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# Untangling the International Responsibility of the European Union and Its Member States in the World Trade Organization Post-Lisbon: A Competence/Remedy Model

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## Abstract

*The aim of this article is to shed light on the legally important and politically sensitive question of the respective responsibility of the European Union (EU) and its member states for the performance of World Trade Organization (WTO) obligations. Specifically, it seeks to challenge two propositions often found in the literature on the basis of a rigorous analysis of WTO dispute settlement practice. First, the claim that the EU's exclusive responsibility for breaches of WTO law by its member states has been widely accepted by other WTO members and dispute settlement organs is not well grounded in existing WTO jurisprudence nor supported by recent post-Lisbon WTO dispute settlement practice. Second, and contrary to what some EU law scholars appear to suggest, what has been decisive in assigning international responsibility in the WTO is not the division of external (treaty-making) competences between the EU and its member states but, rather, the allocation and exercise of internal (treaty-infringing/treaty-performing) competences. In this sense, the Treaty of Lisbon has not fundamentally changed how the issue of EU/member states international responsibility is to be approached in the WTO, insofar as the EU member states remain members of that organization in their own right. With this in mind, a redefined 'competence/remedy' model is put forward to help us untangle 'who is responsible' to third parties for breaches of WTO law.*

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## 1 Introduction

This article revisits the legally important and politically sensitive question of how the unique position of the European Union (EU) and its member states (MS) as full members of the World Trade Organization (WTO) has affected their respective responsibility for the performance of WTO obligations. As is the case for any other ‘mixed’ agreement, this joint EU/MS membership of the WTO inevitably prompts the question of ‘who is responsible’ towards third parties for breaches of WTO law. The question of the EU’s international responsibility *vis-à-vis* that of its member states has been the subject of intense study in the past years,<sup>1</sup> due not only to the increasingly prominent role of the Union on the international scene but also to the work of the International Law Commission (ILC) on the Articles on the Responsibility of International Organizations (ARIO).<sup>2</sup> And, yet, within this broader debate, the WTO is often presented in the scholarship as providing both an ‘exceptional’ and ‘exemplary’ case study.

Not only is the WTO one of the rare international fora in which the EU can fully participate as a party in dispute settlement proceedings,<sup>3</sup> but the Union – perhaps not surprisingly as one of the world’s leading trade powers – has actually been one of the key players in the WTO dispute settlement system: out of the total 525 disputes that have been brought for resolution to the WTO since 1995, the EU (alone or jointly with its member states) has participated in 339 of them.<sup>4</sup> Moreover, this active participation of the EU in the WTO dispute settlement system has been praised as constituting an example of its international actorness and leadership. In fact, the Union has been eager to come forward as a single litigant and to assume sole responsibility in WTO disputes, even for alleged breaches by its member states. Against this background, it has been argued that WTO dispute settlement practice shows how the duty of cooperation (Article 4(3) of the Treaty on the European Union<sup>5</sup>) has allowed the EU to speak with one unified voice, with that voice being the European Commission as *porte-parole* for the Union.<sup>6</sup>

<sup>1</sup> See, e.g., A. Delgado Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (2016); E. Evans and P. Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (2013); and further references in section 2 below.

<sup>2</sup> International Law Commission (ILC), Draft Articles on the Responsibility of International Organizations (ARIO), annexed to UNGA Res 66/100, UN Doc. A/Res/66/100, 27 February 2012. See, most recently on this subject, ‘Special Issue: International Organizations and Member States Responsibility – Critical Perspectives’, 12(2) *International Organizations Law Review (IOLR)* (2015) 285.

<sup>3</sup> See Hillion and Wessel, ‘The European Union and International Dispute Settlement: Mapping Principles and Conditions’, in M. Cremona, A. Thies and R. Wessel (eds), *The EU and International Dispute Settlement* (2017, forthcoming).

<sup>4</sup> See WTO, *Disputes by Country/Territory*, available at [www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm).

<sup>5</sup> Treaty on the European Union, OJ 2010 C 83/13.

<sup>6</sup> See, e.g., Delgado Casteleiro and Larik, ‘The “Odd Couple”: Responsibility of the EU at the WTO’, in Evans and Koutrakos, *supra* note 1, 252, at 254–255; Eeckhout, ‘The EU and Its Member States in the WTO: Issues of Responsibility’, in L. Bartels and F. Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (2006) 449, at 456–457. European Union (EU) member states have continued to exert influence over the conduct of World Trade Organization (WTO) litigation through internal institutional structures.

The aim of this article is not to dispute this prevalent view that the EU's participation in the WTO dispute settlement system has largely been a 'success story'. Rather, it is to address two critical questions that, in the author's view, have not been properly understood in the prevailing scholarship. First, to what extent have third parties in the WTO accepted the EU's eagerness to assert its exclusive responsibility for breaches of WTO law by its member states? And, second, which role (if any) has the division of EU/MS competences under EU law played on the determinations of international responsibility in the WTO dispute settlement system? In order to respond to these questions, the article proceeds as follows. The second part sets out the scene by outlining the theoretical questions of international responsibility stemming from the parallel EU/MS membership of the WTO against the ARIIO framework. As will be seen, since the ARIIO discussions, the knotty point has been whether, and to what extent, the 'rules of the organization' – and, in particular, the delimitation of EU/MS competences under EU law – should be the decisive criterion for determining their respective international responsibility in the WTO.

Against this background, the third part of the article analyses how this issue has been tackled in the practice of the WTO dispute settlement system. Drawing upon this in-depth analysis of practice, the article seeks to accomplish two main objectives. First, it will be argued that the proposition that the EU's exclusive responsibility for breaches of WTO law by its member states has been accepted, 'by and large',<sup>7</sup> by other WTO members and dispute settlement organs is an overstatement. This is because there is no (as of yet) well-established authoritative WTO jurisprudence on this sensitive matter, while joint complaints against the EU and its member states have relatively increased following the entry into force of the Treaty of Lisbon<sup>8</sup> on 1 December 2009 and have concerned matters falling within both the 'old' and 'new' common commercial policy (CCP).<sup>9</sup> This fact shows that the question of who is responsible for breaches of WTO law has not been settled in a post-Lisbon context, but, if anything, has become increasingly unclear to third parties. It is therefore necessary to shed further light on the impact that the division of EU/MS powers under EU law has had on the determinations of international responsibility in WTO dispute settlement practice, which is the second aim of the article.

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See Kuijper, 'International Responsibility for EU Mixed Agreements', in C. Hillion and P. Koutrakos (eds), *Mixed Agreements Revisited: The EU and Its Member States in the World* (2010) 208, at 224.

<sup>7</sup> See, in particular, Delgado Castelleiro and Larik, *supra* note 6, at 235, 234; Hoffmeister, 'Litigating against the European Union and Its Member States: Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?', 21 *European Journal of International Law (EJIL)* (2010) 723, at 734; Kuijper and Paasivirta, 'EU International Responsibility and Its Attribution: From the Inside Looking Out', in Evans and Koutrakos, *supra* note 1, 63.

<sup>8</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, OJ 2007 C 306.

<sup>9</sup> Treaty on the Functioning of the European Union (TFEU), 2010 OJ C 83/49, Art. 207(1) extending the scope of the common commercial policy (CCP) from trade in goods ('old') to trade in services, commercial aspects of intellectual property and foreign direct investment ('new').

With this in mind, the fourth part of the article suggests a redefined ‘competence/ remedy’ model to assist our understanding of how EU competence rules have influenced the approach to EU/MS international responsibility in the WTO. Significantly, this departs from the ‘competence model’ proposed by Jan Kuijper and Esa Paasivirta (and endorsed by other EU law scholars)<sup>10</sup> in one crucial point. Contrary to what they appear to suggest, it is not the division of *external* (that is, treaty-making) competences between the EU and its member states that is of primordial importance for the purpose of assigning international responsibility in the WTO. Rather, it is the division and exercise of *internal* (that is, treaty-infringing/treaty-performing) competences, and, here, as will be seen, the Union does not have exclusive regulatory powers for all areas covered by WTO law, even post-Lisbon. This is because, from the perspective of providing juridical restitution (that is, the WTO-preferred remedy), what matters is who (that is, the EU, its member states or both) has the actual power to remove (or modify) the measure that is found to be WTO inconsistent, whereas the allocation of external competences under EU law is largely irrelevant to answer this question. Accordingly, the fact that the EU has acquired exclusive external competence for *quasi* all WTO matters<sup>11</sup> by virtue of the Treaty of Lisbon has not fundamentally altered how the question of EU/MS international responsibility is to be approached in the WTO. So long as the EU member states remain members of that organization in their own right, it is the allocation and exercise of internal regulatory powers between the EU and its member states that is key in deciding who is responsible for breaches of WTO law. The fifth part of the article concludes.

## 2 EU/MS Joint Membership of the WTO and Questions of Responsibility

### A WTO Agreement as a ‘Mixed’ Agreement

As is well-known, the (umbrella) Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement)<sup>12</sup> was jointly concluded by the EU and its member

<sup>10</sup> This ‘competence model’, with specific reference to the WTO dispute settlement system, is proposed by Kuijper and Paasivirta, *supra* note 7, at 54–63, and further discussed in section 4 below. This also seems to be the position of the European Commission (see further section 2 below).

<sup>11</sup> Except for transport services (TFEU, *supra* note 9, Art. 207(5)). With regard to the TRIPS Agreement, *infra* note 15, see confirmation in Case 414/11, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, judgment of 18 July 2013, not yet reported (ECLI:EU:C:2013:520), paras 45–61. It is beyond the scope of this article to assess whether, as matter of EU law following the entry into force of the Treaty of Lisbon, the WTO Agreement, *infra* note 12, could now be concluded as an EU-only agreement, notwithstanding the exclusion of transport services from the CCP. On this point, see P. Eeckhout, *EU External Relations Law* (2nd edn, 2011), ch. 2; Hoffmeister, ‘The European Union’s Common Commercial Policy a Year after Lisbon: Sea Change or Business as Usual?’, in P. Koutrakos (ed.), *The European Union’s External Relations a Year after Lisbon* (2011) 83, at 83–84.

<sup>12</sup> Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) 1994, 1867 UNTS 154.

states following the famous *Opinion 1/94*,<sup>13</sup> where the Court of Justice of the European Union ruled that the Union<sup>14</sup> had exclusive competence to conclude only the multilateral agreements on trade in goods (Annex 1A), whereas such external competence was shared with the member states in relation to the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).<sup>15</sup> This is reflected in Article XI:1 of the WTO Agreement, which refers to the EU (then 'European Communities') and its member states as full 'original members' in their own right. As for any other so-called 'mixed' agreement, this joint EU/MS membership of the WTO inevitably prompts the question as to 'who is responsible' towards third parties in situations of non-performance. However, unlike other multilateral mixed agreements concluded by the EU, the WTO Agreement does not contain any 'Declaration of Competences',<sup>16</sup> and, thus, there is no indication as to which part of the WTO Agreement (and its covered agreements) binds the Union and which the member states. In other words, there is no express delimitation of their respective responsibility in relation to the performance of WTO obligations.<sup>17</sup> This state of affairs has been maintained after the entry into force of the Treaty of Lisbon, even though the scope of EU exclusive powers under the CCP now encompasses *quasi* all WTO matters.<sup>18</sup>

Against this silence in the WTO Agreement, the general rules of international responsibility as codified by the ILC<sup>19</sup> provide that the existence of an internationally wrongful act entailing international responsibility depends on the twin conditions of breach of an international obligation and attribution of conduct.<sup>20</sup> For our purposes, this raises two questions: (i) how to apportion international obligations between the EU and its member states under a mixed treaty such as the WTO Agreement and (ii) when will conduct of the EU member states that violates WTO law be attributed to the

<sup>13</sup> *Opinion 1/94, Opinion pursuant to Article 228(6) of the EC Treaty (Opinion 1/94)*, [1994] ECR I-5267.

<sup>14</sup> For the benefit of simplification, this article will refer to the European Union only, even though *Opinion 1/94* concerned the then 'European Community', and, indeed, it is the 'European Communities' that formally became a member of the WTO. See WTO Agreement, *supra* note 12, Art. XI:1.

<sup>15</sup> General Agreement on Trade in Services (GATS) 1994, 1869 UNTS 183; Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) 1994, 1869 UNTS 299. For a detailed discussion, see, *inter alia*, Bourgeois, 'The EC in the WTO and Advisory Opinion 1/94: An Echternach Procession', 32 *Common Market Law Review (CMLR)* (1995) 763; Emiliou, 'The Death of Exclusive Competences?', 21 *European Law Review* (1996) 294.

<sup>16</sup> A list of mixed agreements with a 'Declaration of Competences' made by the EU can be found at the European Commission Treaty Office Database, available at <http://ec.europa.eu/world/agreements/view-Collection.do?fileID=76198>. For a critical review, see Delgado Casteleiro, 'EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?' 17(4) *European Foreign Affairs Review (EFAR)* (2012) 491; Heliskoski, 'EU Declarations of Competence and International Responsibility', in Evans and Koutrakos, *supra* note 1, 189.

