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# *Litigating against the European Union and Its Member States – Who Responds under the ILC’s Draft Articles on International Responsibility of International Organizations?*

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## **Abstract**

*In its 2009 Draft Articles on international responsibility of international organizations, the International Law Commission advocated a set of rules on attribution of conduct to the organization (Draft Articles 5–8) and additional rules on the organization’s responsibility in connection with the Act of a State (Draft Articles 13–18). Moreover, it included a Draft Article 63 on lex specialis. The present article examines whether such a special rule exists for the European Union and its Member States, in particular with respect to the attribution of conduct of EU Member States to the Union where they act in the execution of EU law. It therefore reviews international case law in the field of trade, human rights, investment protection, and the law of the sea as well as the special rules of the European Union itself. The author concludes that such a rule does indeed exist and makes a suggestion for a formulation thereof.*

## **I Introduction**

With the entry into force of the Treaty of Lisbon on 1 December 2009, one constant irritant for international lawyers

left the scene: as the European Union replaced and succeeded the European

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Community,<sup>1</sup> there is no longer any need to distinguish between the two. Henceforth, it will be only the European Union which may bear responsibility for an internationally wrongful act. In particular, the treaty obligations of the former European Community are now assumed by the European Union, as further confirmed in the series of succession letters that the Council of the European Union and the European Commission sent jointly its treaty partners and the depositaries of multilateral conventions by the end of 2009. However, the Treaty of Lisbon does not do away with another particular European treaty practice: as before, both the European Union and its Member States may become parties to the same international treaty, leading to the phenomenon of ‘mixed agreements’. Indeed, Article 6(2) TEU even contains a constitutional duty for the European Union to do so in the area of human rights. Union accession to the European Convention on Human Rights will hence lead to the traditional mixed situation, where the European Union itself *and* all its Member States will be party to the Rome Convention and subject to the same enforcement machinery.

At the international level, the UN International Law Commission (ILC) completed the first reading of the draft articles on responsibility of international organizations in August 2009. The Commission submitted a full set of draft articles together with a commentary to governments and international organizations for comments

and observations by 1 January 2011.<sup>2</sup> One important part of the ILC’s work relates to the responsibility of an international organization in connection with the act of a state. In particular, this touches upon sensitive questions of attribution and responsibility when a member state carries out its membership obligations.

Against this two-fold background (entry into force of the Lisbon treaty and completion of the ILC’s first reading) it appears timely to review the relevant international law rules on responsibility for cases which involve the European Union and (one or all of) its Member States under international law. Seen from the angle of a third state, this is an eminently practical question as the former European Community had become more and more active in international litigation. Next to the frequent use of the WTO dispute settlement system (as of March 2009 the EC had been involved in 79 cases as a complainant, in 64 as a respondent and in yet another 82 as a third party), it was also party to the (recently settled) dispute before a special chamber of the International Tribunal on the Law of the Sea.<sup>3</sup> Moreover, the European Commission intervened in a number of cases before the European Court of Human Rights<sup>4</sup> and is

<sup>2</sup> Report of the International Law Commission, sixty-first session (2009), A/64/10, at 19, para. 48.

<sup>3</sup> Case No. 7 concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific (*Chile v. European Community*), available at: [www.itlos.org](http://www.itlos.org).

<sup>4</sup> App. No. 4303/98, *Bosphorus v. Ireland*; App. No. 56672/00, *Senator Lines v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom*; App. No. 62023/00, *Emesa Sugar v. the Netherlands*; App. No. 35524/06, *Artemi and Gregory v. Cyprus and 21 other Contracting States*, all available at: [www.echr.coe.int/echr/Homepage\\_EN](http://www.echr.coe.int/echr/Homepage_EN).

<sup>1</sup> Art. 1(3) TEU, as revised by the Treaty of Lisbon (OJ (2007) C 306/1, at 10). Accordingly, I will refer to the EU instead of the EC also for past events, except where references to the Community are made in *verbatim* quotes or case names.

currently engaged in three cases before ICISD tribunals.<sup>5</sup> Only before the International Court of Justice has the European Union not yet appeared. However, even this possibility is not completely ruled out. Since September 2005, Article 43(2) of the Rules of the Court has provided that any international organization being a party to a convention which is invoked in a contentious case between two states may express its views on the matter arising under the convention. In other words, the European Union may act as a sort of *amicus curiae* to the ICJ on certain interpretative questions arising in litigation between others upon invitation of the Court. To date, the former Community had declined such interventions on three occasions. In two cases,<sup>6</sup> maritime delimitation matters fell outside Community competence, and in the pending herbal spraying case<sup>7</sup> the UN Convention on Narcotic Drugs, to which the Community had become a party for certain aspects only,<sup>8</sup> was not central to the case.<sup>9</sup>

This article asks the question whether the European Union and its Member States are subject to the general rules

for international responsibility as advocated by the ILC, or whether there are special rules in the area which amend or replace the general rules. Evidently, any such rules (be they of a general or special nature) would be relevant for all sorts of EU related litigation, may it arise in the area of human rights, trade, investment protection, or the law of the sea. Accordingly, the inquiry looks first at the rules of responsibility as proposed in the ILC Draft Articles (second section). These will then be compared with relevant case law of international courts and tribunals (third section) and the special rules of the European Union (fourth section). These analyses will then allow the identification of elements of a *lex specialis* for the European Union and its Member States in the conclusion.

## 2 The ILC Draft Articles

According to Article 4(2) of the Draft Articles, there is an international wrongful act of an international organization when conduct consisting of an act or omission (a) is attributable to the international organization under international law, and (b) constitutes a breach of an international obligation of that organization. Articles 5–8 then set out certain rules of attribution, followed by a chapter on the breach of an obligation (Articles 9–12). Interestingly, Part Two also contains another Chapter, which is not directly linked to the two elements mentioned in Article 3(2), namely attribution or breach. Chapter IV, entitled ‘Responsibility of an international organization in connection with the Act of a State or Another International Organization’, is based on the view that Article 4 would

<sup>5</sup> ICSID Case No. ARB 07/22, *AES v. Hungary*; ICSID Case No. ARB 07/19, *Electrabel v. Hungary*; ICSID Case No. ARB 05/20, *Micula v. Romania*, all currently pending.

<sup>6</sup> ICJ, *Case concerning territorial and maritime dispute between Nicaragua and Honduras (Nicaragua v. Honduras)*, Judgment of 8 Oct. 2007, at para. 4; *Case concerning delimitation in the Black Sea (Romania v. Ukraine)*, Judgment of 3 Feb. 2009, at para. 3.

<sup>7</sup> ICJ, *Aerial herbicide spraying (Equator/Columbia)*, pending.

<sup>8</sup> Council Dec. 90/611, OJ (1990) L 326/56.

<sup>9</sup> Hoffmeister and Ondrusek, ‘The European Community in International Litigation’, 61 *Revue Hellenique de Droit International* (2008) 205, at 213.

not rule out exceptions.<sup>10</sup> In his seventh report, Special Rapporteur Gaja recalled that responsibility would not always be conditional on the fact that conduct is attributed to the international organization. For instance, when an international organization coerces a state to commit an act which would, but for the coercion, be an international wrongful act of that state the organization incurs responsibility even if the conduct is not attributable to it.<sup>11</sup> With this explanation in mind, Draft Chapters II and IV of Part Two will now be reviewed, followed by a presentation of Draft Article 63 on *lex specialis*.

### A Rules of Attribution

According to Draft Article 5(1), 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 the international organization under international law, whatever position the organ or agent holds with respect to the organization. This well-established rule reflects the self-evident proposition that the organization acts through its organs with the consequence that the latter's acts are attributable to the former.<sup>12</sup>

<sup>10</sup> ILC Report on its fifty-fifth session (2003), A/58/10, at 45; Commentary (2) to Draft Article 4, ILC Report on its sixty-first session (2009), at 56.

<sup>11</sup> Giorgio Gaja, *Seventh report on Responsibility of International Organisations*, 27 Mar. 2009, A/CN.4/2009, at para. 18.

<sup>12</sup> Talmon, 'Responsibility of International Organizations: Does the European Community Require Special Treatment?', in M. Rangazzi (ed.), *International Responsibility Today* (2005), at 405, 410, drawing an analogy from the finding of the Permanent Court of International Justice (PCIJ) that 'States can act only by and through their agents and representatives': PCIJ, *German Settlers in Poland*, Advisory Opinion, 1923, Series B., No. 6, at 22.

