests that Member States can be brought in at the request of a complainant even if the EU assumes responsibility on behalf of its Member States. Similarly, the EU may be called to conduct negotiation in disputes between its Member States and other members of the WTO, even if it was not a party to the dispute itself.

Neither does the indispensable third parties rule as articulated by the ICJ in the *Monetary Gold* judgment preclude the WTO from ruling against the EU alone, without delving into the complex question of attribution.[519] The issue of indispensable parties generally does not arise in WTO dispute resolution. Panels' reports are automatically adopted upon request, unless appealed. Thus, if there exists and indispensable third party and the complaining member wishes to pursue the matter, it may simply cite the third WTO member as co-respondent in a new proceeding.[520] Even if the citation of co-respondents were possible, the principles of Article 9 of the DSU would apply and the rights and obligations of the parties, including the co-respondents, would have to remain unaffected.[521]

In relation to countermeasures (i.e. mainly suspension of concessions), which may be authorised in cases when the WTO-inconsistent measure has not been withdrawn, attribution could be necessary in order to ensure that they are equivalent to the harm caused by the respondent. To calculate equivalent[522] countermeasures it is necessary to apply econometric models which separate causation from the non-attribution factors (other causes).[523] Countermeasures, however, can be applied *de jure* or *de facto* against any part of the territory (and on any product) of the defending member. In case of the EU the so-called 'carousel

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[518] Bartels refers to two cases which involved the EU and its Member States, namely *EC – Computer Equipment* and *EC and Certain Member States – IT Products*, see Bartels 2013, 351-352.
[519] *Monetary Gold (Italy/France, UK and US) (Preliminary Question)* [1954] ICJ Rep 19, 30–33.
[520] Flett 2016, 868.
[521] Flett 2016, 868. See further Gascoigne, Catherine, 'Causation in the Law of the World Trade Organization' (PhD thesis, University of Cambridge 2018).
[522] WTO Arbitration Panel Report, *US — Tax Treatment for "Foreign Sales Corporations"*, WT/DS108, adopted 30 August 2002, n 15 is an exception. Here authorization was given to 'appropriate' rather than equivalent' countermeasures, see Flett 2016, 867.
[523] Flett 2016, 866.

retaliation' allows the complainant to suspend concessions in any of the Member States and in relation to any of the products. This eliminates the need to draw a precise line between the conduct of the EU and its Member States and to attribute responsibility. It is sufficient to hold the EU responsible because countermeasures can be applied anywhere in the territory of the EU.

The above procedures allow avoidance of questions of attribution of conduct or breach in WTO law. Instead, shared responsibility is distributed to the party(ies) whose restorative actions are necessary to ensure compliance.

To conclude, the proper respondent is that entity which is best placed to achieve a positive solution to the dispute. In the WTO dispute-settlement regime shared responsibility is distributed to the part(ies) whose restorative actions are necessary to achieve compliance, whereas compensation and retaliation are secondary remedies. This is because the aim of inter-state trade dispute resolution is to restore the regulatory order rather than to compensate for damage. It is precisely because the WTO dispute-settlement system is orientated towards a re-balancing of future concessions that the DSB rules on matters before it to the extent this is necessary to ensure compliance. Efficient breach is allowed in the sense that panels refrain from ruling on those inconsistencies which are not relevant to remedial purposes, irrespective of their contribution to the breach. Panels are entitled to pick and choose issues which will be addressed in its recommendations. Furthermore, the decision on what is necessary for remedial purposes is postponed to the final stages of adjudication, in line with the restorative rather than corrective nature of adjudication. A number of procedural techniques applied in the dispute-settlement regime allow panels to avoid the allocation of responsibility for breach and instead focus on what is necessary to a positive solution to the dispute.

4. The proximate cause in investment disputes

It was suggested in Chapter V that the remedial system under investment treaties, including the ECT, differs essentially from that under the WTO regime. The purpose of investment claims is to protect the rights of private persons who have suffered damage as a result of violation of an investment protection standard. Challenges under the ECT thus focus on particular instances of application of law rather than regulatory compliance as such, which dominates interstate dispute

resolution under the WTO regime. The function of the investment protection regime is to compensate an investor for damage caused as a result of a host state's unlawful conduct. The primary remedy here – compensation – is orientated towards past behaviour. An obligation to comply does not arise in an investor-to-state adjudication where the new relationship created by a wrongful conduct is owned to a private party, not the investor's home state.[524]

Wittich notes that situations of shared responsibility are rare in investment law practice, mainly because investment law is characterised by strictly bilateral relationships between states, or between a host state and an investor.[525] Hence, in virtually all cases these relationships involve only two parties without involvement of a third. However, the question of shared responsibility can be raised in the context of the joint participation of the EU and its Member States in the ECT dispute-settlement system.

What does the nature of the remedial system under investment arbitration tell us about the distribution of shared international responsibility in a multi-layered structure like the EU?

The discussion below leaves aside questions concerning the transfer of competence in the field of foreign direct investment from the Member States to the EU under the Treaty of Lisbon. Nor do I here engage in analysis of the new investment chapters under new-generation FTAs recently concluded by the EU. These treaties will be addressed in Chapter IX. Analysis here is limited to identification of an underlying reasoning which explains the distribution of shared international responsibility between the EU and its Member States under the ECT. I focus on the ECT due to its mixed form which provides a useful context in which to analyse the distribution of responsibility for joint obligations in the context of multi-dimensional structures with elements of shared sovereignty. In the following analysis I suggest a novel approach to distribution of shared responsibility in investment disputes which, to the best of my knowledge, has not been identified in legal scholarship to date. I argue, on the basis of an extensive case-law analysis, that Member States have so far been exclusive respondents in investment disputes because their conduct constitutes the proximate cause of (alleged) harm to investors. Since compensation is the primary remedy under investment treaties, it is (in most cases) sufficient to determine the existence of a breach without identifying its scope and root causes.

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[524] Douglas 2009, 95.
[525] Stephan Wittich, 'International Investment Law' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017), 826.

4.1 The concept of proximate cause

I noted in the introductory remarks to this section that the private nature of investment claims defines the tasks of arbitral tribunals. I suggested that the primary function of investor-to-state dispute resolution is to compensate investors for violation of their rights. Damage is thus central to investment claims.

Damage is not, however, an element necessary to a finding of international responsibility under the ILC framework which only refers to conduct attributable to the state (or international organisation) and breach of that obligation. However, the ILC's draft articles do not exclude damage which may be an element under primary norms. According to Crawford, whether such elements as damage are required depends on the content of the primary obligation.[526] The Commentary to Article 29 ARSIWA also notes the relevance of primary norms in the determination of international responsibility: "*As a result of the internationally wrongful act, a new set of legal relations is established between the responsible State and the State or States to whom the international responsibility is owned. But this does not mean that the pre-existing legal relation established by primary obligation disappears*".

Castellanos-Jankiewicz elegantly disaggregates the two levels of relationship created by primary and secondary norms. He notes that the consequences of an internationally wrongful act acquire an existence independent of the obligation that has been violated and so, according to him, a new legal interest arises from breach, which is distinct from the legal interest in safeguarding the rights acquired by the primary norm.[527] In this sense, secondary norms serve a sort of a public interest of protecting the norm itself – the existence of a wrongful conduct in itself creates a new relationship. A private interest, such as that of an investor, rather, stems from rights acquired under primary norms.

Precisely because investment arbitration is a forum for the protection of private interests, damages is central to investment disputes.[528] As the Tribunal in *Merrill & Ring Forestry LP v Canada* noted, "*a finding of liability without finding of damages would be difficult to explain in the context of investment arbitration and would be contrary to some of its fundamental*

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[526] Crawford 2002, 84; see also James Crawford, 'Crawford, Revising the Draft Articles on State Responsibility' (1999) 10 EJIL 435, 438.
[527] León Castellanos-Jankiewicz, 'Causation and International State Responsibility' (2012) 7 SHARES Research Paper, 14. Douglas refers to the interest acquired through the primary norm as a 'secondary consequence of a breach', Douglas 2009, 95.
[528] According to Douglas, there would be no requirement for damages in any state/state proceedings under the investment treaties, Zachary Douglas, 'International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed' (2014) 63 ICLQ 867, 894, ft 115.

tenets".[529] Douglas considers damages to be a constituent element of all forms of delictual responsibility towards foreign nationals, both under the general international law[530] and under the special regime for responsibility established by investment treaties.[531] Article 33 of ARWISA carves out international responsibility under these, to follow Douglas's terminology, 'distinct regimes' from the ILC's secondary rules of international responsibility. Damage is an element under a number of investment treaties,[532] including the investment chapters under new-generation FTAs.[533]

The element of damage will arise at different times depending on the delict.[534] Douglas rightly notes that with respect to the international minimum standard or failure to accord full protection and security, the damage occurs simultaneously with the misfeasance or nonfeasance. A violation of an FET standard does not automatically eliminate the investment but rather consists of a series of events which cause damage to (and decline of) business.[535] Because of the fluid, temporal nature of breaches of an FET standard it is not always easy to identify the exact moment when the damage occurs.

However, leaving aside nuances of FET, if the very existence of breach of investment standards gives rise to damage (and a right to compensation), it means that the focus of investment tribunals is limited to identifying the *occurrence* of a breach. I argue that the *scope* and nature of a breach is in most cases irrelevant. To give a hypothetical example to illustrate my argument: if an investor's rights are violated because it was unlawfully denied a licence to extract mineral resources by ministry X, it is entitled to compensation for damage to its business. The investor is not entitled to *more* compensation because ministry X denied the licence while implementing a decision of the European Commission. Here I identify an important difference between the responsibility regimes under the WTO and the ECT. The source and nature of breach is relevant in the WTO context because overall regulatory compliance requires the elimination of the

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[529] *Merrill & Ring Forestry LP v. Canada*, (Award, 31 March 2010), ICSID Case No. UNCT/07/1, para 245.
[530] For example, Art 1 of the Draft Articles on Diplomatic Protection refers to injury caused by an internationally wrongful act of the state to a natural or legal person. For a different view, see Martins Paparinskis, 'Investment Treaty Arbitration and the (New) Law of State Responsibility' (2013) 24 EJIL 617, 629.
[531] Douglas 2014, 893.
[532] For example, Art 24(1)(A)(II) of US Model BIT, art 82(1) of 2002 Japan/Singapore FTA.
[533] For example, CETA, Article 8.18(1)(b) refers to breach of investment protection standards 'where the investor claims to have suffered loss or damage as a result of the alleged breach'.
[534] Douglas 2014, 894.
[535] Kaj Hobér, 'Remedies in Investment Disputes' in Andrea K Bjorklund, A Ian Laird and Sergei Ripinsky (eds), *Remedies in International Investment Law: Emerging Jurisprudence of International Investment Law* (BIICL 2009), 12.

source of inconsistency. It is irrelevant in investment arbitration where the focus is on the existence of the breach, not its roots or scope.

My thesis is that the above difference directly correlates with the distribution of shared responsibility among the EU and its Member States. Precisely because the right to compensation for breach of investment standards arises upon the very *fact* of the violation of an investor's rights, arbitral tribunals are less (or not at all) preoccupied with identifying the broader regulatory context. Accordingly, I suggest that if a Member State's implementation of an EU policy results in a violation of investor's rights, the tribunal will focus on the Member States' conduct and will likely ignore the implications of the wider EU policy.

My claim holds true because compensation for damage does not depend on the scope of the violation. Most investment treaties have adopted the so-called Hull formula of 'prompt, adequate and effective' compensation. A 'fair market value',[536] 'genuine value', 'market value' and other standards are also applied. Under the ECT, for example, compensation is calculated by reference to lost profits.[537] Compensation is thus calculated according to the (past or future) value of an investment, not the extent and nature of breach. Douglas even notes a tendency of investment tribunals altogether to disregard the type of investment standard under consideration when calculating compensation and focus on the existence of the breach. According to him, "*tribunals are drawing a line under their decisions on whether a breach of an investment treaty obligation has occurred and, by resorting to the distinction between primary and secondary rules, they are purporting to start afresh with a clean slate in deciding upon the remedial consequences for a breach*".[538] In other words once the occurrence of a breach has been established compensation is calculated without taking into consideration the nature of the violation but solely on Chapter II of Part Two of ARSIWA's articles on 'Reparation for Injury'. This, according to Douglas, results in the factual elimination of difference between standards like FET and expropriation.

I am entering here the complex question of causality in the law of international responsibility. While causality is generally not a necessary condition under the secondary rules of international responsibility,[539] Castellanos-Jankiewicz and Pusztai agree that it can be an element of

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[536] As a general rule a fair market value of property is calculated at the time of expropriation and represents the lower limit of the amount of expropriation. No lower limit exists for an FET violation.
[537] ECT Art 13.
[538] Douglas 2009, 104.
[539] Causation appears as an element of responsibility under some secondary norms, namely ARSIWA Art 31, Art 34 and Art 36(1). For difference between causation and attribution, see Ilias Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' (2015) 26 EJIL 471, 479; Fry 2014, 100.

responsibility under primary norms which establish damage as a condition of liability.[540] The discussion here, however, is narrow.[541] This section does not aim to answer the question whether causality is or should be an element of international law, nor other related questions, such as whether/what role it plays in the disputed typology between obligations of means and obligations of result.[542] This section does not refer to causality as an 'element' of responsibility. I look at it from a functional perspective – what must a tribunal determine to fulfil its adjudicative function?

I argue then that if investment tribunals are focused on damage and damage (in most cases) occurs simultaneously with a violation of an investment protection standard, it must be true that tribunals are only concerned with the *existence* of a breach. If A causes B and B causes C and C causes breach, investment tribunals need only look at C – the proximate cause of violation. The roots of C's measures are (in most cases) irrelevant to the determination of damage (or calculation of compensation). This is different under the WTO regime where regulatory compliance cannot be achieved by targeting C's measures without also determining the effect of A's and B's measures.

My reference to 'proximate cause' is not aimed at prescribing a causal test for responsibility arising out of investment treaties, especially since scholarship and practice in relation to causal tests is diverse and inconsistent.[543] Once again, the aim of this section is modest and the language I chose to employ to refer to a standard of causality is functional rather than normative. What I meant here is that investment tribunals look at the last necessary link in the chain of measures, whatever one calls it.[544] I can, nevertheless, borrow some normative considerations related to the proximate causation test to explain this point. The dissenting judgement in the famous New York decision in *Palsgraf v. Long Island Railroad Co.* can be used by analogy to express the very essence of my argument: "*What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. This is practical politics*".[545] Returning to Douglas's statement about the tendency of investment tribunals to disregard the

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[540] Dávid Miklós Pusztai, 'Causation in the Law of State Responsibility' (University of Cambridge, thesis, 2017), 48; Castellanos-Jankiewicz 2012, 25.
[541] For a comprehensive analysis of causation in the law of international responsibility, see Pusztai 2017 and Castellanos-Jankiewicz 2012.
[542] The typology was initially suggested by Ago, Ago Sixth Report. Crawford proposed to eliminate the distinction, see Crawford Second Report, para. 90. For a critical analysis of this typology, see Pusztai 2017, 51-54.
[543] For discussion on various tests, see Plakokefalos 2015.
[544] One of the most widely used tests is the *sine-qua-non*, also known as the but-for test.
[545] *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339 (1928), at 352-53 (Andrews J. dissenting opinion).

extent and nature of breach in calculating compensation, there seems to be no need to explore causal ties between various events which led to the breach.

What does this tell about the distribution of shared international responsibility for violation of joint investment obligations in the context of a multi-layered structure like the EU? My argument is that if it is sufficient to determine a proximate cause of a violation in order to award compensation, tribunals can afford not to trace the roots of the challenged measure. Thus, even if treatment afforded by a Member State stems from an EU law or decision, the EU dimension may not be relevant in investment disputes. In the following sections I provide support for my hypothesis drawing from the dispute-settlement practice under the ECT.

4.2 Proximate cause in practice

This section is a result of an extensive analysis of publicly available investment disputes which involve EU Member States. I suggest a novel approach to international responsibility of the EU and its Member States for violation of their joint investment obligations. I have identified a number of disputes under the ECT system which demonstrate that tribunals focus on Member States' treatment of investors, leaving aside, though often acknowledging, the existence of a related EU measure. In most cases such EU measure is a source of Member States' conduct and its binding nature often leaves no discretion to the Member State in question. The existence of an EU law dimension, however, does not shape the tribunals' decisions on the proper respondent which are exclusively Member States.[546] Tribunals rarely engage in the complex analysis of the relationship between the EU and Member States' measures, nor do they consider causality between the EU conduct and an alleged violation. Instead, tribunals limit the scope of the claim to the Member States' treatment of an investment. Disputes examined below support my finding that a determination of the *existence* of breach through a proximate event (Member States' treatment of investment), leaving aside its root causes (an EU law dimension), is typical of investment arbitration under the ECT framework precisely because their role is to award compensation, not to ensure regulatory compliance. The analysis supports my thesis of remedial international responsibility.

[546] I acknowledge that there may be investment arbitrations where the EU is a respondent, which are not publicly available.

I structure the following analysis by differentiating between three types of EU measure: (i) those which are binding on Member States, (ii) those which authorise Member States' conduct, and (iii) those which require Member States to adopt certain conduct.

4.2.1 First category: binding EU decisions

Electrabel v. Hungary provides a well-known example where a challenged measure was adopted under a binding EU decision. I suggest a novel reading of the Tribunal's approach to international responsibility by arguing that it is remedy-based. While the Tribunal acknowledges that a Member State's violation stems from an EU-wide law, it leaves the EU measure out of its analysis and instead focuses on the proximate cause of harm, which is the conduct of the Member State.

The case arose as a result of Hungary's decision to terminate a power purchase agreement between an investor and Hungary taken under a binding decision of the EU.[547] Despite the presence of an EU law dimension to this dispute, the Tribunal upheld the claimant's objection to the European Commission's claim that the EU was the proper respondent in this dispute.[548]

The relevance of EU law in this dispute was noted by Hungary itself. In its defence, Hungary argued that "*the obvious question, therefore, is whether Hungary can be condemned under the ECT for doing precisely that which it was ordered to do, by a supranational authority whose decisions the Claimant's own expert concedes were absolutely binding on Hungary*".[549] Hungary's statement suggests that Member States are not responsible for conduct carried out in accordance to EU law requirements. The Tribunal disagreed with this approach, instead holding Hungary independently responsible for its conduct, irrespective of whether it constitutes implementation of EU law. This supports the independent responsibility of the EU and its Member States for violation of their joint obligations, which I argued for in Chapter III.

The Tribunal first acknowledged that Member States may be bound internally to implement Union policies. It referred to Article 1(3) of the ECT which states that EU Member States are legally bound by certain decisions of EU organs under EU law. The Tribunal accordingly noted

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[547] *Electrabel v. Hungary*, Claimant's Memorial and Amended Memorial, para 287 as reproduced in the Decision on Jurisdiction, para 4.23. The agreement was terminated following a European Commission's investigation of the Hungarian electricity system following which the Commission requested to end the agreement as it constituted 'unlawful and incompatible state aid to the power generators'.
[548] *Electrabel v. Hungary*, Decision on Jurisdiction, para 4.33.
[549] *Electrabel v. Hungary*, Respondent's Rejoinder, para 192, as reproduced in the Decision on Jurisdiction, para 4.63.

that investors can have no legitimate expectation in regard to the consequences of the implementation by a Member State of any such decision by the European Commission', because "*the possible interference with a foreign investment through the implementation by an EU Member State of a legally binding decision of the European Commission was and remains inherent in the framework of the ECT itself*".[550] The claimant, according to the Tribunal, is not protected from the enforcement by Hungary of a binding EU decision.[551] This statement suggests that the Tribunal acknowledges that an EU Member State may be obliged to carry out certain conduct on the basis of EU law.

The claimant was also supportive of the principle of independent responsibility. It maintained that Member States may not circumvent their obligations on the basis that they are implementing EU law. The claimant did not dispute that the European Commission's decision was legally binding on Hungary under EU law. It nevertheless rejected the claim that Hungary was not a proper respondent in this dispute.[552] Electrabel did not contest that Hungary had no discretion but to implement European Commission's binding decision, but rather it focused on the *manner* in which Hungary went about implementing that decision.[553] In other words the claimant focused not on the decision itself, but on a specific instance of its application which pointed to the Member States rather than the EU.

The Tribunal agreed with the claimant's reasoning. In line with the principle of independent responsibility, the Tribunal emphasised that if Hungary were bound by a legally binding decision of the EU, this would not, by or of itself entail the international responsibility of Hungary as it can only be responsible for its own acts.[554] According to the Tribunal, however, this case was not about the legally binding decision of the EU. The scope of the claim was limited to whether Hungary's own acts[555] in terminating the power purchase agreement violated the ECT.[556] Accordingly, Hungary was the right party and, as pleaded, the claim could not be brought against the EU.[557] The claim challenged Hungary's conduct and it was thus Hungary, not the EC, which had to remedy the breach.

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[550] *Electrabel v. Hungary*, Decision on Jurisdiction, para 4.142.
[551] *Electrabel v. Hungary*, Decision on Jurisdiction, para 4.169.
[552] *Electrabel v. Hungary*, Decision on Jurisdiction, para 2.24.
[553] *Electrabel v. Hungary*, Decision on Jurisdiction, para 4.38.
[554] *Electrabel v. Hungary*, Decision on Jurisdiction, para 6.72.
[555] The basis of illegality of Hungary's conduct when terminating the power purchase agreement are listed in paras 6.21-6.27 of the Decision on Jurisdiction.
[556] *Electrabel v. Hungary*, Decision on Jurisdiction, para 5.34. The changes in the incentivization scheme were introduced by several legal instruments. First, the Royal Decree 1565/2010 promulgated on 19 Nov 2010.
[557] *Electrabel v. Hungary*, Decision on Jurisdiction, para 5.35.

I argue that the Tribunal's reasoning is functional. Firstly, it reinforces the principle of independent responsibility by acknowledging the existence of a relevant binding decision of the EU and at the same time refusing to release Member States from responsibility for breaches which occur in the course of implementation of EU law. Secondly, it limits the scope of its analysis to the proximate cause of harm. It does so by detaching EU law from (the manner of) implementation of that law by Hungary. This supports my hypothesis that if the *occurrence* of a breach is evidenced by the last link in the chain of regulatory events, the Tribunal will focus on the proximate cause of harm without ruling on the EU law dimension. In other words I suggest that if C (binding EU law) causes B (Hungary's implementation of binding EU law) and B causes harm to the investor, the Tribunal's approach is to focus on B because a finding that B resulted in injury is sufficient to award of compensation. To reiterate the distinction between the remedial systems under the WTO and the ECT which I noted above, it would not be sufficient for the DSB to rule on B only, because elimination of B without eliminating C would not ensure overall regulatory compliance with the WTO law and would thus not achieve a positive solution to the dispute.

The case thus illustrates my thesis of remedial international responsibility – the Tribunal focuses on what is necessary for remedial purposes, which depends on the system of remedies under a given treaty regime. Importantly, attribution of breach is not relevant in this context. If identifying the latter were central to the distribution of shared responsibility, the European Commission's decision would have been covered by the adjudication because it (might have) constituted a violation of investor's rights.

4.2.2 Second category: authorised by the EU

I extrapolated a similar pattern of tribunals focusing on the proximate cause of harm in cases arising from a measure which was authorised by the EU. The *Charanne v. Spain* arbitration illustrates how an investment Tribunal operating under the ECT regime narrowed the scope of its analysis to a Member State's conduct, ignoring that this conduct was authorised by the EU. Once again, distribution of responsibility is remedy-based and does not focus on the attribution of conduct or breach.

The case is one of the many disputes under the ECT which arose in relation to incentive measures in the form of feed-in tariffs to photovoltaic energy producers. As a way of achieving renewable energy targets set out by the European Commission, Spain introduced various incentives for solar energy producers. The system was based on the EU directive which

provides for support systems involving direct payments to producers of electricity from renewable energy sources.[558] Mainly due to subsequent overproduction of solar energy,[559] the governments of Member States adjusted their incentive systems, which resulted in a long list of claims filed by investors under the ECT. Spain had established, inter alia, a system of premiums and regulated tariffs to remunerate solar energy producers. The claimants argued that after attracting their investment in the photovoltaic generation sector, Spain had unlawfully amended the special regime regulating the industry, causing losses to their business.[560]

Some of the changes introduced were authorised under EU law. In particular, the disputed requirement to pay a toll for access to the transport and distribution network was applied by Spain "*with reference to the framework established by the valid regulations of the European Union*".[561] Similarly to the pattern observed in *Electrabel v. Hungary*, the *Charanne v. Spain* Tribunal also acknowledged the existence of the link between the Spanish measures and EU-wide laws. It noted that the challenged charge for the use of access to the transport and distribution network was implemented "*according to the European standards*".[562]

Despite the presence of an EU-law dimension, the Tribunal yet again did not focus on the EU-wide framework for the incentivisation of solar production. There is nothing in the Tribunal's analysis to suggest that the Tribunal sought to determine the source of Spain's measures. While it acknowledged that EU law authorised limitations to the incentivisation scheme for production of solar energy, the Tribunal's examination did not extend to the measures adopted at EU level. Repeating the pattern observed in *Electrabel v. Hungary*, the Tribunal focused on the proximate cause of harm, that is measures adopted by Spain, while EU law is noted as a context rather than an object of adjudication in itself.

A similar approach was taken by arbitrators in the *RREEF Infrastructure v. Spain* dispute, which also concerned the Spanish incentivisation schemes for photovoltaic energy production.

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[558] In 2005 the Spanish government approved the 2005-2010 Renewable Energy Plan which contained the government's policy regarding the renewable energy sector's compliance with the EU targets set out in Directive 2001/77, see *Charanne and Construction Investments v. Kingdom of Spain* (Final Award, 16 March 2017), SCC Case No. V 062/2012 *(Charanne v. Spain)*, para 96.

[559] Other factors may also have played a role, such as the financial crisis and the burden of subsidies on Spanish public expenditure.

[560] *Charanne v. Spain,* Final Award, para 80. The claimants based their claim on two points: the elimination of regulated tariffs for photovoltaic facilities and the introduction of a series of additional requirements for energy production, see paras 148-149 of the Final Award. Moreover, on 23 Dec 2010 the Royal Decree 14/2010 introduced further changes: established a limit of operating hours of photovoltaic facilities and introduced an obligation to pay charges for the use of electricity transportation and distribution network, see Final Award, paras 156-158.

[561] *Charanne v. Spain*, Final Award, paras 167-168.

[562] *Charanne v. Spain*, Final Award, para 537.

Here the Tribunal again refused to engage in analysis of the EU regulatory framework for renewable energy, rejecting the European Commission's application to intervene as a non-disputing party.[563]

I contrast the above cases with the underlying reasoning of the DSB which I extrapolated from the WTO case-law. The focus under the latter regime is on the rules of general application (i.e. EU law) because eliminating inconsistencies at the EU level is in most cases necessary in order to ensure overall compliance with the WTO regime. Investment treaties, on the other hand, do not seek compliance but are aimed at compensating for harm, which explains why arbitral tribunals often ignore the EU-wide inconsistency. Responsibility in both trade and investment disputes is remedial. It is not static but dynamic in that distribution of responsibility shifts from one holder of joint obligations to another, in accordance with the system of remedies under a given treaty regime. I thus argue that a dispute based on identical facts may point to the EU or its Member State as the proper respondent, depending on whether it is adjudicated as a trade or investment case.

4.2.3 The category: required by EU law

Nor do arbitral tribunals engage in the analysis of the EU dimension where, though short of a binding EU decision, Member State conduct is nevertheless required by EU law.

Under the ECT dispute-settlement system EU law requirements are treated as facts the accuracy of which is rarely examined by tribunals as independent challenges. *AES Summit v. Hungary* provides an example. The dispute concerned the imposition by Hungary of caps on the price charged for electricity generation.

AES Summit had invested in Hungary's power generation sector following the privatisation of the mid-1990s by purchasing electricity power stations and coal-fired power stations. Subsequently Hungary agreed an electricity-pricing schedule with AES Summit. In 2006, two years after Hungary joined the EU, the Hungarian Parliament amended the 2001 Electricity Act by reintroducing a regime of administrative prices for generation of electricity. As a result the agreed formula under which AES Summit was selling its electricity was no longer applicable.

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[563] European Commission filed an application to intervene as a non-disputing party on 10 Nov 2014 which was rejected by the tribunals' Procedural Order No 2 of 5 February 2015, Decision on Jurisdiction, ARB/13/30, paras 16 and 20.

In 2007 it filed a request for arbitration alleging that Hungary had violated its obligations under the ECT by reintroducing administrative pricing.[564]

Hungary suggested that the Union's competition law must be taken into account in the dispute in question.[565] Hungary argued that it could not ignore Union law requiring that prohibited state aid be minimised or eliminated.[566] It further contended that AES Summit could not legitimately expect that Hungary would never consider, as a rational vehicle for addressing the Union's concerns, the temporary reintroduction of administrative price controls.