<sup>17</sup> Cf. with United Nations Convention on the Law of the Sea 1982, 1833 UNTS 3, Annex IX, Arts 5, 6.

<sup>18</sup> See explanation *supra* note 11.

<sup>19</sup> ILC, Articles on Responsibility of States for Internationally Wrongful Acts (ARS), annexed to UNGA Res 56/83, UN Doc. A/RES/56/83, 12 December 2001; ARIO, *supra* note 2.

<sup>20</sup> ARS, *supra* note 19, Art. 2; ARIO, *supra* note 2, Art. 4.

Union (and vice-versa).<sup>21</sup> A sticking point in the discussions leading up to the drafting of the ARIO, however, was whether the ‘rules of the organization’ – and, in our specific case, the delimitation of EU/MS competences under EU law – should play a role in determining the respective international responsibility of an international organization and its members. While it is not the place here to paint a complete portrait of this theoretical debate,<sup>22</sup> the main diverging positions will be briefly outlined below as a backdrop to the subsequent analysis of practice in the WTO dispute settlement system.

## B Question of Apportionment of Obligations

As they currently stand, the general rules of international responsibility do not specifically address the question of how to determine the respective obligations of an international organization and its members in cases where both are parties to an international treaty, such as the WTO Agreement for the EU and its member states.<sup>23</sup> In this respect, the European Commission’s position, as elaborated in its submissions on the ARIO to the ILC, has been that the question of apportionment of international obligations should be ‘entirely determined by the rules of the organisation, since these rules define the tasks and powers of the organisation which possesses its own international legal personality, vis-à-vis those of the member States’.<sup>24</sup> Moreover, the EU takes the view that apportionment of obligations ‘is really the primary question’ and should be clearly distinguished from the secondary question of attribution of conduct.<sup>25</sup>

Applying this line of reasoning to the case of the WTO, it would mean looking at EU rules on the division of external (that is, treaty-making) powers in order to determine whether a particular WTO obligation has been entered into by the Union or its member states. In a pre-Lisbon context, this would have been a strenuous task given the dynamic and blurry delineation of external competences, and it was hardly realistic to expect WTO dispute settlement organs to engage with such complex questions of

<sup>21</sup> In this article, the term ‘conduct’ is interchangeably used with the term ‘measure’, which in the context of the WTO dispute settlement system equally means ‘any act or omission attributable to a WTO Member’. WTO, *US – Corrosion-Resistant Steel Sunset Review – Report of the Appellate Body*, 9 January 2004, WT/DS244/AB/R, para. 81.

<sup>22</sup> See further d’Aspremont, ‘A European Law of International Responsibility? The Articles on the Responsibility of International Organisations and the EU’, in V. Kosta, N. Skoutaris and V. Tzevelekos (eds), *The EU Accession to the ECHR* (2014) 75; Paasivirta and Kuijper, ‘Does One Size Fit All? The European Community and the Responsibility of International Organizations’, 36 *Netherlands Yearbook of International Law* (2005) 169; Talmon, ‘Responsibility of International Organisations: Does the European Community Require Special Treatment?’, in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005) 405; Paasivirta, ‘The Responsibility of Member States of International Organizations? A Special Case for the European Union’, 12(2) *IOLR* (2015) 448.

<sup>23</sup> See ARIO, *supra* note 2, Art. 11; ARS, *supra* note 19, Arts 12–13.

<sup>24</sup> ILC, Responsibility of International Organisations: Comments and Observations Received from International Organisations (ARIO Comments), Doc. A/CN.4/545, 25 July 2004, at 26, para. 2. This seems also to be the view taken by Advocate General Mischo in Case C-13/00, *Commission of the European Communities v. Ireland*, [2002] ECR I-2923, para. 30; as well as by Paasivirta and Kuijper, *supra* note 22, at 216.

<sup>25</sup> ARIO Comments, *supra* note 24, at 26, para. 3.

EU law, nor does it seem desirable from the perspective of safeguarding the ‘autonomy’ of the EU legal order.<sup>26</sup> Arguably, this issue has now become less complicated with the entry into force of the Treaty of Lisbon,<sup>27</sup> by virtue of which the Union has acquired exclusive external competence for virtually all matters presently regulated by WTO law. Following the Commission’s view, this would imply that, as the sole bearer of WTO obligations in a post-Lisbon setting, only the EU is capable of incurring international responsibility in the WTO. If this is so, there would be no need to consider the question of attribution; for the Commission, it is impossible that a wrongful act can still be attributed to the EU member states, once it has been established they are no longer carriers of the relevant WTO obligations.<sup>28</sup> Even if one accepts that this proposition is true as a matter of EU (competence) law, it is not equally valid under public international law.<sup>29</sup>

From an international law perspective, so long as both the EU and its member states remain parties to the WTO Agreement (and its covered agreements), the presumption is that they are each bound by all obligations therein<sup>30</sup> and may not invoke internal rules as justification for non-performance,<sup>31</sup> unless it is otherwise agreed in the treaty or in situations covered by Article 46 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLTIO).<sup>32</sup> However, as already mentioned, there is no ‘Declaration of Competences’ or any other textual basis in the WTO Agreement for apportioning obligations and responsibility between the EU and its member states.<sup>33</sup> In addition, it is doubtful that Article 46 of the VCLTIO could be invoked in this case.<sup>34</sup> Given the

<sup>26</sup> For a similar view, see Eeckhout, *supra* note 6, at 459.

<sup>27</sup> TFEU, *supra* note 9, Art. 3(1)(e).

<sup>28</sup> ARIIO Comments, *supra* note 24, at 26, paras 4–5, applying this reasoning to customs matters.

<sup>29</sup> On this point, see Advisory Opinion of Advocate General Tesaro in Case 53/96, *Hermes International v. FHT Marketing Choice*, [1998] ECR I-3603, para. 14.

<sup>30</sup> This flows from the principle of *pacta sunt servanda* in Art. 26 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLTIO) 1986, 25 ILM 543 (1986) (not yet in force).

<sup>31</sup> *Ibid.*, Art. 27 (1)–(2).

<sup>32</sup> *Ibid.*, Art. 27(3).

<sup>33</sup> The only caveat to be noted in this regard is the GATS Schedule of Specific Commitments. The EU schedule currently in force (GATS/SC/31) only covers the 12 member states in 1994, while the consolidated schedule negotiated following EU enlargements has not yet entered into force. See WTO, Communication from the European Communities and Its Member States – Draft Consolidated GATS Schedule, Doc S/C/W/273, 9 October 2006. At the time of writing, the 16 member states that acceded to the EU after 1994 are still bound by their individual schedules of specific commitments, and this has implications not only for their market access obligations (GATS, *supra* note 15, Art. XVI) but also for other obligations in the GATS that are applicable only to the extent that a WTO member has undertaken specific commitments in its schedule (notably, Art. XVII on national treatment as well as, e.g., Arts VI:1 and VI:5 on domestic regulation).

<sup>34</sup> VCLTIO, *supra* note 30, Art. 46(2) provides: ‘An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was *manifest* and concerned a rule of fundamental importance.’ Art. 46(3) further states: ‘A violation is manifest if it would be *objectively evident* to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith’ (emphasis added).

ambiguity as to the division of treaty-making competences between the EU and its member states that was prevailing at the time when the WTO Agreement was concluded, a violation of these rules could not have been ‘manifest’ (that is, objectively evident) to third parties.<sup>35</sup> Consequently, this author shares the majority view in the academic literature that the EU and its member states are jointly bound by all provisions of WTO law,<sup>36</sup> and, as will be seen, this position has also been taken by the WTO dispute settlement organs.<sup>37</sup> However, this does not mean that there will be joint responsibility of the EU and its member states for breaches of WTO law in each and every case. This is because being bound by the same WTO obligation is a necessary, but not a sufficient, condition for the joint responsibility of the EU and its member states.<sup>38</sup> In the logic of the system of international responsibility as codified by the ILC, a breach of an obligation needs to be supplemented by attribution, and, therefore, the key question is whether the WTO-infringing conduct is attributable to the EU and/or its member states.

### C Question of Attribution of Conduct

Unlike with the issue of apportionment, the general rules of international responsibility deal specifically with the attribution of conduct to an international organization.<sup>39</sup> Article 6 of the ARIIO provides that conduct of an organ or agent of an international organization shall be attributed to it, while Article 7 of the ARIIO extends such an attribution to the organization for the conduct of an organ of a state in cases where it is ‘placed at the disposal of’ the organization and if the latter exercises ‘effective control’ over such conduct. However, the European Commission and some EU law scholars have argued that these attribution rules are not flexible enough to accommodate the distinctive features of the Union’s constitutional structure and functioning.<sup>40</sup>

<sup>35</sup> For a similar view, see Eeckhout, *supra* note 6, at 451; Steinberger, ‘The WTO Treaty as a Mixed Agreement: Problems with the EC’s and the Member States’ Membership of the WTO’, 17 *EJIL* (2006) 837, at 842–848, 856–857. For a different view, see Björklund, ‘Responsibility of the EC and the Member States for Mixed Agreements: Should Non-Member Parties Care?’, 70 *Nordic Journal of International Law* (2001) 373, at 388–402.

<sup>36</sup> See, *inter alia*, Cremona, ‘External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility and Effects of International Law’, EUI Working Papers Law no 2006/22 (2006); Gaja, ‘The European Community’s Rights and Obligations under Mixed Agreements’, in D. O’Keeffe and H.G. Schermers (eds), *Mixed Agreements* (1983) 133; Neframi, ‘International Responsibility of the European Community and of Member States under Mixed Agreements’, in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations* (2002) 193; Heliskoski, ‘Joint Competence of the European Community and Its Member States and the Dispute Settlement Practice of the World Trade Organization’, 2 *Cambridge Yearbook of European Legal Studies* (1999–2000) 80; Rosas, ‘The European Union and International Dispute Settlement’, in L. Boisson de Chazournes, C. Romano and R. Mackenzie (eds), *International Organisations and International Dispute Settlement: Trends and Prospects* (2002) 49.

<sup>37</sup> See further section 3 below.

<sup>38</sup> Nollkaemper, ‘Joint Responsibility between the EU and Member States for Non-Performance of Obligations under Multilateral Environmental Agreements’, in E. Morgera (ed.), *The External Environmental Policy of the European Union: EU and International Perspectives* (2013) 304, at 330.

<sup>39</sup> ARIIO, *supra* note 2, ch. II.

<sup>40</sup> See, e.g., Kuijper and Paasivirta, *supra* note 7, at 69.



This concern is not entirely misplaced, as applying the ARIO rules on attribution to the EU/MS relationship would considerably limit the situations in which the Union incurs (sole) responsibility for breaches of WTO law.<sup>41</sup> Due to the multi-level and decentralized implementation of most areas of EU law (that is, so-called ‘executive federalism’),<sup>42</sup> EU organs directly implement only a limited (even if important) segment of the CCP – namely, trade defence measures,<sup>43</sup> which are clearly attributable to the Union pursuant to Article 6 of the ARIO. For other areas of the CCP, the Union is largely dependent on its member states to execute EU law, and, thus, national authorities are likely to be more visible to third parties as the factual actors of an alleged WTO breach. Customs administration constitutes the most obvious example of this special character of the Union’s executive federalism; even though this is a core EU exclusive competence, there is no EU customs service but, rather, 28 national customs administrations that implement (directly applicable) EU customs legislation. In this sense, it is true that the EU’s *modus operandi* is different to that of traditional international organizations, which mainly conduct their action through their own organs or agents as reflected in Article 6 of the ARIO.<sup>44</sup>

As the European Commission aptly noted in its comments to the ILC, ‘[t]he fact that the implementation of [EU] law, even in areas of its exclusive competence, is normally carried out by the member States and their authorities, poses the question as to ... when the [EU] as such is responsible not only for acts committed by its organs, but also for actions of the member States and their authorities’.<sup>45</sup> Yet, it is commonly accepted that Article 7 of the ARIO does not provide an appropriate basis for attributing acts of the member states when implementing EU law to the Union; its ‘normative control’<sup>46</sup> over the conduct of member states is generally considered to fall short of the ‘effective control’ test in that provision.<sup>47</sup> Alternatively, the EU would need to constantly rely on

<sup>41</sup> Note that ARIO, *supra* note 2, ch. IV, provides for a number of situations in which the responsibility of an international organization may arise in connection with the act of a state, presumably without attribution, including where the international organization ‘aids or assists’ a state in the commission of an internationally wrongful act (Art. 14) or ‘circumvents one of its international obligations’ through decisions or authorizations addressed to its members (Art. 17), which could be arguably applicable to the EU/MS relationship. However, unlike ARIO, *supra* note 2, Arts 6–7, where responsibility through attribution seems to be a ‘black-or-white’ question (that is, either the organization or the state), ch. IV of the ARIO appears to create an additional layer of responsibility for the organization without prejudice to that of the state (Art. 19), leading therefore to joint responsibility. See further Hoffmeister, *supra* note 7, at 727; Nollkaemper, *supra* note 38, at 323–324.

<sup>42</sup> On this so-called ‘executive federalism’, see Schütze, ‘From Rome to Lisbon: “Executive Federalism” in the (New) European Union’, 47 *CMLR* (2010) 1385.