Draft Article 6 provides that the conduct of an organ of a state which is placed at the disposal of an international organization shall be considered under international law to be conduct of the international organization if the organization exercises effective control over such conduct. As the commentary thereto shows, the Article was mainly written to codify the rule relating to the international responsibility of the United Nations (or regional organizations) for a military operation using the forces of its member states. The criterion of 'effective control' denotes a situation where the member state has assigned operational *command* (i.e. the right of the force commander to issue binding orders to the troops) to the organization. Against that background, only wrongful conduct in military operations under the operational command of the United Nations triggers the responsibility of the UN (or regional organization), whereas all other operations remain the responsibility of the troop-sending state.

In *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, the European Court of Human Rights referred to Draft Article 5 (now Draft Article 6).<sup>13</sup> Although the Kosovo Force (KFOR) had kept operational command to itself and the troop-sending member states the Court attributed the challenged KFOR acts to the United Nations, arguing that KFOR was exercising lawfully delegated Chapter VII powers of the UN Security Council.<sup>14</sup> As the act was thus not attributable to the troop-sending

<sup>13</sup> ECtHR, Admissibility Decision of 2 May 2007 (Grand Chamber) on App. Nos. 71412/01 and 78166/01, at paras 29–33, available at: [www.echr.coe.int/echr/Homepage\\_EN](http://www.echr.coe.int/echr/Homepage_EN).

<sup>14</sup> *Ibid.*, at para. 141.

state, the Strasbourg Court declared the action inadmissible *ratione personae*. The decision is widely criticized in legal doctrine as making a wrong use of the Draft Article 5 'effective control' test,<sup>15</sup> a criticism which is shared by the Special Rapporteur<sup>16</sup> and the ILC itself.<sup>17</sup>

It follows that Draft Article 6 does not contain any rule about 'normative control', making it 'less adequate for deciding attribution in other cases of cooperation between international organizations and states'.<sup>18</sup> Indeed, the Special Rapporteur had in 2004 already declared that he saw no need to devise special rules on attribution in order to assert the organization's responsibility when a member state acts as implementing authority in an area of the organization's competence.<sup>19</sup>

## B Rules on Responsibility in Connection with the Act of a State

Part Two, Chapter IV, contains four rules. Under Draft Article 13, the international responsibility of an organization

is established when it aids or abets an international wrongful act of a state. The same is true if the international organization 'directs and controls a State in the commission of an international wrongful act' (Draft Article 14) or exercises coercion to commit the act (Draft Article 15). Most interestingly, Draft Article 16(1) provides for the international organization's responsibility 'if it adopts a decision binding a member State to commit an act that would be internationally wrongful if committed by the organization and would circumvent an international obligation of the former organization'. Finally Draft Article 16(2) contains a similar provision if the international organization 'authorizes' a member state to commit an international wrongful act, provided that the state actually commits the act in question.

While both Chapters II and IV thus trigger the organization's responsibility if a breach of an obligation can be established, there is an important conceptual difference. According to Draft Article 18, the rules on Chapter IV are without prejudice to the responsibility of the state which commits the act. In other words, Chapter II rules on attribution distribute responsibility *either* to the state *or* the organization. In contrast, Chapter IV does not question the attribution of the act to the state (triggering its responsibility under state responsibility rules), but creates an *additional* responsibility of the international organization, which may have contributed to internationally wrongful act by any of the means enumerated in Draft Articles 13–16. Chapter IV situations therefore would generally lead to responsibility of both the member state and the organization for the conduct in question.

<sup>15</sup> Klein, 'Responsabilité pour les faits commis dans le cadre d'opérations de paix et étendue du pouvoir de contrôle de la Cour européenne des droits de l'homme: quelques considérations critiques sur l'arrêt Behrami et Saramati', 53 *Annuaire Français de Droit International* (2007) 43, at 55; Larsen, 'Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test', 19 *EJIL* (2008) 509, at 521–522; Bodeau-Livinec, Buzzini, and Villalpando, 'Case Note', 102 *AJIL* (2008) 323, at 329.

<sup>16</sup> Gaja, *supra* note 11, at para. 26.

<sup>17</sup> Commentary (9) to Draft Article 6, ILC Report on its sixty-first session (2009), at 67–68.

<sup>18</sup> Statement of Denmark, on behalf of the five Nordic countries (Denmark, Sweden, Finland, Norway, Iceland), A.C.6/59/SR.22, at para. 62.

<sup>19</sup> Georgio Gaja, *Second Report on Responsibility of International Organisations*, A/CN.4/541, 2 Apr. 2004, at para. 11.

### C *Lex Specialis*

How does this idea of attributing the act to the state and creating an additional layer of responsibility for the organization match with the rules and practices of the European Union? As early as 2004, the representative of the then European Community made the following comment:

[T]he normal situation described in article 3(2) [now Article 4(2)] is that conduct is attributed to the organization that is the bearer of the obligation. The EC is a bearer of many international obligations (especially because it has concluded many treaties). However sometimes not only behaviour of its own organs, but also of organs of its Member States may breach such obligations. Such behaviour would, therefore, be *prima facie* attributable to those Member States.

I will give an example of this situation: the EC has contracted a certain tariff treatment with third States through an agreement or within the framework of the WTO. The third States concerned find that this agreement is being breached, but by whom? Not by the EC's organs, but by the Member States' customs authorities that are charged with implementing Community law. Hence their natural reaction is to blame the Member States concerned. In short, there is separation between responsibility and attribution: the responsibility trail leads to the EC, but the attribution trail to one or more Member States.

This example illustrates why we feel that there is a need to address the special situation of the Community within the framework of the draft articles.<sup>20</sup>

He then proposed to the ILC to consider special rules of attribution, so that

actions of member states' organs can be attributed to the organization only. In the alternative, there could be special rules for responsibility, so that the responsibility could be solely charged to the organization, even if a member state's organs were breaching an obligation borne by the international organization.<sup>21</sup>

In 2005, the ILC did not take up either of the suggestions. Rather, when commenting on the rationale behind Chapter IV, it specifically discussed the relationship between the European Union and its Member States by citing three cases, namely the *Melchior* case from the European Commission on Human Rights, the *Geographical Indications* case from a WTO panel, and the *Bosphorus* Case from the European Court of Human Rights.<sup>22</sup> Whereas the trade-related jurisprudence had accepted that Member States act 'de facto as organs of the Community, for which the Union would be responsible under WTO law and international law in general',<sup>23</sup> the human-rights related jurisprudence kept on attributing action of the Member States implementing Union law to the latter.<sup>24</sup> Without explaining why it gave preference to Strasbourg over Geneva, the ILC concluded in 2005 that:

for the purposes of this Chapter, it seems preferable at the current stage of judicial developments *not* to assume that a special

<sup>21</sup> *Ibid.*

<sup>22</sup> ILC, Report of the fifty-seventh session (2005), A/60/10, Responsibility of international organizations, Commentary on Part One, Chapter IV, at 93–95, paras 5–7.

<sup>23</sup> Panel Report, *European Communities – Geographic Indications*, WT/DS174/R, at para. 7.725.

<sup>24</sup> App. No. 13258/87, *Melchior*, EComHR, Decision of 9 Feb. 1990, 64 D&R 138; App. No. 450368/98, (*Bosphorus*), ECtHR, Judgment of 30 June 2005 (Grand Chamber), ECtHR Rep 2005–VI, at para. 153.