Hungary's attempt to hide behind the veil of its membership of the EU was rightly criticised by Eeckhout whose Expert Opinion rejected Hungary's claim that EU law was part of that applicable in this dispute.[567] Furthermore, he challenged the interpretation provided in the Counter-Memorial that EC competition law is part of the notion of public order, which could justify Hungary's conduct. According to him, Hungary's reference to the ECJ's judgment in the *Eco-Swiss* case, where the Court confirmed that the ordinary courts of the Netherland have power to review arbitral awards for consistency with EC competition law,[568] was misplaced. Eeckhout's interpretation thus supports the argument which I laid out in Chapter III that the EU and its Member States are independently responsible for their joint obligations, including Member States' implementing Union law.

While there is nothing in the Tribunal's ruling which would contradict the principle of independent responsibility, it nevertheless excludes EU's measures from the scope of the adjudication. Precisely because the dispute arose in the area which falls within the regulatory framework of the EU, the Union sought to intervene in the dispute. The Tribunal issued a procedural order which allowed the European Commission to participate as a nondisputing party.[569] This attests that the Tribunal acknowledged the relevance of Union law in this dispute. According to the Tribunal "*[h]ad Hungary been motivated to reintroduce price regulation with a view to addressing the EC's state aid concerns, there is no doubt that this would have constituted a rational public policy measure*".[570] However, instead of examining the

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[564] *AES Summit v. Hungary*, Award, para 5.1.
[565] *AES Summit v. Hungary*, Award, para 7.2.4.
[566] *AES Summit v. Hungary*, Award, para 7.2.5.
[567] Expert Opinion of Prof Piet Eeckhout, 'The Law Applicable to the Dispute under the Energy Charter Treaty 1994', *AES Summit v. Hungary*.
[568] Case C-126/97, *Eco Swiss v Benetton International* [1999] ECR I-3055, para 36.
[569] On 3 September 2008, the Legal Service of the European Commission filed an application under the ICSID Arbitration Rule 37 as a non-disputing party.
[570] After having engaged in substantive analysis, the Tribunal concluded that the Union imposed no binding state aid decision, and so Hungary's conduct was not required by EU law, *AES Summit v. Hungary*, Award, para 10.3.16. Arbitrator Stern, on the other hand, considered that pressures from the European Commission certainly weighed

compatibility of measures of the EU, which is an independent member of the ECT, the Tribunal treated Union law as fact. It concluded that "*the Respondent's acts/measures are to be assessed under the ECT as the applicable law but that the EC law is to be considered and taken into account as a relevant fact*."[571] Leaving the deliberations on the status of EU law under the ECT framework aside, the above statement illustrates that the Tribunal did not examine the legality of EU law as an independent object of adjudication. As Hungary's measures were the proximate cause of harm, it was not necessary to subject EU measures to judicial scrutiny to determine whether the investor's rights had been violated.

The now settled *Vattenfall I v. Germany* arbitration provides yet another illustration of distribution of shared responsibility on the basis of the proximate cause of harm.[572] In 2009 the Swedish energy company Vattenfall challenged the adoption of an environmental restriction. The restriction was imposed on the company's coal-fired power plant which was under construction along the banks of the Elbe River. Vattenfall claimed that the imposition of the restriction was in breach of the ECT's investment protection standards.

Plans for the construction the coal-fired power plant were announced by Vattenfall in 2004 and provoked controversy due to environmental concerns.[573] Despite opposition to this large-scale project, a provisional contract with Vattenfall was concluded in 2007 and was followed by the issuance of a preliminary permit. The City of Hamburg issued final permission in 2008, which contained certain environmental restrictions. These restrictions formed the basis for Vattenfall's claim.

Germany claimed that the imposed restrictions were required under EU law. Hamburg explained that it was striving to meet the EU's Water Framework Directive, which requires all EU Member States to ensure certain levels of water quality.[574] Vattenfall alleged, however, that by imposing a more stringent standard in the final construction permit, Hamburg has breached

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on the Hungarian authorities' mind when they decided to reintroduce price regulation. In her view, it appears from the record that the European Commission had made abundantly clear to Hungary that the pricing formula applied to AES Summit was in contradiction with the European free market policies. She concluded that the European Commission's position cannot be separated from the motivation that was behind the disputed decision, see *AES Summit v. Hungary*, Award, para 10.3.19.

[571] *AES Summit v. Hungary*, Award, para 7.6.12.

[572] *Vattenfall AB, Vattenfall Europe AG, Vattenfall European Generation AG v. Federal Republic of Germany* (Award 11 March 2011) ICSID Case No. ARB/09/6 (Vattenfall I v. Germany).The case was settled pursuant to the Agreement of August 25, 2010.

[573] Nathalie Bernasconi, 'Background paper on Vattenfall v. Germany arbitration' <http://www.iisd.org/pdf/2009/background_vattenfall_vs_germany.pdf> accessed 31 July 2018.

[574] Council Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy [2000] OJ L327/1.

its obligations under the ECT.[575] On 28 October 2009 the European Commission sought to intervene.

Even though a detailed analysis of the dispute cannot be carried out due to the lack of publicly available information, it may be concluded that the case had an EU law dimension. Due to its focus on compensation rather than restoration of the legal order, the Tribunal yet again prioritised the application of a challenged measure, not the broader regulatory regime.

Nor did the Tribunal in *Nykomb v. Latvia* examine the link between the respondent's measure and Union law. Here the challenged measures had also been adopted in order to comply with mandatory EU law. The Tribunal noted that the main purpose of the challenged Energy Programme was to integrate the Latvian electricity market with the EU and to harmonise Latvian legislation with EU directives and regulations.[576] Exactly what impact these EU directives and regulations had in relation to the damage to the investor, the Tribunal did not examine.

A detailed discussion on whether EU law is applicable under the ECT regime falls outside the scope of this thesis. Suffices it to say that such a view is not convincing. A claim that there is a special relationship between the ECT and EU law is,[577] while of historical significance, irrelevant from the legal perspective. Eeckhout rightly notes in his Expert Opinion that applicable law, which is defined in Article 26(6) ECT, does not extend to Union law.[578]

What is important for the present purposes is that under the ECT the question of EU law as applicable law is a question of the justification of Member State conduct. That EU law is considered a fact which can exempt treatment of Member States rather than an independent object of judicial evaluation, further supports my finding, argued above, that tribunals do not typically examine the legality of EU law. The Union law dimension is not considered a link in the chain of causal events which lead to the harm. It is presumed legal and is thus not subject to examination. The compatibility of EU law with obligations under the ECT is not in itself an independent object of adjudication.

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[575] The claim of Vattenfall was directed at the City of Hamburg but the claim was brought before Germany as it was a party to the ECT.
[576] *Nykomb v. Latvia*, Award, para 3.1.
[577] For example, Professor Sloth in his Expert Report in *AES Summit v Hungary* suggested that the ECT "should be interpreted as much as possible in harmony with EC law", Expert Report, para 175. In its Counter-Memorial in the same dispute Hungary claimed that the ECT was 'the brainchild of the European Union' and so the ECT could not be read independently from EU law, Counter-Memorial, para 306.
[578] Expert Opinion of Prof Piet Eeckhout, 'The Law Applicable to the Dispute under the Energy Charter Treaty 1994', *AES Summit v. Hungary*, para 21.

To conclude, my analysis of investment arbitration suggests that the approach of arbitral tribunals to shared responsibility under the ECT is similar to that under the WTO dispute settlement system in that questions of attribution of conduct or breach generally do not arise. The commercial nature of investment arbitration directs the focus of tribunals to damage. The proximate cause of harm allows panels to establish the existence of the breach, determination of which is sufficient to award of compensation. Furthermore, the special status afforded to EU law in some disputes is a second reason why the EU dimension is excluded from judicial scrutiny. In this respect the ECT regime differs from that of the WTO where the focus on compliance typically calls for the DSB to determine the legality of EU measures.

5. Conclusion

In international economic law responsibility for violation of international obligations is restorative rather than punitive. The focus is not on the identification of an entity which has carried out unlawful conduct, but on the subject which is best placed to remedy harm. In other words the focus is not on the responsible party, but on that which is best placed to bear responsibility.

Both WTO and investment case-law under the ECT reveal a remedial approach to international responsibility of the EU. The aim of the WTO regime is to bring about compliance. The positive solution test under the WTO guides panels in their determination of who the proper respondents are in a given dispute. The regime allows efficient breach and the proper respondents are those who are necessary to ensure compliance. Entities whose conduct is inconsistent with the framework may be left out of the panels' recommendations if their actions are unnecessary for compliance purposes.

The aim of investment arbitration, on the other hand, is to compensate private investors for damage suffered as a result of breach of investment standards. In most cases damage occurs simultaneously with breach. The proof of the *existence* of breach is sufficient for the right to compensation to arise. Investment tribunals thus focus on the proximate cause of harm and often exclude the broader EU dimension from judicial scrutiny.

I thus conclude that international responsibility for violation of economic obligations is remedial. Distribution of responsibility is not predetermined on the basis of some constant but is dynamic in that distribution of responsibility shifts from one holder of joint obligations to another, in accordance with the system of remedies under a given treaty regime. International

responsibility may thus be allocated to the EU or its Member States, depending on the nature of the economic regime in question.

CHAPTER VII – THE OPTIMAL RESPONDENT

1. Introduction

In Chapter III of this thesis I argued that the EU and its Member States are independently responsible for their international obligations, irrespective of the internal transfer of competence(s). That responsibility of both the EU and its Member States *can* be invoked, however, does not tell us whether the EU, its Member States, or both will be responsible in a given situation. It is thus necessary to determine exclusive responsibility. In Chapter IV I argued that there is no support in international dispute-settlement practice for the European Commission's claim that conduct of Member States' authorities is attributed to the EU in the areas of Union competence(s).

Chapter V questioned whether attribution of breach is at all relevant to the allocation of responsibility for violation of economic obligations. I suggested that the primary function of remedies in international economic law is restorative rather than corrective. Accordingly, investment tribunals focus on identifying the entity which is best placed to restore order rather than on attribution of responsibility for the breach. The question of shared responsibility is in effect the question of the proper respondents.

I argued further in Chapter VI that determination of whether the EU, its Member States, or both are the proper respondents in trade and investment disputes depends on the nature of the treaty regime in question. I analysed an extensive body of case-law which allowed me to identify the underlying rationales for the distribution of shared responsibility between the EU and its Member States. I suggested that WTO panels follow 'the positive solution test' which shifts responsibility to the entity whose conduct is necessary to compliance. Investment tribunals, on the other hand, focus on the proximate cause of harm which is sufficient to merit compensation.

In WTO and ECT adjudication the question of the proper respondent is rarely controversial. The tests for the distribution of shared responsibility that I identified in Chapter VI place either the EU or its Member States as the default respondent. The usual pattern is that the EU is a respondent in WTO disputes, whereas Member States have so far been the primary respondents for violations of ECT obligations. The aim of the present chapter is to answer the question 'why?'. I aim to explain the central role of the EU in the WTO dispute-settlement system on the one hand, and of Member States in investment disputes under the ECT, on the other. I refer to these patterns as the optimal respondent. I suggest that the optimal respondent in a given treaty regime depends on the nature of that regime.

Section 2 explains the correlation between the nature of the WTO regime and the role of the EU as the primary respondent in WTO disputes. I shall argue that the EU's participation in the framework through mixed treaty-making in most cases allows WTO panels to address their recommendations to the EU alone. Revealing the opposite trend, Section 3 will shift focus to investment protection in order to explain why the primary respondents are Member States rather than the EU. The nature of investment protection obligations determines that Member States are the optimal respondents under the ECT regime.

An important caveat is in order. Unlike investment arbitration, where Member States have not only been the optimal but also the exclusive respondents (in publicly available disputes), the pattern is not as clear-cut in WTO disputes. There are a number of cases where panels address their recommendations not only to the EU but also to (some) Member States. The present discussion examines the general pattern and does not aim to explain why in some cases it is necessary to address the recommendations not only to the EU but also Member States. Discussion of the latter question is reserved to Chapter VIII.

2. The EU as the optimal respondent in WTO disputes

I have argued in Chapter VI that the DSB distributes shared responsibility on the basis of what is necessary to achieve a positive solution to the dispute. In most cases this requires the elimination of regulatory inconsistencies and ensuring that the rules of general application comply with WTO law. It has become customary for the EU to represent its Member States in most disputes concerning violation of WTO law.[579] It is usual for the EU to assure the DSB that it will bear responsibility on behalf of its Member States by affirming that all steps necessary to compliance with the ruling will be taken. Presumably the EU's motive for such policy is its exclusive competence in the field of trade.[580] The aim of this section is to explain why the EU is in most cases best placed to achieve a positive solution in WTO disputes.

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[579] Gaja noted a tendency to assume that, whenever the EU was responsible, conduct by Member States had to be attributed to the Union, see Summary Record of the 2803rd Meeting, A/CN.4/SR.2803, 92, para 47. In *EC – Large Civil Aircraft*, the EC drew an ambiguous distinction between representation of Member States and the taking of responsibility for the actions of Member States. According to the EC it "has never said that it "represents" its member States but takes full responsibility in these proceedings for the actions of its member States", see *EC – Large Civil Aircraft*, PR, para 7.171.

[580] The Union's quest to be a sole party to these agreements is motivated by the strengthening of its negotiating power through a one-voice approach. Eeckhout also suggests that the EU's willingness to assume responsibility on behalf of its Member States is most probably related to its quest for integration and for international confirmation, see Piet Eeckhout, 'The EU and Its Member States in the WTO: Issues of Responsibility' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (OUP 2006), 457.

A number of cases analysed in Chapter VII suggest that the DSB does not object to the EU's assumption of responsibility and often considers it sufficient to address its rulings and recommendations to the EU alone. For example, in *EC – Computer Equipment* the EC stated that it would respond to all US claims, including those addressed to Ireland and the UK.[581] The Panel rejected the EC's claim that it was the only respondent in the dispute, noting that both Ireland and the UK were bound by their tariff commitments.[582] However, though the tariff classification of Ireland and UK was found to be inconsistent with the legitimate expectations of the US, the Panel accepted the EC's assumption of responsibility on behalf of Ireland and the UK and addressed its recommendations to the EC alone.[583] Similarly, in *EC and Certain Member States – IT Products* the Panel noted that the EC had assured it that, to the extent the Panel were to find that any of the measures specified in the joint panel request was in breach of WTO obligations, the EC would bear full responsibility for such breach.[584]

In some cases the EC goes as far as to assume international responsibility for Member States' measures which the EC itself considers to be autonomous decisions rather than implementation of EC law. For example, in *EC – Commercial Vessels* a question arose as to whether individual disbursements of aid by the Member States for certain shipyards were covered by the Agreement on Subsidies and Countervailing Measures (SCM Agreement). The EC disputed Korea's inclusion of these measures in their claim and noted that Member States' measures were not implementing measures of the challenged regulation but rather autonomous decisions on whether or not to make use of the derogation from prohibition of state aid under EC law.[585] However, despite its lack of normative control over Member States' measures, the EC indicated that if the national aid measures were to be found inconsistent with the WTO Agreement, the EC would bring those measures into conformity.[586] The Panel accepted the EC's assumption of responsibility, emphasising its focus on the requested remedy. The Panel noted that it understood the EC's declaration that it assumes full responsibility for Member States' measures as the EC's acceptance of responsibility for "*any actions that may be required to bring into conformity the measures at issue*'. It concluded that "*it is sufficient, in the circumstances of this*

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[581] *EC and Certain Member States – IT Products*, PR, para 4.10. For third party perception of the EU's assumption of responsibility, see INTERPOL's comments, Comments A/CN.4/556, 42.
[582] *EC – Computer Equipment*, PR, para 8.16.
[583] *EC – Computer Equipment,* PR, paras 9.1-9.2.
[584] *EC and Certain Member States – IT Products*, PR, para 8.2, ft 1937, citing Letter from the Delegation of the European Commission dated 4 Feb 2009.
[585] *EC – Commercial Vessels*, PR, para 4.22. The Panel also noted that Member States' decisions to grant aid were not implementing EC law, because Member States were not under an obligation to introduce aid schemes in accordance to the challenged regulation, para 7.53.
[586] *EC – Commercial Vessels Commercial Vessels*, PR, para 7.10, also para 7.54.

case, to address our recommendations to bring the measures at issue into conformity to the European Communities".[587]

Importantly, the EC's assumption of responsibility for its Member States does not relieve the latter of their WTO obligations, consistent with the principle of independent responsibility addressed in Chapter III. *EC – Large Civil Aircraft* illustrates this point. In this case the EC stated that it takes full responsibility for the conduct of the Member States.[588] The Panel did not object to the EC's making all submissions and communications in this dispute on behalf of Member States.[589] According to the Panel it was up to the Member States to choose whether to appear and actively defend their interests before the Panel. Importantly, however, the Panel noted that the internal arrangement of the EC and Member States did not alter their status as respondent in this particular dispute.[590]

I suggest that the DSB does not object to the EU's assumption of international responsibility on behalf of its Member States when the conduct of the latter is covered by the claim. While in such cases the DSB does not release Member States from their responsibility, it does not object to the Union's affirmation that it will ensure Member States' compliance. In the following sections I shall explain that the DSB's acceptance of such arrangement stems from the internal interdependency of the EU and its Member States in mixed treaty making. Before addressing mixed-treaty making, I would like to note a related aspect – the EU's exclusive competence in trade.

2.1. The EU's exclusive competence in trade

The WTO Agreements establishe rules of general application for the liberalisation of trade. The purpose of the WTO dispute-settlement system is to safeguard the rules-based international trading system. Because it is an inter-state forum where claims are filtered by governments, challenges to measures of general application form the basis of most claims under the WTO.

The WTO dispute-settlement system is focused on future compliance. The Panel in *US – Superfund* noted that the provisions of the GATT 1947 are intended not only to protect current

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[587] *EC – Commercial Vessels Commercial Vessels*, PR, para 7.33.
[588] *EC – Large Civil Aircraft*, PR, para 7.171. referring to the Letter from the European Communities dated 6 Oct 2005.
[589] *EC – Large Civil Aircraft*, PR, para 7.173. The Panel noted that representatives of the EC Member States in question (France, Germany, Spain and the UK) appeared before the Panel at several meetings but did not speak or make any submissions.
[590] *EC – Large Civil Aircraft*, PR, paras. 7.174-176.

trade but also to create predictability needed to plan future trade.[591] According to the Panel the WTO regime is "*intended to protect not only existing trade but also the security and predictability needed to conduct future trade. This objective would be frustrated if instruments setting out rules or norms inconsistent with a Member's obligations could not be brought before a panel once they have been adopted and irrespective of any particular instance of application of such rules or norms"*.[592]

The EU has competence in the field of trade and is thus the primary actor when it comes to amending rules of general application. In the seminal *Opinion 1/94* the ECJ noted that the Union had exclusive competence to conclude international treaties on trade in goods, whereas competence in relation the General Agreement on Trade in Services (GATS) and TRIPS was shared with Member States. Much has been written on the EU's competence in relation to the WTO and the analysis will thus not be reiterated here.[593] Suffice it to say that while the EU does not have sufficient competence to conclude the WTO Agreements alone, its exclusive competence in trade is nevertheless central to the framework.

The EU's exclusive competence in trade explains the active role played by the EU itself in WTO disputes. The EU is the optimal respondent because it has the necessary competence to ensure compliance with trade rules of general application in the EU. It is the source of EU trade law and thus inconsistencies with the WTO regime are best addressed through measures at Union level. Kuijper rightly notes that the Union is best placed to carry out the restitution that has been ordered by panels or the Appellate Body and ensure that such conformity will come about.[594] According to Kuijper the EU is the relevant entity in WTO dispute resolution because it has exclusive competence in the fields of customs and trade which, especially since the Lisbon Treaty, are coterminous with, if not broader than, the terrain covered by the WTO Agreements.[595]

I would like to emphasise a significant nuance. As I have noted in other chapters, the European Commission as well as a number of legal scholars approach the question of the international responsibility of the EU through the division of competence between the Union and its Member

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[591] *US – Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136, PR adopted 17 June 1987 (US – Superfund).
[592] *US – Superfund,* PR, para 5.2.2.
[593] See, for example, Hilf Meinhard, 'The ECJ's Opinion 1/94 on the WTO - No Surprise, but Wise?' (1995) 6 EJIL 245; Pierre Pescatore, 'Opinion 1/94 on "Conclusion" of the WTO Agreements : Is There an Escape from a Programmed Disaster' (1999) 36 CML Rev 387.
[594] Pieter Jan Kuijper, 'Attribution - Responsibility - Remedy Some Comments on the EU in Different International Regimes' [2014] Available at SSRN: https://ssrn.com/abstract=2405028, 9.
[595] Kuijper 2014, 8.

States. I have considered the competence-based model of responsibility of the European Commission in Chapter III. In their seminal work Kuijper and Paasivirta discussed the competence model on which responsibility should basically lie where the competence is.[596] They explain that EU legislation sets out the basis for assessment of the legality of Member States' conduct and that it is ultimately controlled by the EU judiciary through the exercise of 'normative control'.[597] Delgado's recent work provides a comprehensive and persuasive analysis of the concept of normative control in the context of international responsibility of the EU.[598] Without attempting to give fair voice to Delgado's analysis,[599] I note his argument that by examining which competences are listed in Article 3 of TFEU the areas in which the EU would bear responsibility could be established.[600] Delgado suggests that if there is exclusive competence, the EU should bear exclusive responsibility: if competence is shared, so should be responsibility.[601]

I agree that the division of competences between the EU and its Member States is relevant to the question of international responsibility. As I maintain in this section, the EU's exclusive competence explains the primary role of the EU in the WTO dispute-settlement system. However, as discussed in Chapter III, nothing in WTO case-law indicates that panels allocate responsibility to the EU on the *basis* that it holds exclusive competence in trade. Exclusive competence is not in itself a ground for distribution of shared responsibility. I argue that distribution is based on the identification of those best placed to restore order. Responsibility of the EU in areas of its exclusive competence is an outcome of the application of this basis, not the basis itself. The difference is significant: the EU bears responsibility under WTO law not because it holds competence in the field of trade, but because it is best placed to ensure compliance, given its competence in the field of trade. Interpreting the division of competences as the basis for allocating responsibility would negate the principle of independent responsibility of the Member States discussed in Chapter III. Furthermore, the competence-based model is insufficient to explain cases where the DSB identifies Member States as the proper respondents alongside the EU, despite the EU's exclusive competence (I shall address these special cases of multiple respondents in Chapter VIII).

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[596] Kuijper and Paasivirta 2013, 54.
[597] Kuijper and Paasivirta 2013, 55.
[598] Delgado Casteleiro 2016.
[599] For a more comprehensive overview, see my review of Delgado Casteleiro's book, Emilija Leinarte, "International Responsibility of the European Union: From Competence to Normative Control" by Andrés Delgado Casteleiro', Book review, *European Law Review* (2017) 42(6).
[600] Delgado Casteleiro 2016, 26.
[601] Delgado Casteleiro 2016, 26.

If, on the one hand, I argue that the EU is the optimal respondent in WTO disputes because its exclusive competence in trade makes it best placed to ensure compliance and, on the other hand, I maintain that Member States remain independently responsible for their conduct, why then does the DSB allow the EU to assume international responsibility on behalf of Member States? The Panel stated its approach in *EC – Large Civil Aircraft*: "*The fact that four of those Members are member States of the European Communities, which is itself a Member of the WTO, does not affect their individual status as Members of the WTO against whom another Member, the United States, has brought claims of violation of various provisions of the WTO Agreements. Whether these four WTO Members choose to appear and actively defend their interests before the Panel separate from the actions of the European Communities is a matter entirely within their discretion, subject to the obligations of their status as member States of the European Communities*".[602] If the DSB does not release Member States from their independent responsibility, why does the DSB empower the EU to bring its house in order?

The EU's exclusive competence in trade provides only a partial explanation of the primary role of the EU in the WTO regime. It does explain why the EU itself is a proper respondent in most disputes under the WTO regime. However, it remains to be examined why panels allow the EU to assume responsibility on behalf of Member States who remain independently responsible for their violations. The answer lies in the interdependency of the EU and its Member States in mixed agreements.

2.2. The internal interdependency under mixed agreements

It is well established in WTO law that when an inconsistency between a challenged legal measure and WTO obligations is found, it is up to the respondent to decide how it will bring its inconsistent measure(s) into compliance. Since the central remedy under the WTO dispute-settlement regime is the elimination of regulatory inconsistencies, the manner in which the measure is to be brought into conformity is directly linked to the substance of WTO obligations.[603] As I have argued in Chapter VI above, this is not the case in investment arbitration where the correlation between the type of standard breached and compensation is (mostly) irrelevant.

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[602] *EC – Large Civil Aircraft*, PR, para 7.174.
[603] *EC – Selected Customs Matters*, PR, para 7.17.

If under WTO law the substance of obligations breached defines compliance, the division of competences between the EU and Member States could in effect provide guidance on the optimal respondent. However, the WTO regime does not contain a declaration of competences and even if there were one, its usefulness could be doubted.[604] The apportionment of competences between the EU and its Member States would be too complex a task for an external adjudicator, especially in relation to GATS and TRIPS where the dividing line is not clear.[605] Nor is the DSB obliged to follow such delimitation of competences which is of a purely internal nature.[606] The panels are, however, released from the task by the very nature of the EU's participation in the WTO regime through mixed treaty-making.

2.1.1 The WTO as a mixed treaty

The WTO Agreement is a mixed treaty – both the EU and its Member States are parties to it. Mixity is a technique which aggregates powers of the EU and Member States to enable them to undertake commitments *vis-à-vis* non-member states which none of them could enter alone due to a lack of competence.[607] In his seminal work on mixity, Heliskoski correctly described the use of mixed agreements as a technique for organising international relations of the Union and its Member States.[608] This technique, according to Schermers, is employed in relation to any treaty to which an international organisation, some or all of its Member States, and one or more third states are parties and for execution of which neither the organisation nor its Member States has full competence.[609]

The lack of competence arises because the Union is a separate legal person with limited capacity and therefore enjoys only those powers which Member States have conferred on it.[610] The

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[604] Peter M Olson, 'Mixity from the Outside: The Perspective of a Treaty Partner' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and Its Member States in the World* (Hart Publishing 2010), 337.
[605] Eeckhout is of the same opinion, see Eeckhout 2006, 459.
[606] Christian Tomuschat, 'Liability for Mixed Agreements' in David O'Keeffe and Henry G Schermers (eds), *Mixed Agreements* (Kluwer Law & Taxation Publishers 1983), 125.
[607] Jean Groux and Philippe Manin, *The European Communities in the International Order* (Office for Official Publications of the European Communities 1985), 61. The system of mixed agreements is different from that chosen by federal states in which a single entity enters into agreements binding on both the Union and Member States regardless of the internal allocation of competences, see Olson 2010, 334.
[608] Heliskoski 2001. Ehlermann notes, that the concept of mixed agreements has been created for internal reasons rather than being called for by third states, see CD Ehlermann, 'Mixed Agreements: A List of Problems' in David O'Keeffe and Henry G Schermers (eds), *Mixed Agreements* (Kluwer Law and Taxation Publishers 1983).
[609] David O'Keeffe and Henry G Schermers (eds), 'Mixed Agreements', 25.
[610] Though the Union's legal personality has been recognized early on, it is only the Treaty of Lisbon which, in Art 47 TEU, explicitly recognises the legal personality of the EU, making it an independent entity in its own right. This should be read in conjunction with Art 5 TEU which establishes the principle of conferral and Art 4 TEU which states that competences not conferred upon the Union in the Treaties remain with the Member States. On

dynamism of competence allocation under the internal structure of the EU calls for mixity. Generally, the Union is entitled to conclude international agreements on its own only if it enjoys exclusive competence in all matters covered by that treaty. Therefore, even if the Union has competence for subject-matter of the agreements but that competence is shared with Member States,[611] the latter may become parties alongside the EU, should they wish to do so.[612] Aside from competence-related rationales, Member States favour mixity for political reasons, such as visibility and prestige.[613] Mixity can also result from the inclusion of the so-called subordination clauses in international agreements. For example, many environmental treaties include a subordination clause which obliges the EU to conclude these agreements as mixed.[614] Finally, the CJEU has been flexible and generous in recognising Member States' quest for mixity.[615] The CJEU's *Opinion 2/15* in the EU-Singapore FTA case established that the EU lacks sufficient competence in relation to the investor-to-state dispute-resolution mechanism and so new-generation FTAs will likely be mixed.[616] A number of authors therefore agree that the use of mixed agreements is only going to increase in the future.[617]

From the perspective of third parties, mixity can be regarded as a safeguard that the agreement binds an actor with relevant powers.[618] If an agreement is concluded by the EU alone, a third party may be unable to bring a claim against a Member state because it is not a party to an agreement. Even though Member States would be bound internally, a conclusion of an agreement by the EU alone does not by itself mean that Member States become parties

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the typology of competence allocation, see Allan Rosas, 'The European Union and Mixed Agreements' in Alan Dashwood and Christophe Hillion (eds), *The General Law of E. C. External Relations* (Sweet & Maxwell 2000), 203.

