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Citation for published version (APA):
ATTRIBUTION – RESPONSIBILITY – REMEDY
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Amsterdam Law School Legal Studies Research Paper No. 2014-23
Amsterdam Center for International Law No. 2014-14

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Forthcoming in: Revue belge de droit international (2014)

The Research Project on Shared Responsibility in International Law (SHARES) is hosted by the Amsterdam Center for International Law (ACIL) of the University of Amsterdam.

Some comments on the EU in different international regimes.

Pieter Jan Kuijper

1. Introduction

In the discussion about the responsibility of international organizations and the ILC draft relating to this question, it has often been remarked how difficult it was to codify rules equally valid for all the different international organizations. One organization that was always singled out, next to the international financial institutions, as a special case was the European Union (EU). One ILC Member once said, only somewhat tongue in cheek, that the EU as a near-federal State was so different from other international organizations, that it should simply apply the rules on State responsibility mutatis mutandis, just as it had done in treaty law, where it never accepted the 1986 Vienna Convention. This amounts to a crude competence approach to international responsibility, according to which an international organization will have to shoulder responsibility in direct relation to the scope of the competences that have been transferred to it from its Member States. Others have suggested that for questions of attribution of, and responsibility for, internationally wrongful acts, especially on the part of the EU and its Member States, it may also be important to consider the question of who can undo the wrongful act in question, the Member State or the Union, and in what contractual or non-contractual context the attribution and responsibility questions may arise.

Therefore it is not just the question of the diversity among international organizations and the allegedly unique character of the EU compared to other international organizations, but also often the treaty context or, more generally, the regime in which the responsibility of the EU

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1 Professor in the Law of International Organizations, University of Amsterdam. Many thanks are due to my student-assistant Martin Reuling for his solid support with footnotes and other chores. Thanks also to Christiane Ahlborn and Esa Paasivirta respectively for useful remarks and general inspiration in connection with this paper.

2 In a discussion with the author during “legal week” at the UN in autumn 2005.

3 See for more detail on the competence approach, fn. 00 and accompanying text

4 Kuijper & Paasivirta, “EU International Responsibility and its Attribution: From the Inside Looking Out”, in: Malcolm Evans & Panos Koutrakos eds., The International Responsibility of the European Union, European and International Perspectives, Oxford and Portland 2013, 35-71, mention that the contractual regimes within which responsibility arises, will have considerable influence on whether the Union will be held responsible or the Member States, or both together.
and/or its Member States is invoked, that will influence whether the EU as such, its Member States or both together will be held responsible for an internationally wrongful act. It will be argued that in particular the prevailing remedies preferred by the relevant treaty or other regime will turn out to be important in this respect. Not to the point of largely eclipsing such elements as have already played an important role in the discussion about the responsibility of international organizations and their Member States, such as the power or competence of the organization as compared to that of the Member States, or whether or not organizations can only act through their own organs or also through the organs of their Member States.\(^5\)

However, it is submitted that the above intra-organizational elements will be strongly vary in impact on the final questions of attribution and responsibility depending on the preferred remedy for what is considered an internationally wrongful act by the regime in question (extra-organizational elements).

This hypothesis will first be illustrated by a description and analysis of the functioning of the EU in the WTO dispute settlement system. Subsequently what can be learned from the responsibility of the EU in the WTO regime will be extrapolated to the special rules of attribution and responsibility, which are presently being proposed in the recent draft agreement on accession of the EU to the European Convention on Human Rights.\(^6\) But first it is necessary to briefly recall the traditional rules on remedies for internationally wrongful acts in general international law.

### 2. Remedies for internationally wrongful acts

Articles 28 and following of both the Articles on State Responsibility (ASR) and the Articles on the Responsibility of International Organizations (ARIO) set out the basic rules concerning the consequences of an internationally wrongful act as between States, and when international organizations are involved, in broadly the same terms. First of all there is a continuing obligation on the State or IO to act in conformity with its international obligations (art. 29 ASR and ARIO). The internationally wrongful act has to be stopped immediately after it has been qualified as such and assurances of non-repetition may be required (art. 30 ASR and