<sup>20</sup> EU Presidency Statement on the ILC Report 2004, New York, 5 Nov. 2004, available at: [www.europa-eu-un.org/articles/en/article\\_4020\\_en.htm](http://www.europa-eu-un.org/articles/en/article_4020_en.htm).

rule has come into existence to the effect that, when implementing a binding act of the European Community, State authorities would act as organs of the European Community.<sup>25</sup>

When presenting his seventh report in 2009, the Special Rapporteur (SR) confirmed this line of thinking. Dismissing doctrinal suggestions that the conduct of state organs should be attributed to the international organization where the former act as agents of the latter,<sup>26</sup> Gaja again sought justification from international jurisprudence. While relegating another WTO report (the *EC–Biotech* Panel report<sup>27</sup>) which is in line with the *Geographic Indications* Panel, to a mere footnote amendment, he contrasted the WTO case law with the judgments of the European Court of Human Rights in *Bosphorus* and the European Court of Justice in *Kadi*.<sup>28</sup> In his view, ‘these judicial decisions, both of which examined the implementation of a binding act that left no discretion, clearly do not lend support to the proposal of considering that conduct implementing an act of an international organization should be attributed to the organization’.<sup>29</sup> The Special

Rapporteur therefore did not favour special attribution rules, but rather tried to solve the issue through a broad concept of responsibility. As the Union neither aids and assists nor directs and controls, let alone coerces the Member States when implementing Union law,<sup>30</sup> the only *cas de figure* left for the Union scenario under the SR’s approach would be paragraphs 1 and 2 of Draft Article 16. According to Gaja’s conception, the implementing action remains attributable to the Member State, but the Union is said to bear additional responsibility.

However, during its 2009 session, the ILC took a less categorical approach than previously and adopted a new Draft Article 63 on *lex specialis*. According to this provision the draft articles do not apply ‘where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or a State for an internationally wrongful act of an international organization, are governed by special rules of international law, including rules of the organization applicable to the relations between the international organization and its members’.<sup>31</sup> The commentary thereto explicitly records that there are a variety of opinions concerning the possible existence of a special rule, in particular with respect to the attribution to the European Union of conduct of states members of the Union when they implement binding acts of the Union.<sup>32</sup> Moreover, the commentary referred to

<sup>25</sup> ILC, *supra* note 22, at 95, para. 7 (emphasis added).

<sup>26</sup> Kuijper and Paasivirta, ‘Further Exploring International Responsibility: The European Community and the ILC’s Project on Responsibility of International Organisations’, *I Int’l Orgs L Rev.* (2004) 111, at 127; Talmon, *supra* note 12, at 412–414.

<sup>27</sup> Panel Report, *European Communities – Biotech*, WT/DS 291/R; DS 292/R, WT/DS 293/R, at para. 7.101.

<sup>28</sup> Joined Cases C–402/05 P and C–415/05, *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I–6351, at para. 314.

<sup>29</sup> Gaja, *supra* note 11, at para. 33.

<sup>30</sup> Talmon, *supra* note 12, at 410.

<sup>31</sup> Draft Art. 63, ILC, Report of its sixty-first session, at 172.

<sup>32</sup> ILC, Report of its sixty-first session (2009), Commentary (2) to Draft Article 63, A/64/10, at 173.

WTO and human rights case law on an equal footing without (unlike the SR) giving precedence to one strain of the international case law over the other.<sup>33</sup> The ILC therefore left it open whether or not its general rules on attribution and responsibility would apply to the European Union and its Member States. Rather, it allowed for the identification of a possible special rule. In line with these directions, it therefore seems useful to look in detail at international case law involving the European Union and its Member States in order to verify where such special rules might have already been applied.

### 3 International Case Law

#### A Action of Union institutions and bodies

##### (a) WTO practice

WTO practice leaves no doubt that the Union is responsible for acts done by its institutions or bodies. It suffices to cite the well-known *EC – Hormones*<sup>34</sup>, *EC – Bananas*<sup>35</sup> and *EC – Sardines*<sup>36</sup> cases, where Union regulations affecting the import and marketing of third country goods were attacked by other WTO members. The EU also bears responsibility for regulatory directives<sup>37</sup> or

trade defence measures<sup>38</sup> adopted by its institutions.

##### (b) ECHR practice

Under the European Convention on Human Rights (ECHR), there is no equivalent case law due to the simple fact that the European Union is not (yet) a party thereto. Accordingly, acts of the Union as such cannot be challenged before the Court.<sup>39</sup> However, the Court has faced attempts to turn to the Member States instead, either collectively or individually, with a view to exercising jurisdiction over Union measures.

In *Senator Lines*,<sup>40</sup> a limited company in Germany had been fined €13,750,000 by the European Commission in 1996 for breaching competition rules. It challenged the decision before the Court of First Instance (CFI). Its parallel request to stay the execution of the fine was turned down by the President of the CFI (1997), and on appeal also by the President of the European Court of Justice (ECJ) (1999). Nevertheless, the European Commission abstained from enforcing the award after the applicant brought a case against the then 15 EU Member States collectively before the European Court of Human Rights (ECtHR) in 2000. The applicant argued that by dismissing the requested interim relief, the EU Courts were allowing a mere administrative body to force

<sup>33</sup> ILC, Report of its sixty-first session (2009), Commentaries (3)–(5) to Draft Article 63, A/64/10, at 173–175.

<sup>34</sup> *EC – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26.

<sup>35</sup> *EC – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27.

<sup>36</sup> *EC – Trade Description of Sardines*, WT/DS231.

<sup>37</sup> *EC – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS 291, DS 292, and DS 293.

<sup>38</sup> See, e.g., *EC – Anti-Dumping Measures on Imports of Cotton-Type Bed-Linen from India*, WT/DS141; *EC – Measures Affecting Trade in Commercial Vessels*, WT/DS310; *EC – Definitive Safeguards on Salmon*, WT/DS 326 and WT/DS 328.

<sup>39</sup> App. No. 24833/94, *Matthews v. United Kingdom*, judgment of 18 Feb. 1999, at para. 32, available at: [www.echr.coe.int/echr/Homepage\\_EN](http://www.echr.coe.int/echr/Homepage_EN); *Bosphorus*, *supra* note 4, at para. 152 with further references.

<sup>40</sup> App. No. 56672/00, *Senator Lines*, Decision of 10 Mar. 2004, *supra* note 4.



the applicant company into liquidation, in violation of the rights to a fair hearing, effective access to judicial recourse and the presumption of innocence, contrary to Article 6 of the Convention. In September 2003, the CFI quashed the Commission's decision. As the judgment was not appealed, it became final by November 2003.

The case is interesting as the Strasbourg Court could have declared the application inadmissible out of hand. Accepting the collective responsibility of the EU Member States for a Commission competition decision pierces the corporate veil of the Union as a legal person. It also makes the founding states of any international organizations potentially responsible for all acts adopted by the organization, irrespective of the internal decision-making procedure. That result is particularly awesome for EU Court decisions, where the judges act in full independence. Indeed, emphasizing the separate authority of the Union from that of the Member States, the former European Commission on Human Rights had dismissed an application against all EU Member States collectively.<sup>41</sup> However, while recalling relevant arguments on the alleged reserve responsibility of Member States, the Strasbourg Court chose not to do so. Rather, it found that the applicant lacked the status of victim under Article 34 of the Convention, as the company had never suffered from a denial of access to court and that its claim against the fine had effectively been heard.<sup>42</sup>

The same avoidance technique was applied by the Court in *Emesa Sugar*.<sup>43</sup> Here, the applicant complained that it had been deprived of a fair hearing because it had not been allowed to respond to the Opinion of the Advocate General to the ECJ in a preliminary reference procedure under Article 234 EC. As the subject matter at hand was an order of the EU Court, the most straightforward way to deal with the application would have been to declare it inadmissible *ratione personae*, as suggested by both the Netherlands and the European Commission. However, again, the Strasbourg Court did not address the issue, but preferred to state that original customs proceedings fell outside the scope of 'civil rights' under Article 6(1) ECHR.

Both cases therefore lack a clear statement that only the Union is responsible for the acts of its institutions. The reason for that may be that the Court wishes to have resort to the idea of 'reserve responsibility' of the 15 Member States in more appropriate cases, as long as the Union itself is not a party to the Convention. ECtHR practice in this field can therefore be seen as more pragmatic than dogmatic.

## **B Member States Acting as Agents of the Union**

### *(a) WTO practice*

In the *EC – LAN* case,<sup>44</sup> the Commission had adopted a 'Reclassification Regulation' on certain computer equipment.<sup>45</sup>

<sup>41</sup> App. No. 8030/77, *CFDT v. The European Communities and their Member States* (ECommHR), 13 D&R 231.

<sup>42</sup> *Senator Lines*, *supra* note 4, at 12–13.

<sup>43</sup> App. No. 62023/00, *Emesa Sugar*, Decision of 15 Jan. 2005, *supra* note 4.

<sup>44</sup> Panel Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/R, WT/DS67/R, WT/DS68/R, adopted 22 June 1998.