[611] Areas of shared competence can become exclusive Union's competence once the EU exercises that competence and the exercise of parallel competence by the Member States could affect the common rules or alter their scope.

[612] Heliskoski 2001, 67.

[613] Pieter Jan Kuijper and others, *The Law of EU External Relations Cases, Materials, and Commentary on the EU as an International Legal Actor* (2nd edn, OUP 2015).

[614] For example, UNCLOS Annex IX Art 2 states that an international organization may sign the Convention if a majority of its Member States are signatories to it. For more on subordination clauses in environmental agreements, see Lena Granvik, 'Incomplete Mixed Environmental of the Community and the Principle of Bindingness' in Martti Koskenniemi (ed), *International Law Aspects of the European Union* (Kluwer Law International 1998), 260.

[615] Robert Schütze, 'Federalims and Foreign Affairs: Mixity as a (Inter)National Phenomenon' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010), 82. This is by no means to say that the CJEU ignores legal rules for competence allocation, for example in *Portugal v. Spain*, Case C-268/94, concerning the Union's agreement for cooperation with India, the Court took a restrictive position and noted that the use of mixity is to be determined by analysing the essential object of the agreement (in this case, development cooperation) and not with respect to individual clauses which are merely ancillary.

[616] Opinion 2/15 *Free Trade Agreement with Singapore* [2017]; Opinion of AG Sharpston delivered on 21 December 2016. AG Sharpston concluded that the EU does not have exclusive competence over the area of the FTA and the treaty was thus mixed.

[617] For example, see Rosas 2000, 371.

[618] Groux and Manin 1985, 67; Olson 2010, 334.

implicitly or are bound from the international law perspective.[619] In addition, unlike their ties to the EU, third parties have longstanding relationships with Member States and therefore do not usually object to mixity.[620] Rather, their interest is in achieving clarity and ensuring that all parties necessary to compliance are bound by the agreement. It is therefore correct to suggest that analysis of mixity should incorporate not only the Union and its Member States, but also their treaty partners,[621] a point which is often ignored.

The complexity of the joint participation of the EU and its Member States in the WTO poses little contention because mechanisms are in place which allow the EU to assume responsibility without posing risks to third parties. The following sections will explain procedural safeguards that can achieve this objective – which explain why panels deem it sufficient to leave it to the EU to ensure compliance with its rulings.

2.1.2 The EU/Member States bloc

The WTO Agreement is a multilateral treaty ratified by 164 members. Each member, including the EU and its Member States, is an independent signatory, as is reflected in Article XI:1 of the WTO Agreement.[622] The WTO is a multilateral treaty because it establishes relationships in respect of rights and obligations between each of its members.[623] In this regard it differs from bilateral treaties such as the Lomé Convention which, although concluded with several non-member states, confers rights and obligations only between the Union and its Member States and each of the non-members but not between the latter states themselves.[624]

As was discussed in detail in Chapter III, the EU and Member States are independently responsible for discharging all obligations to other members of the WTO, irrespective of the

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[619] Hendry ID Macleod, I and S Hyett, *The External Relations of the European Communities* (OUP 1996), 126.
[620] Groux and Manin 1985, 68. Resistance towards mixity is more likely to be motivated by political reasons, for example, as was the case when mixed agreements of the European Communities was opposed by the USSR, see p 70-71.
[621] Heliskoski 2001, 8.
[622] According to Gaja, agreements that impose obligations separately on the Community and also grant Community separate rights, may consider Community's participation as completely independent from the Member States. Under this type of agreements, the Community and Member States hold parallel positions and can be viewed as entirely separate contracting parties, see Giorgio Gaja, 'The European Community's Rights and Obligations under Mixed Agreements' in David O'Keeffe and Henry G Schermers (eds), *Mixed Agreements* (Kluwer Law & Taxation Publishers 1983), 138.
[623] Rosas defines multilateral agreements as those involving parallel competences between the Union and the Member States meaning that the EU adherence would not, in principle, be different from the separate participation of some or all of the Member States, see Rosas 2000, 206.
[624] Groux and Manin 1985, 60.

internal division of competences between them.[625] Importantly, the EU and its Member States participate in mixed agreements as one bloc in that they do not acquire rights and duties in respect of each other.[626] Some commentators suggest that from the Union's perspective, the conclusion of a multilateral agreement by the EU in a mixed form should be viewed as 'concealed bilateralism' because the EU and its Member States stand before other members as one party.[627]

That the EU and Member States form one block in the WTO system is reflected in the EU's participation in the treaty. Article IX:1 of the WTO Agreement provides that the EU shall have a number of votes equal to the number of their Member States which are members of the WTO.[628] The EU voting arrangement in the WTO resembles that under UNCLOS.[629] Similarly, the joint nature of membership of the EU and its Member States is also evident from their participation in the regime by way of common positions for the implementation of mixed agreements.[630] The implementation of the WTO Agreement is conditional on the adoption of official common positions since the EU became party to the treaty, though action through *de facto* common positions was a reality even before the EU's accession to the WTO when the Union held observer status.[631] Furthermore, the freedom to regulate the negotiation and

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[625] The WTO does not contain the EU's declaration of competences and thus there is no separability of the parts of the agreement which imposes obligations and gives rights to the Union from the other parts of the same agreement, Groux and Manin 1985, 139. Similarly, from an international law perspective, a Union agreement does not bind those Member States which are not parties to it, see for example UNCLOS Art 4(5) of Annex IX which states that "Participation of such an international organization shall in no way confer any rights under the Convention on member States of the organization which are not State Parties to this Convention". For incomplete mixity issues, see Ehlermann 1983.

[626] Kuijper and others 2015, 171.

[627] Philip Allott, 'Adherence to and Withdrawal from Mixed Agreements' in David O'Keeffe and Henry G Schermers (eds), *Agreements, Mixed* (Kluwer Law and Taxation Publishers 1983), 106. Groux and Manin also notes a bilateral nature of such agreements, suggests that in such cases decisions are adopted unanimously by the 'European Party' on the one hand and the contracting non-member countries on the other, see Groux and Manin 1985, 61.

[628] Voting arrangements in mixed agreements are sometimes a subject of contention inside the EU, for example, regarding a right to vote in the UN Food and Agriculture Organization Conference on the adoption of an Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on High Seas. The decision of the EU Council to allocate the rights to vote to Member States, despite the EU's exclusive competence in this area was annulled by the ECJ, see in Case C-25/94 *Commission of the European Communities v Council of the European Union* [1996], ECR I-01469.

[629] UNCLOS Art 4(4) of Annex IX states that participation of an international organization should not entail an increase in decision-making rights, for more see Ehlermann 1983, 12. Recently, third parties have required that the EU have not more than one vote, see Antarctic Convention Art 12(4).

[630] For the counting of votes for amendments of the WTO Agreements, see Frank Hoffmeister, 'Institutional Aspects of Global Trade Governance from an EU Perspective' in Bart Van Vooren, Steven Blockmans and Jan Wouters (eds), *The EU's Role in Global Governance* (OUP 2013), 147.

[631] Groux and Manin 1985, 54.

implementation of a mixed agreement in accordance with the EU's internal principles allows respect for the internal division of competences.[632]

2.1.3 The duty of cooperation

The building block for the joint participation of the EU and its Member States in the WTO regime is based on the duty of cooperation. Article 216(2) of the TFEU states that Union agreements are binding on the institutions of the Union and on Member States.[633] Member States are under an obligation to respect the mixed agreement which stems from a general obligation not to jeopardise the attainment of the objectives of the Treaties.[634] That Member States have shared competence with the EU is secondary to their duty of cooperation.

Arguably the EU is entitled to take infringement action against Member States which violate an international agreement, even if within the sphere of shared competence.[635] Once the Union enters into an international agreement Member States are subject to the duty of cooperation to facilitate the implementation of obligations under that agreement even in areas of shared competence and are prevented from acting unilaterally.[636] In his Opinion in *EDF* AG Jacobs noted that the exact limits of that duty could not be laid down in the abstract but depended on the agreement in question.[637] This duty of cooperation is an essential element of regional integration, as it would be futile to enter into cooperation if at the same time individual states were able to act contrary to the common interest. The EU's monist approach to international economic law allows international obligations to be enforced inside the EU.[638] The DSB has also recognised the duty of cooperation under EU law.[639]

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[632] Granvik 1998, 268. For a detailed account of the negotiation of mixed agreements, see Heliskoski 2001, 71-100.
[633] Member States are bound by the duty of cooperation already during the negotiations for the conclusion of an international agreement, see Macleod, I and Hyett 1996, 148-150.
[634] ECT Art 5(2), see also Gaja 1983, 140.
[635] Ehlermann 1983, 20-21.
[636] See Rosas 2000, 197.
[637] Opinion of Advocate General Jacobs delivered on 10 November 1993, I-641 in Case C-316/91, *Parliament v. Council of the European Union* [1994] ECR 661.
[638] See C-21-24/72, *International Fruit Company NV et autres contre Produktschap voor Groenten en Fruit* [1972] ECR. For more on the EU's monist approach to international obligations, see Schütze 2010, 77-80. The situation may be different outside economic law, as was evidenced by the Kadi saga, Joined Cases C-402 & C-415/05P, *Kadi & Al Barakaat Int'l Found. v. Comm'n* [2008] ECR. I-6352; Joined Cases C-584, C-593, & C-595/10P, *Comm'n v. Kadi* [2013].
[639] For example, see *EC – Selected Customs Matters*, PR, paras 2.13-2.14, where the Panel noted that the Union's principle of executive federalism is based on the principle of subsidiarity the functioning of which is based on the duty of sincere cooperation.

Stemming from the general duty of cooperation is a more particular duty of unity of representation in international affairs laid down in Article 4 TEU. The ECJ has ruled that Member States have a duty to secure performance of international agreements to which the Union is a party.[640] Even though the duty has often been regarded as an internal obligation,[641] the Court has interpreted it as also binding the EU *vis-à-vis* third states.

The duty is owned to the Union which assumes responsibility for the due performance of the agreement.[642] Member States are precluded from taking action which is capable of affecting or altering the scope of the agreement.[643] The purpose of unity of representation is to present a common, coherent approach and Union action should not be hampered or undermined by the countervailing action of Member States.[644] According to Dolmans, the fewer discretionary powers Members States have to decide on the content of engagements with third parties, the more cooperation and coordination is necessary.[645] This could explain why a duty of cooperation applies with respect to the WTO Agreement, which mainly falls within exclusive EU competence. Cooperation between the EU and Member States is often managed through so-called Codes of Conduct, though no such conduct was adopted in relation the WTO Agreement due to lack of internal agreement.[646]

To conclude, the EU's central role in the WTO dispute-settlement system results from the WTO's rules-based framework the purpose of which is to protect rules of general application and thus achieve a positive solution in WTO disputes which is aimed at compliance. The EU is in most cases the optimal respondent because it is best placed to ensure compliance. As for the EU's assumption of international responsibility on behalf of its Member States when the conduct of the latter is also covered by the claim, the interdependency of Member States and the EU through mixed treaty-making allows the EU to assume international responsibility on behalf of its Member States. Third parties are safeguarded through the duty of cooperation which obliges Member States to comply with the DSB's rulings and recommendations. The existence of the internal mechanisms to bind Member States explains why panels refrain from

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[640] C-104/81 *Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A.* [1982] ECR 3641 11-13.
[641] See Schütze 2010, 76; Macleod, I and Hyett 1996, 126.
[642] Macleod, I and Hyett 1996, 126.
[643] The ECJ has confirmed this duty in its case law, see for example, C-425/01 *Ospelt v. Schlössle Weissenberg Familienstiftung* [2003] ECR I-9743, para 24. The Court recalled that even though the systems of ownership fall under the Member States' competence, they remain subject to fundamental rules of Community law.
[644] CWA Timmermans, 'Organizing Joint Participation of E.C. and Member States' in Alan Dashwood and Christophe Hillion (eds), *The General Law of E. C. External Relations* (Sweet & Maxwell 2000), 241.
[645] Maurits JFM Dolmans, *Problems of Mixed Agreements: Division of Powers Within the EEC and the Rights of Third Parties* (Asser Instituut 1985), 45.
[646] A draft Code of Conduct was published in Inside US Trade, 23 September 1994, at 14. See Meinhard, 248; Kuijper and others 2015, 171.

interfering in the EU's quest to provide compliance itself even in cases where Member States' conduct is found to be inconsistent.

The following section focuses on investment disputes, where Member States have so far been exclusive respondents.[647] Contrary to the WTO regime, where consistency of rules of general application with WTO law are often at the center of adjudication, investment claims are focused on the *application* of inconsistent measures in a specific case. As I have suggested in Chapter VI, investment tribunals focus on the proximate cause of harm because it is sufficient to determining award of compensation. Analysis of the content of investment protection obligations reveals that Member States are the optimal respondents because they are in most cases the proximate cause of harm to investors' rights.

3. Member States as the primary respondent in investment disputes

To date, the EU has not been a respondent in publicly accessible disputes under the ECT. Revealing a trend opposite to that observed under the WTO regime, Member States have been the primary actors in investment arbitration. There are practical reasons for this pattern. The EU is not a party to the International Centre for Settlement of Investment Disputes (ICSID) Convention and claims against the EU cannot be brought before ICSID tribunals. This may change with the implementation of the Multilateral Investment Court (MIC), currently under construction by the European Commission.[648] Setting aside the institutional aspects, I suggest that the central role of Member States in investment disputes stems mainly from the nature of investment protection standards.

Before engaging in the analysis, a preliminary observation is in place. Since 2009 when the Treaty of Lisbon came into force, the EU has held competence in the field of investment protection. Under the new ordering of EU external relations, the EU common commercial policy (CCP) was placed in the category of exclusive EU competences. As a result the area of foreign direct investment (FDI) was transferred from the sphere of competences of Member States to that of the Union. This flows from Article 207 and Article 3(1) TFEU: Article 207 provides that FDI is now one of the areas covered by the CCP, whereas Article 3(1) states that CCP is an area of exclusive EU competence. Article 206 of the TFEU further provides that in

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[647] I acknowledge that there may be publicly not accessible disputes where the EU has been a respondent.

[648] For more on the European Commission's Multilateral Investment Court project, see http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608, last visited 31 July 2018.

establishing the customs union the EU shall contribute, in the common interest, to the progressive abolition of restrictions on international trade and protection of FDI.

In this chapter I do not address the transfer of competences in the area of FDI to the EU. Specifically, I do not discuss investment chapters in new-generation FTAs which the EU has concluded or is in the process of concluding. I shall discuss these treaties in Chapter IX. The present analysis focuses on ECT practice, without touching upon the implications of the new division of competences in the field of investment between the EU and its Member States. The ECT provides a relevant context for the analysis of the distribution of shared responsibility for violation of joint obligations which are discharged in the context of shared sovereignty because of its rich practice and, importantly, it is a mixed agreement which does not contain a declaration of competences.

Recall my argument in Chapter VI, that investment tribunals are mainly concerned with the proximate cause of harm to investors' rights. Damage, which is an element in determining responsibility under investment treaties, in most cases occurs simultaneously with malfeasance or misfeasance. Since the *existence* of breach calls for an award of compensation, the extent and causes of breach are, while relevant, not necessarily part of the remedial process. The context is essentially different under the WTO regime. The aim of the WTO dispute-settlement system is regulatory compliance, which requires WTO panels to determine the roots of inconsistent measures. If the DSB focused on the proximate cause of harm only, adjudication would not result in a positive solution to the dispute which aims to ensure overall regulatory compliance. Furthermore, while WTO disputes mainly arise from inconsistencies of rules of general application, investment arbitration concerns specific instances of application of law.[649] This is so because damage is an important element of investor-state disputes.

In the following sections I shall argue that Member States are the optimal respondents in investment arbitration because it is their conduct that in most cases constitutes the proximate cause of injury to investors. The nature of investment protection standards is closely tied to acts of Member States, while the EU itself rarely interacts with investors directly. This is so because investment protection treaties are intended to create favourable conditions for foreign investment, which call for an effective normative framework, an impartial judicial system, an efficient and legally restrained bureaucracy, as well transparent decisions.[650] Investment

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[649] For data, see Zoe Phillips Williams, 'Risky Business or Risky Politics: What Explains Investor-State Disputes?' (PhD thesis, Hertie School of Governance, Berlin Graduate School for Transnational Studies, 2016), 43.
[650] Robert D Sloane and Michael Reisman, 'Indirect Expropriation and Its Valuation in the BIT Generation' (2003) 73 BYIL 115, 117.

protection regimes set standards for the host state's treatment of investors. They apply to actions and measures of various Member States' institutions and officials, which form the foundation of investment projects.

Precisely because Member States interact directly with investors it is their conduct which gives rise to investors' claims. Member States engage in bilateral relations with investors and adopt measures which affect the development of investment projects. The ECT practice provides a good example. Disputes under the ECT have arisen over a wide variety of Member States' measures adopted by state officials and entities. For example, *Nykomb v. Latvia* concerned the calculation of electric power purchase price by a state-owned company.[651] *Hrvatska Elektroprivreda v. Slovenia* arose due to a state's measure's affecting the ownership and operation of an electric power plant.[652] *PlamaConsortium v. Bulgaria* involved *inter alia* a sudden amendment of an environmental law.[653]

The following section will take a closer look at the content of investment protection standards and investment arbitration practice. Analysis of the content of investment obligations provides insight into the key actors and objects forming investment claims. The analysis reveals that, if applied by analogy to the EU legal order, measures and actions of Member States' institutions and officials, not the EU, are more likely to constitute the proximate cause of the alleged injury to foreign investors. The section below discusses the FET standard, expropriation as well as umbrella clauses, to the extent that they are relevant to my arguments.

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[651] *Nykomb v. Latvia*, Award. A dispute concerned a contract between Latvenergo, a company whose 100 % shares where owned by the Government of Latvia, and a Swedish company Nykomb for the construction of cogeneration plant in Bauska. A purchase price of the electric power was agreed in the contract Nykomb alleged that Latvenergo applied a different price calculation formula than was agreed upon in the contract between the parties claiming that this amounted to indirect expropriation. At the time of the dispute Latvia was not yet a member of the European Union, which she entered in 2004. However, the case serves as an example of a regulatory measure which formed the basis of a dispute and the ECT.

[652] *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia* (Award Dec 17, 2015) ICSID Case No. ARB/05/24. The dispute arose between Croatian company and Slovenia who, prior to declaration of independence in 1991 from the Yugoslavia bloc, constructed a commonly financed power plant sharing the ownership equally. The claimant alleged that after the declaration of independence, Slovenia disconnected electricity deliveries to the claimant and issued a decree which affected its rights. After a failure to solve the differences through the signing of a 2001 agreement for financial arrangements in relation to modernization of the plant, the dispute was brought before the ICSID arbitration. Similarly, to *Nykomb v. Latvia*, the dispute arose prior to Slovenia's membership in the EU. It nevertheless serves as an example of possible Member State measures brought before international arbitral tribunals.

[653] *Plama Consortium Limited v. Republic of Bulgaria* (Award, 27 August 2008) ICSID Case No. ARB/03/24, para 149. Claimant, company incorporated in Cyprus engaged in oil refining, alleged that Bulgarian Government, the national legislative and judicial authorities and other public authorities and agencies deliberately created numerous grave problems for the company's business and refused or unreasonably delayed the adoption of adequate corrective measures upon the initiation of bankruptcy proceedings against the claimant, para 72.

3.1 Fair and equitable treatment

An FET is a central investment protection standard. It is a broad obligation which may be violated in the course of a wide array of Member States' conduct. FET obligation can be found in virtually any investment protection regime. A study shows that 90 percent of investment treaties contain an FET provision and violations of FET constitute the most common challenge in investment arbitration.[654] Though highly significant in relation to investors' rights, an FET is a broad standard which has typically been left undefined in order to give it broad scope and leave room for judicial interpretation. Thus the majority of investment treaties do not spell out the scope or content of this obligation.[655] New-generation FTAs to some extent limit the scope of FET by expressly referring to conduct which constitutes breach of FET. For example, the now abandoned Transatlantic Trade and Investment Partnership (TTIP)[656] and currently provisionally applied CETA[657] provide almost identical open-ended lists of categories of measures that violate FET: denial of justice in criminal, civil or administrative proceedings; fundamental breach of due process in judicial and administrative proceedings; manifest arbitrariness or targeted discrimination on manifestly wrongful grounds; harassment, coercion and abuse of power.[658]

While I do not dispute that a violation of an FET standard may be caused by the adoption of an EU measure as such, Member States are the primary actors in this context. Damage resulting from a violation of FET will in most cases stem from the host state's treatment of investment. The content of FET primarily concerns direct bilateral relations between a host state and an investor. Since the EU generally does not interact with investors directly, measures falling within its sphere of influence will rarely be subject to an FET challenge. I discuss the content

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[654] Bonnitcha, Lauge and Waibel 2017, 94, tables 4.1 and 4.2.
[655] Jeswald W Salacuse, *The Law of Investment Treaties* (2nd edn, OUP 2015), 253; Katia Yannaca-Small, 'Fair and Equitable Treatment Standard' in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: a Guide to the Key Issues* (OUP 2010), 394. The 2004 U.S. Model BIT and a number of US free trade agreements stipulate that FET includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with principle of due process embodied in the principle of legal system of the world (Art 5(2)(a) of 2004 Model U.S. BIT).
[656] TTIP Art 3(1) of Ch III.
[657] CETA Art 8.10(2).
[658] The differences in the wording are as follows: the draft TTIP Art 3(2) of Chapter III lists 'obstacles to effective access to justice' as a possible breach of due process whereas the relevant CETA provision does not include this element. Also, abusive treatment in draft CETA text is a general term (coercion, duress and harassment are listed as possible forms of abusive treatment). The respective general term in TTIP is 'similar bad faith conduct' (Art 3(2)(e)). A third difference is the addition of 'duress' in the list of abusive treatment under Art X.9., which is not stated in TTIP provision.

of FET by considering its three main components: denial of justice and due process, arbitrary and discriminatory treatment and frustration of legitimate expectations.[659]

3.1.1 Denial of justice and due process

Actions or omissions of the Union's quasi-judicial and administrative entities may amount to a breach of due process in a variety of settings, for example through its state aid decisions. However, a host state's judicial and administrative organs interact directly with individual investors to a much greater extent than those of the Union. Decisions of Member States' authorities directly affect the realisation of investors' projects.

Denial of justice is closely related to domestic judicial and administrative systems. It is a category of deficiencies in the host state's governmental organs, particularly those involved in the administration of justice.[660] Denial of justice can arise either from procedural or substantive deficiency. The primary actors in this context are courts and state agencies.[661] In relation to international investment law, denial of justice has in most cases manifested itself in connection with the improper administration of civil and criminal justice, e.g. denial of access to courts.[662] Tribunals have found denial of justice in cases where an investor was not given proper notification of a hearing or was prevented from participation in an administrative process directly concerning its rights.[663]

Closely related to denial of justice are due process infringements.[664] A wide variety of judicial, legislative or executive deficiencies can amount to a breach of due process and it is therefore more viable to list examples than provide a typology of relevant measures.[665] In *Petrobart v.*

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[659] Bonnitcha, Lauge and Waibel 2017, 109-111.
[660] James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012), 619. Paparinskis states that denial of justice unquestionably applies to administration of justice, Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013), 181. Third Restatement of the Foreign Relations Law of the United States § 711 adopts a narrower approach to the scope of denial of justice by referring only to injury consisting of, or resulting from, denial of access to courts, or denial of procedural fairness and due process in relation to judicial proceedings.
[661] Salacuse 2015, 265.
[662] In *Waste Management, Inc. v. United Mexican States* ("Number 2") (Award, 30 April 2004), ICSID Case No. ARB(AF)/00/3.
[663] For example, *Metalclad Corporation v. The United Mexican States* (Award, 30 August 2000) ICSID Case No. ARB(AF)/97/1. A construction permit was denied to investor at a municipal meeting of which the investor received no notice and before which it was given no opportunity to appear; in *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, (Award, 12 April 2002) ICSID Case No. ARB/99/6, an investor complained that an Egyptian government seized and auctioned its ship without a proper notice.
[664] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008), 142.
[665] In *Waste Management v. Mexico*, Award, para 98, the Tribunal provided a general description of due process requirement: "[th]e minimum standard of treatment of fair and equitable treatment is infringed by conduct

Kyrgyz Republic the Tribunal found a breach of due process when a host state failed to execute a judgment of a local court rendered in favour of an investor by transferring assets of a liable state entity and declaring it bankrupt.[666] In *Tecmed v. Mexico* arbitration, due process was breached because the environmental regulatory authority had failed to notify the investor of its intentions, which deprived the investor of the opportunity to state its position.[667] A miscarriage of justice due to a gross failure to afford due process during trial proceedings and failure to protect an investor from nationality-based prejudice was affirmed (though obiter only) by the *Loewen v. United States* Tribunal.[668]

Denial of justice and due process infringements by Member States, though in a context other than investment protection, has manifested itself in numerous forms and instances, as is attested by the case-law of the ECtHR. The Court has found denial of justice by Member States on a variety of grounds: denial of right of access to a court,[669] lack of an impartial court system[670] or fair trial.[671]

Due process infringements are most likely to appear at Member State level of decision-making where measures of all branches of government influence the development of investment projects. Investors are often the direct addressees of institutional policies which, accordingly, may be the proximate cause of injury.

3.1.2 Arbitrary and discriminatory treatment

As is the case with denial of justice and breach of due process, a wide variety of host state's judicial, executive and legislative actions may fall within the arbitrary and discriminatory measures category. As noted by Salacuse, the discrimination element of an FET standard is

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attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic".

[666] *Petrobart Limited v. The Kyrgyz Republic* (Award, 29 March 2005) SCC Case No. 126/2003, 82.

[667] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* (Award, 29 May 2003) ICSID Case No. ARB (AF)/00/2.

[668] *Loewen Group, Inc. and Raymond L. Loewen* v. US, (Award, 26 June 2003) ICSID Case No. ARB(AF)/98/3.

[669] For example, denial of access to court was addressed claimed in *Kreuz v. Poland* and (*Hadjianastassiou v. Greece* App no 12945/87 (ECtHR 16 Dec 1992) (concerning procedural obstacles on access); *Arnolin v. France*, *Legrand v. France*, *Maggio and others v. Italy* App no 61145/16 (ECtHR 22 Feb 2017) and other regarding finality of decisions; *Užkurėlienė and others v. Lithuania* App no 62988/00 (ECtHR 7 April 2005) for timely execution of awards.

[670] For example, *Piersack v. Belgium; H. v. Belgium* App no 8692/79 (ECtHR 10 Jan 1982).

[671] For example, *Monnell and Morris v. the United Kingdom* App no 9562/81; 9818/82 (ECtHR 2 March 1987). For a detailed account of ECtHR case-law in relation to denial of justice, see Dovydas Vitkauskas and Grigoriy Dikov, *Protecting the right to a fair trial under the European Convention on Human Rights Council of Europe human rights handbooks* (Council of Europe 2012).

highly fact-specific – it calls for determination whether in a given situation the particular action of a government in respect of an individual investor within a framework of a relationship that is complex and longstanding is actually discriminatory and arbitrary.[672] Member States, under whose jurisdiction a particular investor operates, are best placed to respond to specific fact-driven challenges.

Furthermore, faced with claims based on discriminatory measures, tribunals are often required to balance investors' interest against those of a host Member State. This calls for close analysis of various social, economic or political circumstances that have informed a host state's decision.[673] Member States, whose system and particularities in this context form the essence of a dispute, are in most cases the optimal respondents.

To avoid an overly broad discussion of the discrimination element of an FET standard, I take a look at discriminatory or arbitrary treatment arising from tax measures, which frequently form a ground of investors' claims.[674] In the legal order of the European Union Member States have retained competence to regulate taxation, as long as national rules are consistent with the Union's principles, such as the general prohibition of discrimination.[675] In this context Member States' tax administrators are the key actors. The degree of deference to be afforded to tax administrators, who interact directly with investors and take measures as well as provide interpretative guidance, is often at the center of discrimination challenges. A host state is entitled to apply various measures in relation to an investor, such as source withholding or punishment for failure to comply.[676] As Tietje and Kampermann note, taxation, by its very nature, is predestined to offer alternative, more subtle measures to squeeze foreign investors

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[672] Salacuse 2015, 261.

[673] For example, in *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc v. Argentine Republic* (Decision on Liability, 3 Oct 2006) ICSID Case No. ARB/02/1, the Tribunal had to weight measures taken by Argentina in the midst of its economic and financial crisis with investor's interests. Similarly, in *Alex Genin and others v. Republic of Estonia* (Award, 25 June 2001) ICSID Case No. ARB/99/2, the Tribunal considered whether political and economic transition occurring in Estonia at the time justified heightened scrutiny of the banking sector.