<sup>43</sup> TFEU, *supra* note 9, Art. 291(2); see Hoffmeister, *supra* note 7, at 740.

<sup>44</sup> Paasivirta, *supra* note 22, at 456–457.

<sup>45</sup> ARIO Comments, *supra* note 24, at 29, para. 3.

<sup>46</sup> Hoffmeister, *supra* note 7, at 742, suggests that there are two conditions for determining ‘normative control’ of the Union for the purpose of international responsibility: (i) EU law governs the substantive legality of member state action; (ii) this is ultimately controlled by the EU judiciary. This approach is borrowed by Kuijper and Paasivirta, *supra* note 7, at 55; Nollkaemper, *supra* note 38, at 335.

<sup>47</sup> ILC, Draft Articles on the Responsibility of International Organisations, with Commentaries (ARIO Commentary) (2011), at 20–26, reflecting it was mainly intended to codify rules on the responsibility of international organizations for military operations using forces of its members. See also Hoffmeister, *supra* note 7, at 726–727; Nollkaemper, *supra* note 38, at 331.

the exception provided for in Article 9 of the ARIO so as to ‘acknowledge and adopt’ the conduct of its member states as its own.<sup>48</sup> That being so, it is understandable to some extent that the European Commission pressed for a special rule of attribution of internationally wrongful acts during the ILC codification process,<sup>49</sup> which was initially opposed by Special Rapporteur Gaja and eventually led to the introduction of Article 64 of the ARIO on *lex specialis*. It reads:

These 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 ... are governed by special rules of international law. Such special rules of international law may be contained in the *rules of the organization* applicable to the relations between an international organization and its members.<sup>50</sup>

Whereas Article 64 of the ARIO leaves open the possibility that the general rules on attribution, and, hence, responsibility, may be set aside in the case of the EU and its member states, it does specify which ‘rules of the organization’ may instead become relevant in this respect. As seen earlier with respect to the question of apportionment, the European Commission considers that the division of external competences under EU law is equally decisive for the purpose of attributing conduct. Drawing on its statements in *EC – Computer Equipment*, discussed below,<sup>51</sup> the Commission posits that acts by the authorities of member states when implementing EU law in a field of EU exclusive (external) competence should be attributed to the Union itself.<sup>52</sup> According to Frank Hoffmeister, this would follow from Article 2(1) of the Treaty on the Functioning of the European Union (TFEU) containing ‘a strong indication that in areas of exclusive *external* Union competence [such as the CCP] 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’.<sup>53</sup> Moreover, he suggests that Article 64 of the ARIO should be invoked, if necessary, to defend this (external) competence-based approach to attribution and international responsibility.<sup>54</sup>

The problem of attribution of member states’ conduct to the Union should be further refined, though. In support of its position, the Commission often relies on the example of customs legislation, which is a purely external matter and extensively harmonized though EU regulations that are binding in their entirety and directly applicable in the member states.<sup>55</sup> Put differently, EU customs legislation clearly instructs what

<sup>48</sup> For a criticism, see Paasivirta and Kuijper, *supra* note 22, at 217.

<sup>49</sup> For a more detailed account, see Hoffmeister, *supra* note 7, at 728–729.

<sup>50</sup> The commentary thereto explicitly records that there is a variety of opinions concerning the possible existence of a special rule with respect to the attribution to the EU of conduct of the member states when they implement binding acts of the Union. See ARIO Commentary, *supra* note 47, at 100 (emphasis added); Hoffmeister, *supra* note 7, at 728–729.

<sup>51</sup> See section 3.B below.

<sup>52</sup> ARIO Comments, *supra* note 24, at 29, para. 5.

<sup>53</sup> Hoffmeister, *supra* note 7, at 743 (emphasis added). TFEU, *supra* note 9, Arts 2(1), 3(1)(e).

<sup>54</sup> Hoffmeister, *supra* note 7, at 745–746; see similarly Kuijper and Paasivirta, *supra* note 7, at 69.

<sup>55</sup> TFEU, *supra* note 9, Art. 288.

the member states have to do, and they have no choice but to implement it. In these particular circumstances, where member states' conduct is strictly confined to implementing EU law, it is not difficult to accept that national customs authorities act *de facto* as organs of the Union. Yet, importantly, this perfect example of EU executive federalism is not necessarily applicable to all areas covered by WTO law. As we move away from tariffs and customs matters, the relationship between the EU and its member states becomes in fact more complex than the Commission suggests. Part of the reason for this complexity is that the exclusive EU external competence under the CCP is not, unlike what Hoffmeister posits,<sup>56</sup> fully matched by an exclusive competence to regulate internally in every field covered by WTO law. As Piet Eeckhout rightly points out, the taxation of products provides a case in point. Externally, such taxation is subject to Article III of the General Agreement on Tariffs and Trade (GATT),<sup>57</sup> falling under exclusive CCP powers, whereas, internally, member states retain competence for certain forms of taxation that are not fully harmonized or even regulated at the EU level.<sup>58</sup> When member states impose such taxes through independent national legislation, they can hardly be regarded as functionally acting as organs of the Union.

Similar doubts may arise in other 'grey areas' where, even though member states do act within the scope of EU law,<sup>59</sup> the degree of the Union's normative control over their conduct is more limited than in the context of implementing EU regulations. One example is state aid, which is subject to WTO disciplines on subsidies. Unlike in classical executive federalism, the EU member states are not acting to execute a certain harmonized EU rule but, rather, individually providing aid within certain boundaries set by EU law.<sup>60</sup> In addition, the link between member states' conduct and EU law may not always be straightforward when they act to implement EU directives, as these are only binding with respect to the aim(s) pursued, but leave some discretion as to the form and method of implementation,<sup>61</sup> and, thus, a varied application is likely to result across EU member states. Moreover, particularly in the fields of consumer and environmental protection, it is not uncommon for the EU to adopt so-called minimum harmonization directives setting out standards that national legislations must meet but which they may exceed if a given member state so desires.<sup>62</sup> One significant

<sup>56</sup> See note 53 and accompanying text.

<sup>57</sup> General Agreement on Tariffs and Trade 1994 (GATT), 55 UNTS 194.

<sup>58</sup> Eeckhout, *supra* note 6, at 460–461.

<sup>59</sup> The term 'scope of EU law' is here used as encompassing member states' action not only when implementing EU law *sensu stricto* (e.g., fully binding and directly applicable EU regulations) but also when acting under the normative umbrella of the EU treaties in a broader sense (e.g., providing state aid within the boundaries set by EU law). See similarly Hoffmeister, *supra* note 7, at 741.

<sup>60</sup> TFEU, *supra* note 9, Arts 107(2), (3) stipulate the conditions under which state aid, otherwise prohibited under Art. 107(1) of the TFEU, may be considered 'compatible with the internal market'. Art. 108(3) requires member states, as a general rule, to notify new state aid measures to the European Commission, and they may only put these measures into effect after obtaining the Commission's approval. However, there are some exceptions to this requirement of prior notification/approval (e.g., state aid covered by the so-called 'Block Exemption' Regulations and *de minimis* aid).

<sup>61</sup> TFEU, *supra* note 9, Art. 288.

<sup>62</sup> This is in line with the TFEU, *ibid.*, Arts 169(4), 193.

example in light of the ongoing WTO dispute *Australia – Tobacco Plain Packaging*<sup>63</sup> are the UK and Irish legislations on standardized packaging of tobacco products,<sup>64</sup> which go beyond the requirements of the EU Tobacco Products Directive.<sup>65</sup> The question thus arises as to whether such a restricted EU normative authority over member states' conduct may be enough to attribute it to the Union for the purposes of international responsibility.<sup>66</sup>

Against this background, the next part turns to analyse how the WTO dispute settlement system has tackled the joint membership of the EU and its member states. Have these theoretical questions of responsibility been a controversial issue in practice or, conversely, have third parties in the WTO de facto accepted the EU's assertion of exclusive responsibility for all breaches of WTO law, even by its member states?

### 3 Revisiting EU/MS Responsibility in WTO Dispute Settlement Practice

#### A *The Broad Picture*

At first glance, the joint EU/MS membership of the WTO appears hardly visible in dispute settlement practice. As reflected in [Table 1](#), the EU undoubtedly stands out as one of the most active users of the WTO dispute settlement system. Out of the 525 disputes that have been brought for resolution to the WTO since 1995,<sup>67</sup> the Union (alone) has participated either as a complainant (97), a respondent (70) or a third party (162) in 329 of them. By way of comparison, the USA, as the other key player in the WTO dispute settlement system, has participated in a total of 380 WTO cases.<sup>68</sup>

<sup>63</sup> WTO, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging – Procedural Arrangement between Australia and Ukraine, Honduras, the Dominican Republic, Cuba and Indonesia*, 28 April 2014, WT/DS434/12, WT/DS435/17, WT/DS441/16, WT/DS458/15, WT/DS467/16.

<sup>64</sup> WTO Committee on Technical Barriers to Trade, Notification by the United Kingdom, Doc. G/TBT/N/GBR/24/Add.1, 2 October 2015; Notification by Ireland, Doc. G/TBT/N/IRL/1/Add.2, 20 June 2016.

<sup>65</sup> EC Council Directive 2014/40, OJ 2014 L 127/1. Art. 24(2) specifically allows member states to introduce further requirements in relation to the standardization of the packaging of tobacco products, provided they are justified on grounds of public health, are proportionate and are not a means of arbitrary discrimination or disguised restriction on trade between member states.

<sup>66</sup> This seems to be the position taken by Hoffmeister, *supra* note 7, at 746, suggesting the following special rule of attribution: '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' (emphasis added).

<sup>67</sup> See WTO, *Chronological List of Dispute Cases*, available at [www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm).

<sup>68</sup> See WTO, *Disputes by Country/Territory*, available at [www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm).

**Table 1:** EU/MS Practice in WTO Dispute Settlement (1995–2017)

	<b>Complainant</b>	<b>Respondent</b>	<b>Third Party</b>	<b>Total</b>
EU (individual claims)	97	70 <sup>a</sup>	162	329
EU/MS (joint/parallel claims)	–	14 <sup>b</sup>	–	14
MS (individual claims)	1 <sup>c</sup>	10 <sup>d</sup>	–	11

*Notes:*

<sup>a</sup> This number seeks to capture the number of WTO disputes in which EU sole responsibility was invoked by the third parties concerned. It thus reflects the total ‘request for consultations’ (i.e., this being the first step in WTO dispute settlement procedures – Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, 1869 UNTS 401, Art. 4) addressed exclusively to the EU. Note, however, that in some of these cases, a ‘mutually agreed solution’ was reached by parties to the dispute, while a considerable number of other cases have been formally pending for years at consultations stage.

<sup>b</sup> This number seeks to capture the number of WTO disputes in which the ‘joint’ responsibility of the EU and its member states was invoked by the third parties concerned. It thus reflects the total ‘request for consultations’ addressed to the EU jointly with one or more of its member states (e.g., WTO, *European Communities and its Member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375-377) and those addressed to the EU in parallel to claims on the same subject matter addressed to its member states (e.g., WTO, *EC – Customs Classification of Computer Equipment*, WT/DS62, in which the USA also brought separate claims against Ireland (WT/DS68) and the United Kingdom (WT/DS67)).

<sup>c</sup> See note 70 in the text.

<sup>d</sup> This number reflects the total ‘request for consultations’ addressed only to individual EU member states (see note 71 in the text), even though the EU may have intervened as a party to negotiate a ‘mutually agreed solution’ to the dispute (see notes 88–92 in the text).

In contrast, the EU member states (individually) have played a minimal and passive role in WTO dispute settlement.<sup>69</sup> To date, none has initiated a dispute against a third country<sup>70</sup> or intervened as a third party in any WTO case, while only some have been occasionally targeted as individual respondents by another WTO member (that is, the USA in all 10 cases).<sup>71</sup>

However, for the purpose of our discussion, it appears pertinent to examine in more depth the statistics concerning passive litigation – that is, EU and/or its member states acting as a respondent jointly or individually – as an indicator of how the question of EU/MS international responsibility has been approached by third countries and

<sup>69</sup> The lack of active litigation by EU member states in the WTO dispute settlement system may be due to purely political/institutional reasons, but may also be explained by legal constraints resulting from EU law and, in particular, the duty of cooperation. For a discussion, see Delgado Casteleiro and Larik, *supra* note 6, at 251–252.

<sup>70</sup> To date, the only EU member state to have initiated WTO dispute settlement procedures is Denmark, but in respect of the Faroe Island and against the EU. *European Union – Measures on Atlanto-Scandian Herring – Request for Consultations by Denmark in Respect of the Faroe Island*, 7 November 2013, WT/DS469/1. On 21 August 2014, the parties informed the Dispute Settlement Body that the matter raised in this dispute was settled. *European Union – Measures on Atlanto-Scandian Herring – Joint Communication from Denmark in Respect of the Faroe Island and the European Union*, 25 August 2014, WT/DS469/3.