<sup>45</sup> Reg. (EC) 1165/95 of 23 May 1995, OJ (1995)L 117/15, at 15–18.

Thereafter, the Irish and British customs authorities withdrew the previously issued 'Binding Tariff Information' letters for importers, which increased the applicable rate from 2 per cent to 7.5 per cent. The United States formally challenged both the EC and two of its Member States (UK and Ireland). The EU responded that it was a member in its own right of the WTO and had taken sole responsibility for tariff concessions on goods in the EC schedule.<sup>46</sup> The US counter-argued that Ireland and the UK were members of the WTO as well, and that the internal arrangements of the Union could not result in fewer rights and obligations allotted to other WTO members.<sup>47</sup> The EU disagreed with the US' allegation that the transfer of sovereignty from the Member States to the EU was irrelevant on the external plane, arguing that the EU schedule had been recognized by other WTO members, and that the EU was more than a simple customs union. The EU was ready to assume its international obligations, but was not ready to allow an attack on its constitution in the WTO.<sup>48</sup>

The Panel decided as follows:

[W]hat is at issue in this dispute is tariff treatment of LAN equipment and multi-media PCs by customs authorities in the European Communities. Since 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.<sup>49</sup>

The Panel also refused the US request to include the Member States in the title of the dispute, clarifying that 'the title of a particular dispute is given for the sake of convenience in reference and in no way affects the substantive rights and obligations of the parties to the dispute'.<sup>50</sup>

By using the formula 'customs authorities in the EC, including those located in Ireland and the United Kingdom', the Panel made it clear that the Irish and British administrations were acting within a broader system, namely the Community system. On the other hand, the Panel fell short of finding that Schedule LXXX was binding only on the EU with the consequence that only the EU would bear responsibility for any breaches. Rather, by stating that EU, Ireland, and the UK are all bound by the same Schedule LXXX, it presumed an identical international obligation of the Member States. The case could therefore be seen as sympathetic to the theory of joint responsibility of the Union and the Member States for agency situations.

The analysis shifted in the *EC – Customs Case*.<sup>51</sup> Here, the United States attacked the EU Customs Code, the EU Customs Tariff, and the implementing regulation. It complained, *inter alia*, that the EU administers these rules by the Member States 'in 25 different ways'.<sup>52</sup> Classification and valuation practice in the Member States was said to be inconsistent. Moreover, the US was dissatisfied with the fact that EU Member States are responsible for the implementation of

<sup>46</sup> *Ibid.*, at paras 4.9–4.11.

<sup>47</sup> *Ibid.*, at paras 4.12–4.13.

<sup>48</sup> *Ibid.*, at para. 4.14.

<sup>49</sup> *Ibid.*, at para. 8.16.

<sup>50</sup> *Ibid.*, at para. 8.17.

<sup>51</sup> Panel Report, *European Communities – Selected Customs Matters*, WT/DS315/R, adopted 11 Dec. 2006.

<sup>52</sup> *Ibid.*, at para. 4.3.

appeals procedures. This way of administering a Customs Union was claimed to be inconsistent with uniformity requirements under Articles X(1) and X(3)(a) and (b) of GATT. This time, the US challenged only the EU and not its Member States, considering that the Union was the author of the relevant legislation and therefore responsible for the customs authorities in the Member States. However, in the US' view, the Union was under a GATT obligation to replace the system of decentralized implementation with more centralized forms. The Panel did not agree with the US on most of the substantive allegations. However, it endorsed the idea of Union responsibility for the entire customs administration. Referring to ECJ jurisprudence, it held that the customs union, 'which includes the administration of customs matters', fell within the exclusive competence of the Union.<sup>53</sup> Moreover, it referred to the fact that EU customs law is executed by the Member States as 'executive federalism',<sup>54</sup> quoting a leading textbook on the issue.<sup>55</sup> It also made the observation that the courts of the Member States performed a dual role: when determining a dispute governed by national law, they formed part of the national legal order; however, these national courts assumed the role of Union courts when determining a case governed by Union law.<sup>56</sup> Finally, it mentioned that Union law provided for cooperation between the

customs administrations of Member States and the Commission.<sup>57</sup>

Against this background, the Panel was prepared to analyse the responsibility of the Union for 'the manner of administration by the national customs authorities of the member States of the Community Customs Code, the Implementing Regulation, the Common Customs Tariff, the TARIC and related measures in the areas of customs administration', which it considered to be the measure at issue.<sup>58</sup> The Appellate Body overruled the latter finding, arguing that the definition of a measure within the meaning of Article 6.2 DSU should not depend on the substantive claim raised.<sup>59</sup> However, the Appellate Body did not touch upon the Panel's basic understanding or the Union's responsibility for the administration of its customs legislation. Rather, it expressly confirmed that the subject of the dispute were the four Union regulations 'as administered collectively'.<sup>60</sup> When analysing the US' uniformity claim, it further stated that 'the penalty laws of the Member States, as instruments of implementation of European Communities customs law'<sup>61</sup> could be examined under Article X(3)(a) of GATT. Finally, the Appellate Body also established the responsibility of the EU for the customs related administrative processes in the Member States.<sup>62</sup>

A similar approach to that in *EC – Customs* has been taken by panels also

<sup>53</sup> *Ibid.*, at para. 2.2.

<sup>54</sup> *Ibid.*, at para. 2.13.

<sup>55</sup> K. Lenaerts and P. van Nuffel, *Constitutional Law of the European Union* (2nd edn, 2005), at para. 14-047.

<sup>56</sup> *Supra* note 44, at para. 2.23.

<sup>57</sup> *Ibid.*, at paras 2.28–2.31.

<sup>58</sup> *Ibid.*, at para. 7.33.

<sup>59</sup> Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315//AB/R, adopted 11 Dec. 2006, at paras 122–137.

<sup>60</sup> *Ibid.*, at paras 152–154, particularly 154.

<sup>61</sup> *Ibid.*, at para. 210.

<sup>62</sup> *Ibid.*, at paras 218–227.

with regard to other EU policies. As mentioned by the ILC's Special Rapporteur, in *EC – Geographic Indications*, the Panel held that Member States act 'de facto as organs of the Community, for which the Community would be responsible under WTO law and international law in general'.<sup>63</sup> This allowed the Panel to refute the US allegation that there is an infringement of the most-favoured national principle under Article 4 of the TRIPS when Member States are executing the Union-wide system on the protection of geographic indications, as established by Regulation 2081/92<sup>64</sup> on the protection of geographical indications and designations of origin for agricultural products and foodstuffs.

It can be safely concluded from the three cases that situations of 'executive federalism' have been extensively scrutinized in the WTO. At times, other WTO members are of the opinion that those situations trigger the responsibility of the Union and its Member States as in the *LAN* case and the pending *ITA* dispute.<sup>65</sup> However, both the panels involved and the Appellate Body have concluded that the Union bears sole

responsibility for Member States' action when implementing Union regulations in areas of exclusive Union competence.

(b) *ECHR practice*

In *Matthews*,<sup>66</sup> the UK Electoral Registration Office turned down the applicant's demand to be registered for European Parliament Elections in Gibraltar. The Office applied Annex II to the Act on Direct Elections of 1976, which bears the force of primary law and is attached to Council Decision 76/787.<sup>67</sup>

The Court had two choices: it could either stress that the Office is a British organ and therefore attribute its conduct to the UK, irrespective of the fact that the Office applied only Union law. Or it could attach importance to the fact that the United Kingdom had participated in the decision-making concerning Union law. Interestingly, the Court did not choose the first option. Rather than relying on the fact that UK authorities had denied registration, it looked into the legal basis for the refusal. In this respect, the Court noted that Convention rights should not be theoretical or illusory, but practical and effective, and derived the UK's responsibility 'from its having entered into treaty commitments subsequent to the applicability of Article 3 Protocol 1 to Gibraltar, namely the Maastricht Treaty taken together with its obligations under the Council Decision and the 1976 Act'.<sup>68</sup>

In *Bosphorus*, the analysis changed. In that case, the Court ruled upon an Irish measure which impounded a Yugoslav aeroplane in execution of a Union regulation establishing sanctions against

<sup>63</sup> Panel Report, *European Communities – Geographic Indications*, WT/DS174/R, at para. 7.725.

<sup>64</sup> 14 July 1992, OJ (1992) L 208/1.