[674] Some investment protection treaties expressly exclude tax administration from the coverage of the FET obligation. Examples of cases where tribunals found such a limitation of the FET standard include *Marvin Roy Feldman Karpa v. United Mexican States* (Award, 16 Dec 2002) ICSID Case No. ARB(AF)/99/1, para 109; *EnCana Corp v. Republic of Ecuador* (Award, 3 Feb 2006) London Court of International Arbitration (LCIA) Case No. UN3481 para. 140. However, in *Occidental Exploration v. Ecuador Occidental Exploration and Production Company v. The Republic of Ecuador* (Award July 1, 2004) LCIA Case No. UN3467, paras 185-187, the Tribunal found determined that the denial of VAT rebate was the result of a failure to provide predictable environment to the investor and thus constituted a violation of FET obligation.

[675] Case C311/97 *Royal Bank of Scotland plc v. Greece* [1999] ECR I2651.

[676] The arbitration in the Yukos case provides an example of a tribunal ruling that reporting requirement was enforced too rigidly, *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (Final Award, 18 July 2014) UNCITRAL, PCA Case No. AA 227.

out of the country.[677] Measures such as collection and asset freezing are of utmost importance to investors whose projects depend on cash flows.[678] Accordingly, actions or omissions of a host Member State's tax administrators may be the proximate cause of alleged harm.

3.1.3 Legitimate expectations

Member States are also the optimal respondents in disputes over frustration of investors' legitimate expectations. Member States deal directly with investors for various administrative purposes related to their projects' realisation and are thus the key providers of representations which form legitimate expectations. The EU rarely plays a central role in this regard because specific investment projects are subject to the host Member State's domestic regime.

A claim that a host state frustrated an investor's legitimate expectations is based on a duty of consistency. An investor has a right to expect that representations made to it by the state and on which it relied in making its business decisions are not unreasonably frustrated. Claims of inconsistency on behalf of a state have arisen in a variety of forms and factual circumstances. One common feature is often a claim by an investor that it had received some form of official approval on which an investor was entitled to rely.[679] An essential aspect in this context is the specificity of a representation – an investor has to show that it received specific formal assurances that visibly display an official character.[680] Accordingly, the conduct of Member States' officials who directly interact with investors often constitutes a proximate cause of injury stemming from inconsistent executive action. For example, in *Metalclad v. Mexico*, a claim arose in relation to representations by federal government officials who assured the investor that it could proceed with the construction and operation of a landfill.[681] In *Tecmed v. Mexico*, in dispute was the replacement of an unlimited licence with that of limited duration by state officials.[682]

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[677] Christian Tietje and Karoline Kampermann, 'Taxation and Investment: Constitutional Law Limitations on Tax Legislation in Context' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010), 581.
[678] An asset freeze was in dispute under Yukos arbitration, because an investor claimed the measure was not necessary since the company had available liquid assets sufficient to cover liability, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, Final Award.
[679] Danielle Morris, 'The Regulatory State and the Duty of Consistency' in Shahleza Lalani and Rodrigo Polanco Lazo (eds), *The Role of the State in Investor-State Arbitration* (Brill Nijhoff 2015), 49.
[680] Jan Paulsson and Zachary Douglas, 'Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects' in Norbert Horn (ed), *Indirect Expropriation in Investment Treaty Arbitration* (Kluwer Law International 2004), 157.
[681] *Metalclad v. Mexico*, Award.
[682] *Tecmed v. Mexico*.

Sudden and inconsistent departures from established administrative practice by tax administrators provide another example of sources of misrepresentation.[683] A frequent reason for a change of treatment by state authorities is a change in government.[684] A change in policy also often results in amendments to tax regimes.[685] Moreover, not only the change in policy itself but also the treatment of an investor during the process of regulatory change may form the basis of an investor's claim.[686] For example, in *PlamaConsortium v. Bulgaria* the claimant argued that a sudden change in Bulgarian environmental regulation resulted in an unexpected financial burden being placed on the company.[687] Member States, who legislate and apply tax regimes, are the optimal respondents in claims over alleged injury through tax measures.

Another category of complaints where Member States' conduct may constitute a proximate cause of injury to investors is the frustration of a host state's contractual obligations. Though there is debate in the literature as to the extent to which FET protection extends to observance of obligations arising from contract,[688] some authors suggest that breaches of contract by state authorities in their official capacity can amount to frustration of legitimate expectations.[689] Key actors in these disputes are once again authorities of host Member States who are involved in contractual relations with investors. Case-law analysis reveals a wide variety of state officials whose actions have formed a basis of investors' claims of a breach of contractual obligations, for example local city councils,[690] ministers[691] and quasi-governmental regulatory bodies.[692] Inconsistency of action between two arms of the same government in relation to contractual

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[683] Paul B Stephan, 'Comparative Taxation Procedure and Tax Enforcement', *International Investment Law and Comparative Public Law* (OUP 2010), 603.
[684] NAFTA case *International Thunderbird Gaming Corporation v. Mexico* (Award, 26 Jan 2006) IIC 136 provides an example. Investor's gaming facilities, which were operated with a permission of a preceding government, were declared illegal after a new government took over the power.
[685] Bonnitcha, Lauge and Waibel (n 389). Ch. 9.
[686] *Franck Charles Arif v. Republic of Moldova* (Award, 8 April 2013) ICSID Case No. ARB/11/23, para 555.
[687] *Plama Consortium v. Bulgaria*, Award, para 198.
[688] Dolzer and Schreuer 2008, 140.
[689] Salacuse 2015, 259. A restrictive approach that only *puissance publique*, that is activity beyond that of an ordinary contracting party, can amount to frustration of legitimate expectations was affirmed by the Tribunal in *Impregilo S.p.A. v. Islamic Republic of Pakistan* (Decision on Jurisdiction, 22 April 2005) ICSID Case No. ARB/03/3, paras 266-270. Position that only breaches in sovereign capacity can amount to frustration of legitimate expectations was also taken by tribunal in *Consortium RFCC v. Royaume du Maroc* (Award, 22 Dec 2003) ICSID Case No. ARB/00/6, paras 33-34. Dolzer and Schreuer suggest that is yet too early to determine whether restrictive or broader approach will prevail, see Dolzer and Schreuer 2008, 142. They also note, that even if the underlying relationship is clearly commercial, the motives of a government for a certain act may still be governmental.
[690] For example, in *Waste Management v. Mexico* at dispute was a failure by the City of Acapulco to make payments under the concession agreement.
[691] Such was a case in *Eureko BV v. Poland* (Partial Award, 19 Aug 2005) IIC 98, where the investor claimed that the Minister of Treasury of Poland wilfully refused to sell shares to an investor it had previously agreed.
[692] *CME Czech Republic BV v. Czech Republic* (Final Award, 14 March 2003) IIC 62 concerned interference with contractual obligations by the Czech Media Council, which reversed its previous position on the legal situation of an investor as a licence holder.

obligations is yet another ground for claims.[693] With respect to case-law involving European countries, *PlamaConsortium v. Bulgaria* concerned *inter alia* an alleged breach of a debt settlement agreement by a state-owned bank.[694] Breach of a contractual agreement entered into by the claimant and a state-owned company Latvenergo in relation to the formula for the calculation of an electric power purchase price was at issue in *Nykomb v. Latvia.*[695] *Electrabel v. Hungary* concerned the termination of a power purchase agreement by Hungary.[696]

Closely related to the frustration of legitimate expectations is a claim that host states fail to provide a transparent environment for the realisation of investment projects. Transparency means that the legal framework for the investor's operations is readily apparent and that any decision affecting the investor can be traced to that legal framework.[697] Transparency claims target the host state's legal framework and its implementation practices. The legal framework consists first and foremost of assurances by national authorities of the Member States, rather than EU actors. For example, in *Occidental v. Ecuador*, an investor's claim was directed at inconsistent practice of the host state's tax administrators in reimbursing VAT.[698] The Tribunal in *CMS Gas Transmission Company v. Argentina* dealt with adoption of emergency laws and regulations that caused loss to the investor.[699] In *Bayindir v. Pakistan* the Tribunal stated that an obligation to maintain a stable framework applies not only to the regulatory framework as such but also to the goal of the relevant policies and to administrative practices.[700] Executive actions that affect investors are primarily acts of Member States and not general Union legislation.[701]

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[693] In *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (Award, 25 May 2004) ICSID Case No. ARB/01/7, investor signed an investment contract with Chile's Foreign Investment Commission. However, the project was disrupted once zoning authorities discovered that it was in breach of zoning requirements.

[694] The claimant alleged that various breaches of a Debt Settlement Agreement which it was obliged to enter due to accrual of significant debts owed to a state-owned bank, for more details see *Plama Consortium v. Bulgaria,* Award, Sect C.5.

[695] *Nykomb v. Latvia*, Award, para 4.2.

[696] *Electrabel v. Hungary*, Award, para 51.

[697] Dolzer and Schreuer 2008, 133.

[698] *Occidental Exploration v. Ecuador Occidental Exploration and Production Company v. The Republic of Ecuador*, (Award, 1 July 2004) LCIA Case No. UN3467.

[699] *CMS Gas Transmission Company v. The Republic of Argentina* (Award, 12 May 2005) ICSID Case No. ARB/01/8.

[700] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (Decision on jurisdiction, 14 Nov 2005) ICSID Case No. ARB/03/29, para 240.

[701] For example, in *Plama Consortium v. Bulgaria*, the claimant alleged that Bulgaria failed to create a stable, equitable, favourable and transparent conditions for making the investment (Award, para 73) by a number of actions and omissions of the government, the national legislative and judicial authorities and other public authorities and agencies deliberately creating numerous, grave problems for NovaPlama and/or refused or unreasonably delayed the adoption of adequate corrective measures (Award, para 73).

To conclude, the nature of challenges of denial of or maladministration of justice and due process, discriminatory measures and failure to fulfil legitimate expectations explains why Member States are the optimal respondents in FET disputes. It is the acts and measures of their officials and entities that may be and often are the proximate cause of FET violations. I acknowledge that there can be instances when acts of EU organs are the source of investment claims, for example if the ECJ were to annul a patent. However, in most cases the Union does not hold sufficient power to ensure the application of an FET standard in the Member States' jurisdiction since state sovereignty prevents them from intruding into national judicial and administrative systems.

3.2 Expropriation

The prohibition of unlawful expropriation is another major element of investment protection. New-generation FTAs of the EU are no exception.[702] The provisions cover protection against both direct and indirect expropriation.[703] Member States are the optimal respondents in challenges to both types of expropriation.

A typical form of direct expropriation is acquisition by the state of property for public infrastructure or to pursue national economic policies.[704] Member States are the proper respondents in disputes alleging unlawful direct expropriation because it is Member States that must ensure the legality of direct takings by, first and foremost, paying adequate compensation to an investor.[705] The EU's influence in this respect is limited. Article 345 TFEU states that the Treaties shall in no way prejudice Member States' rules governing the system of property ownership. It is suggested by some that usually investment treaties do not prohibit host states from expropriating assets of foreign investors but rather place certain conditions upon the exercise of a state's right to expropriate.[706] Dimopoulos points to the limits of Article 354

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[702] For example, protection against unlawful expropriation is provided in CETA Art 8.12.
[703] CETA Annex 8-A defines direct and indirect expropriation.
[704] An example of direct expropriation is a case *Marvin Roy Feldman Karpa v. United Mexican States* (Award 16 Dec 2002), ICSID Case No. ARB(AF)/99/1 para 100, where the Tribunal noted: "Recognizing direct expropriation is easy: governmental authorities take over a mine or factory, depriving the investor of all meaningful benefits of ownership and control".
[705] Even though in the pre-EU membership era, a case against Latvia provides an example. Latvia was brought before an investment tribunal by a Swedish investor who claimed that believing he had an agreement with appropriate Latvian authorities, purchased and renovated a ship to be used as a floating trade center. Latvian authorities, without providing a notice to the owner, removed the ship from the port and sold it in auction. Tribunal rules that such actions by the Latvian authorities were ruled to be direct expropriation, *Swembalt AB, Sweden v. The Republic of Latvia*, (Award 23 Oct. 2000) UNCITRAL, para 38.
[706] Vidal Puig, 'Scope of the New Exclusive Competence of the European Union with Regard to Foreign Direct Investment' (2013) 40 Legal Issues of Econ. Integration 133, 146.

TFEU, suggesting that it preserves the power of the Member States to decide whether and when expropriation occurs, not the conditions under which it takes place.[707] Nevertheless, in most cases Member States not only decide on the system of property but also place conditions on its use because property falls within domestic jurisdiction.

The essence of indirect expropriation disputes is that not all host state's measures which harm investments are expropriatory and carry with them an obligation to compensate.[708] General regulatory measures[709] adopted in the exercise of functions that are generally considered to be among the government's powers to regulate public welfare do not lead to an obligation to compensate.[710] The complexity of expropriation disputes in most cases lies in the difficulty of drawing a line between non-compensable public policy regulations and expropriation which calls for compensation.[711] The host states' regulatory powers are thus at the heart of expropriation disputes. Tribunals are required to balance a state's regulatory actions and investors' interests, therefore the manner of a host state's exercise of its sovereign powers is at the center of such disputes.

While I do not dispute that the EU's conduct may lead to indirect expropriation claims, for example through adoption of an unlawful state aid decision, it is nevertheless Member States who are the optimal respondents in virtually all indirect expropriation cases.[712] Challenges alleging unlawful indirect expropriation in most cases concern executive action of the host Member State.

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[707] Angelos Dimopoulos, 'The Common Commercial Policy After Lisbon: Establishing Parallelism between Internal and External Economic Relations' (2008) 4 CYELP 101, 116. Similarly, Eeckhout notes that the ECJ tends to interpret the scope of Art 345 TFEU restrictively, see Piet Eeckhout, *EU External Relations Law* (2nd edn, OUP 2011), 65.

[708] Dolzer and Schreuer 2008, 109.

[709] Some tribunals have used a term 'police powers' which is common in the United States, for example *Tecmed v. Mexico*, Award, para 119.

[710] For example, such approach was taken by tribunals in *Telenor Mobile Communications A.S. v. The Republic of Hungary*, (Award 13 Sept 2006) ICSID Case No. ARB/04/15, para 78. In *Saluka Investments B.V. v. The Czech Republic* (Partial Award 17 March 2006), paras 254-255, the Tribunal stated that deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order. For a different approach, see *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica* (Award 17 Feb. 2000) ICSID Case No. ARB/96/1, para 72.

[711] Andrew Newcombe and LlLluís Parade, *Law and Practice of Investment Treaties. Standards of Treatment* (Kluwer Law International 2009), 30; Tarcisio Gazzini, 'States and Foreign Investment: A Law of the Treaties Perspective' in Lalani Shahleza and Rodrigo Polanco Lazo (eds), *The Role of the State in Investor-State Arbitration* (Brill Nijhoff 2015), 29.

[712] For example, claims alleging expropriation were initiated against Lithuania by OAO Gazprom which claimed that implementation of the ownership unbundling model in the energy sector had an effect of expropriation. Lithuania chose complete ownership unbundling provided as an alternative in the EU Third Energy Package, i.e. Directive 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC and Directive 2009/73/EC concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC.

It is impossible to provide a full typology of Member States' regulatory measures capable of leading to indirect expropriation. As was noted by the tribunal in *Feldman v. Mexico*, the way in which governmental authorities may force a company out of business, or significantly reduce the economic benefits of its business, are many.[713] Some first-generation BITs have enumerated certain types of measure that can be expropriatory, including taxation, the freezing or blocking of assets or funds, compulsory sales and deprivation of management.[714] Among the measures which could lead to expropriation claims, Christie lists the blocking of factory entrances on the pretext of maintaining public order, the setting of wages for local labour at prohibitively high rates, the denial of visas to foreign technical personnel, interference with occupation of real property, appointment of conservators, managers or inspectors who might interfere with the free use of premises and facilities.[715] Effectively any area of a host state's regulatory action could give rise to expropriation claims.[716] Salacuse groups case-law into broad categories and suggests the following list of regulatory areas that most commonly form the subject of expropriatory disputes: interference with contract rights, revocation or denial of government permits or licences, disproportionate tax increases and interference with management of an investment.[717] Actions or omissions concerning these measures involve direct interaction between the host state and investors. Accordingly, Member States are the primary actors in this regard.

In relation to interference with contractual rights, for example, contractual obligations in question are in most cases those assumed by Member States, not the EU. Often investment decisions are protected by specific contractual obligations assumed by the host state, which cover matters such as taxation, customs regulation, right and duty to sell at a certain price to the

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[713] *Feldman Karpa v. United Mexican States* (Award 16 Dec 2002) ICSID Case No. ARB(AF)/99/1, para 103.
[714] Kenneth J Vandevelde, *United States Investment Treaties: Policy and Practice* (Kluwer Law and Taxation Publishers 1992), 117-138. For example, Art 5 of the Protocol of the Congo, Democratic Republic Of (Kinshasa) BIT (1984) provides that expropriation "<…> may include the levying of taxes equivalent to indirect expropriation, the compulsory sale of all or part of an investment, or the impairment or deprivation of the management, control, or economic value of an investment".
[715] Christie George C., 'What Constitutes a Taking of Property Under International Law' (1962) 38 BYIL 307.
[716] To illustrate the diversity of measures addressed in expropriation cases, see the following examples: in *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana* (Award on Jurisdiction and Liability, 27 October1989) UNCITRAL. At dispute was the issuance of stop work order by the local government authorities as well as arrest and expulsion of investor. To provide another example, *S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo* (Award 8 Aug 1980) ICSID Case No. ARB/77/2 concerned *inter alia* interference with the marketing of investor's products by fixing sales prices dissolving a marketing company, constituting criminal proceedings against the investor who then left the country.
[717] Salacuse 2015, 328. Art 3 of the 1967 OECD Draft Convention on the Protection of Foreign Property describes non-compensable measures as "normal and lawful regulatory measures short of direct taking of property rights, but rather, to misuse of otherwise lawful regulation to deprive an owner of the substance of his rights". Art 4(b) then lists possible misuses of lawful regulation: excessive or arbitrary taxation, prohibition of dividend distribution complied with compulsory loans, imposition of administrators, prohibition of dismissal of staff, refusal of access to raw materials or of essential export or import licences.

host state or pricing questions.[718] Contractual rights form part of the term 'investment' under most investment protection treaties.[719] New-generation FTAs also provide protection of contractual rights.[720]

A related ground for indirect expropriation challenges is that of decisions to revoke licences and permits issued by the host state.[721] Investment projects often depend on various licences and therefore revocation of a licence or modification of its terms may harm investors' projects. In the EU legal order regulatory licences, permits and authorisations are issued mainly by Member States. For example, in the energy sector national governments issue permits for various activities, such as the extraction of natural resources, electricity and gas distribution and supply, as well as construction of wind turbines. Member States set the conditions and procedure for the issuance of these authorisations. To give an example, the EU may announce financial bids, such as NER 300 for carbon capture and storage and other similar projects, but even in such cases the issuers of licences for CO2 storage are the Member State.[722] Similarly, Member States are the issuers of authorisations in the telecommunications and other sectors.[723]

As mentioned above, another regulatory area which has caused a number of investors to file complaints against host governments is disproportionate taxation measures. Taxation in general

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[718] Dolzer and Schreuer 2008, 116.

[719] For example, ECT Art 1(6)(f) provides that the term 'investment' includes "any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector". Similarly, NAFTA Art 1139(h) states that 'investments' cover "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise.

[720] CETA Art 8.1 defines investment, *inter alia*, as (f) an interest arising from (i) a concession conferred pursuant to domestic law or under a contract, including to search for, cultivate, extract or exploit natural resources (ii) a turnkey, construction, production, or revenue-sharing contract (iii) or other similar contracts.

[721] For example, *Antoine Goetz et consorts v. République du Burundi* (Award 2 Sept 1998) ICSID Case No. ARB/95/3 and *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt* (Award 12 April 2002) ICSID Case No. ARB/99/6) both concerned claims that a host governments' revocation of investors' free-zone status (and benefits) had expropriatory effects. Another landmark case is *Tecmed v. Mexico,* which concerned a refusal of the host government to renew authorization to operate a hazardous waste landfill. The Tribunal found a refusal to renew the authorization by the host state's agency to amount to expropriation, para. 151. An example of a refusal to grant licence by a local municipality authorities is provided in *Metalclad v. Mexico* arbitration where the Tribunal found such refusal to show elements of indirect expropriation.

[722] For more on NER 300 see here: https://ec.europa.eu/clima/policies/lowcarbon/ner300_en (last visited 16 September 2018).

[723] General guidance on authorizations is provided in the Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorization of electronic communications networks and services as amended by Directive 2009/140/EC. The national rules in relation to the enforcement mechanisms for authorization holders and procedures aimed at addressing breaches of an authorized operator follow the general line of the director, but generally Member States follow their own framework in this context, see Report for the European Commission 'MSS authorisation regimes, authorisations and enforcement in the EU Member States', available at https://ec.europa.eu/digital-single-market/en/news/mss-authorisation-regimes-authorisations-and-enforcement-eu-member-states-call-tenders-20130013, 3, (last visited 1 August 2018).

is a form of appropriation which is non-compensable.[724] At the same time excessive taxation has proved to be one of the most intensive intrusions into investors' property as it is a means of rendering the economic value of an investment worthless.[725] At the center of disputes concerning disproportionate taxation is the difficult task of drawing a line between a legitimate state regulatory power to tax and taxation which shows elements of expropriation. In *Link Trading v. Moldova* the Tribunal considered tax measures to be expropriatory when they amounted to an 'abusive taking'.[726] The famous *Yukos v. Russia* case demonstrated the magnitude of claims arising out of state-taxing powers.[727] As has been mentioned in relation to the discussion of an FET standard, taxation is regulated primarily by Member States' rules and managed by its tax administrators, whereas EU powers in this area are limited.

To conclude, analysis of measures which have given rise to claims for unlawful expropriation reveals that the acts of Member States' officials and entities are of central importance. Accordingly, in their claims for compensation, investors focus on Member States' measures because they are the proximate cause of alleged injury.

3.3 Umbrella clauses

Finally, I shall briefly explain why Member States are also the optimal respondents in claims of violation of umbrella clauses. For the development of investment projects host states often enter into various commitments based on which an investor makes his business decisions. Such commitments are embodied in a variety of legal instruments, for example bilateral agreements such as investment accords, development contracts, public service concessions, and tax stabilisation agreements, or multilateral acts like foreign investment legislation, licences and regulatory permission.[728] Taking into consideration the importance of such undertakings to foreign investors in the development of their projects, around 45 percent of investment agreements include so-called umbrella clauses, which provide protection from breach by the host state of its commitments.[729]

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[724] Newcombe notes that taxes of 50 % or 60 % are common in some countries and international authorities are clear that a significant tax burden may be imposed on an investment, Andrew Newcombe, 'The Boundaries of Regulatory Expropriation in International Law' (2005) 20 ICSID Review-FILJ, 36.
[725] Tietje and Kampermann 2010, 590.
[726] *Link Trading Joint Stock Co v. Moldova* (Award 18 April 2002) UNCITRAL, paras 64-91. For analysis of the concept of 'abusive' fiscal measures, see also *Burlington Resources Inc. v. Republic of Ecuador* (Decision on Liability 14 Dec 2012) ICSID Case No. ARB/08/5, para 394.
[727] *Yukos Universal Limited (Isle of Man) v. The Russian Federation*.
[728] Salacuse 2015, 299.
[729] Bonnitcha, Lauge and Waibel 2017, 94, table 4.2.

Depending on the precise formulation in a given treaty, the effect of umbrella clauses is that host states become obliged under international law to respect state concession contracts to operate public services, government permits to operate landfills, tax exemptions promised in foreign investment codes, and even representations made by ministers to investors during investment promotion 'road shows'.[730] Therefore umbrella clauses impose on a host state a direct obligation under international law to honour obligations into which they have entered with the investors.[731]

One effect of umbrella clauses is that they introduce domestic law, which governs the nature and scope of a commitment in question, directly into investment arbitration proceedings. It should be noted here that umbrella clauses do not transform a contractual obligation governed by domestic law into an obligation governed by international law. The source, nature and scope of the obligation remain to be governed by the law under which it was originally created, that is, in most cases, the law of host states.[732] This point has been underlined by the *SGS v. Philippines* Tribunal, which stated that the clause addresses not the scope of the commitment entered into with regard to specific investments but the performance of these obligations, once they are ascertained.[733]

The distinction is important for the present discussion. It suggests that if a tribunal is asked to determine the (non)performance of a Member State commitment, it will have to take into consideration that Member State's national law which governs the obligation in question. Member States are thus the optimal respondents in cases involving umbrella clauses because they are best placed to redress violation of commitments under such clauses.

In conclusion, analysis of the content of investment obligations suggests that Member States are central and necessary parties to investment disputes. The body of case-law on FET, expropriation and umbrella clauses reveals that the majority of measures and actions challenged in investment dispute would, if applied by analogy, be those of the Member States, not the EU. Accordingly, the nature of investment protection obligations organically places Member States as optimal respondents in investment disputes. EU law, even if it is a source of an unlawful

[730] Salacuse 2015, 306.
[731] James Crawford, 'Treaty and Contract in Investment Arbitration (2008) 24(3) Arbitration International, 351.
[732] Salacuse 2015, 303.
[733] *SGS v. Philippines* (Decision 29 Jan 2004) ICSID Case No. ARB/02/6, para. 126. In para 128 of the Decision, the tribunal reasserted that it makes a breach of the BIT for the host state to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments.

Member State measure, is in most cases irrelevant because tribunals focus on proximate cause of harm.

4. Conclusion

The purpose of this Chapter was to explain the correlation between the optimal respondents and the nature of the international economic regime in question. The characteristics of the treaty regime in question determine whether the EU or its Member States are best placed to ensure compliance.

I suggested that the central role of the EU in WTO disputes stems from the rules-based character of the WTO regime, the purpose of which is to protect rules of general application. The EU holds exclusive competence in trade and is thus best placed to ensure regulatory compliance. Its participation in the WTO through mixed treaty-making allows it to assume responsibility on behalf of its Member States without creating risks to complainants. The interdependency between the EU and its Member States under mixed treaties provides safeguards for compliance which explains the deference afforded by the DSB to the EU's quest to assume international responsibility.

Member States, by contrast, are the optimal respondents in investment disputes. Member States and investors enter into direct bilateral relations for the development of investment projects. Investors depend on various measures of host states, such as the issuance of licences and contracts, and a transparent and just judicial and administrative system. The executive machinery of the host Member State interacts with investors who rely on investment protection standards to conduct their business. Violations of investment standards by host Member States are in most cases the proximate cause of injury proof of which prompts an award of compensation.

The following chapter will examine the special cases in WTO dispute-settlement where the DSB deems it necessary to direct their recommendations not only to the EU, but also to Member States. The aim of Chapter VIII is to explain why in some cases the DSB deviates from the general pattern in its choice of the EU as the optimal respondent discussed above and instead calls for multiple respondents. Findings addressed in Chapter VIII further support my thesis of remedial international responsibility.

CHAPTER VIII – MULTIPLE RESPONDENTS IN WTO DISPUTE-SETTLEMENT

1. Introduction

The previous chapter explained patterns in the selection of optimal respondents in trade and investment disputes. I suggested that the central role of the EU in WTO dispute settlement stems from its exclusive competence in trade, which allows it to ensure that its legal framework complies with the WTO regime. The interdependency of the EU and its Member States, woven into their joint participation in mixed treaties, allows panels to shift shared responsibility to the EU without engaging in attribution of conduct. I also examined the opposite trend in the investment regime, where the optimal respondents are Member States. I argued that Member States are the primary respondents in investment disputes because their measures in most cases constitute the proximate cause of (alleged) injury to investors. Whether the EU or its Member States are the optimal respondents thus depends heavily on the nature of a given treaty regime.

In Chapter VII I also made a brief remark that in some disputes under the WTO dispute-settlement system the DSB addresses its recommendations not only to the EU but also to some of its Member States. The aim of the present chapter is to examine these specific WTO cases of multiple respondents. The following sections are based on the results of an extensive review of WTO cases which involve the EU. Analysis of practice reveals a correlation between, on the one hand, the scope of the claim and remedy in a given dispute and, on the other, the distribution of shared responsibility between the EU and its Member States.

The findings/of this analysis are novel and, to the best of my knowledge, have not been identified in the literature. They support my thesis that responsibility in the international economic context is distributed on a remedial basis rather than through attribution of conduct or breach. Whether the EU alone or also its Member States will be the addressees of panels' recommendations depends on whether Member States' actions are necessary for compliance purposes. To put it simply, my argument is that the scope of the claim defines the remedy which in turn points either to the EU or (also) to its Member States. The findings of the present discussion add an additional layer to the conclusions assessed in Chapter VII by explaining particular cases where the general pattern of sole EU responsibility is modified by Member States' participation in dispute-settlement.