<sup>71</sup> Namely, Belgium (WTO, *Belgium – Measures Affecting Commercial Telephone Directory Services – Request for Consultations by the United States*, 13 May 1997, WT/DS80/1; WTO, *Belgium – Certain Income Tax Measures Constituting Subsidies – Request for Consultations by the United States*, 11 May 1998, WT/

dispute settlement organs in the WTO. In doing so, it also seems interesting to divide the statistics into the pre-Lisbon and post-Lisbon periods<sup>72</sup> as a means of gauging whether, and if so how, the transfer of exclusive external competence to the EU for all CCP matters has influenced the approach to EU/MS international responsibility in the practice of WTO dispute settlement.

### **B Pre-Lisbon Practice: Pragmatism towards EU Exclusive Responsibility**

A glimpse at Table 2 would seem to support the view that, '[i]n fact, the whole discussion on the [joint responsibility] of the EU and its Member States in the WTO is put aside in favour of the sole responsibility of the Union in the WTO dispute settlement system', particularly during the pre-Lisbon period.<sup>73</sup>

Evidently, the vast majority of WTO disputes (54) during the pre-Lisbon period were brought against the EU alone. In all instances, the Union (through the European Commission) has been eager to come forward as the lead litigant and to assume exclusive responsibility for all alleged breaches of WTO law, including in the field of the TRIPS Agreement, which still fell within EU/MS shared external competence at that time.<sup>74</sup> However, one should not be bewildered by this wide targeting of the EU as a single respondent, given that most of these complaints concerned only legal acts of the EU institutions,<sup>75</sup> which are clearly attributable to the Union pursuant to Article

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DS127/1; WTO, *Belgium – Administration of Measures Establishing Customs Duties for Rice – Request for Consultations by the United States*, 19 October 2000, WT/DS210/1); Denmark (WTO, *Denmark – Measures Affecting the Enforcement of Intellectual Property Rights – Request for Consultations by the United States*, 21 May 1997, WT/DS83/1); France (WTO, *France – Certain Income Tax Measures Constituting Subsidies – Request for Consultations by the United States*, 11 May 1998, WT/DS131/1); Greece (WTO, *Greece – Certain Income Tax Measures Constituting Subsidies – Request for Consultations by the United States*, 11 May 1998, WT/DS129/1); Ireland (WTO, *Ireland – Certain Income Tax Measures Constituting Subsidies – Request for Consultations by the United States*, 11 May 1998, WT/DS130/1); Netherlands (WTO, *Netherlands – Certain Income Tax Measures Constituting Subsidies – Request for Consultations*, 11 May 1998, WT/DS128/1); Portugal (WTO, *Portugal – Patent Protection under the Industrial Property – Request for Consultations by the United States*, 6 May 1996, WT/DS37/1); Sweden (WTO, *Sweden – Measures Affecting the Enforcement of Intellectual Property Rights – Request for Consultations by the United States*, 2 June 1997, WT/DS86/1).

<sup>72</sup> The Treaty of Lisbon, *supra* note 8, was signed on 13 December 2007 and entered into force on 1 December 2009. Thus, in Table 2, 'pre-Lisbon' period refers to all WTO disputes initiated between 1 January 1995 and 1 January 2008, whereas 'post-Lisbon period' to those initiated between 1 January 2008 and 1 March 2015.

<sup>73</sup> Delgado Casteleiro and Larik, *supra* note 6, at 238.

<sup>74</sup> Notably: WTO, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs – Report of the Panel*, 20 April 2005, WT/DS174/R. However, this case did not directly address the question of EU/MS international responsibility, as the USA raised violation claims against the EU only, and no specific measure by the EU member states was identified.

<sup>75</sup> With the exception of the following disputes: WTO, *European Communities – Trade Description of Scallops – Notification of Mutually Agreed Solution from Canada and the European Union*, 19 July 1996, WT/DS7/12; WTO, *European Communities – Trade Description of Scallops – Notification of Mutually Agreed Solution from Peru, Chile the European Union*, 19 July 1996, WT/DS12/12, WT/DS14/11, concerning a French measure; WTO, *European Communities – Measures Affecting Butter Products – Notification of a Mutually Agreed Solution from New Zealand and the European Union*, 18 November 1999, WT/DS72/7, concerning

**Table 2:** EU/MS as Respondents in WTO Dispute Settlement (1995–2017)

	Respondent Pre-Lisbon	Respondent Post-Lisbon
<b>EU (individual claims)</b>	54	16
<b>EU/MS (joint/parallel claims)</b>	5	9
<b>MS (individual claims)</b>	10	0

6(1) of the ARIO.<sup>76</sup> Nonetheless, in some cases, claims directed against the EU alone have also involved measures of its member states, not only when implementing EU law *sensu stricto* but also when acting under the normative umbrella of the EU in a broader sense.

A well-known example is *EC – Biotech Products*, where the contested measures included national safeguard measures prohibiting the import and/or marketing of specific biotech products, which had been taken by six member states relying on the possibility provided for in the relevant EU legislation.<sup>77</sup> Even if the degree of EU normative control with respect to these safeguard measures was somehow restricted (that is, to authorization),<sup>78</sup> the WTO panel accepted the EU's standing as the single respondent bearing sole responsibility for these measures, based on two pragmatic considerations:

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decisions by the European Commission and the United Kingdom's Customs and Excise Department; WTO, *European Communities – Certain Measures Prohibiting the Importation and Marketing of Seal Products – Communication from Canada*, 3 December 2014, WT/DS369/3, concerning measures taken by Belgium and the Netherlands.

<sup>76</sup> It suffices to cite the well-known cases, WTO, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26 and WT/DS48 involving, *inter alia*, claims under the GATT, the SPS Agreement, and the TBT Agreement against EEC Council Directive 602/81, EEC Council Directive 146/88 and EEC Council Directive 299/88; WTO, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27, involving, *inter alia*, claims under the GATT, the GATS and the Agreement on Import Licensing Procedures 1994, 1868 UNTS 436, against EEC Council Regulation 404/93; WTO, *European Communities – Export Subsidies on Sugar*, WT/DS265, WT/DS266 and WT/283, involving claims under the Agreement on Agriculture 1994, 1867 UNTS 410, and the SCM Agreement against EC Council Regulation 1260/2001 and related measures; as well as various WTO cases concerning EU trade defence measures (e.g., WTO, *European Communities – Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India*, WT/DS141, involving claims under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, 1868 UNTS 201; WTO, *European Communities – Definitive Safeguard Measures on Salmon*, WT/DS326 and WT/DS328, involving claims under the Agreement on Safeguards 1994, 1869 UNTS 154).

<sup>77</sup> WTO, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products – Report of the Panel (EC – Biotech Products, panel report)*, 21 November 2006, WT/DS291/DS/292/DS293/R, paras 2.1–2.5.

<sup>78</sup> See Council/EP Directive 2001/18, OJ 2001 L 106/1, Art. 23; Council/EP Regulation 258/97, OJ 1997 L 43/1, Art. 12 permitting, under certain conditions, EU member states to adopt safeguard measures in respect of biotech products that have obtained approval for EU-wide marketing. It has been reported that the safeguard measures at issue in this dispute had not been approved by the EU, nor had the European Commission opened infringement procedures against the member states concerned, which, in practice, were arguably free from the EU's normative control. See Delgado Casteleiro, *supra* note 1, at 186.

It is important to note that even though the member State safeguard measures were introduced by the relevant member States and are applicable only in the territory of the member States concerned, the [EU] as a whole is the responding party in respect of the member State safeguard measures. This is a *direct consequence* of the fact that the *Complaining Parties have directed their complaints against the [EU]*, and not individual [EU] member States. The [EU] never contested that, for the purposes of this dispute, the *challenged member State measures are attributable to it* under international law and hence can be considered [EU] measures.<sup>79</sup>

In support of this pragmatic approach, the panel referred to the earlier *EC – Asbestos* case, where the EU was targeted as the sole defendant – and, potentially, solely responsible if a breach of the WTO law had been established (*quod non*) – of the challenged French decree banning asbestos and asbestos-containing products, even though the link between this national measure and EU legislation was not readily obvious.<sup>80</sup> Another less cited, but also important, case is *EC – Commercial Vessels*, concerning the grey area of state aid. Here, the challenged measures included national aid schemes adopted by five EU member states pursuant to an EU regulation (providing for a temporary defensive mechanism for the shipbuilding sector), which had been explicitly authorized by the European Commission.<sup>81</sup> After formally noting that Korea had made the panel request with respect to the EU only,<sup>82</sup> the panel accepted the EU's sole responsibility for the national aid schemes, emphasizing two key elements: first, that the EU regulation and Commission's decisions were the 'legal authority' under which the EU member states provided aid and, second, in the event of a finding of WTO inconsistency, the EU had assumed responsibility for 'any actions that may be required to bring into conformity the measures at issue', removing thereby the 'legal basis for granting any further aid'.<sup>83</sup>

Turning to the 10 WTO disputes against individual member states, these were all brought (perhaps non-coincidentally) by the USA and date back to the early years of the WTO dispute settlement system (1995–2000). Some of these cases concern claims under the GATS and the TRIPS Agreement and, to some extent, may be genuinely motivated by the lack of legal clarity, which prevailed at that time following *Opinion 1/94*, as to the exact division of external competences – and, thus, respective obligations – between the EU and its member states in these fields of WTO law.<sup>84</sup> However, other

<sup>79</sup> *EC – Biotech Products*, panel report, *supra* note 77, para. 7.101 (emphasis added).

<sup>80</sup> WTO, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos – Report of the Panel*, 5 April 2001, WT/DS135/R, paras 3.32–3.35. While the EU had adopted a series of directives on the matter since 1980, it was only in May 1999 (i.e., three years after the adoption of the French decree) that it decided to introduce an EU-wide ban on all types of asbestos (including chrysotile asbestos at issue) with effect from 1 January 2005.

<sup>81</sup> WTO, *European Communities – Measures Affecting Trade in Commercial Vessels – Report of the Panel (EC – Commercial Vessels*, panel report), 20 June 2005, WT/DS301/R, paras 7.36–7.51. The five EU member states concerned were Denmark, Germany, France, the Netherlands and Spain.

<sup>82</sup> *Ibid.*, para. 7.33.

<sup>83</sup> *Ibid.*, paras 7.33, 7.53, n. 156.

<sup>84</sup> With regard to GATS claims, see WTO, *Belgium – Measures Affecting Commercial Telephone Directory Services – Request for Consultations by the United States*, 13 May 1997, WT/DS80/1. As for the TRIPS Agreement, see WTO, *Denmark – Measures Affecting the Enforcement of Intellectual Property Rights – Request*



cases involved claims in areas that were unequivocally held in *Opinion 1/94* to fall fully under EU exclusive external competence (that is, the GATT and the Agreement on Subsidies and Countervailing Measures (SCM Agreement)<sup>85</sup> and may well have been motivated by a strategic attempt to weaken European unity and leadership in the WTO.<sup>86</sup> In any event, no WTO panel has pronounced itself on the responsibility of EU member states in these disputes, as six of them have been formally pending for years at the consultation stage,<sup>87</sup> while, in the other four, a ‘mutually agreed solution’ was reached. Nevertheless, it is significant that in all but one of the cases resulting in a ‘mutually agreed solution’,<sup>88</sup> this was achieved with the EU intervening as a negotiating/responding party, not only for matters falling under its exclusive external competence<sup>89</sup> but also for issues revolving around the application of the TRIPS Agreement where the extent of its competence was not entirely clear in this pre-Lisbon setting.<sup>90</sup>

Most significant for our purposes, only in a few cases (five) have third countries formally invoked the joint responsibility of the EU and its member states for alleged breaches of WTO law, by targeting them together (one) or by directing parallel claims on the same subject matter to each of them separately (four).<sup>91</sup> *EC – Computer Equipment* was the first case in which the joint EU/MS membership of the WTO caused

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*for Consultations by the United States*, 21 May 1997, WT/DS83/1; WTO, *Portugal – Patent Protection under the Industrial Property – Request for Consultations by the United States*, 6 May 1996, WT/DS37/1; WTO, *Sweden – Measures Affecting the Enforcement of Intellectual Property Rights – Request for Consultations by the United States*, 2 June 1997, WT/DS86/1.

<sup>85</sup> Agreement on Subsidies and Countervailing Measures (SCM Agreement) 1994, 1869 UNTS 14. With respect to the GATT, see WTO, *Belgium – Administration of Measures Establishing Customs Duties for Rice – Request for Consultations by the United States*, 19 October 2000, WT/DS210/1. With respect to the SCM Agreement, see WTO, *Belgium – Certain Income Tax Measures Constituting Subsidies – Request for Consultations by the United States*, 11 May 1998, WT/DS127/1; WTO, *France – Certain Income Tax Measures Constituting Subsidies – Request for Consultations by the United States*, 11 May 1998, WT/DS131/1; WTO, *Greece – Certain Income Tax Measures Constituting Subsidies – Request for Consultations by the United States*, 11 May 1998, WT/DS129/1; WTO, *Ireland – Certain Income Tax Measures Constituting Subsidies – Request for Consultations by the United States*, 11 May 1998, WT/DS130/1; WTO, *Netherlands – Certain Income Tax Measures Constituting Subsidies – Request for Consultations*, 11 May 1998, WT/DS128/1.