<sup>65</sup> *EC and its Member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375-377 (pending). While the US, Japan, and Taiwan are complaining against the tariff treatment of certain information technology products, they have been addressing their Panel request to 'the EC and its member States', arguing that both the EC and its Member States impose duties on those products despite their commitment to grant duty-free treatment under the Ministerial Declaration on Trade in Information Technology Products: Consultation request from Taiwan, WT/DS377/1, at 1.

<sup>66</sup> *Matthews v. UK*, *supra* note 39.

<sup>67</sup> 8 Oct. 1976, OJ (1976) L 278/1.

<sup>68</sup> *Supra* note 39, at para. 34.

Yugoslavia. The compatibility of the regulation with primary law had previously been confirmed by the ECJ in a preliminary reference. Here, the Court did not inquire about the participation of Ireland in the Treaty (transferring power to the Union to adopt sanctions) or in the adoption of the regulation at hand to argue for Ireland's answerability before the Court. Rather, this time, the Court placed emphasis on the fact that the measures were adopted by Irish authorities, finding 'that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations'.<sup>69</sup>

The case law of the ECtHR for situations where Member States implement Union law (be it anchored in primary or secondary law) is hence driven by the mission of the Court to provide effective human rights protection. Whereas attribution of Member States' conduct to the Union would lead to the undesired result that the case would have to be declared inadmissible, attribution to the Member State affirms the jurisdiction of the Court. This policy choice was motivated in *Bosphorus* in a different way when compared with *Matthews*. It can therefore be assumed that the reasoning of the Court will again change if the Union becomes a party to the Convention and is answerable for human rights applications brought against any of its rules, be they executed by whatever Member State.

### (c) Investment protection practice

Under the Energy Charter Treaty (ECT) investors of one Contracting Party enjoy

protections against measures of another Contracting Party. As both the Union (through succession to the Community<sup>70</sup>) and its Member States have become Contracting Parties to the treaty, investors may thus bring claims against a Member State and/or the Union before an international investment tribunal (Article 26(1) ECT). So far, investors have chosen to initiate proceedings against certain Member States only, irrespective of whether or not the case has an important Union dimension. Where such dimension became apparent, the European Commission intervened in the cases as non-disputing third party under Article 37(2) of the ICSID rules of procedure.<sup>71</sup>

Leaving aside the merits of these pending cases, any investment case against an EU Member State raises important questions of attribution and responsibility. Generally speaking, the Union has invited investors to seek clarification on whom to challenge by virtue of a statement deposited at the time of ratification.<sup>72</sup> According to this statement:

[T]he 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

<sup>70</sup> Council and Commission decision of 23 Sept. 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects, OJ (1998) L 69/1.

<sup>71</sup> ICSID Case No. ARB 07/22, *AES v. Hungary*; ICSID Case No. ARB 07/19, *Electrabel v. Hungary*; ICSID Case No. ARB 05/20, *Micula v. Romania*, all *supra* note 6.

<sup>72</sup> Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Art. 26(3)(b)(ii) of the Energy Charter Treaty, OJ (1998) L 69/115, at 115.

<sup>69</sup> *Bosphorus*, *supra* note 4, at para. 153.

accordance with their respective competences. The Communities and the Member States will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of another Contracting Party. In such case, upon the request of the Investor, the Communities and the Member States concerned will make such determination within a period of 30 days.

As to the likely outcome of such determinations, liability would normally fall upon the EU if Member States' organs were simply implementing Union law. Accordingly, the EU would then signal to the investor that it would become the respondent party before such proceedings were initiated.<sup>73</sup>

When an investor fails to use this prelitigation channel, his choice to bring a case against the Member State can be contested before the Tribunal. It is nowadays accepted that the EU can affect an investor not only directly (through regulation or decision addressed to the investor), but also indirectly 'through directive or decision addressed to the Member State which then acted accordingly'.<sup>74</sup> In accordance with this logic, the EU would thus be the correct respondent in an agent situation, with the consequence that cases wrongly brought against the Member State would then be inadmissible.

(d) *ECJ practice with respect to the UN*

Finally, the ILC's Special Rapporteur Gaja cited the *Kadi* case against a special rule on attribution, stating that it equally concerned the situation of implementation of

a legal act of an organization which left no discretion.<sup>75</sup> The relevant passage of the Luxemburg Court reads:

[T]he contested regulation cannot be considered to be an act directly attributable to the United Nations as an action of one of its subsidiary organs created under Chapter VII of the Charter of the United Nations or an action falling within the exercise of powers lawfully delegated by the Security Council pursuant to that chapter.<sup>76</sup>

The statement indeed seems to reject the idea that decentralized implementation by a UN member state (or the EU) of a binding UN Security Council resolution should be attributed to the UN. However, does that also mean that decentralized implementation of EU law by an EU Member State cannot be attributed to the EU? For the present writer, at least two arguments can be made against such an equation.

First, the scenario under discussion, namely decentralized implementation by EU Member States of Union law, concerns directly applicable regulations. The EU Member State's administration does nothing more than simply execute them. In contrast, the binding Chapter VII resolution of the Security Council creates an international obligation of the UN member states (and the Union) to freeze the assets of the person. As the ECJ held, these are *not* directly applicable within the legal orders of all UN Member States by their simple adoption in New York. Even after having been listed by the UN Sanctions Committee for his presumed links to international terrorism, Mr. Kadi was still not prevented from making use of his assets held in the Union. Only with

<sup>73</sup> Eilmansberger, 'Bilateral Investment Treaties and EU Law', 46 *CMLRev* (2009) 383, at 396.

<sup>74</sup> Happ, 'The Legal Status of the Investor vis-à-vis the European Communities: Some Salient Thoughts', 74 *Int'l Arb L Rev* (2007) 77 with further references.

<sup>75</sup> Gaja, *supra* note 11, at para. 33.

<sup>76</sup> *Kadi*, *supra* note 29, at para. 314.

the entry into force of the Union regulation did the legal obligation for European banks and for him arise. In other words, *Kadi* is not an example of the execution of a directly applicable rule of an international organization, but of the *transformation* of an international obligation into domestic law. Any act of transformation is, however, normatively controlled by the domestic legal order. In the words of the Court, the question of the Court's jurisdiction arose 'in the context of the internal and autonomous legal order of the Community, within whose ambit the contested regulation falls and in which the Court has jurisdiction to review the validity of Community measures in the light of fundamental rights'.<sup>77</sup> Accordingly, as normative control is derived from Union primary law, the ECJ confirmed the responsibility of the Union for its own regulation, rather than the affirming the responsibility of the UN.

Secondly, the ECJ was not unsympathetic to the idea that even in situations of *transformation* responsibility could ultimately be vested in the UN if circumstances so permitted. As the 'root cause' of Mr. Kadi's treatment lies in New York and can best be removed there, the ECJ did consider whether it could defer its jurisdiction in favour of UN control mechanisms, as argued by the European Commission.<sup>78</sup> However, as the UN had not yet provided sufficient guarantees of due process for listed persons, this option was temporarily ruled out.<sup>79</sup> This indicates that the ECJ may be willing to accept the primary responsibility of the

UN in the future, even when an EU transformation act is attacked: this, however, does not follow from any general rule of attribution, but is dictated by considerations of available effective legal remedies.

### *C Member States' Action falling within the Scope of Union Law*

Finally, there is important jurisprudence on the responsibility of the Union for Member States' action which is not executing a Community rule, but falls within the scope of Union law. Again, WTO case law is most explicit in the field, and a settled UNCLOS case also deserves attention.

#### *(a) WTO practice*

In *EC – Asbestos*,<sup>80</sup> Canada challenged a French decree of 1996 banning asbestos and products containing asbestos, pursuant to the French Labour and Consumer Code. Only in 1999 did the Union start the legislative process for a directive on the matter.<sup>81</sup> The panel did not question the fact that not France, but the Union, defended the case. Indeed, it follows from the structure of the panel's analysis that it accepted the Union's responsibility for the French measure, scrutinizing it against the Union's obligations under the SPS agreement, the TBT Agreement, and Articles III and XI of GATT.<sup>82</sup>

The *EC – Biotech* Panel went a step further and provided an explicit explanation for its approach. When considering the measure at issue, it not only looked at what it called the 'moratorium', i.e. a consistent policy of the Union institutions not

<sup>77</sup> *Ibid.*, at para. 317.