As I have already noted in the introduction to this thesis, identifying rationales that underlie the determination of international responsibility of the EU and its Member States in WTO law was complex and time-consuming. My findings are counterintuitive in that the DSB does not

distribute shared responsibility on a predetermined basis stemming from the institutional arrangement between the EU and its Member States. Rather, distribution varies on a case-by-case basis, depending on what is necessary to achieve a positive solution to the dispute. Accordingly, it was difficult to pinpoint the factors that are decisive in the DSB's decision on the proper respondent(s). I have identified these novel patterns by putting together multiple pieces of the DSB's reasoning scattered throughout the reports which were not expressed directly and thus were not easy to spot.

I should like to make a timely remark. As I suggested in Chapter VII, the EU is the optimal respondent in WTO disputes because in most cases it takes it upon itself to ensure compliance with the panels' reports. A question may arise as to how panels differentiate between situations where the EU is allowed to assume responsibility on behalf of its Member States (Chapter VII) and special cases examined in this chapter where the panels deem it necessary also to address their recommendations to the Member States.

It seems to me that there is no particular rationale for the different treatment of the two situations and the approach is somewhat random. I did notice that panels tend to address the question of multiple respondents in those disputes where complainants insist that the DSB determine whether Member States' conduct is also to be also included in judicial scrutiny. However, even in such cases the DSB may decide to shift responsibility to the EU if the EU gives assurance that it will ensure compliance on behalf of its Member States, as was suggested in Chapter VI. Marín Durán notes that joint EU-Member State membership of the WTO is becoming much more visible in dispute-settlement practice post Lisbon as complaints addressed jointly to the EU and one or more of its MS are no longer the exception but almost as common as complaints directed against the EU alone.[734] This observation supports my finding that distribution of shared responsibility does not follow the internal division of competences because the Lisbon Treaty expanded rather than reduced the scope of the EU's competences in the area of common commercial policy.

I shall start my analysis by considering the correlation of the scope of claims and remedies under the WTO system (Section 2). I shall then identify the difference between two types of claims – claims 'as such' and claims 'as applied' (Section 3). Finally, in Section 4 I shall explain how that correlation plays out in the DSB's identification of multiple respondents.

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[734] Gracia Marín Durán, 'The EU and Its Member States in WTO Dispute Settlement: A "Competence Model", or a Case Apart, for Managing International Responsibility?' in Marise Cremona, Anne Thies and Ramses A Wessel (eds), *The EU and International Dispute Settlement* (Hart Publishing 2016), 257.

2. Correlation of claims and remedies

Article 6.2 of the DSU provides in relevant part that "*[t]he request for the establishment of a panel shall… identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly*". The 'measure at issue' stated in the request for establishment of a panel plays a pivotal role in WTO dispute-settlement proceedings because it constitutes the matter referred to the DSB which forms part of a panel's terms of reference under Article 7.1 of the DSU. Terms of reference define the scope of a dispute.[735]

Importantly, it is the 'measure at issue' identified in the request for the establishment of a panel, and consequently stated in the terms of reference, that must be brought into conformity in case it is found to be in violation of WTO Agreements. This flows from Article 19.1 of the DSU which states that if the Appellate Body concludes that a measure is inconsistent with a covered agreement, that measure must be brought into conformity with that agreement. Thus there is an inter-linkage between the reference to the term 'measure' in Article 19.1 of the DSU and the term 'measure at issue' in Article 6.2 of the DSU.[736] In other words the DSU establishes a direct link between the challenged measure and the remedy – in case of a violation of a WTO obligation, a measure which will have to be brought into consistency will be the same measure which the complainant challenged. This is different from investment arbitration where, as I argued in the previous chapter, tribunals focus on the existence of breach whereas the scope and roots of a challenged measure are largely irrelevant because compensation is calculated in accordance to the harm.

A 'measure' should not, however, be understood as a specific law or regulation, i.e. a Member State is free to implement DSB recommendations through *legal instruments* different from those in dispute, as long as they bring the challenged *measure* into conformity with its WTO obligations.[737] This corresponds to the central goal of the WTO remedial system, which is to restore the balance of concessions.

If the measure identified in the request for the establishment of a panel is defined broadly, the remedy will have a corresponding scope. In some cases the system can even encourage the

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[735] *US – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213, ABR adopted 28 November 2002, para 126.
[736] *EC – Selected Customs Matters*, PR, para 7.14.
[737] *EC – Geographical Indications*, PR, para 7.746.

complaining party to draft their requests broadly. For example, in *EC – Geographical Indications* the Panel refused to declare a violation of an obligation to accord a certain treatment under Article 22.2 TRIPS[738] based on the regulation identified in the request, because the obligation could have been implemented by other legal instruments which were not identified in the request.[739] It remains unclear whether the result would have been more favourable to the complainant had it attacked the legal regime of protection of geographical indications as a whole. Similarly, in *EC – Selected Customs Matters* the panel also noted that while there is nothing in the DSU that would prevent a complaining party from challenging a responding member's system as a whole,[740] the complainant was precluded from so challenging the EC customs administration system in this dispute because the complainant's request was restricted to specific areas of customs administration.[741]

As to how broadly the 'measure at issue' may be defined by the complainant, the DSB sets no limit but requires that the request be not vague. In the *EC –Bananas III* dispute the Panel rejected the claim against the EU's banana import 'regime', stating that the request was too vague and did not identify specific measures.[742] According to the Panel, as long as the complaining party does not expand the scope of the dispute, it hesitates to impose too rigid a standard for the 'precise and exact' identification of a request.[743] In-depth analysis of the scope of claims falls outside the ambit of present discussion. Suffice it here to note that both specific regulatory measures as well as an overall regulatory system can be challenged under the WTO regime, provided that the claim is precise.

While the remedy cannot exceed the scope of the claim, panels are not obliged to make findings and recommendations with respect to all the measures and claims identified in a request for the establishment of a panel.[744] The rationale behind the discretion afforded to the DSB in this regard is based on the principle of judicial economy which has been widely endorsed under the WTO dispute-settlement system.[745] Thus, consistent with my analysis in Chapter VI, panels are

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[738] An obligation to protect geographical indications.
[739] *EC – Geographical Indications*, PR, para 7.747.
[740] *EC – Selected Customs Matters*, PR, para 7.44.
[741] *EC – Selected Customs Matters*, PR, para 7.46.
[742] *EC – Bananas III*, PR, para 2.9.
[743] *EC – Large Civil Aircraft*, PR, para 7.121, referring to *US – Subsidies on Upland Cotton*, WT/DS267.
[744] See, for example, *EEC – Quantitative Restrictions Against Imports of Certain Products from Hong Kong*, BISD 30S/129, PR adopted 12 July 1983, para 33.
[745] *Canada – Wheat Export and Grains Imports*, ABR para 133; *EC – Biotech Products*, PR, para 6.81.

vested with a *discretion* only to rule on those matters *necessary to secure a positive solution* to a dispute.[746]

The Appellate Body in the *Australia – Salmon* case clarified when judicial economy can be exercised so that it does not result in a partial resolution of the matter at issue. According to the Panel, the principle of judicial economy has to be applied keeping in mind the aim of the dispute-settlement system, which is to resolve the matter at issue and to secure a positive solution to the dispute.[747] The DSB must address those claims on which a finding is "*necessary in order to enable the DSB to make sufficiently precise rulings as to allow (for) prompt compliance by a Member with those recommendations and rulings in order to ensure effective resolution of disputes to the benefit of all members*".[748]

From the above analysis I draw three conclusions regarding the scope of claims under the WTO system. Firstly, measures identified in the complainant's request for the establishment of a panel correspond to the measures which will have to be brought into compliance if the claim is upheld. Thus the scope of the claim determines the scope of the remedy. Secondly, a measure identified in the request can be defined broadly, provided it is not vague. Thirdly, subject to the principle of judicial economy, the DSB enjoys discretion only to rule on those matters which are necessary to secure a positive solution to the dispute.

I suggest that in the special cases (as opposed to the general pattern identified in Chapter VII where the EU acts as the optimal respondent) when the DSB addresses the question whether the EU or its Member States, or both, should be respondents in a given dispute, it determines the proper respondent in light of the cumulative effect of the three rules identified above. Panels look at the scope of the request for the establishment of a panel and decide which measures must necessarily be brought into compliance to achieve the balance of concessions. In so doing the DSB determines whose actions are necessary to ensure compliance with WTO obligations. Thus, instead of engaging in a complex analysis of attribution of breach, panels either include or exclude Member States from the addressees of its recommendations according to whether their action(s) is necessary for remedial purposes. As will be seen from the following analysis,

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[746] *EC – Selected Customs Matters*, PR, para 7.42. DSU Art 3.4 provides that recommendations or rulings by the DSB must be aimed at achieving a satisfactory settlement of the 'matter'. The matter to be settled is the matter referred to the DSB for settlement, see *Guatemala — Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60, ABR adopted 2 Nov 1998, para 72.
[747] *Australia – Measures Affecting Importation of Salmon,* WT/DS18, ABR adopted 20 Oct 1998, para 223.
[748] *Australia – Salmon*, ABR, para. 223.

an actor whose conduct constitutes a breach of WTO rules and an actor whose conduct is necessary to eliminate the inconsistency is not always the same entity.

Before considering the rationales underlying the DSB's reasoning on the proper respondent, I should like to distinguish between two types of claim under the WTO dispute-settlement regime: claims 'as such' and claims 'as applied' – in order to provide a normative framework for the case-law analysis.

3. Claims 'as such' and claims 'as applied'

The nature and scope of claims under the WTO system play a crucial role in the determination of whether a ruling and recommendation will be addressed to the EU, its Member States, or both. In this regard two main types of claims are decisive. Claims 'as such' challenge laws and other legal instruments on their face, whereas claims 'as applied' contest specific instances of application of such laws. As will be seen below, the typology is reflected in the case-law.

In Chapter VII I argued that the EU is the optimal respondent under the WTO regime because WTO disputes often target rules of general application. Claims alleging inconsistency of rules of general application are claims 'as such'. The EU will typically be the optimal respondent in 'as such' disputes because the EU is the main source of trade rules of general application and is best placed to ensure they are brought into conformity with the WTO regime. Member States are drawn into the dispute when the claim (also) covers specific instances of application of such rules, that is claims 'as applied'. The EU reflects the system of executive federalism where Member States implement Union law. Accordingly, if a claim covers instances of application of inconsistent laws, panels will often decide to address their rulings and recommendations to the Member States as well because those Member States' restorative action will be necessary for compliance purposes. Though, to the best of my knowledge, the typology has remained unnoticed by scholars exploring the distribution of shared responsibility between the EU and its Member States, I suggest that the nature of claims is decisive in this context.[749]

The DSB itself distinguishes between challenges to rules of general application and claims 'as applied'.[750] For example, the Panel in *EC – Commercial Vessels* noted that the disputed EC

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[749] Flett 2016, notes the distinction.

[750] For example, in *US – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108, PR adopted 8 Oct 1999, the Panel noted that it examined the 'FSC scheme' as a whole, that is the existence and operation of the scheme itself rather than individual instances of application of the scheme by particular corporations, see Panel Report, paras 7.98-7.101. See also *Canada – Wheat Exports and Grain Imports*, PR, paras 22 and 27.

authorisations of subsidies apply to the aid scheme 'as such', not to the grant of aid in individual cases pursuant to the aid scheme.[751] Flett rightly notes that the choice between bringing claims 'as applied' and claims 'as such' may in some cases be dictated by WTO law itself.[752] For example, Article 17.4 of the Anti-Dumping Agreement states that a member may refer to the DSB a final action taken by the administrative authorities of the importing member to levy definitive anti-dumping duties or to accept price undertakings. Under EU law those types of decision are taken by the Member States and constitute application of anti-dumping rules. The case-law shows that the US has argued (albeit unsuccessfully) that 'final liquidations' in US anti-dumping law are not caught by Article 17.4, which would explain why they have not attacked identical Member States' measures when bringing cases against the EU.

It must be acknowledged, however, that the distinction between claims 'as such' and claims 'as applied' does not always square with the differentiation between EU and Member States' measures. For example, in relation to trade remedies, a measure adopted at EU level may relate to a specific WTO complaining member and/or to a specific product and impose a specific duty or other constraint. In such cases a challenge to an EU measure could be regarded as a claim 'as applied'. This is also true of EU treaty provisions.[753] Panels have in some cases also found the distinction between 'as such' and 'as applied' claims to be irrelevant.[754] Though I acknowledge that the typology is not straightforward, the distinction is nevertheless helpful for present purposes.

Importantly, with respect to 'as such' challenges, claimants are not required to adduce evidence of specific instances of application of a measure under dispute. The systematic application of a challenged rule or norm can be evidence of its general and prospective application, but such evidence is not required to substantiate an 'as such' challenge of a particular rule or norm.[755] For example, in *US – Tax Incentives for Large Civil Aircraft*, a claim brought by the EU against the US concerning tax incentives for large civil aircraft, the Panel noted that the distinction between 'as such' claims and claims 'as applied' is important because the former is not directed

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[751] *EC – Commercial Vessels*, PR, para 7.51.
[752] Flett 2016, 884.
[753] Flett 2016, 894.
[754] For example, in *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, WT/DS10/R-37S/200, PR adopted 7 Nov 1990, para 19, the US noted that implementation of the import licencing system set forth in Tobacco Act of 1996 acted as a de facto prohibition on imports from the SY and other Contracting Parties. See also *US – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, PR adopted 2 Sept 2011, para 7.18, where the Panel refused to afford any relevance to the 'as such' and 'as applied' distinction of a claim.
[755] *EC and Certain Member States – IT Products*, PR, para 7.1168, ft 1538.

against the application of tax measures at any given time or in any particular instance.[756] According to the Panel, although evidence of the actual use of certain fiscal incentives may support or confirm its findings, it is not required for 'as such' claims.[757] That a measure imposed inconsistently with GATT could nullify or impair benefits accruing under the GATT before they were actually applied to specific imports had also been recognised in *Japanese – Measures on Imports of Leather*.[758] Here the Panel stated that the existence of a quantitative restriction should be presumed to cause nullification or impairment not only because of any effect it had had on the volume of trade but also for other reasons.[759] I note that the requirement to show evidence of application of a challenged measure in 'as applied' claims should not be confused with the presumption of nullification or impairment of benefits. While the latter concerns the admissibility of claims, the former is a rule of evidence.

If both types of claims exist in WTO law, in what circumstances can a measure be challenged 'as such' and when it is necessary to show that it has been applied? Case-law analysis reveals that the DSB has developed a so-called 'mandatory/discretionary legislation' doctrine to determine whether a measure in question can be challenged 'as such'.[760] As formulated by the Panel in *US – Malt Beverages*, the test states that legislation mandatorily requiring the executive authority to take action inconsistent with WTO Agreements violates the WTO regime whether or not the legislation was currently implemented, whereas legislation merely allowing the executive to act inconsistently, does not, by itself, constitute a violation.[761] The Panel in this dispute concluded that the mandatory laws of Massachusetts and Rhode Island by their terms treated imported beer and wine less favourably than similar domestic products and they were thus inconsistent with Article III:4 GATT, irrespective of the extent to which they were being enforced.[762]

Similarly, the Panel in *Thailand – Cigarettes* concluded that legislation mandatorily requiring the executive authority to impose internal taxes discriminating against imported products was inconsistent with Article III:2 of GATT whether or not an occasion of its actual application had

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[756] *US – Tax Incentives for Large Civil Aircraft*, WT/DS487/R, PR adopted 28 Nov 2016, para 7.154.
[757] *US – Tax Incentives for Large Civil Aircraft*, PR, para 7.154. The US agreed with such interpretation, by stating that where a Member asserts that a financial contribution exists in the abstract, there is no need to establish actual receipt of the subsidy under examination, US Second Written Submission, para 85.
[758] *Japanese – Measures on Imports of Leather*, BISD 31S/113, PR adopted 15/16 May 1984.
[759] *Japanese – Measures on Imports of Leather*, PR.
[760] The burden of proof in 'as such' is on the claimant. In *US – Carbon Steel*, ABR, para 157, noted that that a measure is considered WTO-consistent until proven otherwise.
[761] *US – Malt Beverages*, WT/DS23/R-39S/206, PR, adopted 19 June 1992, para 5.57.
[762] *US – Malt Beverages*, PR, para 5.60.

yet arisen.[763] The Panel in *US – Tobacco* stated that legislation which mandated action inconsistent with the GATT could be challenged *per se*, whereas legislation which merely gave discretion to the executive authority to act inconsistently could not be challenged as such. Only the actual application of such legislation could be the subject of a claim.[764]

In *US – Superfund* Canada and the EEC considered it appropriate to challenge the US legislation establishing a tax which was not in operation, because it could affect the decision on investment and supply contracts before more serious trade damage had occurred. The Panel agreed with the complainants and suggested that "*the very existence of mandatory legislation providing for an internal tax without being applied to a particular imported product should be regarded as falling within the scope of Article III:2, first sentence*".[765] The Appellate Body in *US-Anti-Dumping Act of 1919* rejected the US claim that the 'mandatory/discretionary legislation' test is relevant only in those cases where the challenged legislation has never been applied.[766]

Additionally, the Panel in the *US – Tyres (China)* dispute explained that in practice the import of the mandatory/discretionary distinction is most pronounced in cases where, although a member's law appears to be WTO-inconsistent on its face, there is sufficient discretion to allow national authorities to apply the law in a WTO-consistent manner.[767] For example, the Panel in *EEC – Regulation on Imports of Parts and Components* concluded that the anti-circumvention provision under the EC anti-dumping law did not mandate the imposition of duties or other measures but merely authorised the Commission and Council to take certain actions.[768] The Panel noted that although it would be desirable for the EC to withdraw the anti-circumvention provision, the EC would meet its obligations under the GATT if it were to cease to apply the provision in respect of the contracting parties.[769]

While the distinction between claims 'as such' and claims 'as applied' is not always clear-cut, the general pattern which can be drawn from the EU's executive federalism is that the Union is in most cases the legislator of trade rules which are implemented by Member States. Accordingly I assume that the EU is the proper respondent in claims 'as such', whereas Member States are necessary parties in claims 'as applied' precisely because their action will be

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[763] *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes* WT/DS10/R - 37S/200, PR adopted 7 Nov 1990, para 84.
[764] *US – Measures Affecting the Importation, Internal Sale and Use of Tobacco*, WT/DS44/R, PR adopted 4 Oct 1994, para 118.
[765] *US – Superfund*, PR, para 5.2.2.
[766] *US – Anti-Dumping Act of 1916*, WT/DS 136/AB/R, WT/DS 162/AB/R, ABR adopted 26 Sept 2000, para 93.
[767] *US –Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China Tyres (China)*, WT/DS399/R, PR adopted 13 Dec 2010, para 7.118.
[768] *EEC – Regulation on Imports of Parts and Components*, L/6657-37S/132, PR adopted 16 May 1990, para 5.25.
[769] *EEC – Regulation on Imports of Parts and Components*, PR, para 5.26.

necessary to eliminate the inconsistency. Taking the above normative considerations a step further, the following sections will consider the case-law which supports my hypothesis. It will be shown that the DSB refers to the type of a claim (and accordingly the respective remedy) in the identification of whether the EU, its Member States, or both, are the proper respondents in a given dispute.

4. Identification of multiple respondents

Claims 'as such' dominate WTO dispute settlement, which explains why the EU is the optimal respondent in WTO law (Chapter VII). The WTO dispute-settlement regime provides a state-to-state forum which is why in most cases WTO members bring claims 'as such' to challenge laws, regulations or other instruments of general and prospective application. The purpose of such claims is to prevent members *ex ante* from engaging in certain conduct and the DSB considers 'as such' claims to be more serious than 'as applied' claims.[770] Unlike investment protection treaties which aim to compensate harm already caused, the WTO dispute-settlement system focuses on prospective trade relations. The central focus of the WTO dispute-settlement system is the preservation of the regulatory order established by WTO Agreements. Claims 'as such' prevent future violation because they eliminate '*the root of WTO-inconsistent behaviour*'.[771] Explanation for the active role of the EU in 'as such' disputes is straightforward: if the validity of a norm rather than its application in specific instances is at issue, it will be the EU which in most cases will be best placed to bring that regulation into conformity with the WTO obligations. This brings me back to the EU's exclusive competence in trade, discussed in Chapter VII. Matters such as customs, antitrust law, import and export restrictions are regulated by the EU and it is the Union bodies that are best placed to make laws WTO-consistent in accordance with recommendations of the DSB. The EU is a more frequent respondent under claims challenging laws and norms themselves, rather than their application, because it is the proper party to ensure the necessary regulatory changes. Member States, on the other hand, are better placed to respond to 'as applied' claims because they implement Union trade law.

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[770] *US – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268, ABR adopted 29 Nov 2004, para 172. The AB stated "By definition, an "as such" claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct—not only in a particular instance that has occurred, but in future situations as well—will necessarily be inconsistent with that Member's WTO obligations. In essence, complaining parties bringing "as such" challenges seek to prevent Members ex ante from engaging in certain conduct. The implications of such challenges are obviously more far-reaching than "as applied" claims".

[771] *US – Sunset Review of Anti-Dumping Duties on Corrosion Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, ABR adopted 15 Dec 2003, paras 81-82.

An important observation is that the subject of the dispute does not necessarily correspond to what a claimant asks for. For example, a dispute may focus on Member States' conduct which serves as evidence of a systematic failure in the legal framework itself. If the claim challenges a legal system as such, Member States' conduct will be treated as a fact, not as an independent object of a claim. Member States will thus not be treated as respondents because the remedy will call for removal of the inconsistencies in the legal system by the EU, not the Member States, because the EU is (in most cases) the legislator of general rules. Conversely, a claimant may focus on the unlawfulness of a rule to assert that its application violates its rights. This further supports my hypothesis that attribution of conduct is not decisive for the distribution of shared responsibility in international economic disputes.

As I shall discuss below, claims 'as applied' are common under the WTO regime. In fact claims brought before the DSB are often composite, that is they cover both 'as such' and 'as applied' measures. WTO members challenge not only an EU legal instrument in isolation, but various systems, regimes and processes.[772] Claims tend to be broadly defined and often involve Member States' measures which either implement or apply Union law. The task of identifying whether Member States are necessary respondents in a given dispute is complex because of the composite structure of claims under the WTO regime.

The task, however, is decisive to the distribution of shared responsibility between the EU and its Member States. In a factually identical situation the EU, its Member States, or both, may be the proper respondent(s), depending on the target of the claim and the respective remedy. Neither the division of competences between the EU and its Member States, nor attribution of conduct, provides a sufficient basis for the allocation of responsibility between an organisation and its member states. The EU, its Member States, or both, may be the proper respondent(s) in exactly the same dispute covering exactly the same competences. Which of them will bear responsibility depends on the object of the disputing party's claim and the remedy it seeks.

EC – Geographical Indications provides a good example. The dispute concerned an EC regulation which set out procedure for the individual product designation of origin and geographical indications. Under the disputed regulation applicants for registrations had to submit their applications to authorities in the country of the geographical area, that is Member

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[772] *US – Sunset Review of Anti-Dumping Duties on Corrosion Resistant Carbon Steel Flat Products from Japan*, ABR, paras 81-82. Note, that DSU Art 6.2 requires inclusion of the laws, regulations, decisions alleged to be administered in a manner that is in violation of Article X:3(a) GAT, see para 7.27. There is a special duty of diligence on the part of a claimant to set out 'as such' claims in their panel requests as clearly as possible, *US – Oil Country Tubular Goods Sunset Reviews*, ABR, paras. 172-173.

States (or third countries).[773] The US argued that the registration procedure on its face did not afford equal treatment to the nationals of EC and other WTO members because it did not allow applications for geographical indications located in third countries to be filed directly with the competent authorities in Europe. It challenged the procedure 'as such', not specific instances of product registration. Thus, while the conduct concerned is that of Member States, the issue before the Panel was a legal instrument itself, not its application in a particular case.

In fact provisions concerning the protection of geographical indications under consideration have never been applied[774] and parties were not aware of any application for registration of a name of an area in a third country outside the EU ever having been filed with authorities of a third country.[775] Since the focus was on the regulatory scheme as such, the EC was the proper respondent because it was best placed to bring the regulation into compliance with the recommendations of the DSB. The Panel itself noted that one way in which the EC could implement recommendations was to amend the challenged EC regulation in such a way that different registration procedures not to apply to the registration of geographical names located in other WTO members.[776]

That Member States are entities which designate geographical indications was irrelevant in this particular dispute because compliance was focused on amending the legal instrument rather than correcting consequences which flowed from an incorrect application of that instrument. Nor is the division of competences between the EU and its Member States decisive in this context. Had the claimant challenged specific designations of geographical indications, it is probable (as will be seen below) that the relevant Member States would have been assigned respondent status, even though trade is an area of EU competence.

In the following sections I provide further support for my thesis. For purposes of clarity I have structured my discussion by grouping disputes in accordance to their subject-matter.

4.1 Customs disputes

As I suggested above, attribution of conduct is not helpful in distributing responsibility between the EU and its Member States in the WTO context (as well as in international economic law in general). Moreover, tracing conduct may be misleading for the determination of the proper

[773] *EC – Geographical Indications*, PR, para 7.271.
[774] *EC – Geographical Indications*, PR, para 7.52.
[775] *EC – Geographical Indications*, PR, para 7.266.
[776] *EC – Geographical Indications*, PR, para 8.5.

respondent. The *EC – Selected Customs Matters* illustrates my point. In this case litigation focused on Member States' conduct but the claim challenged a regulatory system as such, leaving it up to the EC to ensure compliance. The US contested 'the manner' in which the EC administered its laws, regulations, decisions and rulings in relation to the customs union.[777] This function is carried out by Member States. According to the US, Member States' administrations "*do not always treat the [binding tariff information] issued by another Member State as binding*".[778]

In this particular dispute the US was concerned with the way in which the EC customs authorities administered the customs framework.[779] The emphasis is on the actions of customs authorities of the Member States whereas, by contrast, there is no mention of actions taken and/or procedures and institutions existing at EC level.[780] The Panel concluded that it was authorised to examine particular cases or instances of the administration of customs laws expressly identified in the US' request.[781] The case thus concerned conduct of Member States which, following the doctrine of attribution of conduct, points to the Member States rather than the EU as proper respondents in this dispute.

Yet, while the case was *about* Member States' conduct, the remedy sought directed the Panel to the EU as the proper respondent. The US claimed that the regime itself was flawed and was not designed systematically to achieve uniform administration, thus resulting in a breach of Article X:3 of the GATT 1994.[782] It sought changes in the way the EU administered its customs law, not to remedy the consequences of particular instances of misapplication of customs law by Member States.[783] Particular instances of alleged incorrect administration by Member States[784] served as factual evidence to show that inconsistencies did occur (and so the system as such had be improved), rather than as independent challenges.[785]

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[777] *EC – Selected Customs Matters*, PR, para 4.546.
[778] *EC – Selected Customs Matters*, PR, para 4.602. The US claimed that it challenges the design and structure of the EC system of customs administration 'as such', see para 7.51.
[779] *EC – Selected Customs Matters*, PR, para 7.59.
[780] *EC – Selected Customs Matters*, PR, para 7.60.
[781] *EC – Selected Customs Matters*, PR, para 7.64.
[782] *EC – Selected Customs Matters*, PR, para 4.34.
[783] Obligation for uniform administration of customs laws under GATT Art X:3(a) GATT does not require harmonization of laws at sub-levels as long as a certain minimum degree of predictability and security is ensured. In other words, the US went after the EC's obligation of an overall administration, not of particular laws of Member States.
[784] Different interpretations by national authorities of complex nomenclature system, para 4.9; failure of customs authorities to abide by binding customs classifications rulings, 4.12; exercise of discretionary powers by the Member States with respect to revocation of binding tariff information etc.
[785] Similarly, the EC claimed that the dispute did not concern the correctness of individual classifications, but rather the question of uniform administration of customs regime, *EC – Selected Customs Matters*, PR, para 4.627.

As a result the Panel identified a number of gaps in the system of customs administration, such absence of a duty to consult other Member States before adopting binding decisions, of a system to inform of revocations, and of a duty in Member States to consult the binding tariff information database.[786] The Panel called for a *restitution in integrum* type of remedy, suggesting that if manner in which laws and regulations are administered were found to lack uniformity, there would be a need to amend the legal regime of customs administration itself.[787] It was then up to the EC, not the Member States, to fill the gaps in the legal framework, which explains why the Panel addressed its rulings and recommendations to the EC alone. Member States' conduct was investigated by the Panel as evidence of a problem, but the solution to it was to come from the EC.

Taking the facts of this case by analogy, the result could have been different had the claim focused on correcting Member-State conduct itself, rather than the system in which Member States' operate. For example, had the US complained not about the structural gaps in the EC customs regime but about the actual tariff classification by a Member State, the Panel might have addressed its rulings and recommendations to that Member State.