<sup>86</sup> On this point, see Billiet, ‘The EC and WTO Dispute Settlement: Initiation of Trade Disputes by the EC’, 10 *EFAR* (2005) 197, at 199.

<sup>87</sup> This is the case of the five WTO disputes concerning claims under the SCM Agreement (see *supra* note 85), as well as that involving GATS claims (see *supra* note 84).

<sup>88</sup> The exception being WTO, *Portugal – Patent Protection under the Industrial Property Act – Notification of a Mutually-Agreed Solution from the United States and Portugal*, 8 October 1996, WT/DS37/2.

<sup>89</sup> Notably, WTO, *Belgium – Administration of Measures Establishing Customs Duties for Rice – Notification of a Mutually Agreed Solution from the United States and the European Union*, 2 January 2002, WT/DS210/6.

<sup>90</sup> WTO, *Denmark – Measures Affecting the Enforcement of Intellectual Property Rights – Notification of a Mutually Agreed Solution from the United States, the European Union and Denmark*, 13 June 2001, WT/DS83/2; WTO, *Sweden – Measures Affecting the Enforcement of Intellectual Property Rights – Notification of a Mutually Agreed Solution from the United States, the European Union and Sweden*, 11 December 1998, WT/DS86/2, both following amendments in the respective national laws to provide for provisional measures *inaudita altera parte* in civil proceedings involving intellectual property rights.

<sup>91</sup> In addition to the *EC – Computer Equipment* dispute discussed here (*infra* note 92), the other three cases in which parallel claims were directed against the EU and its member states separately have resulted in

controversy as to who was responsible in panel proceedings.<sup>92</sup> The case concerned the tariff treatment of certain computer equipment, which the USA claimed was in breach of the tariff concessions contained in the EU Schedule under Article II:1 of the GATT. Thus, it typically illustrated the kind of responsibility question that may arise in the context of classical EU executive federalism – that is, who is responsible for the acts of member states’ custom authorities in situations where they functionally act as organs of the Union? Unsurprisingly, the EU sought to assert its exclusive responsibility for any GATT infringement, based on its understanding that apportionment of obligations and attribution of conduct in the context of international responsibility should follow the delimitation of external competences under EU law.<sup>93</sup> In particular, the EU stressed that it was an ‘original member of the WTO in its own right’ and that the tariff concessions ‘were bound in the GATT 1994 ... exclusively at the level of the [EU] and not at the level of individual member States’.<sup>94</sup> Positioning itself as the only bearer of the GATT obligations in question, the EU declared its readiness to assume the entire responsibility for all measures in the area of tariff concessions, whether the measure complained about had been taken at the EU level or at the level of the member states.<sup>95</sup> Significantly, the Union went further to support its full responsibility by linking it to the question of who can remedy the alleged wrongs: ‘[I]t was *exclusively competent* for the subject matter concerned and thus the *only entity in a position to repair* the possible breach’<sup>96</sup> – that is, the only entity capable of ensuring the necessary restitution under WTO dispute settlement rules.<sup>97</sup>

The USA, on the other hand, submitted that both the EU and two of its member states were responsible for the allegedly wrongful tariff treatment, arguing that

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a ‘mutually agreed solution’ or been formally pending at consultations stage for years: (i) WTO, *France – Measures Relating to the Development of a Flight Management System – Request for Consultations by the United States*, 31 May 1999, WT/DS173/1; WTO, *European Communities – Measures Relating to the Development of a Flight Management System – Request for Consultations by the United States*, 31 May 1999, WT/DS172/1, concerning GATT and SCM Agreement claims; (ii) WTO, *Ireland – Measures Affecting the Grant of Copyright and Neighbouring Rights and European Communities – Measures Affecting the Grant of Copyright and Neighbouring Rights – Notification of Mutually Agreed Solution from United States, the European Union and Ireland*, 13 September 2002, WT/DS82/3, WT/DS115/3; (iii) WTO, *Greece – Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs and European Communities – Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs – Notification of Mutually Agreed Solution from the United States, the European Union and Greece*, 26 March 2001, WT/DS124/2, WT/DS125/2.

<sup>92</sup> WTO, *European Communities – Customs Classification of Certain Computer Equipment – Report of the Panel (EC – Computer Equipment, panel report)*, 22 June 1998, WT/DS62/R, WT/DS67/R, WT/DS68/R.

<sup>93</sup> See *supra* section 2.

<sup>94</sup> *EC – Computer Equipment*, panel report, *supra* note 92, para. 4.10.

<sup>95</sup> *Ibid.*, paras 4.11, 4.15.

<sup>96</sup> ILC, Responsibility of International Organizations: Comments and Observations Received from International Organizations, Sixty-Third Session, Doc. A/CN.4/637, 14 February 2011, at 24 (emphasis added), where the EU clarified that it was not simply adopting member states conduct as its own (as per ARIO, *supra* note 2, Art. 9).

<sup>97</sup> On this point, see further section 4 below.

Ireland and the United Kingdom were ‘independent members’ of the WTO and equally bound by the EU Schedule under the GATT.<sup>98</sup> The panel, however, avoided explicitly addressing the USA’s request to clarify the responsibility of the respective defendants and, instead, put forward compromise language that could satisfy both parties:

[S]ince the [European Union], 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 Union]*, including those located in Ireland and the United Kingdom, have or have not deviated from the obligations assumed under that Schedule.<sup>99</sup>

On the one hand, the formula ‘customs authorities in the European Union’ could be read as endorsing the EU’s proposition that member states’ customs authorities act functionally as EU organs when implementing EU law,<sup>100</sup> and, thus, responsibility for their conduct should be solely attributed to the EU.<sup>101</sup> On the other hand, the panel sided with the USA that the relevant EU Schedule was equally binding on both the EU and its member states,<sup>102</sup> presumably implying that all of them bear international responsibility for any breaches thereof, even if this is an area of EU exclusive external competence. Nevertheless, the panel ultimately found that it was the Union alone to have ‘acted inconsistently with its obligations under Article II GATT’ and addressed recommendations to the EU only.<sup>103</sup>

The other borderline case of this pre-Lisbon period,<sup>104</sup> in which the joint responsibility of the EU/MS was invoked and addressed by a WTO panel, was the famous *EC and Certain Member States – Large Civil Aircraft*, which was initiated by the USA back in 2004 but, this time, brought joint claims against the EU and four of its member

<sup>98</sup> *EC – Computer Equipment*, panel report, *supra* note 92, para. 4.13. The USA further argued that transfer of powers for tariff matters from the member states to the Union under EU law was irrelevant externally and did not result in ‘fewer rights and obligations being allotted to the Member States’ under WTO law (para. 4.14). Taking the view that the conduct of the Irish and UK customs administrations was attributable to those two states, the USA claimed to have been told during consultations with the EU that it ‘could not control the classification practices of member State customs authorities’ (para. 4.12).

<sup>99</sup> *Ibid.*, para. 8.16 (emphasis added).

<sup>100</sup> This federal-type agency argument was further advanced by the EU and accepted by the WTO panel in: WTO, *European Communities – Selected Customs Matters – Report of the Panel (EC – Selected Customs Matters*, panel report), 11 December 2006, WT/DS315/R, paras 7547–7553. However, this case touched only indirectly upon the issue of EU/MS international responsibility, given that the US violation claims under Art. X:3 of the GATT were only addressed against the EU and not against the EU member states themselves.

<sup>101</sup> This is the reading by Hoffmeister, *supra* note 7, at 732.

<sup>102</sup> This was also the position taken in *EC – Selected Customs Matters*, panel report, *supra* note 100, para. 7.548: ‘[I]t would appear that the [EU] as well as its constituent member States *concurrently* bear the obligations contained in the WTO Agreements, including those contained in Article X:3(b) of the GATT 1994’ (emphasis added).

<sup>103</sup> *Ibid.*, paras 9.1–9.2 (emphasis added). The issue of who was the proper respondent on the EU/MS side was not raised again on appeal. WTO, *European Communities – Customs Classification of Certain Computer Equipment – Report of the Appellate Body*, 22 June 1998, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 57.

<sup>104</sup> While the case was initiated in 2004, the panel and Appellate Body proceedings were only concluded in 2011.

states (Germany, France, Spain, and the United Kingdom).<sup>105</sup> The USA claimed they had all provided subsidies separately and in parallel to the Airbus large civil aircraft<sup>106</sup> in contravention of ‘their obligations’ under the GATT and the SCM Agreement.<sup>107</sup> Again, not surprisingly from an EU law standpoint, the Union requested that the panel determine, as a preliminary matter, that the EU was the ‘only proper respondent’ in the dispute, stressing that it was not simply ‘representing’ the member states in the proceedings but that it took ‘full responsibility’ for their actions.<sup>108</sup> However, the EU’s argumentation was essentially limited to restating that the alleged GATT/SCM violations related to matters within its exclusive external competence, and for which it bore sole responsibility in the WTO,<sup>109</sup> with no indication as to how it would ensure compliance by its member states with any potentially adverse recommendations by the panel in this specific case.

The panel rejected the EU’s request, endorsing instead the formal argument advanced by the USA that consultations and panel requests had been made with respect to the four member states ‘in addition’ to the EU: ‘Each of these five is, in its own right, a Member of the WTO, with all the rights and obligations pertaining to such membership, including the obligation to respond to claims made against it by another WTO Member.’<sup>110</sup> For the panel, the rules of the organization – that is, the division of powers under EU law – were of no relevance for the purpose of apportioning WTO obligations and allocating responsibility for any possible breach thereof between the EU and its member states. Notably, it reasoned that the fact that the four member states had chosen not to directly defend their interests in the dispute by making oral and written submissions separate from those of the EU was ‘a matter entirely within their discretion’ and subject to their obligations under EU law but that it did ‘not affect their rights or status as respondent parties’ under WTO law.<sup>111</sup>

<sup>105</sup> WTO, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Report of the Panel (EC and Certain Member States – Large Civil Aircraft, panel report)*, 1 June 2011, WT/DS316/R.

<sup>106</sup> The principal measure at issue were the so-called ‘launch aid’ or ‘member state financing’ (LA/MFS) arrangements, provided by France, Germany, Spain and the United Kingdom to Airbus for the development of large civil aircraft (LCA). Other measures challenged were: (i) loans provided through the European Investment Bank to Airbus for LCA design, development and other purposes; (ii) infrastructure and infrastructure-related grants to Airbus provided by member state authorities; (iii) the provision to Airbus of equity infusions, debt forgiveness and grants through government-owned and government-controlled banks; and (iv) research and technological research funding to Airbus provided by the EU and its member states.

<sup>107</sup> WTO, *European Communities – Measures Affecting Trade in Large Civil Aircraft – Request for Consultations by the United States*, 12 October 2004, WT/DS316/1.

<sup>108</sup> *EC and Certain Member States – Large Civil Aircraft*, panel report, *supra* note 105, paras 7.171, requesting that the term ‘certain Member States’ be dropped from the name of the case.

<sup>109</sup> *Ibid.*, paras 7.169, 7.172. See also WTO, *European Communities – Measures Affecting Trade in Large Civil Aircraft – First Written Submission by the European Communities*, 9 February 2007, WT/DS316, at 4, 43, available at [http://trade.ec.europa.eu/wtodispute/show.cfm?id=268&code=2#\\_eu-submissions](http://trade.ec.europa.eu/wtodispute/show.cfm?id=268&code=2#_eu-submissions).

<sup>110</sup> *EC and Certain Member States – Large Civil Aircraft*, panel report, *supra* note 105, para. 7.174.

<sup>111</sup> *Ibid.*, para. 7.176.

Taking this position a step forward, it held that ‘whatever responsibility the [EU] 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 [EU] and its member States’.<sup>112</sup> Following this line of reasoning, the panel determined that both the EU and the four member states had acted inconsistently with their WTO obligations and addressed recommendations accordingly – this was, significantly, the first and only WTO ruling to date establishing such a joint responsibility.<sup>113</sup>

### C Post-Lisbon Practice: Challenging EU Exclusive Responsibility?

Against the backdrop of the pre-Lisbon practice just examined, it is readily apparent from Table 2 that the joint EU/MS membership of the WTO is becoming much more visible in dispute settlement practice post-Lisbon, even if this may appear somehow counter-intuitive from an EU law perspective, with the Union having been granted exclusive external competence for all CCP matters. At the outset, two main observations can be made: first, complaints addressed jointly to the EU and one or more of its member states (nine) are no longer the exception when compared to complaints directed against the EU alone (16) and, second, it is no longer just the USA bringing such joint complaints, but also other active players in the WTO dispute settlement system (that is, Argentina, Brazil, China, India, Japan and Russia). Out of the nine cases in which the joint responsibility of the EU and its member states has been formally invoked, only one<sup>114</sup> has led to the adoption of a WTO panel report, while the others are still at the consultations/panel proceedings stage.<sup>115</sup> Therefore, it is too

<sup>112</sup> *Ibid.*, para. 7.175 (emphasis added).