<sup>78</sup> *Ibid.*, at paras 318–319.

<sup>79</sup> *Ibid.*, at paras 320–326.

<sup>80</sup> Panel Report, *European Communities – Measures Affecting Asbestos and Products containing Asbestos*, WT/DS/135/R.

<sup>81</sup> *Ibid.*, at para. 3.32.

<sup>82</sup> *Ibid.*, at paras 8.1–8.8 setting out the measure and the main claims of the parties.

to approve certain genetically modified organisms within the Union and certain decisions taken with respect to specific products.<sup>83</sup> It also looked at safeguard measures taken by individual Member States in reliance on the relevant authorization contained in the directive. The Panel observed that ‘the European Communities never contested that, for the purposes of this dispute, the challenged Member States measures are attributable to it and can be considered EC measures. Indeed it was the European Communities – and it alone – that defended the contested member States safeguard measure before the Panel’.<sup>84</sup> In this respect it noted that a similar situation had arisen in the *EC – Asbestos* case.<sup>85</sup>

(b) *Law of the Sea practice*

In the law of the sea field, the leading case is *Chile v. European Communities*.<sup>86</sup> Vessels under the Spanish flag had been fishing swordfish on the High Seas adjacent to Chile’s exclusive economic zone. Chile claimed that these activities had caused a deterioration in the relevant stocks. Interestingly, Chile did not sue Spain under the Law of the Sea Convention. Rather, it brought the case against the Union, alleging that it did not comply with its obligations under UNCLOS to ensure conservation of swordfish in the fishing activities undertaken by vessels flying the flag of any of its Member

States.<sup>87</sup> As the case has been settled<sup>88</sup> the Special Chamber did not have to deal with the question of responsibility. However, it can be reasonably assumed that the Chamber would not have raised doubts about the status of the Union as the proper respondent in the case, even though the Spanish fishermen had not carried out an EU regulation. Rather, the fact that their action falls within the scope of the Union’s exclusive competence for the conservation of maritime resources would have been likely to be for the Chamber to accept Union responsibility for such kind of Member State action. Indeed, the Tribunal took positive note of the settlement reached between the two parties, thereby acknowledging the fact that the Union was (solely) competent to deal with the matter before and outside the Court.

## D *The Common Thread in the Case Law*

Reviewing the case law in the fields of trade, human rights, investment protection, and law of the sea, one common thread can be identified. Each jurisdiction decides questions on responsibility very much against the procedural background of available respondents. Whereas WTO dispute settlement organs and ITLOS have no hesitation in attributing conduct of the Union institutions as well as Member States’ action (either as executive agency or falling within the scope of Community law) to the Union alone, the ECtHR has shown the opposite tendency.

<sup>83</sup> Panel Report, *European Communities – Biotech*, WT/DS 291/R; DS 292/R, WT/DS 293/R, at paras 7.98–7.100.

<sup>84</sup> *Ibid.*, at para. 7.101.

<sup>85</sup> *Ibid.*, at para. 7.101, n. 275 with reference to *EC – Asbestos*, *supra* note 81, at paras 2.3 and 3.4.

<sup>86</sup> *Supra* note 3.

<sup>87</sup> ITLOS, Press Release 43, 20 Dec. 2000, available at: [www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html).

<sup>88</sup> ITLOS, Press Release 141, 17 Dec. 2009, available at: [www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html).



The reason is very simple: in Geneva and Hamburg, the Union is available and prepared to show up as respondent with the power to take certain action in line with its commitments. In Strasbourg the Union's non-adherence to the ECHR so far makes the Court think of alternative ways to provide effective human rights protection. The same idea can also be traced back as the rationale for the ECJ's *Kadi* case. As the right to due process cannot be enforced internationally against the UN for the time being, there is no readiness to attribute even transformation action in the Community of binding Chapter VII resolutions to the UN. Being aware of comparable policy choices made by all tribunals, there is no compelling reason to give more credence to human rights jurisprudence over trade-related jurisprudence when searching for a special rule.

Rather, one may distil three common factors from international practice when dealing with the specificities of the European Union. First, as explained in *EC – Customs*, the possibility that Member States may perform a dual role (acting either in a national or in a Union agent capacity) must be taken into account. Secondly, it has been common ground in both human rights and trade-related disputes that the unprecedented internal regulatory powers of the Union play an important role – accordingly, the question of normative control must always be asked; most probably this factor will also come to the forefront in a number of investment arbitration awards involving EU Member States. Thirdly, only the Union's capacity to contract international obligations on a widespread scale (even to the exclusion of Member States in areas of exclusive competence) can

explain why Chile chose to attack the Union rather than Spain. Rather than stressing the factual conduct of Spanish fisheries or enquiring whether they were executing a Union fisheries regime, Chile relied on the fact that the Union is exclusively competent for the protection of natural resources on the High Seas, as expressed by the Union's declaration of competence under Annex IX to UNCLOS. Moreover, only the Union would be able to negotiate an out-of-court settlement (as eventually occurred). The same point can explain Canada's decision in the WTO to attack the Union for the French asbestos decree, knowing that the SPS and TBT Agreements as well as the GATT fell under the exclusive trade competence of the Union.

#### 4 Special Rules of European Union Law

Whereas the case law presented here already militates in favour of the existence of a special rule for the European Union and its Member States, Draft Article 63 further requires an analysis of the 'rules of the organization applicable to the relations between the international organization and its members'. The commentary explains that this mention is due to the 'particular importance that the rules of the organization are likely to have as special rules concerning international responsibility in the relations between an international organization and its members'.<sup>89</sup> This encapsulates the idea that the rules of the European Union itself are a direct expression of the specificity of the

<sup>89</sup> Commentary (7) to Draft Article 63, ILC Report on its sixty-first session (2009), at 175.

Union as a regional economic integration organization.<sup>90</sup> Indeed, EU law is highly informative on the three factors distilled from international case law, namely the issues of (1) actors, (2) normative control, and (3) external Union competence.

## A Actors

### *(a) Action of Union institutions, bodies, offices, agencies and their servants*

According to Article 51(1) of the EU Charter of Fundamental Rights<sup>91</sup> (which is elevated to the rank of primary law by Article 6(1) TEU in the version of the Lisbon Treaty) its provisions are addressed to ‘institutions, bodies, offices and agencies of the European Union’. Under Article 340(2) TFEU (ex Article 288(2) EC), the Union bears non-contractual liability for damage caused ‘by its institutions or by its servants in the performance of their duties’. Article 263 TFEU (ex Article 230 EC) allows a legal action to be brought in respect of legal acts adopted by the institutions when the claimant considers that they violate primary law.

Although these provisions concern varying matters of substantive and procedural law, they can be seen as embodying a broader principle of responsibility. Indeed, entrusted with legal personality (Article 47 TEU), the Union can act only through its institutions, bodies, offices, and agencies and their servants. While the term ‘institutions’ is defined in the Treaty, the expression ‘bodies, offices and

agencies’ refers to all authorities set up under the Treaty or secondary legislation.

Accordingly, the Treaty expresses the general idea that the Union is responsible for all acts of its instrumentalities and subjects them to legal remedies at Union level. For example, the Union is liable for legislation (regulations or directives) adopted by the Council of Ministers and by the European Parliament in an ordinary or special legislative procedure, or for administrative acts adopted by the European Commission or a Union agency. Moreover, non-legally binding acts taken by an instrumentality can trigger Union responsibility under certain circumstances as well.

### *(b) Member States acting as agents of the Union*

Much more difficult to grasp are the rules on Union responsibility for Member States’ actions in their function as agents of the Union. While the Union is endowed with normative powers in an important number of policy fields, it only exceptionally has the administrative capacity to implement its legislation itself. This is the case for competition policy, trade defence, social or regional funds, and personnel matters, where the European Commission directly implements Union law. Sometimes, this task is also entrusted to the Council of the European Union. These two possibilities are nowadays enshrined in Article 291(2) TFEU.

In most other cases, the Union relies on the administrations and courts of the Member State to carry out Union law. This point was recalled by a declaration at the Maastricht conference,<sup>92</sup>

<sup>90</sup> See EU Presidency Statement on the ILC Report 2003, New York, 27 Oct. 2003, available at: [www.europa-eu-un.org/articles/en/article\\_2940\\_en.htm](http://www.europa-eu-un.org/articles/en/article_2940_en.htm).