EC – Computer Equipment sustains this claim. This dispute concerned reclassification of certain computer equipment by the European Commission and, accordingly, UK and Irish authorities. The US and Japan argued that Member States, specifically the United Kingdom and Ireland, were respondents in this dispute in addition to the EC because they were independent members of (the) GATT and bound by corresponding obligations.[788] The reasoning of the parties with respect to Member States' responsibility was focused on the remedy. For example, Chinese Taipei, which was acting as a third party in this dispute, sought to challenge Member States in lieu of the EC on the rationale that if the DSB recommendation were not addressed to the Member States, they might continue with the violation and thus the positive solution to the dispute would fail.[789] The identification of the UK and Ireland in the request for establishment of a panel was most likely based on the fact that these countries were the US industry's largest export markets in the EC. The strategic importance of obtaining a remedy not only against the EC but also against the specific instances of tariff classification by the UK and Ireland explains

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[786] *EC – Selected Customs Matters*, PR, paras 7.159-7.170.
[787] *EC – Selected Customs Matters*, PR, para 7.21.
[788] *EC and Certain Member States – IT Products*, PR, para 7.81. The EC did not agree with such position and argued that the US and Japan may not challenge the application of duties by the Member States because they have not challenged the measures on an 'as applied' basis. According to the EC the role of customs authorities of EC Member States is limited to applying measures previously enacted by the Union, see para. 6.11, also para. 8.1. and para. 8.6.
[789] *EC and Certain Member States – IT Products*, PR, para 6.45.

why tariff treatment of several other Member States (Denmark, the Netherlands and France) served as evidence rather than individual claims.[790]

The complainants acknowledged that they did not challenge any particular prior application of customs duties by particular Member States but claimed that it was appropriate directly to challenge the Member States because it is their authorities that applied customs duties.[791] The Panel agreed and stated that the UK and Ireland were respondents alongside the EC.[792] Its decision to include Member States as co-respondents can be explained by the US's arguing that its claim concerned not reclassification as such, but the actual tariff treatment by the European Commission, the UK and Ireland.[793]

Theories of competence-based responsibility or normative control would be insufficient to explain the different approach of the DSB to the question of international responsibility of the EU in *EC – Selected Customs Matters* and *EC – Computer Equipment*. Both disputes concerned customs matters subject to the same internal EU normative framework. Explanation of this difference lies in the claim and, accordingly, the remedy requested by the claimant. In the case of the former dispute, the remedy was the filling of gaps in the legal framework of the customs administration, a task to be undertaken by the EU. In the latter case, the US sought to correct the actual tariff treatment not only by the EU, but also by two strategically important Member States. Thus two disputes covering the same field of competence where conduct is carried out by the same actors (Member States) can result in responsibility of the EU, a Member State, or both, depending on the focus of the claimant's request and the remedy it seeks.

Differently from *EC – Computer Equipment*, where the UK and Ireland were included as respondents in the proceedings, the Panel in *EC and Certain Member States – IT Products* refused to afford that status to the Member States. In line with my analysis in Chapter VI, the Panel noted that its primary objective was a positive solution to the dispute.[794] According to the Panel, the claimant challenged customs duties 'as such' without identifying any particular instances of application.[795] It thus concluded that findings with respect to the measures adopted by the EC alone would provide a positive solution to the dispute.[796]

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[790] *EC – Computer Equipment*, PR, para 8.44.
[791] *EC and Certain Member States – IT Products*, PR, para 7.85, also para. 8.2.
[792] *EC – Computer Equipment*, PR, para 8.16.
[793] *EC – Computer Equipment*, PR, para 5.3, see also paras 8.58, 8.12.
[794] *EC and Certain Member States – IT Products*, PR, para 7.90.
[795] *EC and Certain Member States – IT Products,* PR, para 7.89. Interestingly, the request for the establishment of a panel did refer to 'applied measures' in a reference attached to the main text. However, in the Report of the Panel reference to 'applied measures' had disappeared, most probably as a technical error.
[796] *EC and Certain Member States – IT Products*, PR, para 8.2.

One additional point further supports the remedial approach to international responsibility. The Panel in *EC – Computer Equipment* ultimately decided to exclude two respondents, the UK and Ireland, from its recommendations and instead address its recommendations to the EU alone. According to the Panel, having determined an inconsistency on the part of the EU, it was unnecessary also to address its ruling to the UK and Ireland.[797] The DSB did not provide its reasoning for omitting the two respondents and instead resorted to judicial avoidance techniques. A likely explanation for this approach was that in this particular case declaring unlawful an EU measure automatically resulted in the inapplicability of the UK and Irish measures.[798] It was unnecessary to rule against the Member States because elimination of an inconsistency on the EU's part was sufficient to achieve a positive solution to the dispute. Leaving out of a ruling respondents whose measures are found inconsistent but who add nothing to compliance is consistent with my argument that responsibility in international economic law carries a restorative rather than corrective function, in line with the argument in Chapter V.

4.2 Subsidies disputes

Subsidies decisions differ from customs measures in that the EU does not oblige Member States to grant subsidies, whereas Member States are bound by customs regulation. Nevertheless, subsidies cases reveal a pattern in the DSB's reasoning analogous to that discussed above. This further supports the view that panels are neither concerned with attribution of conduct, nor with the untangling of organisational ties and power dynamics within an organisation when faced with the task of distribution of shared responsibility.

EC – Commercial Vessels provides an illustration. In this dispute the parties held different views as to whether Member States were parties to the proceedings. Member States were not initially cited as co-respondents in the request for the establishment of a panel and the question of multiple respondents arose during the adjudicative phase. The dispute concerned a Council regulation governing the granting of state aid to certain shipyards as well as national aid schemes adopted in line with the regulation.[799] Under this scheme, and subject to a decision of the European Commission, Member States could grant individual subsidies to certain shipyards.

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[797] *EC – Computer Equipment*, PR, para 8.15-8.16 and 8.72.
[798] The claim challenged an EU regulation classifying computer equipment as 'telecommunications apparatus' and two subsequent binding tariff information letters, one by Irish customs authorities and one by UK authorities.
[799] The Council Regulation (EC) No 1177/2002 of 27 June 2002 concerning a temporary defensive mechanism to shipbuilding.

The EC argued that the claim did not cover individual Member States' grants of subsidies and that Korea's claim was limited to the subsidy scheme as such.[800] According to the EC, Member States' measures were autonomous decisions on whether to provide state aid.[801] Such a position departs from the EU's claims in other disputes that responsibility follows the division of competences because competition matters fall within the exclusive EU competence. According to the Union, the importation of individual disbursements of funds by the Member States into the dispute would have severely hampered its due process rights because such disbursements are granted by the Member States leaving no time to obtain the relevant evidence from them.[802]

Korea's reasoning that Member States' grants of subsidies were not separate measures but mere applications of the disputed regulation was compliance-focused.[803] It was concerned that if the EC's general measures were to be found inconsistent while any specific applications were excluded unless individually listed in the claim, the result would seem to be that such applications could continue, at least to the extent that they had been committed, but not paid prior to the panel's rulings and recommendations.[804] According to Korea, Member States implementing the challenged regulation, including the Denmark, France, Germany, the Netherlands and Spain, equally violated WTO obligations and directed its arguments regarding illegality of the EC's regulation *mutatis mutandis* to the Member States implementing these measures.[805] To prevent the circumvention of WTO obligations, Korea asked the Panel to clarify whether individual disbursements of funds by Member States were covered by the claim because they were part of the implementation of the challenged regulation.[806]

The Panel's analysis supports my argument that distribution of shared responsibility under WTO law is remedy-based. The Panel rejected Korea's request, drawing a distinction between the EC's and Member States' measures. It emphasised that the regulation under consideration did not in itself authorise individual disbursements.[807] According to the Panel, the EC regulation provided a legal basis but not an obligation of Member States to make individual disbursements

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[800] *EC – Commercial Vessels*, PR, para 4.7.
[801] *EC – Commercial Vessels*, PR, para 4.22.
[802] *EC – Commercial Vessels*, PR, para 4.15.
[803] *EC – Commercial Vessels*, PR, para 7.4.
[804] *EC – Commercial Vessels*, PR, para 4.14, also 7.22. Korea was relying on ABR in *Brazil-Aircraft* where the AB noted that "continue to make payments under an export subsidy measure found to be prohibited is not consistent with the obligation to 'withdraw' prohibited export subsidies", see ABR, para 45.
[805] *EC – Commercial Vessels*, PR, para 4.250.
[806] *EC – Commercial Vessels*, PR, para 4.22. Korea argued that if disbursements are not covered by the claim, they might continue for a period of years after expiration of the authority under the challenged regulation as long as they were approved before such expiration, see para 4.19.
[807] *EC – Commercial Vessels*, PR, para 7.53.

of aid.[808] Moreover, there was no information before the Panel regarding individual instances of application of the national aid schemes.[809] The Panel separated the Member States' application of the disputed regulation and limited the scope of the dispute to an 'as such' claim. The approach supports my thesis that in cases where individual instances of application of general rules are not challenged (or do not exist), the Panel will not address its recommendations to the Member States because their actions are not necessary for restorative purposes.

Importantly, the focus of the Panel was on whether ruling on individual disbursements was necessary to provide an effective solution to the dispute, in line with my analysis in Chapter VI above. The Panel noted that Article 19.1 of the DSU permitted it only to make a recommendation to 'bring its measures into compliance' but it could not request cessation of further disbursements.[810] Accordingly, individual disbursements of Member States were neither expressly stated in the request, nor was ruling on them helpful for purposes of ensuring the effective solution to the dispute. The Member States were thus not afforded a respondent status in this dispute. Furthermore, as was noted in Chapter VII, the EC assured the Panel that it would ensure compliance on behalf of its Member States, if necessary.

The Panel's conclusion regarding multiple respondents in *EC – Commercial Vessels* can be contrasted with that in *EC – Large Civil Aircraft*. Unlike *EC – Commercial Vessels*, the claimant in *EC – Large Civil Aircraft* identified various instances of financing. Though drafted in broad terms, the claim alleged more than 300 instances of subsidisation over a period of almost 40 years by the EC and four of its Member States with respect to large civil aircraft.[811] The US specifically targeted German, French, Spanish and UK subsidisations of Airbus through the provision of infrastructure grants.[812] The requested remedy *inter alia* expressly included the withdrawal of export subsidies by these four Member States.[813] The EC contested the US' claim that Member States should be included in the dispute as co-respondents with the EC.[814]

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[808] *EC – Commercial Vessels*, PR, para 4.53. The Panel noted that authorization by the European Commission applies to the aid scheme as such, not to the grant of aid in individual cases pursuant to the aid scheme, see para 7.51.
[809] *EC – Commercial Vessels*, PR, para 4.51.
[810] *EC – Commercial Vessels*, PR, para 7.24.
[811] *EC – Large Civil Aircraft*, PR, para 7.1.
[812] *EC – Large Civil Aircraft,* PR, para 4.271.
[813] *EC – Large Civil Aircraft*, PR, para 3.2.
[814] Here the EC contested a broad term 'launch aid' which was used by the US to refer to the pool of the EC and Member State instances of financing of Airbus. The EC stated that 'rather than using the suggestive and oversimplifying term 'launch aid', the EC will refer to each of the member States' measures separately' WTO Panel Report, *EC – Large Civil Aircraft,* para 4.85.

A question arose as to who was the proper respondent in this dispute. In its usual manner the EC claimed that it was the only proper respondent.[815] However, in line with the principle of independent responsibility (Chapter III), the Panel noted that in addition to the EC France, Germany, Spain and the UK were also the proper respondents in this dispute, irrespective of any internal arrangements in the EU.[816]

The Panel's decision to include the four Member States as co-respondents in this dispute was remedy-focused. Unlike *EC – Commercial Vessels*, the claimant in *EC – Large Civil Aircraft* asked not only that the EC state aid measures as such, but also specific instances of funding by certain Member States be declared unlawful. In other words the claim challenged not only legal instruments as such but also specific instances of application, calling for remedial action from both the EC and the four Member States. Addressing the recommendation to the EU alone would be insufficient to achieve a positive solution to the dispute because elimination of an inconsistent measure of general application would not result in elimination of Member States' inconsistent measures.

4.3 Regulatory measures

Disputes over regulatory measures also reveal a remedial approach to the distribution of shared responsibility between the EU and its Member States.

Though the two disputes differ in their facts, the nature and focus of the claim in *EC – Biotech Products* resembles that in *EC – Geographical Indications* discussed above in one relevant respect. As in *EC – Geographical Indications*, the claim in *EC – Biotech Products* was about Member States measures 'as applied' but it in fact targeted rules of general application. The proper respondent was thus not the Member States but the EC, because the EC was best placed to eliminate the inconsistency.

In this dispute the US complained that the EC carried out a *de facto* moratorium on the approval of biotech products which was a condition of importing biotech products to the EC. The Panel set out to determine whether there were any grounds for believing that the EC or one of its entities – the Member States, the European Commission or the Council – had intended to

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[815] *EC – Large Civil Aircraft*, PR, para 7.169.
[816] *EC – Large Civil Aircraft*, PR, para 7.174. Whether or not it will address its rulings and recommendations to the Member States as well will be known, according to the Panel, only once its decision-making process is completed, para 7.177.

suspend biotech product approval.[817] The issue before the Panel was whether these entities could prevent or delay approval.[818] The Panel considered sovereign actions[819] of the Member States which were involved in the process of biotech product approval, including the adoption by the environment ministers of five EC Member States, of a declaration on suspension of authorization; delay in assessment of 9 applications at Member-State level;[820] and the role of the Council and Member States in the Regulatory Committee.[821] The complainant itself noted that the European Commission's approval of applications for biotech products had consistently been blocked by the five Member States.[822] Thus the conduct before the Panel was that of the Member States, in addition to that of the EC.

The Panel found that Member States' conduct had violated the claimant's rights. It found a systematic opposition to final approvals of biotech products by certain Member States who formed a 'blocking minority'.[823] Moreover, it acknowledged that the European Commission sought to introduce the 'interim approach', the purpose of which was to resume the authorisation process, but it lacked political support from the Member States.[824] It is thus clear from the facts of the case that the failure to approve biotech products was caused by the actions of specific Member States, not the EU itself.

However, despite the inconsistencies on the part of the Member States, the question before the Panel was not whether certain Member States had or had not approved biotech products, but whether the system of approval itself could lead to an outright ban of approvals.[825] In other words the claim was about deficiencies in the system as such. According to the Panel, it was not necessary to rule on the general moratorium itself (i.e. Member States' conduct) in order to

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[817] *EC – Biotech Products*, PR, para 7.460.
[818] *EC – Biotech Products*, PR, para 7.466.
[819] Under laws governing the approval of biotech product at a time of the dispute, individual Member States had a right to provisionally restrict or prohibit the use and/or sale of an approved biotech product in their own territory if they had detailed grounds for considering, that the particular product posed a risk to human health or the environment. In cases where a Member State was to adopt a 'safeguard' measure, it had an obligation to inform other EC Member States and the Commission of the action it has taken and a decision the Member State 'safeguard' measure then had to be taken at Community level, Directive 2001/18/EC, O.J. 17.4.2001 L106/1 and Regulation (EC) No. 258/97, O.J. 14.2.1997 L043/1.
[820] *EC – Biotech Products*, PR, para 4.150-4.151. The European Commissioner David Byrne stated that the reluctance of Member States to approve the placing on the market of new biotech products has resulted in a complete standstill in the current authorizations and a de facto moratorium, *EC – Biotech Products*, PR, para 4.146.
[821] *EC – Biotech Products*, PR, paras 4.200-4.204.
[822] *EC – Biotech Products*, PR, para 4.586.
[823] *EC – Biotech Products*, PR, para 7.493.
[824] *EC – Biotech Products*, PR, para 4.586.
[825] Irrespective of the different effect of the European Commission the Member States in the creation of the general moratorium, the delays at the Community level and those at Member States' level were merged into what the Tribunal referred to as a 'general moratorium', see *EC – Biotech Products*, PR, para 7.1340.

reach a positive solution to the dispute.[826] The focus of the Panel was on the process of approval as such, whereas Member States' conduct was regarded as a way of proving that an outright ban was in fact possible within the current framework and was thus improper. The claimant's request was not to eliminate inconsistent Member States' conduct but to trigger changes in the general regulatory process. In this respect the dispute resembles *EC – Geographical Indications* in that Member States' conduct is examined in order to determine inconsistencies of the rules as such. Similar to my conclusions with respect to that case, the decisive factor in the determination of multiple respondents is the remedy requested by the claimant, not attribution of conduct under consideration. This approach explains why the respondent in this dispute was the EC itself, not the Member States and supports my argument that attribution of conduct is not a decisive factor in international economic disputes.

EC – Asbestos, another regulatory dispute involving the EU and its Member States, was decided prior to *EC – Biotech Products*. Though the exact reasoning of the parties in *EC – Asbestos* is not known, it seems that the focus on the remedy had been the driving force in the choice of bringing a claim against the EC, even though the challenge targeted a national measure. In *EC – Asbestos* the EC was the respondent in a case brought by Canada regarding a French ban on chrysotile fibre.[827] France, which imported 2/3 of its chrysotile fibre from Canada, imposed a ban in 1996 by decree and various other EC Member States had also introduced restrictions on the use of asbestos since the 1980s. Several years later in 1999 the EC had adopted legislation banning asbestos products which was to enter into operation in 2005.[828] Thus at the time of the claim in *EC – Asbestos* case, the EU measure was not yet in force.

The *EC – Asbestos* case reveals a functional compliance-focused approach to international responsibility of the EU and its Member States. The primary interest of the claimant in this case was the ban on asbestos products. At the time of the claim, the EC ban had not yet been in force, only a national measure. The inability to bring a legal challenge against an EC-wide measure must have been the reason why Canada requested that the Panel recommend France make its domestic measure compatible with its WTO obligations.[829] At the same time, since the EU-wide regulation was underway at the time of the panel proceedings, the claim was directed against the EC (note: not against an EC measure). The result of such procedural tactic was a somewhat confusing case study of international responsibility: a claim against the EC

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[826] *EC – Biotech Products*, PR, para 6.79-6.83.
[827] *EC – Measures Affecting Asbestos and Products Containing Asbestos (EC – Asbestos)* WT/DS135, PR adopted 18 Sept 2000.
[828] The EU decision was adopted in on 4 May 1999
[829] *EC – Asbestos*, PR, para 3.3.

challenging a French measure of general application. This conundrum can be explained by the fact that the time when the EC had adopted its common policy banning asbestos coincided with the timing of the dispute proceedings. A ruling on the French measure would not have achieved compliance and so would have failed to achieve a positive solution to the dispute since the later EU-wide ban would have been intact. Placing the EC in a respondent status pre-empted its ability to enforce the EC-wide ban even before it became law proper. The *EC – Asbestos* dispute is thus a rather extreme example of the functional approach employed by the DSB to achieve a positive solution to the dispute, in line with my analysis in Chapter V.

The above cases illustrate remedial international responsibility adopted in the WTO dispute-settlement. Determination of multiple respondents is based on whose actions are necessary to ensure compliance with WTO law. That in turn depends on the scope and nature of the claim. The EU, its Member States, or both, may be respondents in a particular dispute based on what is necessary for remedial purposes, irrespective of the internal division of competences or attribution of conduct.

5. Conclusion

I argued in Chapter VI that the primary focus of the WTO DSB is to ensure a positive solution to dispute. Since withdrawal of an inconsistent trade rule is a central remedy under the WTO regime and the EU is in most cases the legislator of trade rules of general application, it is the optimal respondent in WTO disputes (Chapter VII). However, in several cases restorative action on the part of Member States was (also) necessary for compliance purposes. These latter disputes were the focus of the present chapter.

Analysis of the WTO case-law has revealed a correlation of the scope of the claim and the requested remedy on the one hand, and inclusion of Member States as co-respondents on the other. Differentiation between claims 'as such' and claims 'as applied' is useful for this purpose. Challenges 'as such' cover rules of general application, whereas the application of such rules in specific cases constitute 'as applied' claims.

Close analysis of customs, subsidies and regulatory disputes reveals patterns in the DSB's determination of multiple respondents. The EU is in most cases the proper respondent in 'as such' disputes because it is often best placed to bring measures of general application into compliance with WTO obligations. Member States are commonly necessary parties when disputes also cover specific instances of application of trade rules because restorative action on their part is necessary to ensure a positive solution to the dispute.

The competence-based approach to international responsibility as well as the normative control theory are insufficient to explain why panels decide to address some of their recommendations to the EU, while others (also) to its Member States, when dealing with cases in the same area of competence. This is so because the basis for distribution of shared responsibility is not static and depends on what remedy the claimant requests. The findings of this chapter thus further reinforce my thesis of remedial international responsibility.

CHAPTER IX – NORMATIVE IMPLICATIONS FOR THE EU'S FREE TRADE AGREEMENTS

1. Introduction

In Part I of this thesis I argued that the EU and its Member States are independently responsible for their joint obligations. I further concluded that international dispute-settlement practice provides no support for the theory that adjudicators follow some predetermined structural basis in deciding exclusive responsibility within the EU. International trade and investment case-law does not support the EU's claim that responsibility follows the internal division of competences or that the conduct of Member States' authorities is attributed to the Union when they implement EU law.

In Part II of this thesis I developed a theory of the remedial international responsibility of the EU and its Member States in international economic law. I argued that distribution of shared responsibility is remedy-based. Responsibility is shifted to the entity which is best placed to restore order and eliminate wrong. Because of the restorative rather than corrective nature of remedies in international economic law, distribution of shared responsibility typically raises the question of the proper respondent(s). Whether the proper respondent is the EU or its Member States, or both, in a given dispute depends heavily on the nature of the treaty regime in question. I argued that the system of remedies for the protection of obligations under a given treaty is decisive for how international courts and tribunals will distribute shared responsibility within the EU.

My findings are the result of an in-depth case-law analysis, primarily under two multilateral economic treaties which were concluded in a mixed form with both the EU and its Member States holding joint obligations – the international trade regime under the WTO Agreements and the investment regime under the ECT.[830] The WTO case law analysis revealed that the DSB employs what I called 'the positive solution test' to identify the proper respondent(s). WTO panels address their recommendations to the party (or parties) which is necessary to ensure compliance with WTO law. Investment tribunals, on the other hand, focus on the proximate cause of harm which enables them to award compensation. I conducted an analysis both of the substantive nature of obligations and relevant procedural aspects of participation of

[830] Three main reasons guided this choice. Firstly, both the WTO Agreements and the ECT are mixed treaties with the EU and its Member States as parties. Secondly, neither agreement contains a declaration of competences which would separate EU obligations from those of the Member States. The third reason was the availability of dispute-resolution practice.

EU/Member States in the WTO regime and the ECT in order to explain why the EU is the optimal respondent in WTO claims, whereas investment claims have so far been typically brought against Member States. Finally, I conducted an additional WTO case-law analysis to identify the special cases of multiple respondents in WTO law. I suggested that the inclusion of Member States in the dispute-settlement proceedings varies depending on the object of the disputing party's claim.

In the following analysis I shall attempt to apply the above normative outcomes to new-generation FTAs that the EU has recently concluded or is in the process of negotiating. Analysis is based on my extensive discussions in the autumn of 2017 with a number of officials involved in the negotiation of the new FTAs, including representatives of the Legal Service of European Commission, the Directorate General for Trade, the EU Mission in the WTO, the Mission of Canada to the EU and the United States Trade Representative. These discussions provided insight into the process of negotiation of the dispute-settlement mechanism under the new FTAs and the approach to the distribution of shared responsibility of the EU and its Member States adopted by both the EU and its trading partners.

My aim here is not to provide a policy evaluation of the normative outcomes of this thesis. My analysis is limited to identification of the rationales that govern the allocation of international responsibility in the EU. In my conclusions in Chapter X I shall nevertheless note some of the critical questions that lead to further debate on remedial international responsibility in international economic law.

Section 2 of this chapter will outline the application of the normative findings of this thesis to dispute resolution under the EU's new-generation FTAs. It will then discuss the mechanism for the determination of the proper respondent for investment claims under new investment chapters (Section 3). The last Section 4 of this chapter will consider procedural safeguards which serve as a guarantee to third parties that the Union will not use its discretion to determine the proper respondent as a way of obstructing adjudication.

2. Application of the normative findings to new-generation FTAs

The Treaty of Lisbon gave new impetus to the EU's external action in the area of common commercial policy. Among other things the Treaty of Lisbon transferred competences in the field of foreign direct investment from Member States to the Union and integrated it in the EU's common commercial policy. Empowered with these new powers, the EU has started to negotiate a number of FTAs with third countries which, in addition to trade liberalisation, also

cover investment protection. The Union has recently signed treaties with several countries, including the CETA, the EU-Singapore Free Trade Agreement (EUSFTA), and the EU-Japan Economic Partnership Agreement (EPA).[831] Investment chapters under these FTAs are replacing the web of BITs that the EU Member States have concluded with third parties. Accordingly, investment arbitration regimes under the Member States' treaties are being gradually replaced by the dispute-resolution mechanism established in new-generation FTAs.

The purpose of this chapter is to apply the normative findings of this thesis to the dispute-resolution mechanisms under new-generation FTAs. The question of mixity of these FTAs provides a significant contextual point for further analysis.

2.1 The question of mixity

Until May 2017, it was unclear whether future EU's FTAs would be mixed or EU-only agreements. If Member States were not party to new-generation FTAs, they would not be bound by these agreements from the international law perspective. Accordingly, the question of the distribution of international responsibility between the EU and its Member States would have been moot (though the question of the internal allocation of financial responsibility would have remained). Such outcome was likely if one were to follow the position that the EU holds exclusive competence to conclude future investment treaties. Nevertheless, since the beginning of my doctoral studies in 2014 I have relied on the assumption that both the EU and its Member States would become parties to the new FTAs. This explains why I chose mixed agreements like the WTO and the ECT as key legal sources for my analysis. *Opinion 2/15*, delivered on 16 May 2017, turned my assumption into a legal certainty as the CJEU concluded that the EU does not hold sufficient competence to conclude the new free trade agreements alone and stated that they must also be signed and ratified by all Member States.

Much has been written about *Opinion 2/15*, though often only in the form of blog posts or other short formats.[832] The dispute concerned the EUSFTA which, according to the European Commission, could be concluded as an EU-only agreement because the Union held all necessary powers to do so.[833] The European Parliament supported the European Commission's

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[831] For a list of the EU's FTAs, see Overview of FTA and other trade negotiations at http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf, last visited 1 Aug 2018.
[832] For a more in-depth analysis, see David Kleimann, 'Reading Opinion 2/15 : Standards of Analysis, the Court's Discretion, and the Legal View of the Advocate General' (2017) 23 EUI RSCAS.
[833] *Opinion 2/15*, para 12. In relation to portfolio investment the European Commission stated that the EU has exclusive competence pursuant to Art 3(2) TFEU because of the overlap between (i) the commitment contained in

claim of exclusive competence.[834] The Council and certain Member States, on the other hand, contended that parts of the treaty cover areas of shared competence and thus called for a mixed form of treaty-making.[835] The ECJ, upon reviewing the agreement chapter by chapter, concluded that the EU lacks the necessary exclusive competence to conclude the agreement alone.[836] Importantly, the ECJ ruled that provisions setting out an investor-state dispute-settlement (ISDS) mechanism is an area of shared competence and cannot be established without the Member States' consent.[837] The Court also ruled that Chapter 15 of the FTA, which lays out the dispute-settlement mechanism between the parties cannot be concluded by the EU alone.[838] The ECJ's position echoed the Opinion of AG Sharpston, who considered that not all parts of the agreement fall within the EU's exclusive competence and therefore the agreement cannot be concluded without the participation of all of its Member States.[839]

Opinion 2/15 has important implications for the EU's external economic governance. Following the Court's interpretation, both CETA and EUSFTA were concluded in a mixed form, though the main part of CETA negotiations was conducted with a view to it being an EU-only agreement. Like CETA and EUSFTA, it is likely that future EU trade and investment agreements will also be mixed.

Clarification of the mixity of the Union's FTAs will likely be welcomed not only by Member States by also by the Union's trading partners. Though mixed treaty-making inevitably complicates and prolongs the process of treaty ratification,[840] it also ensures that Member States give direct consent to obligations under an FTA. In this way mixity can be considered a tool for organising both the EU and Member States' internal and external relations.

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that agreement concerning those investments and (ii) the prohibition of restrictions on movement of capital and on payments between Member States and third states that is laid down in Art 63 TFEU, see para 16.

[834] *Opinion 2/15*, para 18.

[835] *Opinion 2/15*, para 19.

[836] Among other, the ECJ concluded that the EU does not have exclusive competence in relation to portfolio investments, see *Opinion 2/15*, para 244.

[837] *Opinion 2/15*, paras 292-293. The Court reasoned that an investor may decide to submit a dispute to arbitration rather than courts of a Member States, without that Member State being able to oppose this, see para 291.

[838] *Opinion 2/15*, para 304.

[839] Opinion of AG Sharpston delivered on 21 Dec 2016.