<sup>113</sup> *Ibid.*, para. 8.5. Note that the EU did not appeal the specific issue of the proper respondent, and, thus, the Appellate Body did not have a chance to rule on it in an authoritative manner. See WTO, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Notification of Appeal by the European Union*, 23 July 2010, WT/DS316/12. The Appellate Body addressed its recommendations to the EU only. However, it also upheld the Panel’s recommendations to ‘the Member granting each subsidy’ for those findings that were not appealed. WTO, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Report of the Appellate Body (EC and Certain Member States – Large Civil Aircraft, Appellate Body report)*, 1 June 2011, WT/DS316/AB/R, paras 1416, 1418.

<sup>114</sup> WTO, *European Communities and its Member States – Tariff Treatment of Certain Information Technology Products – Report of the Panel (EC – IT Products, panel report)*, 21 September 2010, WT/DS375/R, WT/DS376/R, WT/DS377/R.

<sup>115</sup> WTO, *European Union and a Member State – Seizure of Generic Drugs in Transit – Requests for Consultations by India*, 19 May 2010, WT/DS408/1; WTO, *European Union and a Member State – Seizure of Generic Drugs in Transit – Request for Consultations by Brazil*, 19 May 2010, WT/DS409/1, both concerning GATT and TRIPS Agreement claims against several EU regulations and Dutch measures; WTO, *European Union and a Member State – Certain Measures Concerning the Importation of Biodiesels – Request for the Establishment of a Panel by Argentina*, 7 December 2012, WT/DS443/5, involving claims under the GATT and the Agreement on Trade Related Investment Measures (TRIMs Agreement) 1994, 1868 UNTS 186, against a Spanish ministerial order allegedly adopted pursuant to EC Council Directive 2009/28; WTO, *European Union and Certain Member States – Certain Measures Affecting the Renewable Energy Generation Sector – Request for Consultations by China*, 7 November 2012, WT/DS452/1, regarding claims under the GATT

early to appraise the significance of this trend in WTO dispute settlement practice. Nonetheless, it is interesting to note that these cases concern claims under WTO-covered agreements that fall within the ‘old’ (that is, the GATT and other multilateral agreements on trade in goods) and the ‘new’ EU exclusive external competence (that is, the GATS and the TRIPS Agreement) alike and that increasingly involve measures by member states taken in the framework of EU legislation in the field of energy and climate change policies.<sup>116</sup>

At the time of writing, the issue of EU/MS joint responsibility has only been addressed by the WTO panel in *EC – Information Technology Products*,<sup>117</sup> which concerned the tariff treatment of certain information technology products that the USA, Japan and Chinese Taipei claimed was in breach of the EU’s and its member states’ obligations under, *inter alia*, Articles II:1(a) and II:1(b) of the GATT since it did not respect their commitments to provide duty-free treatment for these products under the Information Technology Agreement.<sup>118</sup> The complainants addressed the consultations and panel requests jointly to the EU and its member states on grounds that both the EU and its member states played a role in the application of the duties concerned. The complainants submitted that, while the Union had promulgated the challenged measures, the customs authorities of the member states, in implementing these EU regulations, issued ‘Binding Tariff Information’ decisions specifying the customs classification code and applied customs duties to the products at issue. They further argued that the ‘internal legal relationship’ between the EU and its member states ‘cannot diminish the rights of other WTO members’, including under the Dispute Settlement Understanding to bring claims against the EU member states as WTO members in their own right.<sup>119</sup>

However, the EU notified the panel that it would participate as a sole respondent in the proceedings and bear sole responsibility for any GATT breach. As in *EC – Computer*

and the SCM and TRIMs Agreements against Italian and Greek measures supposedly taken pursuant to EC Council Directive 2009/28; WTO, *European Union and Certain Member States – Certain Measures on the Importation and Marketing of Biodiesel and Measures Supporting the Biodiesel Industry – Request for Consultations by Argentina*, 23 May 2013, WT/DS459/1, concerning claims under the GATT and the TBT, SCM and TRIMs Agreements against EC Council Directive 2009/28 and EC Council Directive 2009/30 and related measures taken by several member states; WTO, *European Union and its Member States – Certain Measures Relating to the Energy Sector – Request for the Establishment of a Panel by Russia*, 28 May 2015, WT/DS476/2, involving claims under the GATT and the GATS against the so-called ‘Third Energy Package’ as well as related EU legal instruments and implementing measures by the member states.

<sup>116</sup> For an overview, see Perišin, ‘Pending EU Disputes in the WTO: Challenges to EU Energy Law and Policy’, 10 *Canadian Yearbook of International Law* (2014) 371.

<sup>117</sup> WTO, *European Communities and its Member States – Tariff Treatment of Certain Information Technology Products – Request for the Establishment of a Panel by the United States, Japan and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, 19 August 2008, WT/DS375/8, WT/DS376/8, WT/DS377/6, which also includes claims under Art. X of the GATT (publication and administration of trade regulations) by the USA and Chinese Taipei.

<sup>118</sup> WTO Ministerial Conference, Ministerial Declaration on Trade in Information Technology Products, Doc. WT/MIN(96)/16, 13 December 1996.

<sup>119</sup> *EC – IT Products*, panel report, *supra* note 114, para. 7.81. Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) 1994, 1869 UNTS 401.

*Equipment*, discussed above, the EU's assertion of exclusive responsibility was here supported by a combination of internal and WTO-based legal arguments. As could be expected, the Union reiterated its exclusive competence under EU law for all tariff matters, arguing that the role of national customs authorities was limited to applying measures previously enacted at the EU level. However, critically, it also stressed that this meant, from a WTO law perspective, that only the EU could take 'remedial action' to implement the panel's recommendations to the extent that a GATT violation was determined, and, thus, 'addressing any recommendations to each [EU] Member State would serve no useful purpose'.<sup>120</sup> In addition, the Union sought to assure the panel that the EU member states would be required, as a matter of EU law, to apply any such implementing measures taken at the EU level.<sup>121</sup> The panel made its recommendations to the EU only, hiding behind a rather formalistic argument (that is, an 'as such' challenge) but ultimately persuaded that the EU's sole responsibility would bring a satisfactory settlement of this specific dispute:

[W]e note that the complainants have framed their claims as *challenging the [EU] measures 'as such'* and have confirmed to the Panel that they are not making claims with respect to specific applications of those measures by national customs authorities of any member States. Under the circumstances, the Panel considers that it is not required to make, and does not make, findings with respect to member States' application of the [EU] measures that were challenged 'as such' in this dispute. Moreover, we are of the view that findings with respect to the measures adopted by the [EU] will provide a *positive solution* to the dispute.<sup>122</sup>

#### **D Overall Assessment: Third Party Acceptance and Impact of EU Competence Rules**

In light of the questions raised at the beginning of this article, the preceding analysis first reveals that theoretical questions of responsibility arising from the joint EU/MS membership of the WTO have seldom been a controversial issue in dispute settlement practice. In fact, the question of EU/MS responsibility has thus far been litigated and directly addressed only on three occasions in WTO panel proceedings (that is, in *EC – Computer Equipment*, *EC – Information Technology Products* and *EC and Certain Member States – Large Civil Aircraft*) and never, thus far, in Appellate Body proceedings. Furthermore, in those few instances where EU/MS responsibility was contentious, what caused the contention was the Union's eagerness to be held responsible in lieu of its member states and not them seeking to hide behind each other so as to evade international responsibility altogether.<sup>123</sup> Put differently, concerns over 'accountability gaps' have not really materialized in EU/MS practice within the WTO dispute settlement system.

However, and by the same token, this limited jurisprudence does not support the proposition made that WTO dispute settlement practice 'has gone a long way in the

<sup>120</sup> *Ibid.*, para. 7.80.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*, para. 8.2 (emphasis added).

<sup>123</sup> For a similar view, see Delgado Casteliero and Larik, *supra* note 6, at 255; Eeckhout, *supra* note 6, at 456.

direction of attributing the acts of the Member States to the EU, in particular when the Member States implement EU law or when their acts fall within the scope of EU legislation'.<sup>124</sup> This statement seems both misleading and premature for a number of reasons. First, as we have seen, out of the 70 WTO disputes in which the EU was targeted as a sole respondent, only a few actually raised this sensitive question of attribution of conduct of the member states to the Union. Since the vast majority of these cases involved complaints against EU measures only – rather than specific applications thereof by the member states – there was no ambiguity that the Union bore sole responsibility for the alleged WTO inconsistency of such acts.<sup>125</sup> Second, there were certainly some instances, particularly in the pre-Lisbon period, in which WTO members could have challenged, but instead tacitly accepted, EU exclusive responsibility for actions of the member states taken under its (limited) normative authority – notably, *EC – Asbestos*, *EC – Commercial Vessels* and *EC – Biotech*. And it is also true that WTO panels have refrained from interfering with this course of action insofar as it was acquiesced to by WTO members.<sup>126</sup> However, this does not necessarily set a precedent for future disputes.<sup>127</sup> Indeed, our examination of post-Lisbon practice reveals that WTO members have increasingly brought joint complaints when challenging measures adopted by the member states within the normative sphere of EU law,<sup>128</sup> and it remains to be seen how these claims of joint EU/MS responsibility will be dealt with if they are actually contested in WTO panel proceedings.<sup>129</sup>

With regard to the degree to which EU competence rules have been considered a relevant criterion for the purpose of allocating EU/MS international responsibility, the approach of the WTO panels has not been entirely consistent in the three cases in which this proved to be a controversial issue.<sup>130</sup> Understandingly from an international law perspective, the WTO panels have consistently taken the position that transfers of external powers under EU law do not affect the validity of WTO obligations for EU member states; as full WTO members in their own right, they are bound by

<sup>124</sup> Kuijper and Paasivirta, *supra* note 7, at 63; for a similar view, see Hoffmeister, *supra* note 7, at 734, 743; Delgado Casteliero, *supra* note 6, at 202.

<sup>125</sup> See *supra* notes 75 and 76.

<sup>126</sup> In this sense, the approach to EU/MS international responsibility in the WTO has been rightly described as being marked by both assertiveness of the Union and pragmatism of all parties involved. See Delgado Casteliero and Larik, *supra* note 6, at 254; Eeckhout, *supra* note 6, at 456.

<sup>127</sup> This point is further corroborated by the fact that there is no strict rule of *stare decisis* in WTO dispute settlement according to which previous rulings bind panels in subsequent cases, nor an Appellate Body decision on the matter that could be relied upon by future panels. See P. van den Bossche, *The Law and Policy of the World Trade Organization* (3rd edn, 2013), at 51–53.

<sup>128</sup> On this point, see further section 4 below with specific reference to: WTO, *European Union and Certain Member States – Certain Measures on the Importation and Marketing of Biodiesel and Measures Supporting the Biodiesel Industry – Request for Consultations by Argentina*, 23 May 2013, WT/DS459/1.

<sup>129</sup> In this context, note that the panel in *EC – IT Products*, panel report, *supra* note 114, para. 8.2, sounded a warning that, if necessary, it would have been prepared to address specific recommendations to the member states, even if they are merely implementing EU legislation found to be WTO inconsistent. For a similar reading, see Bartels, 'Procedural Aspects of Shared Responsibility in the WTO Dispute Settlement System', 4 *Journal of International Dispute Settlement* (2013) 343, at 352.

<sup>130</sup> Kuijper and Paasivirta, *supra* note 7, at 60.



the entire WTO Agreement (and its covered agreements), in spite of whatever external competence the Union may have for parts thereof as a matter of EU law.<sup>131</sup> In other words, the rules of the organization are largely irrelevant for the question of apportioning WTO obligations between the EU and its member states, so long as the latter remain independent members of that organization.

Conversely, the available WTO jurisprudence is less clear on the extent to which the rules of the organization may be relevant to the question of attributing acts of the member states to the Union. Whereas in cases of classical EU executive federalism (that is, *EC – Computer Equipment* and *EC – Information Technology Products*), the WTO panels have ultimately accepted the Union's sole responsibility for the acts of its member states when implementing EU (customs) legislation found in violation of the GATT, the panel in *EC and Certain Member States – Large Civil Aircraft* drew a line in this regard and held both the EU and its member states responsible for breaches of the SCM Agreement. These different findings cannot be easily explained in light of the allocation of external powers under EU law, since both the GATT and the SCM Agreement have long been within the exclusive external competence of the Union. Yet, as will be argued next, this case law may appear less inconsistent if viewed from the perspective of WTO rules on remedies, which requires us to look instead at the distribution of internal regulatory competences under EU law.

#### 4 Untangling EU/MS International Responsibility in the WTO: A 'Competence/Remedy' Model

In comparing the different approaches to EU/MS international responsibility in the WTO and under the European Convention on Human Rights, Kuijper aptly qualifies the relative impact of EU competence rules on determinations of international responsibility. He argues that it is not just internal factors, such as the scope of EU powers and whether the member states may be seen as de facto Union organs in certain instances, that determine the degree to which the EU will bear sole or joint responsibility.<sup>132</sup> Rather, these internal elements will 'strongly vary in impact on the final questions of attribution and responsibility' depending on the specific treaty regime in which the responsibility of the EU and/or its member states is invoked and, in particular, on the prevailing remedy for an internationally wrongful act preferred by the regime in question.<sup>133</sup> In the context of the WTO, both the legal texts and the jurisprudence of the dispute settlement organs clearly attach a strong preference for juridical restitution – that

<sup>131</sup> *EC – Computer Equipment*, panel report, *supra* note 92, para. 8.16; *EC – IT Products*, panel report, *supra* note 114, para. 8.2; *EC and Certain Member States – Large Civil Aircraft*, panel report, *supra* note 105, para. 7.174.