<sup>91</sup> Charter of Fundamental Rights of the European Union, OJ (2007) C 303/1.

<sup>92</sup> See Declaration (No. 19) on the implementation of Community law annexed to the Final Act of the TEU, done at Maastricht on 7 Feb. 1992, OJ (1992)C 191/1, at 95.

and is now formally laid down in Article 291(1) TFEU. Decentralized implementation is especially important for Union regulations, which apply directly in the Member States (Article 288(2) TFEU, ex Article 249(2) EC). When implementing a Union regulation, the Member States must apply the substantive rules of the regulation, but may apply their own procedural law under the condition that this is done in a non-discriminatory and effective way.<sup>93</sup> On the other hand, the substantive standard for reviewing the legality of such action rests in the hands of the Union. Whenever a Member State's act implementing Union law is challenged because of the recipient's dissatisfaction with the underlying Union legislation, only primary law norms of the Treaty or general principles of Union law, including Union human rights,<sup>94</sup> apply.<sup>95</sup> Moreover, only the ECJ is competent to declare the eventual incompatibility of secondary Union law with higher-ranking norms. Accordingly, each court in a Member State must ask the ECJ for a preliminary ruling when the validity of a Union regulation is at stake in national proceedings.<sup>96</sup>

It follows that in these cases of decentralized implementation of Union regu-

lations, the administration and courts of Member States act as agents of the Union. They put into practice the will of the Union legislature, the compliance of which with Union primary law is ensured at Union level.

## B Normative control within the scope of Union law

In addition to putting their organs at the disposal of the Union, Member States serve the Union legal order also in another way. For example, they adopt national legislation implementing a Union directive which is binding on them only with respect to the aims pursued (Article 288(3) TFEU, ex Article 249(3) EC). They may also take legislative or administrative decisions to comply with other obligations flowing from Union law. This may be the case when bringing domestic requirements on the circulation of goods, persons, or services in line with the fundamental freedoms or when complying with a state aid decision from the Commission.

The common thread of those actions is that they fall within the scope of Union law. However, the normative control of the Union is different from implementing Union regulations. Rather than executing a certain harmonized rule, the Member States are under a duty not to overstep certain boundaries set by Union law. They are obliged not to take action which is contrary to the Directive, a fundamental freedom, or a Commission state aid decision. While the Member State may exercise discretion between several legal options, the Union rules out other options as being contrary to Union law. The question arises whether such restricted normative control over Member States' action

<sup>93</sup> Case 33/76, *Rewe v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989, at para. 5; Joined Cases 205–215/82, *Deutsche Milchkontor GmbH* [1983] ECR 2633, at para. 19.

<sup>94</sup> Compare Art. 51(1), Second Alternative of the EU Charter of Fundamental Rights, according to which the Charter applies 'to the Member States only when they are implementing Union law': OJ (2007) C 303/1, at 13.

<sup>95</sup> Case C-434/02, *Arnold André* [2004] ECR I-11825, at para. 28.

<sup>96</sup> Case 314/85, *Photo Frost v. Hauptzollamt Lübeck-Ost* [1984] ECR 4199, at para. 14.

is enough to attribute it externally to the Union. Some indicators can be raised in favour of such a proposition.

In *ERT*, the ECJ held that Union human rights apply also in a situation where a Member State adopts a broadcasting law, but must justify it in the light of a Community fundamental freedom.<sup>97</sup> In the explanations of the Presidium to the EU Charter of Fundamental Rights, this case is cited as an example of the ‘implementation of Union law’ by the Member States,<sup>98</sup> thereby assimilating it with the previously mentioned scenario.

In *Mox Plant*,<sup>99</sup> the British authorities had given permission to build a plant on the coast of the Irish Sea using spent nuclear fuel from nuclear reactors in the UK. Ireland brought a complaint against the UK before an Arbitral Tribunal under UNCLOS, arguing, *inter alia*, that the UK had failed to take necessary measures to prevent the pollution of the sea and to carry out a proper environmental impact assessment. The ECJ observed that the substance of the cited UNCLOS provisions was covered by Directive 85/337, and that the complaints relating to the international transfer of radioactive substances fell within Directive 93/75.<sup>100</sup> As the Union had exercised its competence with respect to environmental protection when acceding to UNCLOS, the Court concluded that the dispute was not of an international nature, but a dispute over

the interpretation and application of Union law over which it enjoyed exclusive jurisdiction under Article 344 TFEU (ex Article 292 EC).<sup>101</sup>

Both cases show a common feature. Rather than scrutinizing the level of discretion of the Member State in a given policy field, the Court emphasizes that the measure’s legality is ultimately governed by Union law. The compatibility of the Member State’s action with Union law cannot be verified by national courts (*ERT* case) or international courts (*MOX* constellation). Rather, it is for the ECJ to make sure that the Union legal order is properly applied in the Member States for action falling within Union competence. Accordingly, also in these cases of Member State action the determination of substantive legality and final judicial authority lie with the Union.

The abovementioned rules have been developed within the Union legal system for the purpose of identifying the applicable law (national law or Union law) and the appropriate forum (national/international courts or Union Courts). However, these rules can also be used to determine normative control within the Union for the purpose of international responsibility. When it is established that Union law governs both the substantive legality of and the available remedies for a measure, then the Union exercises normative control over it. In such a situation, it would also only be the Union which could modify or allow the modification of such measure in order to bring it into line with an international norm. In other words, the internal regulatory competence of the Union for matters falling within the scope

<sup>97</sup> Case C-260/89, *ERT v. SABAM* [1991] ECR I-2925, at paras 41–45.

<sup>98</sup> Explanations by the Presidium relating to the EU Charter of Fundamental Rights, OJ (2007) C 303/17, at 32.

<sup>99</sup> Case C-459/03, *Commission v. Ireland (Mox Plant)* [2006] ECR I-4635.

<sup>100</sup> *Ibid.*, at paras 110–116.

<sup>101</sup> *Ibid.*, at paras 121–139.

of the Treaty is necessarily translated into a criterion of establishing the Union's international responsibility for measures taken under its normative authority.

### C *The Union's capacity to assume international obligations*

Finally, Union law contains important clarifications of the Union's capacity to assume international obligations and the effects thereof on the respective capacity of Member States. Indeed, the nature of the Union's external competence is an important factor in the allocation of international responsibility.

Codifying previous case law of the ECJ, Article 3(1)(d) and (e) TEU make it clear that the conservation of marine biological resources under the common fisheries policy and the common commercial policy belongs to the Union's *exclusive competence*. Moreover, there is exclusive Union competence when the conclusion of an international agreement is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope (Article 3(2) TEU). Importantly, Article 2(1) TEU expresses the rule that Member States can no longer act in such exclusive Union policies unless if so empowered by the Union. Accordingly, Union law contains a strong indication that in areas of exclusive external Union competence action of either Union institutions or the Member States should be attributed to the Union, as only the Union has the legal power to act in this field and to remedy a potential breach of international law.

The opposite *cas de figure* exists for the Union cooperation policies. Agreements in the area of development cooperation,

or humanitarian aid do not touch upon the competence of the Member States to conclude agreements in the same field. This rule of *parallel competence*, nowadays enshrined in Article 4(4) TFEU, also has a direct consequence of the division of responsibility. As it would be impossible to identify certain parts of a given cooperation agreement as belonging exclusively to either the Union or the Member States, the relevant Union rule speaks in favour of joint responsibility in such cases. Indeed, as the ECJ held with respect to the EC-ACP Lomé Convention, the Union and its Member States are jointly liable to its treaty partners for the fulfilment of every obligation arising from the commitments undertaken, unless there is a derogation laid down in the Convention which allows responsibility to be separated.<sup>102</sup>

The situation is more complex in areas of *shared competence* laid down in Article 4(1) and (2) TFEU. Here, both the Union and the Member States may legislate (or assume international obligations); however Member States shall exercise their competence only to the extent that the Union has not exercised its competence (Article 2(2) TEU). This rule often leads to mixed situations, where both the Union and its Member States have assumed an international obligation, without it being clear at first sight for which parts of the Convention the Union and/or the Member State is likely to bear responsibility. Rather, an analysis is warranted of whether the Union has already occupied a certain policy field falling under the Convention (and thus become exclusively