[840] The very recent example of how mixity can complicate the treaty-making process is the rejection by the Walloon government to ratify CETA. Under the federal constitution of Belgium, Walloon approval is necessary for Belgium to be able to ratify the agreement. Upon revision, Wallonia ultimately withdrew its veto.

Clarity on mixity is especially relevant in relation to the dispute-settlement system under the new treaties. Recently concluded EU's FTAs set out two fora for dispute resolution: a general dispute-settlement mechanism for trade measures and a special ISDS forum.[841]

Before examining the application of the normative findings of this thesis to the dispute-settlement regimes under the new FTAs, one general remark is timely. I concluded in Chapter III that the Union and its Member States remain independently responsible for their joint international obligations, irrespective of the internal division of competences. In the case of mixed agreements which do not contain a declaration of competences, the obligations of the EU and its Member States are joint and they are independently responsible for their violations. My analysis further revealed that while both the Union and Member States are internationally responsible for all obligations under mixed agreements, the proper respondent in a particular case is that best placed to remedy a breach under consideration. The focus is not on the responsible party, but on the party which is best placed to bear responsibility. The principle of independent responsibility and remedial international responsibility thus complement each other. Two entities may be independently responsible for their joint obligations but which of them will bear exclusive responsibility in a given dispute depends on which of them is best placed to restore the order. The coexistence of these two stages in the determination of responsibility (i.e. independent responsibility and remedy-based exclusive responsibility), which I extrapolated from an extensive case-law analysis conducted in Part II, has been set out expressly in new-generation FTAs. For example, Article 1.8 of CETA states that each party is fully responsible for the observance of all provisions of this agreement. This provision is novel as it has not been provided in other mixed treaties, such as the WTO or the ECT. It expressly lays down the principle of independent responsibility of the EU and its Member States in mixed agreements. At the same time Article 8 of CETA establishes a mechanism for the determination of the respondent, which is applied on a case-by-case basis. Accordingly, the normative findings on the principle of independent responsibility and remedial international responsibility suggested in this thesis are expressly reflected in new-generation FTAs.

[841] For example, CETA Sect F Ch 8 (investment disputes), Ch 29 (trade disputes); EUSFTA Ch 9 (investment disputes), Ch 15 (trade disputes).

2.2 Application of the normative findings to trade disputes

Trade disputes under the new FTAs are covered by the general treaty dispute-settlement mechanism which closely follows the WTO dispute-resolution model.[842] In fact both agreements address a possible overlap with WTO obligations through choice of forum provisions. Article 29.3 of CETA, and the parallel Article 15.21 of the EUSFTA, provide that if an obligation is equivalent in substance under CETA and the WTO Agreement, a party may not seek redress for the breach of such an obligation in the two fora.

Application of the normative findings of this thesis to trade disputes under the new FTAs is straightforward. I suggest that trade disputes will follow the pattern of the optimal respondent in WTO law which I identified in Chapter VII of this thesis.[843] To reiterate, it is likely that the EU will be the proper respondent in *trade disputes* under the new FTAs. In most cases the EU is best placed to ensure compliance with trade obligations. In addition, the internal interdependency of the EU and its Member States inherent in mixed treaty-making will allow third parties and tribunals to accept the EU's assumption of international responsibility on behalf of its Member States, similarly to the DSB's approach in WTO dispute-settlement.

My conclusions differ with respect to the special cases of multiple respondents addressed in Chapter VIII. In that chapter I identified a correlation of the scope of a claim and the DSB's decision to address its recommendations to Member States in addition to the EU. I suggested that the EU is the proper respondents in claims 'as such', whereas Member States are the necessary parties in challenges 'as applied'. I argue that it is unlikely that the patterns identified and discussed in Chapter VIII will be repeated in new-generation FTAs.

As I suggested in Chapter VII, from an international law perspective the relationship between the EU/Member States on the one hand, and other members of the WTO on the other, is *de facto* bilateral. In practice the EU and its Member States participate in the WTO as one bloc (e.g. they have special voting arrangements) but they each constitute separate and independent members of the WTO. Though considered during the negotiations, a disconnection clause, which would exclude the application of the WTO obligations from the inter-Member States relations, has not been included in the WTO Agreements. Accordingly, from a purely external perspective, the Union and its Member States are unrelated and independent members of the WTO.

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[842] For example, the dispute settlement laid out in CETA Ch 29.
[843] Rules for the choice of forum between the WTO and CETA are provided in CETA Art 29.2.

Thus the new FTAs are different from the WTO Agreements – they are *de iure* bilateral because the EU and its Member States are expressly defined as one party (referred to as the 'EU Party').[844] Unlike under the WTO system, where from an international law perspective intra-EU disputes are *de jure* possible, the new FTAs do not establish Member States' obligations to each other. It should be noted that the definition of the parties in, for example, Article 29.2 of CETA specifies that the 'EU Party' covers both the 'EU *and* its Member States' as well as the 'EU *or* its Member States'. While the second prong does refer to the separateness of the two entities and thus reinforces the principle of independent responsibility discussed in Chapter III of this thesis, challenges to Member States are unlikely. This is so because Article 29.2 also provides that the EU and its Member States are parties to the treaty "*within their respective areas of competence as derived from the Treaty on European Union and the Treaty on the Functioning of the European Union*". This novel generalised declaration of competences[845] allows the EU to claim that it is the proper respondent in all trade disputes. It is likely that, because of the expressly bilateral nature of the new treaties and the reference to the internal division of powers, the number of special cases of both the EU and its Member States as co-respondents will be, at most, rare.

While I will limit my discussion of future *trade* disputes under the new FTAs to the above, the new *investment* chapters beg a more nuanced analysis and will thus be the focus of the current chapter. The dispute-resolution mechanism under the new treaties reveals a combination of Part II normative findings attributed to both the WTO and the ECT.

2.3 Application of the normative findings to investment disputes

Application of the normative findings of this thesis to investment disputes under the new FTAs is complex. On the one hand, in line with Chapter VII analysis, the substantive nature of investment obligations under the new FTAs points to Member States as the proper respondents in investment disputes. As was suggested, Member States' actions are commonly the proximate cause of harm to investors. On the other hand, the new FTAs are innovative in that they oblige

[844] For example, CETA Art 1.1 provides that "Parties means, on the one hand, the European Union or its Member States or the European Union and its Member States within their respective areas of competence as derived from the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as the 'EU Party'), and on the other hand, Canada".
[845] For more on declaration of competences, see Sect 3.2 of Ch III above.

third parties to allow the Union internally to determine the proper respondent.[846] Allocation of responsibility is governed by Regulation (EU) No. 914/2014 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 under international agreements to which the EU is a party (Regulation No. 914/2014).[847] I shall examine the mechanism for the allocation of responsibility set out in the Regulation No. 914/2014 in the following sections of this chapter. Suffice it here to say that the EU's rules place the Union, not the Member States, at the center of investment-dispute resolution, contrary to the general pattern observed in Chapter VII. This relates back to the Treaty of Lisbon which transferred competence in the area of foreign direct investment from Member States to the EU. Accordingly I argue that the new FTAs establish primacy of procedural rules, which place the EU at the forefront of dispute resolution, over investment obligations and the system of remedies designed to protect them.

As my discussions with the negotiators of the new FTAs reveal, in exchange for empowering the EU with a discretionary right to modify the general pattern of Member States as the optimal respondents in investment disputes due to their being the proximate cause of harm (Chapter VII), third parties negotiated a number of procedural safeguards. These guarantee that the award will be complied with, irrespective of whether the Member States are respondents in a given investment dispute. Procedural rules effectively transform the internal interdependency of the EU and its Member States into an external interdependency, thus allowing third parties to rest assured that the 'EU party' will not circumvent its obligations by hiding behind the institutional veil. Thus, under the new FTAs the internal interdependency, which I discussed in the WTO context in Chapter VII, is elevated to the domain of international law. Though not yet tested in practice, the new FTAs demonstrate how the EU's international responsibility can be constructed through procedural mechanisms.

The following section will examine the mechanism for the determination of respondents in investment disputes under the new FTAs.

3. The mechanism for the determination of respondents under the new FTAs

[846] A similar mechanism was provided in the ECT, albeit only on a voluntary basis.
[847] For more on the Regulation No. 914/2014, see Armin Steinbach, *EU Liability and International Economic Law* (Hart Publishing 2017).

Under new FTAs both the EU and Member States can be respondents in investment disputes.[848] New-generation FTAs also provide a mechanism for determining the proper respondent(s) in disputes involving the EU.[849] Article 8.21 of CETA, entitled 'Determination of the respondent for disputes with the European Union or its Member States' was drafted at a time when both negotiating teams considered the new treaty to be an EU-only agreement; thus the relevance of the provision only increased with the ultimate choice of mixity. Under Article 8.21(1) the claimant shall deliver notice to the EU requesting a determination of the proper respondent. The EU shall, upon its decision, inform the investor as to whether the EU or its Member States, or both, shall be the proper respondent(s) in a given case.

The scheme for the determination of respondents negotiated under the new FTAs is not novel. Pursuant to Article 26(3)(b)(ii) of the ECT[850] the EC Council and European Commission submitted a statement which addressed *inter alia* the determination of the respondent in investor-state disputes under the ECT.[851] The statement established that the EC and their Member States have both concluded the ECT and are thus internationally responsible for the fulfilment of the obligations contained therein, in accordance with their respective competence. The statement further provides that the EC and its Member States shall, if necessary and on investor's request, determine among them who is the proper respondent. The mechanism, however, is yet to be used. As was mentioned above, Member States have been respondents in all publicly available disputes under the ECT, including those with an EU dimension. Such was the choice of investors themselves who opted not to follow the procedure allowing the EU to determine a proper respondent internally, as provided in the statement. The statement did not constitute a procedural technique powerful enough to override the content of investment obligations which, as I suggested in Chapter VII, is closely related to Member State conduct and thus organically called for Member States' participation. It is my belief that this is so partly because the EC statement was provided in the form of a letter annexed to the main body of the ECT rather than its main text and partly because its mandatory force was further diminished by a qualification that the statement is without prejudice to the investor's right to initiate proceedings against both the EC and its Member States.

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[848] Art 8.1 provides that respondent means Canada or, in the case of the EU, either the Member State of the EU or the EU pursuant to Art 8.21.
[849] For example, determination of the respondents in EUSFTA Art 9.15, CETA Art 8.21.
[850] Art 26(3)(b)(ii) required each Contracting Party that is listed in Annex ID to provide a written statement of its policies, practices and conditions, Annex 1 to the Final Act of the European Energy Charter Conference (adopted 16-17 Dec 1991, opened for signature 17 Dec 1994) (1994) 34 ILM 360.
[851] Statement submitted by the European Communities to the Secretariat of the ECT, OJ L 336, 23.12.1994, 115.

Unlike the ECT, the scheme which allows the EU to determine the proper respondent internally is mandatory under the new FTAs. It is provided in a form of a legally binding provision in the main body of the treaty and thus investors have an obligation rather than choice to request the EU to determine the respondent. The loose language in the EC's statement under the ECT, that the EC and Member States shall determine the respondent 'if necessary' is replaced by the obligatory verb 'shall' in the new FTAs.[852] The new treaties eliminate the investor's choice of respondent by obliging it to send its request for consultation concerning an alleged breach to the EU.[853] The system established under the new FTAs is not without ambiguities, however. For example, Article 8.19 of CETA provides that consultations concerning a dispute take place in Brussels if measures challenged include a measure of the EU, or in Member States if they are exclusively measures of that Member State. It remains unclear how an investor is to determine whether conduct is that of the EU or its Member State beforehand and how Article 8.19 corresponds to the EU's right and obligation to determine the proper respondent under Article 8.21. It is likely that for practical reasons all consultations will take place in Brussels.

In addition to the establishment of a mechanism under which the EU itself will determine whether it will act as respondent in a given dispute, the new FTAs also provide a forum where it will in fact be able to act as such. One of the practical and procedural reasons which prevented the EU's participation in dispute settlement under the ECT was that the EU is not a party to the ICSID Convention and could not become one unless changes were introduced which allowed international organisations to become parties to the Convention. The EU's new FTAs were accompanied by calls for reform of ISDS. Among the major developments are plans to create the Investment Court System (ICS) which are increasingly gaining speed and form.[854] The European Commission is currently working on the Multilateral Investment Court (MIC) project.[855] It is expected that by the time CETA takes full effect, a new and improved ICS will replace the current investor-state dispute-settlement mechanism with respect to the EU's investment treaties.

It follows then, that investment arbitration under the new FTAs allows the EU to place itself as respondent in investment disputes. Differently from BITs and the ECT, new-generation

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[852] CETA Art 8.21(1) provides that "the investor shall deliver to the European Union a notice requesting a determination of the respondent".
[853] CETA Art 8.19(7).
[854] CETA Art 8.9 provides that the parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Before the multilateral investment tribunal is establishes, CETA provides for a possibility to submit a claim under ICSID, ICSID Additional Facility Rules, or any other rules on agreement of disputing parties, see Art 8.23(2) CETA.
[855] For more on the European Commission's Multilateral Investment Court project, see http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608, last visited 1 August 2018.

investment treaties also establish a dispute-resolution forum where the EU's participation will be practically possible. A question then is whether and how these novel arrangements will redefine the distribution of shared responsibility of the EU and its Member States in investment arbitration.

To reiterate the normative findings of this thesis, I noted in Chapter VII that Member States have so far been the exclusive respondents in investment disputes under the ECT, even though it is a mixed agreement which binds both the EU and its Member States. I explained this pattern by suggesting that the content of investment obligations is closely linked to Member States' conduct. From a remedial perspective, a wider EU law dimension, even if present, is in most cases insignificant. Differently from the WTO system, where the primary aim is overall regulatory compliance, the aim of investment disputes is compensation. Compensation is triggered by the existence of a breach and is calculated on the basis of harm, not according to the scope of regulatory inconsistency. Thus, from the investor's perspective, it is sufficient to challenge a measure which is the proximate cause of harm. I suggested that in most situations it is the host Member States' conduct which constitutes the proximate cause of harm because Member States have a direct relationship with investors. That the source of a challenged Member State measure is an EU wide policy is essential to WTO panels that are called to identify regulatory inconsistencies and are not required to calculate damage (unless noncompliance calls for retaliation). Investment tribunals, on the other hand, perform an entirely different task as their focus is the determination of the degree and extent of damage, not the investigation of an overall regulatory system.

The new FTAs reverse this pattern through a negotiated construct which allows the EU itself to determine the proper respondent in a given dispute. As will be discussed below, it is likely that under the new system the EU will become a key respondent in investment disputes. The question arises as to why third parties have agreed to this new arrangement?

The answer to this question recalls Chapter VII's analysis of the internal interdependency of the EU and its Member in the WTO regime. I explained that in WTO law the EU is in most cases allowed to assume international responsibility on behalf of its Member States because these are internally bound to the EU's international commitments. This reduces the risk of circumvention of obligations and allows the DSB to address their rulings to the EU even when Member State compliance is necessary to ensure a positive solution to a dispute. In other words, provided there are sufficient procedural safeguards, the DSB typically leaves the matter to be determined in accordance with the internal rules of the EU (though in some cases it will still call for Member States to act as co-respondents, as I have explained in Chapter VIII). These

same considerations form the basis of the third-party position under the new FTAs. The EU's partners under the recently concluded FTAs have accepted the arrangement which will place the decision to determine the proper respondent with the EU precisely because the new FTAs provide sufficient procedural safeguards to ensure that a remedy will be delivered. In addition, while interdependency of the EU and its Member States in the WTO context is internal (i.e. binding under EU law), the system of safeguards under the FTAs is binding *vis-à-vis* contracting third states. The following section examines these safeguards.

4. Procedural safeguards under the new FTAs

The new FTAs contain several procedural safeguards aimed at providing additional security to third parties in case the EU fails to determine the proper respondent or otherwise hinders third parties from exercising their right to judicial protection. These procedural safeguards allow third parties to leave it to the EU to decide how it participates in the negotiations. For example, during the negotiations of CETA Canada showed deference to the Union's internal constitutional arrangement by allowing the EU fully to represent its Member States. In fact, in contrast to Canada's large delegation which included representatives of provinces, EU Member States were not present at all during negotiations of the treaty as they were represented by the EU Directorate General for Trade. Revealing a functional approach, the focus of third parties is not whether and how Member States participate in treaty negotiations, but whether there are sufficient procedural safeguards which ensure that Member States are bound by the treaty.

4.1 Safeguards against inadmissibility defence

When it comes to the scheme under which the EU itself determines the proper respondent, one of the central concerns of third parties was that the arbitral process could be blocked by a delay in EU decision-making. In CETA this concern is addressed by Article 8.21(4) which establishes a time of 50 days for the EU's determination of the respondent. The provision states that if no decision is made within this period, a Member States shall be the respondent if the challenged measure is exclusively that of a Member State, whereas if it also includes a measure of the EU, the EU shall be a respondent. It is unclear how an investor would determine the exact nature and scope of the measure, and it is thus likely that in Article 8.21(4) situations all investor claims would be filed against the EU.

Article 8.21(4) was adopted as a procedural safeguard for the treaty partner. It was hoped by third party negotiators that recourse to it would in practice never be necessary. From an EU law perspective the provision is problematic as it leaves it to the tribunal to decide whether a measure is exclusively that of a Member State or the EU. Under Article 19(1) of the TEU the CJEU has exclusive jurisdiction to interpret and apply EU Treaties, including questions concerning competence. While Article 8.21(4) provides a necessary safeguard for the treaty partner, my discussions with informed officials reveal that there was an intention that this clause is not triggered.[856]

An arguably stronger procedural safeguard for the treaty partner is enshrined in Article 8.21(6) which establishes the 'no inadmissibility' rule. This provision states that if the EU or a Member State is a respondent, neither can object to the claim on the ground that the respondent was not properly determined. The 'no inadmissibility' rule applies both to the determination of a respondent by the EU pursuant to Article 8.21(1) as well as in the Article 8.21(4) situation when the determination is made by the investor upon the EU's failure to do so within the 50-day period.

The purpose of the 'no inadmissibility' rule is to safeguard third parties from the Union's procedural defence that the claim has been brought against a wrong party. There have so far been no cases where an inadmissibility defence has been employed by the Union, most likely because the EU is seeking to prove itself as a significant global player. A procedural defence of inadmissibility should not be conflated with the substantive defence that a challenged measure is required under Union law. This latter defence has caused confusion in practice and so I shall discuss it in the following section.

4.2 Safeguards against Micula-type situations

The question of legitimacy of intra-EU obligations has been a subject of extensive debate among scholars and practitioners since the Treaty of Lisbon transferred competence in the field of FDI from the Member States to the EU. Analysis of the status of intra-EU BITs falls outside the scope of this thesis and will thus not be addressed in detail. However, what is important for purposes of the present analysis is the question of the supremacy of EU law over that of

[856] Informal interview conducted on 27 Sept 2017 at the Mission of Canada to the European Union, Brussels.

international treaties governing investment obligations which has arisen mainly in the context of disputes under intra-EU BITs, including disputes between Member States under the ECT.

The European Commission holds EU law supreme in matters concerning investment protection obligations between Member States. Member States have, on several occasions, employed the notion of primacy as a defence against claims brought by investors. Importantly, the supremacy argument has so far been limited to situations where a claim is brought by an EU-incorporated investor against a host Member State. There is thus no clear indication that the European Commission or Member States would employ the supremacy defence in disputes under the new FTAs with third parties. Nevertheless, as I was told by US TTIP negotiators, the prospect that supremacy may be invoked is unsettling for third parties.[857] Some of the considerations of arbitral tribunals concerning the relationship between EU law and international investment obligations create ambiguity, if not anxiety, among EU partners as it is not clear whether they target exclusively intra-EU relations. Before addressing the procedural safeguards employed in the new FTAs to give assurance to the EU's treaty partners, it is useful to survey disputes where the supremacy argument has been raised as it reflects more generally on tribunals' approach to the status of EU law in relation to the ECT.

In its submission as a non-disputing party in *Electrabel v. Hungary*, the European Commission stated that the tribunal, established under the ICSID Convention, had no jurisdiction over the claim under consideration.[858] *Electrabel v. Hungary* was an intra-EU dispute between Hungary and Electrabel S.A., an energy generation and sales company incorporated under Belgian law. The European Commission cited *Bosphorus* case, where the ECtHR noted that the Convention has to be interpreted in the light of any relevant rules and principles of international law applicable in relations between the Contracting Parties, that is EU law.[859] In argument reminiscent of Solange-type reasoning the European Commission reiterated the ECtHR's conclusion that if the two bodies of law can be considered equivalent in their protection of individual rights, an act which is in conformity with EU law will be considered to be in conformity with the ECHR.[860] The European Commission further maintained that in case of contradiction between the ECT and EU law, the latter prevails.[861] Accordingly, an award that substituted compensation for state aid unlawful under EU law would not be enforceable because

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[857] Informal interview conducted on 25 Sept 2015 at the United States Trade Representative, Washington, D.C., United States.
[858] *Electrabel v. Hungary*, Decision on Jurisdiction, para 4.101.
[859] *Electrabel v. Hungary*, Decision on Jurisdiction, para 4.102.
[860] *Bosphorus*, para 150.
[861] *Electrabel v. Hungary*, Decision on Jurisdiction, para 4.109.

it would be equivalent to a judgment of a national court of an EU Member State made in contradiction of EU law.[862] The Tribunal noted that the European Commission did not explain precisely how this defence to recognition or enforcement of an award could be made in respect of an ICSID award before the national courts of a non-EU Member State.[863] The analysis of the Tribunal's approach is relevant to the new FTAs as it discusses the relationship between the ECT and other agreements, including EU Treaties.

Though the Tribunal noted from the outset that there was no inconsistency between the EU law and the ECT,[864] it nevertheless went on to provide a theoretical analysis of a situation where such inconsistency does in fact arise. It first noted that there is no rule of international law compelling harmonious interpretation of all existing legal rules.[865] However, the Tribunal noted that if there were an inconsistency between the EU law and the ECT, they should, if possible, be read in harmony.[866] While the implications of the Tribunal's considerations for interpretation of the new FTAs remain unclear, a possibility that investment tribunals may apply the self-imposed principle of harmonious interpretation remains.

The Tribunal then considered a hypothetical situation where there in fact exists a material inconsistency not subject to harmonious interpretation. In a surprising turn, it noted that decisions of the EU which bind the respondent have to be taken into account because the ECT does not protect investors from enforcement by the respondent of a decision of the European Commission binding under EU law.[867] According to the Tribunal, the framework of the ECT recognises that EU Member States will be legally bound by decisions of the EU under EU law and thus investors can have no legitimate expectation in regard to the consequences of the implementation by an EU Member State of any such decision by the European Commission.[868]

The Tribunal also considered Article 16 of the ECT which *inter alia* states that where contracting parties have entered into a prior or subsequent international agreement whose terms concern provisions related to investment protection and dispute-settlement provisions under the ECT, nothing in the provisions of such international agreements or the ECT shall be so construed as to derogate from reciprocal provisions in another agreement where any such provision is more favourable to the investor. A parallel provision is established in CETA Article

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[862] *Electrabel v. Hungary*, Decision on Jurisdiction, para 4.110.
[863] *Electrabel v. Hungary*, Decision on Jurisdiction, para 4.110.
[864] *Electrabel v. Hungary*, Decision on Jurisdiction, para 4.167.
[865] *Electrabel v. Hungary*, Decision on Jurisdiction, para 4.173.
[866] *Electrabel v. Hungary*, Decision on Jurisdiction, para 4.167.
[867] *Electrabel v. Hungary*, Decision on Jurisdiction, para 4.169.
[868] *Electrabel v. Hungary*, Decision on Jurisdiction, para 4.142.

1.5 which states that the parties affirm their mutual rights and obligations under the WTO Agreement and other agreements to which they are party. The Tribunal dismissed the applicability of Article 16 ECT in *Electrabel v. Hungary*. According to it nothing in EU law can be interpreted as precluding investor-state arbitration under the ECT and the ICSID Convention simply because the EU law does not deal with investor-state disputes.[869] As for the substantive protections, Article 16 was equally inapplicable because the ECT and EU law do not share the same subject-matter.[870]

The tribunal then proceeded to Article 351 TFEU which establishes that pre-accession agreements between the Member States and third parties shall not be affected by the provisions of EU Treaties.[871] As interpreted by the ECJ, in relation to treaties between Member States and third parties, the provision resolves the conflict between the two incompatible obligations in favour of the earlier obligation.[872] Article 351 TFEU itself is not directly relevant to the new FTAs as these constitute post-accession obligations.

Similarly, in *RREEF Infrastructure v. Spain*, a dispute over photovoltaic energy regulation, Spain argued that the EU is an economic integration area which includes a comprehensive system for promoting and protecting intra-EU investments. This, it said, has primacy over that provided by the ECT.[873] Spain argued that the system of intra-EU investor protection deriving from EU instruments and judicial decisions takes precedence over or displaces that contained in any other international treaty.[874] Spain rejected the relevance of absence of disconnection clause in the ECT and instead provided a number of arguments in support of its supremacy argument.[875] The tribunal rejected Spain's considerations, in line with the previous decision in *Electrabel v. Hungary*.[876] However, contrary to the position in *Electrabel v. Hungary*, the Tribunal found that to the extent possible the two treaties should be interpreted in such a way

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[869] *Electrabel v. Hungary*, Decision on Jurisdiction, para 4.175.
[870] *Electrabel v. Hungary*, Decision on Jurisdiction, para 4.176.
[871] The provision has been interpreted by the ECJ as bearing opposite logics in relations between two EU Member States, i.e. that inconsistent earlier treaties between Member States do not survive entry into the EU, see Case 10/61, *Commission v. Italy* [1962] ECR 1, 10. See also Jan Klabbers, *Treaty Conflict and the European Union* (CUP 2009), 120.
[872] This position was followed by the ECJ in its Judgment in Case C-264/09, *European Commission v. Slovak Republic* [2011] ECR I-08065, para 41: "According to settled case-law, the purpose of the first paragraph of Article 307 EC is to make clear, in accordance with the principles of international law, as set out in, inter alia, Article 30(4)(b) of the Vienna Convention on the Law of Treaties of 23 May 1969, that the application of the EC Treaty does not affect the duty of the Member State concerned to respect the rights of non-member countries under a prior agreement and to perform its obligations thereunder (see, to that effect, Case 812/79 *Burgoa* [1980] ECR 2787, para 8)." This Judgment only reiterates the ECJ's analysis since Case 10/61, *Commission v. Italy* [1962] ECR 1.
[873] *RREEF Infrastructure v. Spain*, Decision on Jurisdiction, para 40.
[874] *RREEF Infrastructure v. Spain*, Decision on Jurisdiction, para 41.
[875] *RREEF Infrastructure v. Spain*, Decision on Jurisdiction, para 40-50. Spain stressed the special status of the EU in the framework of the ECT and the fact that the EU was one of the authors of the ECT.
[876] *RREEF Infrastructure v. Spain*, Decision on Jurisdiction, para 75.

as not to contradict each other.[877] It then applied what it called a principle of harmonious interpretation to the present case but found no inconsistency between EU law and obligations under the ECT.

The practical implications of the supremacy of EU law manifested themselves in the *Micula v. Romania* arbitration under the Romania-Sweden BIT. The dispute arose after the Micula brothers invested in a food production facility in Romania based on an investment incentive scheme in the form of an emergency government ordinance. Romania repealed the tax incentives because it was considered state aid. Investors brought a claim against Romania before the ICSID Tribunal. The Award, which was issued in December 2013, awarded the Micula brothers damages equivalent to the assistance which they would have received if the tax incentives had not been repealed.

Enforcement of the ICSID award encountered opposition from the EU which argued that the payment of any compensation to the Micula brothers would constitute unlawful state aid and be invalid under EU law. In 2014 the EU issued an injunction to Romania to restrain its compliance with the Award. Moreover, on March 30, 2015 the EU adopted a Final Decision 2015/1470 which declared that payment of the Award would constitute unlawful state aid and ordered Romania to recover payments already made. The Micula brothers challenged the Final Decision before the General Court of European Union (GCEU). In parallel, the English High Court rejected Romania's application to set aside the Court's 2014 order registering the Award. The Award was registered in the High Court pursuant to the Arbitration (International Investment Disputes) Act of 1996.[878] However, the Court stayed enforcement of the Award in the UK pending determination of proceedings before the GCEU.

The Court's reasoning was based on the argument that registered ICSID awards are treated in the same way as judgements of the English High Court and so must be in conformity with EU state aid rules. The Court did not dispute the claimant's position that the Award was *res judicata* from the date of its issue.[879] However, the Court reasoned that if it proceeded to enforce the Award, this would contravene the European Commission's Final Decision. Since the issue of whether the Award was *res judicata* is before the GCEU, the Court saw a possibility of inconsistency if it were to decide that the Award could be enforced. Thus enforcement of ICSID

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[877] *RREEF Infrastructure v. Spain*, Decision on Jurisdiction, para 76.
[878] The Act implements the ICSID Convention in English law. Registration takes place where a person seeks '*recognition or enforcement*' of an award. Under Art 54 of the ICSID Convention, the Award must be recognized as if it were a final judgment of a Contracting State's own national system.
[879] According to the Court as a matter of English law read with Art 54 of the ICSID Convention, an ICSID Convention award achieves finality, and becomes *res judicata*, at the time of the award.

awards was deemed subject to EU law. The Court refused to rule on the effect of Article 351 TFEU, which establishes that international obligations arising from Member State's pre-accession agreements are not affected by the Treaties as this provision was raised in proceedings before the GCEU.