<sup>132</sup> Kuijper, 'Attribution – Responsibility – Remedy: Some Comments on the EU in Different International Regimes', SHARES Research Paper No. 30 (2014), at 20.

<sup>133</sup> *Ibid.*, at 2.

is, the ‘prompt’ withdrawal (or modification) of the WTO-inconsistent measure and continued performance of WTO obligations.<sup>134</sup> In such a system where the primary consequence of international responsibility is the return to legality, the key question becomes who (that is, the EU, the member states or both) has the actual power to undo the wrongful act and ensure conformity to existing WTO obligations. In this sense, as rightly pointed out by André Nollkaemper, the role of power in determining international responsibility (whether joint or not) is a fundamental one.<sup>135</sup> Put simply, why would WTO dispute settlement organs bother to assign responsibility to a WTO member that does not hold the power to remove (or modify) the measure found to be WTO inconsistent?

That being said, does it necessarily follow that the EU is the one and only member able to provide for restitution and ensure performance of WTO obligations in all instances? This would seem to be the view taken by Kuijper and Paasivirta in suggesting the so-called ‘competence model’ for managing EU/MS international responsibility in the WTO. In their opinion, the relevant WTO member is the Union, and not the member states, because the near-exclusive EU external competence for WTO matters post-Lisbon implicates that only its institutions can provide for the necessary restitution. Following this line of reasoning, the Union should be solely responsible for the WTO inconsistency of all acts taken in the sphere of EU law, including by its member states.<sup>136</sup> But if this proposition is accepted, what would be the legal justification for the member states to remain independent members of the WTO, given they are claimed entirely incompetent to fulfil one of the key obligations of that membership – that is, to ensure the conformity of their laws, regulations and administrative procedures with WTO obligations?<sup>137</sup>

In reality, the proposed competence model may need some refinement, as evidenced by the EU’s own argumentation in the three WTO cases previously discussed in which the issue of EU/MS international responsibility proved contentious at the panel proceedings. On the one hand, the two premises underlying the competence model appear perfectly sensible when applied to situations of classical EU executive federalism such as those posed by *EC – Computer Equipment* and *EC – Information Technology Products*, both involving EU customs legislation. In both cases, it was plainly clear that, first, the EU had required the member states to act inconsistently with WTO law – that is, by adopting the challenged (directly applicable) regulations that member states have no choice but to apply and that leave no room for discretion in terms of implementation and, second, the EU was the only entity with the actual power to provide restitution – that is, to modify/withdraw the regulations found to be WTO inconsistent. Under

<sup>134</sup> DSU, *supra* note 119, Art. 3.7; see also Arts 19.1, 21.1; see van den Bossche, *supra* note 127, at 194–195, for an overview.

<sup>135</sup> Nollkaemper, *supra* note 38, at 307–308, 346.

<sup>136</sup> This model was first introduced in Kuijper and Paasivirta, *supra* note 7, at 54–55, and further elaborated in Kuijper, *supra* note 132, at 8–9, 18. A similar view is taken by Hoffmeister, *supra* note 7, at 743. See, most recently, Paasivirta, *supra* note 22, at 457.

<sup>137</sup> WTO Agreement, *supra* note 12, Art. XVI:4.

these circumstances where the Union has full *ex-ante* and *ex-post* normative control over member state action, it would not be very efficient, nor provide much legal certainty from a third-party perspective, to hold EU member states responsible as they do not have any individual power to undo the wrongful situation and ensure the performance of WTO obligations.

On the other hand, it is less clear that these two assumptions underpinning Kuijper and Paasivirta's competence model can be upheld as we move away from tariffs and customs matters into other areas of WTO law that are not so extensively regulated at the EU level and where the role of the EU member states is not strictly confined to executing EU law. This point is well illustrated in *EC and Certain Member States – Large Civil Aircraft*. First, it is generally the case that, in the field of state aid, the EU does not require, but at most authorizes, member states to provide aid under certain conditions,<sup>138</sup> and, therefore, member states do enjoy some level of discretion in whether or not they act in contravention of the SCM Agreement. Moreover, in this particular dispute, the EU did not point to any Commission state aid decision actually authorizing the separate subsidies granted by the member states,<sup>139</sup> and it has indeed been reported that such subsidies were not subject to a specific EU authorization.<sup>140</sup> This being so, it would be hard to see how the EU could claim to exercise normative control over subsidizing action taken by the member states where there appears to be no basis in EU law for assessing the substantive legality of such action.<sup>141</sup> Indeed, even in an area where the EU has exclusive competence both externally and internally,<sup>142</sup> it may be possible for member states to act outside the scope of EU normative authority in a manner that violates the SCM Agreement. A key reason for this is that the Commission's control powers are limited to government support that constitutes 'state aid', which is a narrower concept than the WTO's notion of 'subsidy'.<sup>143</sup>

Second, in terms of remedial action, the EU did not attempt to argue that it was best placed to implement the panel's recommendations. In fact, it is far from evident that

<sup>138</sup> See *supra* note 60.

<sup>139</sup> See, e.g., WTO, *European Communities – Measures Affecting Trade in Large Civil Aircraft – First Written Submission by the European Communities*, 9 February 2007, WT/DS316, at 89–95, providing the factual background to MSF/LA arrangements.

<sup>140</sup> See, e.g., Kuijper and Paasivirta, *supra* note 7, at 63; Delgado Casteleiro, *supra* note 6, at 206. In this sense, *EC and Certain Member States – Large Civil Aircraft*, panel report, *supra* note 105, significantly differs from *EC – Commercial Vessels*, panel report, *supra* note 81, where EU law was clearly at the origin of the national aid schemes found WTO inconsistent and EU sole responsibility was accepted (see *supra* section 3.B)

<sup>141</sup> Hoffmeister, *supra* note 7, at 742, stating that it is necessary to establish that EU law governs the substantive legality of member state action as one of the conditions for determining 'normative control' of the Union for the purpose of international responsibility.

<sup>142</sup> TFEU, *supra* note 9, Art. 3(1)(b).

<sup>143</sup> An obvious reason for this is that the TFEU, *ibid.*, Art. 107(1) confines 'state aid' to government support measures that distort competition and trade within the EU, whereas WTO disciplines apply more broadly to subsidies that affect international trade (e.g., export and import substitution subsidies prohibited under Art. 3 of the SCM Agreement) and cause 'adverse effects' to other WTO members (i.e., so-called 'actionable subsidies' under Art. 5 of the SCM Agreement). For further discussion, in

the Union alone could have remedied the wrongful situation, particularly for those ‘member state financing’ (or ‘launch aid’) measures that the panel found to constitute a prohibited (export) subsidy under Article 3.1(a) of the SCM Agreement and had to be withdrawn within 90 days.<sup>144</sup> Under these circumstances, it appears perfectly sensible for the panel to address individual recommendations to each subsidizing EU member state, as they had actual power and full discretion to withdraw their WTO-inconsistent subsidies with no need for any prior EU legislative action.

Therefore, *EC and Certain Member States – Large Civil Aircraft* highlights that a perfect match between EU exclusive external competence for WTO matters and exclusive remedial capacity for any breach of WTO law, which underlies Kuipjer and Paasirvita’s competence model, cannot simply be taken for granted. The question remains, however, whether this may be considered a marginal case due to the peculiarities of EU state aid rules or, conversely, whether similar doubts as to the EU’s exclusive ability to provide restitution could arise in other fields of WTO law. Arguably, this could also become an issue in WTO disputes involving acts of the member states apparently aimed at implementing EU directives, where it can be highly complex, particularly for a third party, to identify whether the alleged WTO-inconsistent measure is required by EU law or, instead, results from an autonomous decision of the member states or, indeed, implicates both.<sup>145</sup>

A case in point is the recent complaint brought by Argentina against the EU and some of its member states regarding certain measures affecting the marketing of biodiesel products and supporting the biodiesel industry.<sup>146</sup> On the one hand, the EU seems clearly responsible for the claims against the ‘sustainability criteria’ for biofuels and bioliquids under the GATT and the Agreement on Technical Barriers to Trade.<sup>147</sup> These criteria are established as mandatory common standards in the EU Renewable

the specific context of *EC and Certain Member States – Large Civil Aircraft*, panel report, *supra* note 105, see Wu, ‘Why Not Brussels? European Community State Aid Rules and the Boeing-Airbus Dispute: Comment on Piet Jan Slot’, in K.W. Bagwell, G.A. Bermann and P.C. Mavroidis, *Law and Economics of Contingent Protection in International Trade* (2010) 186; and, more generally, Ehlermann and Goyette, ‘The Interface between EU State Aid Control and the WTO Disciplines on Subsidies’, 4 *European State Aid Law Quarterly* (2006) 696.

<sup>144</sup> *EC and Certain Member States – Large Civil Aircraft*, panel report, *supra* note 105, paras 8.1, 8.6, pursuant to Art. 4.7 of the SCM Agreement. Note, however, that this finding was later reversed by the Appellate Body. *EC and Certain Member States – Large Civil Aircraft*, Appellate Body report, *supra* note 113, paras 1415–1416.

<sup>145</sup> See, e.g., WTO, *European Union and Certain Member States – Certain Measures Affecting the Renewable Energy Generation Sector – Request for Consultations by China*, 7 November 2012, WT/DS452/1, at 1.

<sup>146</sup> WTO, *European Union and Certain Member States – Certain Measures on the Importation and Marketing of Biodiesel and Measures Supporting the Biodiesel Industry – Request for Consultations by Argentina (EU and Certain Member States – Biodiesel)*, consultation request, 23 May 2013, WT/DS459/1.

<sup>147</sup> *Ibid.*, at 1–4. With regard to these GATT/TBT Agreement claims (Part A), Argentina appears indeed to invoke solely EU responsibility in referring to the WTO Agreement, *supra* note 12, Art. XVI:4, whereas this reference is not made with respect to GATT/SCM Agreement claims in Part B of the consultations request. Agreement on Technical Barriers to Trade (TBT Agreement) 1994, 1868 UNTS 120.

Energy and Fuel Quality Directives<sup>148</sup> (that is, only conforming biofuels and bioliquids may count towards meeting the obligatory national renewable energy targets set out for each member state<sup>149</sup> and/or be eligible for financial support), and, thus, only the EU is in a position to modify (or withdraw) these criteria if they are found to be WTO inconsistent. On the other hand, it is less obvious whether the Union is equally responsible for the GATT/SCM Agreement claims against tax exemptions/reductions on such 'sustainable' biofuels allegedly applied by some EU member states.<sup>150</sup> These tax incentives are not, strictly speaking, required by EU law,<sup>151</sup> and, therefore, member states retain the power to withdraw them if they are found to be WTO inconsistent. In fact, this case raises the type of responsibility question that was pragmatically avoided in *EC – Biotech*, discussed above, and, should it reach panel proceedings, may provide a first opportunity for WTO dispute settlement organs to actually rule on the question of who is responsible for the conduct of the member states that is authorized in EU directives.<sup>152</sup>

The above example also corroborates the key point that there is no strict parallelism between EU exclusive external competence in the field of the CCP and the distribution of internal regulatory competences between the Union and its member states.<sup>153</sup> To put it differently, even if it is accepted that the Union has exclusive treaty-making powers for (nearly) all WTO matters, it does not have exclusive treaty-infringing powers. There are some important policy fields covered by WTO law that have been only partially regulated at the EU level and where member states retain considerable regulatory autonomy internally. In addition to internal taxation just seen (covered by

<sup>148</sup> Council/EP Directive 2009/28, OJ 2009 L 140/16, Art. 17; Council/EP Directive 2009/30, OJ 2009 L 140/88, Art. 7(b).

<sup>149</sup> Council/EP Directive 2009/28, *supra* note 148, Art. 3, Annex I. For a discussion, see Swinbank and Daugbjerg, 'Improving EU Biofuels Policy? Greenhouse Gas Emission, Policy Efficiency and WTO Compatibility', 47 *Journal of World Trade* (2013) 813.

<sup>150</sup> *EU and Certain Member States – Biodiesel*, consultation request, *supra* note 146, at 4–7. The EU member states concerned are Belgium and France.

<sup>151</sup> EU Council Directive 2003/96, OJ 2003 L 283/51, para. 26 of the Preamble and Art. 15 allow member states to exempt or reduce excise duties so as to promote the use of biofuels. As such tax exemption/reduction may constitute 'state aid', member states are required (Art. 26) to notify such measures to, and obtain approval from, the Commission pursuant to Art. 108 of the TFEU, *supra* note 9. Implementation of such tax incentive schemes varies significantly across EU member states. For an overview, see A. Jung *et al.*, *Biofuels: At What Cost? Government Support for Ethanol and Biodiesel in the European Union: 2010 Update*, July 2010, at 42–47, available at [www.iisd.org/gsi/sites/default/files/bf\\_union\\_2010update.pdf](http://www.iisd.org/gsi/sites/default/files/bf_union_2010update.pdf).