<sup>102</sup> Case C-316/91, *Commission v. Council* [1994] ECR I-623, at para. 29.

competent externally) or whether this policy field still falls within the competence of the Member States. However, even where there is no specific Union legislation available, there can still be joint liability for the Union and its Member States. For example, in *Etang de Berres*, concerning the shared competence for environmental protection, both the Union and France were party to the Barcelona Convention for the Protection of the Mediterranean Sea against Pollution and its Athens Protocol. The Union had legislated in a number of environmental fields, but not specifically on the protection of soil. Nevertheless, in the absence of a declaration of competence, the Court acknowledged a Union interest to prevent France from polluting certain land, as otherwise the Union might become internationally responsible.<sup>103</sup> This judgment therefore speaks to the Court's understanding of the joint responsibility of the Union and its Member States for a mixed agreement falling within their shared competence.<sup>104</sup>

Hence, there is a need to undertake a case-by-case analysis of whether a certain obligation is binding jointly on the Union and its Member States or on only one of them. In order to clarify to what extent shared competence has been exercised either by the Union or by its Member States, Union declarations of competence made at the time of ratification, procedures to identify the bearer of the

obligation in question, or case law of the ECJ may be of help. For example, Article 6 of Annex IX to UNCLOS, or the previously cited Statement under the Energy Charter Treaty provides for a system where the claimant can ask for clarification from the European side before bringing a case. Interestingly, Protocol 8 to the Lisbon Treaty on the future accession treaty of the European Union to the European Convention on Human Rights also asks for the establishment of a 'mechanism necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate'. It is thus likely that details of a new co-defendant mechanism will be laid down in the future Union accession treaty to the Convention.<sup>105</sup> In WTO disputes, the EU and the Member States coordinate internally to determine the proper respondent upon an application of another WTO member. Hence, the duty of sincere cooperation between the Union and its Member States as enshrined in Article 4(3) TEU is another reassurance for third states that the European side will come up with a clear identification of which of them bears the international obligation in question (separately or jointly). In the long run, one may also conceive of standardized clauses on the internal determination of responsibility which could be included in the internal decisions when the Council of Ministers

<sup>103</sup> Case C-239/03, *Commission v. France* [2004] ECR I-9325, at paras 26–30.

<sup>104</sup> Kuijper, 'International Responsibility for EU Mixed Agreements', in P. Koutrakos and C. Hillion (eds), *Mixed Agreements Revisited* (2010), 208, at 210.

<sup>105</sup> For first ideas about such mechanism see the study of the Council of Europe's steering group on Human Rights entitled 'Technical and Legal Issues of a Possible EC/EU Accession to the European Convention on Human Rights', Strasbourg, 28 June 2002, Doc CDDH (2002)010 Addendum 2, at paras 57–62.

approves a mixed agreement on behalf of the EU.<sup>106</sup>

## 5 Conclusion: Elements of a *Lex Specialis* for the Responsibility of the European Union and its Member States

When one compares the results of the analysis of international case law and of the special rules of the European Union, there is considerable overlap. Both international case law and European Union rules attach significance to the actor, but are also aware of the situation that a Member State may not act on his own behalf, but merely as an agent of the Union. International practice also takes account of the fact that the Union is exclusively competent or has exercised its shared competence in a certain policy field, with the consequence that the Union is considered to have the power to bring an end to the alleged breach, provided that it has assumed an international obligation in the field. That leads inevitably to the rules of the European Union on external competences and their differentiation between exclusive, shared, and parallel competences. Such rules are hence of primordial importance for both the third state or applicant in question and the Union and its Member States alike.

In view of this remarkable overlap, it is suggested that one should always examine and evaluate three criteria in order to determine whether action can be attributed to the Union or its Member States under international law:

- (a) Who is the factual actor of the alleged breach?
- (b) Who has the legal power to bring an end to the alleged breach?
- (c) Who bears the international obligation invoked concerning the alleged breach?

With this matrix in mind, one may be tempted to identify all of a sudden more coherence than contradictions in the case law and practice. In the WTO cases, panels and the Appellate Body were convinced and reassured that points (b) and (c) fall to the Union. They were thus less concerned with point (a) and attributed Member States' action to the Union. In the human rights cases, the Strasbourg Court faced a situation where (c) spoke for the Member States, although (b) would go for the Union. In this situation, it either stressed (a) as decisive (*Bosphorus*) or decreased the significance of (b). The Strasbourg Court diminished the normative control of the Union either by saying that the Member State in question had contributed to the bringing about of the breach by concluding the EC Treaty and other primary law (*Matthews*) or by leaving open the possibility that Member States may still be able to change the Treaties if the operation of the EC system is fundamentally wrong (*Senator Lines, Emesa Sugar*). Finally, the UNCTOS *Swordfish* case shows us that Chile considers that (b) and (c) clearly fall to the Union, thereby generously disregarding (a). Investment cases under the Energy Charter Treaty will most likely not be decided by (c), as both the Union and its Member States are a party to the agreement without having made a declaration of competence. Rather, attribution will be likely to be decided by reference to either (a) or (b).

<sup>106</sup> Kuijper, *supra* note 104, at 225.

Certainly, the exact application of the three criteria may be subject to debate and controversy. But codifying and progressively developing international law is a tremendous task in any event. Having finished its first reading on responsibility of international organizations, the ILC has so far decided not to propose a special rule for the attribution of Member States' conduct to the European Union in particular circumstances. But it opened the door to accepting such a rule as *lex specialis* under Draft Article 63 provided that it can be firmly rooted in international law, including the rules of the organization applicable between the international organization and its members.

A close analysis of the international jurisprudence cited by the ILC (and those cases that it did not address) and European Union rules shows that there is a good case for assuming a special rule. While the Special Rapporteur seems to have perceived such practice as contradictory, playing Strasbourg case law against findings made in Geneva, this perception can be corrected when one does not look just at the question of 'actors', but also at the criteria of 'normative control' and 'bearer of the obligation'. This allows current litigation practice involving the Union and its Member States to be explained as more coherent than apparent. Moreover, it has been demonstrated that all the three criteria are firmly rooted in EU law concepts, which has the additional advantage that third states or an international dispute settlement body can resort to them when addressing the issue. It is hence suggested that a special rule on responsibility for the European Union and its Member States be taken account of for the purposes of Draft Article 63. In the present author's view, such rule currently reads as follows:

*Conduct of organs of a Member State of a regional economic integration organization*

The conduct of a State that executes the law or acts under the normative control of a regional economic integration organization may be considered an act of that organization under international law, taking account of the nature of the organization's external competence and its international obligations in the field where the conduct occurred.

Certainly, the exact formulation thereof may be refined or further explored. However, acknowledging such a special rule would seem to provide important guidance to international dispute settlement organs before which international litigation against the European Union and/or its Member States takes place. Attributing certain implementing Member State conduct to the Union under Draft Article 63 rather than creating an additional responsibility of the Union under Draft Article 16 would also have an important consequence for the applicable law in such disputes. When the conduct is attributed to the Member State (alone), it may plead that Union law (as a specialized legal order of international law) must be applied next to the other applicable international law in the dispute, or at least inform the interpretation of the applicable law under Article 31(3)(c) of the Vienna Convention on the Law of Treaties.<sup>107</sup> For example, only because it attributed an implementing act to the Member State in question did the ECtHR hold in *Bosphorus* with reference to Article 31(3)(c) of the Vienna Convention that compliance with EU law leads to a

<sup>107</sup> On the principle of systemic interpretation under Art. 31(3)(c) VCLT see generally McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', 54 *Int'l and Comp LJ* (2005) 279, at 296–299.



presumption that the same conduct is also justified under the ECHR.<sup>108</sup> If, however, conduct is solely attributed to the European Union, Union law would be seen as domestic law of the respondent only and become irrelevant under Article 27 of the Vienna Convention on the Law of Treaties for the purposes of finding a material breach or not under international law. Seen from that perspective,

the proper attribution of conduct to either the Member State or the Union will have a bearing not only on the admissibility of cases, but probably also on the merits. It is therefore submitted that the utmost attention should be paid to the choice of the respondent in cases against the European Union and/or its Member States by taking into account the special rule advocated in this article.

<sup>108</sup> *Bosphorus*, *supra* note 4, at paras 149–158.