The European Commission has adopted the *Micula*-type approach in a number of pending investment disputes under the ECT over Spain's incentivisation scheme for renewable energy production.[880] Most of the investors that have brought claims against Spain are based in other Member States, thus the disputes are mainly intra-EU. In November 2017 the European Commission issued a decision in which it stated that any compensation which an arbitration tribunal were to grant to an investor on the basis that Spain had modified the premium economic scheme by the notified scheme would constitute in and of itself state aid.[881] Furthermore, the European Commission maintains that if tribunals award compensation, as in *Eiser v Spain*, or were to do so in the future, this compensation would be notifiable state aid pursuant to Article 108(3) TFEU and be subject to the standstill obligation. According to the European Commission, this decision is binding on investment tribunals and can only be interpreted by the CJEU.

The European Commission's refusal to accept the effects of the intra-EU BITs has been supported by the CJEU's recent judgment in *Slovak Republic v. Achmea B.V.*[882] The CJEU ruled that the arbitration clause contained in Article 8 of the 1991 Netherlands-Slovakia BIT has an adverse effect on the autonomy of EU law and was therefore unlawful.

An important safeguard is enshrined in the already mention Regulation No. 914/2014 which establishes a framework for managing financial responsibility linked to investor-to-state dispute-settlement under new-generation FTAs to which the EU is party. Regulation No. 914/2014 gives priority to the payment of the award, whereas the internal allocation of financial responsibility can be carried out retroactively. Regulation No. 914/2014 provides that where an award has been issued against the Union, that award should be paid without delay.[883] The legislation calls for a separate line in the Union's budget to cover expenditure resulting from agreements pursuant to provisions on foreign direct investment to which the Union is a party

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[880] For the list of disputes, see https://energycharter.org/what-we-do/dispute-settlement/all-investment-dispute-settlement-cases/, last visited 1 Aug 2018.
[881] European Commission's letter 'State aid SA.40348 (2015/NN) – Spain Support for electricity generation from renewable energy sources, cogeneration and waste', Brussels, 10.11.2017 C(2017) 7384 final, para 165.
[882] C-284/16 *Slowakische Republik v. Achmea BV* [2018].
[883] Para 19 of the preamble of the Regulation.

and which provide for investor-to-state dispute settlement.[884] Article 20(1) of the regulation states that the European Commission may adopt a decision requiring the Member State concerned to advance financial contributions to the budget of the Union in respect of foreseeable or incurred costs arising from the arbitration. Regulation No. 914/2014 thus establishes a tight link between the EU and its Member States under the new FTAs, with the Union confining itself to paying awards without delay, even if the expense will ultimately have to be covered by the Member State. In other words the Union pledges to pay any adverse award, irrespective of whether it will bear financial responsibility under internal rules. CETA Article 8.41 similarly states that an award issued by an arbitral tribunals shall be binding between the disputing parties and must be complied with without delay.

Whether the combined effect of CETA and Regulation No. 914/2014 is sufficient to protect investors' rights in *Micula*-type situations remains to be seen. It is likely that the European Commission's insistence on the primacy of EU law will be confined to intra-EU disputes. It is doubtful that the EU will be willing to jeopardise its newly acquired role as the negotiator of EU trade agreements by raising concerns about its trustworthiness in the eyes of its foreign partners. It is expected that the European Commission will try to maintain an image of a house in order by abiding to the code of conduct established under Regulation No. 914/2014. The following section considers Regulation No. 914/2014 in more detail.

4.3 The internal code of conduct under Regulation No 914/2014

It has been mentioned above that the new FTAs leave the determination of the respondent in disputes involving EU measures to the Union itself. To this end the EU has adopted Regulation No. 914/2014 for managing financial responsibility resulting from adverse arbitral awards. Regulation No. 914/2014 applies not only to the new FTAs but also to existing agreements to which the Union is a party, such as the ECT.

In the Explanatory Memorandum to the Regulation No. 914/2014 the European Commission suggested that the regime is based on special rules applicable between an international organisation and its members as provided in DARIO Article 64, the *lex specialis* rule. In the Explanatory Memorandum the Commission refers to Article 64, stating that "*in the international context, the International Law Commission has recognized the possibility that special rules may apply between an international organization and its member*". As I have

[884] Para 21 of the preamble of the Regulation.

argued in Chapter II, the DARIO framework does not govern the allocation of international responsibility in a multi-layered structure of an international body. DARIO rules determine whether a subject *is* internationally responsible. If responsibility arises in the context of an international body where sovereignty is shared between the organisation and its member states, additional questions arise which fall outside the scope of the ILC rules. Nor do the rules govern the internal allocation of financial responsibility between the organization and its member states. Nevertheless, the Commentary to Article 64 refers to special rules which may 'supplement' more general rules (not only replace them). Regulation No. 914/2014 is *lex specialis* in relation to the DARIO framework, especially since the Commentary specifically refers to the special rules which govern attribution to the EU of conduct of Member States when they implement binding acts of the Community.

The framework of responsibility established under Regulation No. 914/2014 differentiates between two types of responsibility, *international* and *financial*.[885] While the term 'financial responsibility' is expressly defined in the Regulation,[886] neither the proposal for Regulation No. 914/2014 nor the legal act itself explains in more detail what is meant by the term 'international responsibility' as opposed to 'financial responsibility'.[887] It seems that under Regulation No. 914/2014 international responsibility concerns questions of settlement of international disputes, especially the status of respondent. International responsibility and financial responsibility are determined on a different legal basis. The motive for the introduction of financial responsibility as a category was the need to protect the Union's budget from the adverse effect of awards which result from conduct of Member States.

The regulation establishes a competence-based principle of *international responsibility*. Paragraph 3 of the preamble states that international responsibility follows the division of competences between the Union and Member States, irrespective of whether the treatment at issue is afforded by the Union itself or by a Member State. *Financial responsibility*, on the other hand, is based on authorship of the treatment in question.[888] In cases where an adverse award flows from treatment afforded by a Member State, that Member State will bear *financial*

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[885] Explanatory Memorandum the European Commission stated that "[i]t is important to separate the issue of the conduct and management of an investor-to-State arbitration claim from the issue of the allocation of financial responsibility", sect 1.3.
[886] Article 2(g) of the Regulation states that 'financial responsibility' means an obligation to pay a sum of money awarded by an arbitration tribunal or agreed as part of a settlement and including the costs arising from the arbitration'.
[887] Proposal for a regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party of 21 June 2012, COM(2012) 335 final (Proposal).
[888] Proposal for a Regulation, Explanatory Memorandum, 2.

responsibility, unless the treatment in question is required by Union law.[889] Joint financial responsibility is provided in cases which concern both treatment afforded by a Member State and treatment required by Union law.[890]

It is not clear how the treaty partners and the Union itself will separate Member State 'treatment' from that of the EU itself as it is not defined in Regulation No. 914/2014. The task is not easy, because the conduct of EU and Member States is inextricably linked and it is often difficult to draw a dividing line between a Member State's implementation of the Union's measure and the Member States exercise of discretion. Definition of the term 'required by Union law', provided in Article 1(l) of the Regulation No. 914/2014, will hardly be helpful as it refers to a clear-cut 'with discretion/without discretion' situation, whereas the functioning of the Union is often polychromatic. According to the European Commission officials, the exact meaning of the term 'required' was extensively debated during the adoption of the regulation.[891] It is understood that the definition is narrow in that it refers to situations were no margin of discretion is given to Member States, such as in the case of customs tariff classifications. The definition of 'measure' provided in CETA Article 1.1 is similarly of little relevance as it covers 'any form of measure' by a party.

Guidance on the definition of the term 'required by Union law' may be afforded in the doctrine of direct effect under EU law. Provisions of EU directives may have horizontal direct effect (i.e. may be invoked and relied on by individuals before national courts) if *inter alia* they are sufficiently clear and precise.[892] Whether a provision is sufficiently clear and precise depends on how much discretion a Member State enjoys with respect to its implementation. The Court's case-law on what constitutes discretion is, however, complex.[893] It is thus difficult to determine what counts as 'no discretion' under Regulation No. 914/2014. For example, the controversial *Kortas* decision the ECJ ruled that the possibility of a Member State's derogation from a harmonising directive did not prevent direct effect and did not preclude an individual from relying directly on its provisions.[894] My assumption is that in the context of Regulation No. 914/2014, the term 'required by Union law' will be interpreted broadly so as to cover a wide

[889] CH 2 Art 3(1), also para 5 of the preamble.
[890] Para 7 of the preamble.
[891] Informal interview conducted on 6 Oct 2017 at the Directorate General for Trade of the European Commission, Brussels.
[892] Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (6th edn, OUP 2015), 202, ft 71.
[893] Craig and de Búrca 2015, 202.
[894] Case C-319/97 *Kortas* [1999] ECR I-3143.

range of Member States' conduct. This is based on the EU's seeking to be an active participant in international adjudication which can be observed in the WTO regime.

It must be noted that the competence-based principle of international responsibility created discomfort among the Member States. They were displeased with an arrangement in which the Union participates in all investment disputes, including those where the award is to be paid by a Member State.[895] Regulation No. 914/2014 thus qualifies the principle of competence-based international responsibility. Paragraph 9 of the preamble provides that a Member State may act as respondent to defend the treatment which it has afforded to the investor. The European Commission thus adopts a treatment-based approach to responsibility which is different from its competence-based stance under the WTO regime. Despite this qualification, the EU equips itself with broad discretion to decide whether a Member State in question will be given a role in the dispute after a "*full and balanced factual analysis and legal reasoning provided to the Member States*".[896] Joint participation of the Union and Member States in investment disputes involving treatment afforded both by the EU and Member States can be excluded on the basis of a decision of the European Commission.[897] Further exceptions to a Member States' right to act as respondent are provided in Article 9 and include *inter alia* situations when a related case is filed under the WTO dispute-settlement system.

The Explanatory Memorandum to Regulation No. 914/2014 affords even broader discretion to the European Commission. It is suggested that *"<…> rather than set up the mechanisms in a manner reflecting a strict application of the rules on competence, it is more appropriate to put forward pragmatic solutions which ensure legal certainty for the investor <…> the Commission is of the view that Member States should be permitted to act as respondents in order to defend its own actions, except under circumstances where the Union interest requires otherwise*". The European Commission can thus opt in to act as a respondent in an investor-state arbitration whenever it decides that "*the Union interest so requires*"[898]. Furthermore, Member States may similarly transfer the task of respondent to the Union, an option provided in the Regulation itself.[899]

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[895] Informal interview conducted on 6 Oct 2017 at the Legal Service of the European Commission, Brussels.
[896] Regulation Art 9(2) and (3).
[897] Para 11 of the preamble of the Regulation.
[898] For a supporting position as to the Union's right to decide on the naming of a respondent, see Eileen Denza, 'Responsibility of the EU in the Context of Investment' in Malcolm Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart Publishing 2013), 232.
[899] Regulation Art 9(2).

It is yet to be seen whether Member States will be keen to transfer the role of respondent to the European Commission. Given the European Commission's growing expertise in investment dispute settlement, Member States may consider it pragmatic to leave litigation to its Legal Service. Such tendency is evident from WTO dispute-settlement practice, where Member States have shown little interest in getting involved. This may also depend on the size of the EU Member State and its administrative resources. It may also depend on the extent of the Member States' experience in investment arbitration since some states have participated in investment disputes more often than others (e.g. Hungary has been a repeat respondent in investment disputes). On the other hand, the WTO arrangement is different from investment disputes because under the WTO regime Member States do not bear the risk of a direct financial burden in case of an adverse award. In an unlikely event of retaliation, an application of the so-called 'carousel retaliation' would mean that the negative effects of countermeasures would be shared by various Member States. If a WTO-type approach of refraining from dispute resolution repeats itself under the new FTAs, the determination of a respondent mechanism under Regulation No. 914/2014 will become less relevant because the central focus shifts instead to the rules for the allocation of financial responsibility.

Some elements of the model of separating international responsibility and financial responsibility established under Regulation No. 914/2014 can be found in federal systems. The adoption of the regulation was well received by the EU's trade partners, who welcomed the legislation as the EU's house-keeping rules which bring clarity.[900] In fact the inspiration for the adoption of Regulation No. 914/2014 itself came from the gap in the constitutional law of Canada, the EU's CETA partner. Canada, which is a federal state, does not have a mechanism to allocate financial regulation between the federal government and provinces. This has proved to be problematic, for example, in the *Abitibi v. Canada* dispute under the North American Free Trade Agreement (NAFTA).[901] The case concerned an expropriation claim by a US incorporated pulp and paper manufacturer which operated in the Canadian province of Newfoundland. Upon its closure in 2009 Abitibi still retained various property rights and assets which, it claimed, were unlawfully expropriated by the government of Newfoundland and Labrador. The claim was filed against the federal Government of Canada which acted as respondent in the dispute. The parties settled the case in 2010 for $130 million with a final settlement agreement signed between the company and the Government of Canada.[902] The

[900] Informal interview conducted on 27 Sept 2017 at the Mission of Canada to the European Union, Brussels.
[901] *AbitibiBowater Inc. v. Government of Canada* (Consent Award 15 Dec 2010) ICSID Case No. UNCT/10/1.
[902] *AbitibiBowater Inc. v. Government of Canada*.

province was not involved in the settlement and has so far paid no contribution towards the compensation. It remains unclear how the Canadian Government will seek recovery of the settlement money from the province.[903] Similarly, in *Metalclad v. Mexico*, concerning a claim brought by US investors against Mexico under NAFTA, the federal government was also obliged to bear international responsibility for the actions of sub-national units.[904] The question of allocation of responsibility between a federal government and provinces has also arisen in the WTO context.[905] Regulation No. 914/2014 thus provides assurance to the EU's partners that the EU has 'its house in order' when it comes to issues of allocating responsibility between the Union and its Member States.

The EU's house-keeping rules are not, however, free of complication. The basis for the adoption of Regulation No. 914/2014 was the 2009 transfer of exclusive competence in the field of foreign direct investment from Member States to the EU, which now has exclusive competence to represent the Union in investment disputes. When the treatment in question is that of a Member State, the Union delegates power to participate in the dispute back to the Member State. The reverse delegation is implicit in Article 2(1) TFEU, which provides that Member States can act in the field of an exclusive competence of the EU only if empowered by the Union. Such reasoning, however, suffered a setback by the *Opinion 2/15* that stated that the Union has exclusive competence in relation to substantive standards, whereas dispute settlement is part of shared competence. The Court's rejection of exclusive Union competence in relation to dispute settlement placed the European Commission in limbo. One way of solving the conundrum is to suggest that by adopting Regulation No. 914/2014 the European Commission exercised its shared competence which accordingly was transformed into its exclusive competence. Such solution remains ambiguous given that Article 1(1) of the Regulation itself states that its adoption shall not affect delimitation of competences established by Treaties. All in all the Court's interpretation may remain theoretical only, since Member States have not expressed objection to Regulation No. 914/2014, which serves their interests by providing clarity as to the consequences of investment dispute.

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[903] Céline Lévesque, 'Les Rôles et Responsabilités Des Provinces Canadiennes Dans Le Cadre de Procédures d'arbitrage Entre Investisseurs et États Fondées Sur Des Traités Économiques' (2015) 28 Revue québécoise de droit international, 107-155. See also Scott H Fairley, 'Internal Accountability for Provincial Violations of Canada's International Obligations: Lessons from Abitibi' (2012) 53 Can Bus LJ.

[904] *Metalclad v. Mexico*, Award.

[905] For example, see *Canada – Provincial Liquor Boards* (EEC), WT/ DS17/R - 39S/27, PR adopted 18 Feb 1992; *Canada — Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, BISD 35S/37, PR adopted 22 March 1988; *Canada – Provincial Liquor Boards* (US), WT/DS17/R, PR adopted 18 Feb 1992; *Canada — Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, BISD 39S/27, PR adopted 18 Feb 1992.

In conclusion, the new FTAs provide several procedural safeguards which help to ensure that the Union and its Member States will deliver the remedy in a given dispute. In particular, the safeguards protect third parties from an inadmissibility defence in relation to the proper respondent, avoid Micula-type situations where awards conflict with EU law and establish an internal mechanism for the allocation of financial responsibility. These safeguards allow third parties comfortably to place the determination of a proper respondent at the Union's discretion. The substantive nature of investment protection obligations, which points to the Member States as essential players, is neutralized by the primacy of procedural rules. As long as these rules ensure that the Union will deliver a remedy, third parties abstain from interfering in the EU's internal constitutional arrangements.

5. Conclusion

The aim of this chapter was to apply the normative findings of this thesis to new-generation FTAs recently negotiated between the EU and third countries, primarily CETA. I suggested that trade disputes under the new FTAs will closely follow the patterns of remedial international responsibility laid out in Part II of this thesis. I argued that the EU will be the optimal respondent in trade disputes, similarly to its current role in the WTO dispute-settlement regime. I also argued that disputes involving multiple respondents, such as those observed in Chapter VIII in the WTO context, will be rare under the new FTAs because of the *de jure* bilateral nature of the new treaties.

With respect to investment arbitration under the new FTAs, distribution of shared responsibility will embody mixed patterns observed in relation to the WTO and the ECT. This is so because dispute resolution under the new FTAs provides mechanisms which will allow tribunals to place the determination of the proper respondent in the hands of the European Commission. The effect of these procedural safeguards will be similar to the internal interdependency of the EU and its Member States in the WTO context that I discussed in Chapter VII.

Accordingly, while the content of investment arbitration suggests that Member States are the optimal respondents in investment disputes, the procedural rules modify this pattern by shifting responsibility to the EU. I thus conclude that remedial responsibility may be structured through procedural mechanisms provided in the treaty framework.

CHAPTER X – CONCLUSIONS

The question of the international responsibility of the European Union is inextricably linked to the allocation of responsibility between the Union and its Member States. Only separate subjects of international law may have international obligations and bear responsibility if they breach them. Organisations and their member states are separate legal persons, but the transfer of powers between them blurs the line dividing their conduct. Distribution of shared responsibility for violation of joint obligations in a multi-layered structure of an international body where sovereignty is shared between the organisation and its members has caused confusion among international scholars and practitioners. The aim of this thesis has been to identify the legal basis for the distribution of responsibility between the EU and its Member States in international economic law. It reached the following findings.

Firstly, I enquired what law governs the allocation of responsibility between the EU and its Member States. Following an orthodox approach, I started my analysis from the ILC framework of international responsibility. Upon reviewing the ILC rules for responsibility of states (ARSIWA) and international organisations (DARIO) and their *travaux préparatoires*, I concluded that the ILC framework does not govern the allocation of responsibility within an international body. The purpose of the ILC rules is to determine whether a subject of international law *is* internationally responsible. If the question arises in a multi-layered structure like the EU, the exercise of sovereignty by the organisation and its member states must first be defined. I suggested consideration of the rules of organisation.

Secondly, I considered the EU's claim that its international responsibility is competence-based, and rejected it. I explained the position of the European Commission, that the EU is internationally responsible for all violations that fall within its competence, irrespective of who carried out the conduct in question. The extensive body of international dispute-settlement practice in the areas of human rights, trade and investment protection does not support the competence-based approach to international responsibility. While states are free to transfer their powers to an international organisation, their obligations are nontransferable. I argued that states and international organisations remain independently responsible for violation of their joint obligations, as in the case of the EU's mixed agreements.

Thirdly, I found that independent responsibility of the EU and its Member States provides only a half-way solution to the EU's responsibility conundrum. That the EU and its Member States, or both, *may* be held responsible for violation of their joint obligations does not mean that they

will be held responsible in a given dispute. Having determined independent responsibility, I turned to determining exclusive responsibility. To establish the latter I drew a line between the conduct of the EU and its Member States. For that purpose I explored the concept of an organ and agent in ILC doctrine. I concluded that the ILC supports a broad reading of the term 'organ' of an international organisation which may effectively cover any person who carries out the functions of an organisation. This provides room for the European Commission's interpretation that authorities of the Member States act as *de facto* organs of the EU when they implement Union law. I did not, however, find support for such claim in the international dispute-settlement practice. I argued that international dispute-settlement bodies do not allocate responsibility between the EU and its Member States on the basis of attribution of conduct.

Fourthly, I concluded that attribution of conduct (or breach in case of derived responsibility) is irrelevant to the distribution of shared responsibility between the EU and its Member States in international economic law. For that purpose I analysed the nature of international economic obligations and the system of remedies that protects them, particularly under the WTO and the ECT regimes. I argued that remedies in international economic law have a restorative rather than corrective purpose. Dominance of liability-type obligations suggests that the focus of adjudication is on keeping the international economic order intact rather than punishing entity that carried out the (allegedly) unlawful conduct. As the primary purpose of adjudication of economic disputes is restorative, attribution of conduct or breach is irrelevant. I further argued that the question of responsibility typically raises the question of the proper respondent. Responsibility is allocated to that subject of international law which is best placed to restore order.

Fifthly, the question then was to determine *how* international courts and tribunals determine whether the EU or its Member States, or both, are the proper respondents in a given dispute. I noted the essential difference in the system of remedies under the two treaties – compliance under the WTO regime and compensation under the ECT. I confirmed my hypothesis that distribution of shared responsibility correlates with the nature of the remedial regime under a given treaty. In order to test this hypothesis, I analysed an extensive body of trade and investment disputes, primarily under the WTO and ECT regimes. My analysis allowed me to discover patterns in the reasoning of the WTO DSB and investment tribunals acting under the ECT which have not been identified in legal scholarship. I suggested that the DSB applies what I called 'the positive solution test' to determine which party is necessary for compliance purposes. The WTO panels shift responsibility to those subjects the actions of which are necessary to ensure removal of inconsistent measures. Investment tribunals, on the other hand,

focus on the proximate cause of breach because the determination of the *existence* of breach is sufficient to trigger award of compensation to an investor. Allocation of responsibility is remedy-based. Rather than being predetermined on some structural basis, it varies in accordance with the system of remedies under the treaty regime in question.

Sixthly, having determined that allocation of responsibility in international economic law is remedy-based, I then explained why the EU has so far been the optimal respondent in WTO cases, whereas Member States have been exclusive respondents in investment disputes. What makes the EU best placed to remedy violations of trade obligations, and why are Member States the optimal respondents under the ECT? I argued that the answer lies in the nature of these treaty regimes. In WTO disputes the EU in most cases assumes responsibility on behalf of its Member States. The DSB's acceptance of such arrangement stems from the internal interdependency of the EU and its Member States in mixed treaty-making. On the other hand, the primary role of Member States in investment disputes can be explained by the nature of investment protection standards, which focus on the conduct of the host state, not the EU.

Seventhly, I noted that while the EU is in most cases the optimal respondent in WTO dispute settlement, there are special cases of multiple respondents. I suggested a correlation between the scope of the claim (and the requested remedy), on the one hand, and the DSB's decision to address its recommendations to Member States in addition to the EU, on the other. Analysis of WTO disputes reveals that panels distinguish between two types of claim: claims 'as such' and claims 'as applied'. The EU is the optimal respondent in claims challenging measures of general application as such, whereas Member States are necessary respondents when a complaint (also) covers specific instances of application of such measures. This is so because Member States' actions are necessary to correct breaches resulting from the application of EU trade policies. The DSB's reasoning further supports my thesis of remedial international responsibility.

Finally, I applied the above normative findings to the EU's new-generation FTAs, primarily CETA. I focused on investment chapters in the new treaties, which provide a novel mechanism for the determination of the proper respondent in investment disputes. I suggested that the new FTAs exhibit a mix of characteristics of the WTO and ECT regimes of responsibility addressed in this thesis. Under the new FTAs the right to determine the proper respondent is afforded to the EU in exchange for procedural safeguards which serve as a guarantee that the EU will not misuse that right to obstruct adjudication. The effect of these procedural safeguards is similar to the internal interdependency of the EU and its Member States in the WTO context, which I also addressed in this thesis. I concluded that the new FTAs demonstrate how the EU's international responsibility can be constructed through procedural mechanisms.

Outlook

The aim of this thesis has been to identify the legal basis for the distribution of shared responsibility for violation of joint economic obligations in the multi-layered structure of the EU. This thesis does not provide a policy evaluation of its findings. I leave critical assessment of remedial international responsibility for future research. I should nevertheless like to make several remarks.

This thesis has argued that in international economic law shared responsibility is distributed among subjects of international law which are part of a common institutional structure based on which of them is best placed to remedy breach. This is so because the purpose of international economic adjudication is restorative rather than corrective. Allocation of responsibility does not follow attribution of conduct (or breach) but instead depends on the system of remedies available under a given treaty. Allocation of responsibility is thus a dynamic concept which is not tied to breach but rather depends on the nature of the treaty regime in question.

It follows then that the distribution of responsibility in international economic law is to some degree left to treaty negotiations which may lead to fragmentation of international rules of responsibility in this field. Benvenisti notes that new-generation multi-regionals[906] are negotiated following a strategy of fragmentation which separates competing groups of state parties and by maintaining secrecy over the content of negotiations.[907] The conclusion of mega-regionals shapes global rules and so Benvenisti concludes that negotiating such agreements behind closed doors by the world's super-powers denies the voice of 'Global Others'.[908]

As I have explained in Chapter IX of this thesis, the EU's new-generation FTAs provide almost unhindered freedom to the EU to decide on the internal allocation of responsibility. Differently to both the ECT, where the European Commission's determination of the proper respondent was an option, and the WTO, where the DSB could at any time reject the EU's assumption of responsibility on behalf of its Member States, the new FTAs oblige parties to hand the decision to the EU. Responsibility has thus been 'downsized' to an internal affair of commercial nature.

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[906] In particular, Benvenisti refers to TTIP and TPP. The negotiations of the former are currently on hold while the latter was transformed into CPTPP upon withdrawal of the US.
[907] Eyal Benvenisti, 'Democracy Captured: The Mega-Regional Agreementsand the Future of Global Public Law' (2016) 23 Constellations 58, 58.
[908] Benvenisti 2016, 62.

This seems to be the new global rule on international responsibility of organisations, established by the largest organisation itself – the EU.

Remedial international responsibility may thus enhance fragmentation. The Brexit negotiations illustrates this point. The central principle of the EU's common commercial policy is regulatory equivalence. The extent of frictionless trade with the EU directly depends on an obligation to apply rules equivalent to those of the EU. Furthermore, frictionless trade requires the acceptance of the CJEU's jurisdiction. For example, the implementation of rights and obligations stemming from the EU-Turkey Customs Union, in so far as they are identical with corresponding provisions of EU Treaties, must be interpreted in conformity to CJEU's case-law.[909] And while such reach of the EU's Court does not extend beyond a customs union with the EU, the tendency of the EU to domesticate international law is present. Article 403 of the EU-Moldova Association Agreement provides that the CJEU's rulings are binding on matters of EU law in disputes between the EU and Moldova. Similarly, Article 322 of the EU-Ukraine Association Agreement provides that where a dispute raises a question of EU law, the arbitration panel must request the CJEU's ruling which would be binding on the arbitration panel. Where frictionless trade with the EU calls for regulatory alignment (or at least regulatory harmonisation), the role of the CJEU is very considerable. The independence of international adjudication of these bilateral relationships is thus reduced. It seems then that, at least in cases of close economic cooperation, violation of international economic obligations may be decided by an EU Court which distributes international responsibility within the EU according to its own internal rules.

If international responsibility is subject to treaty negotiations, whom do the Member States of the EU account to for their conduct? It seems that Member States sit behind a powerful organisation which has become the global rule-setter,[910] and which is willing to assume international responsibility on their behalf. For example, as I have explained in Chapter V and elsewhere in this thesis, if a trade rule is violated by one of the Member States, retaliation can be applied to any part of EU's customs territory.[911] Remedial international responsibility thus shields Member States from personal responsibility. The more trade powers are transferred to the EU, the less personal responsibility is carried by an individual Member State. This is so because authority points to the EU as best placed to remedy the consequences.

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[909] Art 66 of the Decision No 1/95 of the EC-Turkey Association Council.
[910] Anu Bradford, 'The Brussels Effect' (2012) 107(1) Northwestern University Law Review, 1.
[911] The so-called 'carousel retaliation'.

One may be concerned that turning international responsibility into an internal affair may reduce transparency and even disincline Member States to abide by their international obligations. On the other hand, international economic relations are contractual and they last only so long as there is political will. Perhaps then, it is only reasonable that the nature of the institution of international responsibility in the context of global trade is functional. But that is a subject for further debate.

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