<sup>152</sup> See also WTO, *European Union and Its Member States – Certain Measures Relating to the Energy Sector – Request for the Establishment of a Panel by Russia*, 28 May 2015, WT/DS476/2, concerning, *inter alia*, GATS claims against Council/EP Directive 2009/73, OJ 2009 L 211/94 and member state implementing measures (particularly Croatia, Hungary and Lithuania). Here, however, the degree of discretion left to the member states in implementing the EU Directive (Art. 9) does not appear to be the only rationale for invoking their responsibility: rather, the alleged claims of violation of Arts XVI and XVII of GATS are based on the specific commitments that the three EU member states concerned (presumably) undertook in their individual services schedules (see *supra* note 33) with respect to pipeline transport services.

<sup>153</sup> This is reflected in TFEU, *supra* note 9, Art. 207(6).

the GATT/SCM Agreement),<sup>154</sup> another example is patent law (covered by the TRIPS Agreement).<sup>155</sup> In these areas, it could well be that an act of an EU member state outside the scope of EU legislation infringes WTO law. If presented with such a scenario, proponents of EU exclusive responsibility may still argue that the Union has internal control mechanisms to effectively ensure compliance with an adverse WTO ruling.<sup>156</sup> It is true that the WTO Agreement (and its covered agreements) is ‘an integral part’ of EU law,<sup>157</sup> and, thus, the European Commission can in principle initiate infringement proceedings against member states to ensure compliance with WTO law.<sup>158</sup> However, this argument misses out on a fundamental point: why should WTO dispute settlement organs rely on the Commission’s infringement action when it would seem more effective to hold the infringing EU member state(s) (if targeted as respondent) directly responsible under WTO law?

To sum up, when approaching EU/MS responsibility for breaches of WTO law, the key practical question is who has the actual power to provide juridical restitution and secure the performance of WTO obligations, as underscored by the ‘competence/remedy’ model suggested here. From this angle, EU competence rules become a relevant criterion for the purposes of attributing EU/MS international responsibility; complaining parties would generally address their claims,<sup>159</sup> and WTO dispute settlement organs their findings, based on their assessment of who is in the best position to withdraw or amend the WTO-inconsistent measure.<sup>160</sup> However, the key in answering this question is not the division of external competences under EU law, since this says nothing about who has the power to act internally to undo an internationally wrongful situation but merely indicates who has the power to conclude a given international treaty. Rather, what is decisive in terms of providing juridical restitution is the division of internal (and not external) regulatory competences under EU law as well as the manner in which these are exercised by the Union and/or its member states. Accordingly, and contrary to what Kuipjer and Paasarvita suggest, it is not true that the EU will be best placed to remedy breaches of WTO law in each and every case just because it has acquired exclusive external competence for (nearly) all WTO matters after Lisbon. Particularly as we move away from highly integrated areas of the CCP,

<sup>154</sup> *Ibid.*, Art. 113; Eeckhout, *supra* note 6, at 461.

<sup>155</sup> *Ibid.*, Art. 118; see also one of the few pieces of EU legislation in the field of patent law, Council/EP Directive 98/44, OJ 1998 L 213/13.

<sup>156</sup> See Kuipjer and Paasivirta, *supra* note 7, at 39, 59.

<sup>157</sup> This is so by virtue of TFEU, *supra* note 9, Art. 216(2); see also C-181/73, *Haegeman v. Belgium*, [1974] ECR 449, para. 5.

<sup>158</sup> TFEU, *supra* note 9, Arts 258, 260; C-239/03, *Commission v. France (Étang de Berre)*, [2004] ECR I-9325, para. 29. See generally Mendez, ‘The Enforcement of EU Agreements: Bolstering the Effectiveness of Treaty Law?’, 47 *CMLR* (2010) 1719.

<sup>159</sup> However, see Delgado Casteleiro and Larik, *supra* note 6, at 253, rightly noting that complaining parties in the WTO may strategically target the EU as a respondent, rather than individual member states, fostered by the prospects of being capable to retaliate. Yet, arguably, this possibility of retaliating against the EU as a whole is not impaired by bringing joint complaints against the EU and (some of) its member states.

<sup>160</sup> For a similar view, in the context of non-compliance proceedings under multilateral environmental agreements, see Nollkaemper, *supra* note 38, at 343, 346.

individual member states may well be the relevant actor with a power to take remedial action because EU normative control over their WTO-infringing conduct is either limited or absent altogether. In this case, and insofar as EU member states are targeted as respondents, there are no compelling grounds why WTO dispute settlement organs should instead rely on the Commission's infringement action or other internal enforcement mechanisms so as to ensure due performance by the member states of their WTO obligations.

## 5 Conclusions

It is largely undisputed that the EU has played a prominent role in the WTO dispute settlement system over the past three decades. As one of the rare international fora where the EU is actually allowed to participate fully in dispute settlement proceedings, it is not surprising that the Union has been eager to stand as a 'responsible', if not 'over-responsible', actor in the multilateral trading system, even if not always compliant with WTO law. And, yet, this 'success story' should not lead us to overstate the degree to which third parties have accepted the EU's eagerness to assume exclusive responsibility for breaches of WTO law by its member states, nor to misrepresent the relative impact of its own competence rules on determinations of EU/MS international responsibility in the WTO. The main reason for calling for a more qualified assessment is that we simply do not have (as of yet) well-established authoritative WTO jurisprudence on the sensitive question of when member states' conduct can be attributed to the Union.<sup>161</sup> As we have seen, it has been raised and adjudicated only on three occasions in WTO panel proceedings and never thus far in Appellate Body proceedings. In addition, WTO dispute settlement practice reveals that joint complaints against the EU and its member states have not ceased but, rather, have increased relatively, even if the Union has been granted exclusive external powers for almost all WTO matters under the Treaty of Lisbon.

In fact, what emerges from existing WTO jurisprudence is that the division of external competences under EU law has not, unlike the Commission and some EU scholars have submitted, been decisive in assigning responsibility for breaches of WTO law. In all three cases where EU/MS responsibility was contentious, the WTO panels have unambiguously held that EU member states are bound to perform all obligations incumbent upon them under the WTO Agreement (and its annexed agreements), so as long as they remain full and independent members of the WTO and irrespective of the (exclusive) external powers they may have transferred to the Union in the CCP field under EU law. While this stance may grate on the ears of most EU lawyers, it is legally sound from an international law standpoint. Moreover, it is also wise from a broader governance perspective – to put it bluntly, it is not for WTO dispute settlement organs to

<sup>161</sup> See *supra* section 3.D, indicating that the vast majority of the total 70 WTO disputes in which the EU was targeted as sole respondent concerned EU measures only – and not member state measures as such – and, therefore, there was no ambiguity that such EU acts were attributable to the Union.

turn the WTO Agreement de facto into a ‘pure’ EU agreement for the purpose of international responsibility.<sup>162</sup> That being so, in assigning international responsibility – that is, whether solely to the EU (*EC – Computer Equipment* and *EC – Information Technology Products*) or jointly with (some of) its member states (*EC and Certain Member States – Large Civil Aircraft*), these WTO panels were seemingly guided by one pragmatic consideration: who has the actual power to remove (or modify) the measure found to be WTO inconsistent?

However, and contrary to what other scholars appear to suggest,<sup>163</sup> it is not a foregone conclusion that the EU is always the one and only entity with the actual power to provide juridical restitution in the WTO dispute settlement system, just because it has exclusive external competence for nearly all WTO matters. This is undoubtedly the case when it comes to highly harmonized segments of the CCP (for example, tariffs and customs matters), where the conduct of the member states is strictly confined to implementing directly applicable EU legislation. Evidently, the EU only can amend/withdraw such legislation if it is found to be WTO inconsistent. And, yet, as we have seen, it is less straightforward why the EU would also have such an exclusive remedial capacity for breaches of WTO law in cases where its normative control over member state action is more limited or, indeed, entirely absent – for instance, why could the EU member states themselves not withdraw their own subsidies, or regulatory measures that are permitted but not required by EU law, if they were found to be WTO inconsistent? In fact, from the perspective of providing juridical restitution, it is not the delimitation of *external* (that is, treaty-making) competences between EU and member states that is of primordial importance. Rather, it is the allocation and exercise of *internal* (treaty-infringing/treaty-performing) competences that, importantly, are not within the exclusive regulatory domain of the Union for all subject matters covered by WTO law even post-Lisbon.<sup>164</sup> This being so, insofar as EU member states are targeted as a respondent in a WTO dispute and hold the power to end an eventual breach of their WTO obligations, there is no cogent reason why WTO dispute settlement organs should rely on EU control mechanisms instead of direct responsibility and accountability under WTO law.<sup>165</sup>

In closing, it is important to underline that the issue of EU/MS international responsibility in the WTO is not, of course, a purely legal question but, rather, one that is highly political for all players involved. For the EU, the capacity to speak with one voice and assert its exclusive responsibility in the WTO dispute settlement system is certainly instrumental in forging its own identity as a leading trade actor and power on

<sup>162</sup> In a post-Lisbon setting, this would have likely been the practical consequence had WTO dispute settlement organs accepted the Commission’s proposition that the apportionment of obligations should strictly follow the distribution of external competences under EU law and be the decisive factor in assigning international responsibility (see *supra* section 2.B).

<sup>163</sup> See *supra* note 136.

<sup>164</sup> See *supra* section 4.

<sup>165</sup> Again, doing so would de facto turn the WTO Agreement into a ‘pure’ EU agreement, whereby EU member states are not seen as WTO members in their own right and bearers of the contractual obligations but mere vehicles for carrying out the EU’s obligations under WTO law.



the global stage<sup>166</sup> as well as important at a more practical level.<sup>167</sup> At the same time, it appears politically unviable for (some) EU member states to even consider relinquishing their independent membership in the WTO.<sup>168</sup> For their part, other WTO members may target the EU and its member states jointly as respondents not solely out of genuine legal concerns<sup>169</sup> but, strategically, as a means to challenge the Union's unity and leadership in the WTO.<sup>170</sup> In these circumstances, the EU and its member states may increasingly find themselves at a crossroads between maintaining their joint membership of the WTO while claiming the EU's exclusive responsibility in its dispute settlement system. Indeed, aside from voting and other political considerations,<sup>171</sup> one may well question whether there is still a legal need, as a matter of EU law,<sup>172</sup> for the parallel EU/MS membership of the WTO. It is not the purpose of this article to engage with convoluted questions of EU law nor to take a position on the highly controversial and politically sensitive issue of whether the member states should remain WTO members in their own right.<sup>173</sup> What is here submitted is that it is for the EU and its member states to address these matters in-house, and, meanwhile, the WTO dispute settlement organs have made a judicious choice not to interfere.

<sup>166</sup> Delgado Casteleiro and Larik, *supra* note 6, at 255.

<sup>167</sup> Kuijper, *supra* note 6, at 224.

<sup>168</sup> See, e.g., see Hanh and Danieli, 'You'll Never Walk Alone: The European Union and Its Member States in the WTO', in M. Bungenberg and C. Herrmann (eds), *European Yearbook of International Economic Law: Common Commercial Policy after Lisbon* (2013) 49, at 63.

<sup>169</sup> Arguably, *EC – Large Civil Aircraft*, panel report, *supra* note 105, could be cited as an example here.

<sup>170</sup> Arguably, *EC – Computer Equipment*, panel report, *supra* note 92, and *EC – IT Products*, panel report, *supra* note 114, could be seen as an example of the USA's 'divide-and-rule' strategy. See Billiet, *supra* note 86, at 199.

<sup>171</sup> Under WTO Agreement, *supra* note 12, Art. IX(1), the EU has a number of votes equal to the number of its member states (i.e., 28 at present) in WTO decision making. From this perspective, the EU may not want to give up its current voting power should WTO decision-making practice move away from consensus in the future. On this point, see Bungenberg, 'Going Global? The EU Common Commercial Policy after Lisbon', in C. Herrmann and J.P. Terhechte (eds), *European Yearbook of International Economic Law* (2010) 123, at 134–135; Hanh and Danieli, *supra* note 168, at 53–54.

<sup>172</sup> From an EU law perspective, besides the exclusion of transport services from the scope of the CCP, EU member states seem to attach particular significance to the fact that they (not the EU) contribute to the WTO budget to justify their continued participation in the organization. See, e.g., WTO Trade Policy Review Body, Trade Policy Review: Report by the European Union, Doc. WT/TPR/G/248, 1 June 2011, at 6, n. 2. However, see *Opinion 1/94*, *supra* note 13, para. 21.

<sup>173</sup> From a WTO law perspective, any member may unilaterally withdraw from the WTO. WTO Agreement, *supra* note 12, Art. XV(1). In favour of preserving the *status quo*, see, e.g., Hanh and Danieli, *supra* note 168, at 61–63. For a seemingly different view, see Bungenberg, *supra* note 171, at 134.