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ARIO). At the same time a duty of reparation arises. This reparation may be for different kinds of injury, both material and moral (art. 31 ASR and ARIO). Reparation may also take different forms, which even can be said to stand in a hierarchical relationship to one another. Reparation can consist of restitution, compensation and satisfaction, broadly in that order, but they may also be combined (art. 34 ASR and ARIO).7

The Chorzow Factory case, as is generally accepted in the literature, has clearly laid down that the first preference of international law goes to restitution, that is to say a return to the situation as it existed before the wrongful act, all the consequences of which must be undone, and pre-existing legality has to be restored (restitutio in integrum).8 Only if this is materially impossible, because the object of the restitution does not exist anymore or has been fundamentally altered, compensation may be considered as an alternative (art 34). This is also acceptable, if restitution would be severely disproportional compared to compensation or satisfaction as remedies for the injury suffered. That is to say, if the latter two alone or in combination yield better proportionality than restitution in relation to the injury suffered, they may be chosen. over the former.9 It is important to recall, however, that the criteria for material impossibility of restitution should be narrowly construed. Mere administrative difficulties or inconveniences are not considered sufficient, according to important sources of the doctrine,10 as they often are in national administrative law. It is seldom that, for instance, an unlawfully disciplined civil servant is reinstated by the administrative courts; compensation for damages, of purely material nature, but also to reputation, are most often the way chosen by the administrative courts, also inside international organizations.11 Christine Gray already demonstrated at the time that both the courts and arbitral tribunals of general international, as well as those of certain special regimes of international law had a distinct preference for reparations.12 We will see below, however, that presently some of the special regimes in international law demonstrate a strong tendency to insist on restitutio in integrum.

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8 See Chorzow Factory (Jurisdiction) case, PCIJ Ser. A no. 9, p.21
9 See ILC commentary to Article 34 ASR, Yb ILC 2001, Vol II, Part II, pp. 665-66, from which this may be deduced.
11 See ILC Commentary to Article 34 ASR, op. cit. fn. 9, ibid.
12 See Gray, op. cit. fn. 7 above, inter alia at p. 11.
There are special responsibility regimes in international law and organization that have an even more extreme attachment to restitution as the first and foremost remedy for re-establishing legality than general international law itself. The internal infringement procedure of the EU itself is a strong example of such attachment.\textsuperscript{13} If an administrative procedure for breach of treaty initiated by the Commission does not lead to a Member State correcting the breach, the matter can be brought by the Commission before the CJEU (Art. 258 TFEU). If the Member State is then condemned by the Court, originally under the EC Treaty the only remedy was immediate cessation, if the breach of treaty was constituted by an administrative practice or withdrawal or amendment of offending laws and regulations, i.e. legal restitution, in case such laws and regulations constituted the infringement. Even when the EC Treaty was amended in order to make pecuniary reparations or sanctions possible\textsuperscript{14}, they remained a secondary measure next to cessation and legal restitution. Initially the Commission exclusively used the penalty payment, because it was considered to be well suited to bring about cessation and legal restitution. It was only after a particularly egregious case of connivance at the highest government levels of a Member State in falsifying data important for verifying conformity, that the Court, on advice of its Advocate-General, proprio motu imposed the payment of a lump sum on that Member State.\textsuperscript{15} Later the Commission followed this example by demanding lump sums in some cases.\textsuperscript{16}

Why would mere conformity play such an important role in the European Union to the point of the Commission initially not even wanting to have recourse to the lump sum? The answer to that is simple: the sum of the tariff eliminations and other steps (including legislation) that the Members have taken in the EU Council of Ministers in order to bring about the single internal market, constitute obligations to all the other Member States and their citizens and residents. In order to keep the internal market functioning at the desired level of integration, it is of extreme importance that all Members fulfil all of their obligations all of the time. Conformity is all in maintaining the progression of competitive forces that makes the internal

\textsuperscript{13} See articles 258-260 TFEU. For a good recent assessment of the infringement procedure and its functioning, see: Luca Prete and Ben Smulders, ‘The Coming of Age of Infringement Proceedings’ (2010) 47 CMLR 9.
\textsuperscript{14} It is not fully clear from the treaty text, which uses the words “penalty payment” and “lump sum”, whether the monetary payments are administrative sanctions for not implementing the earlier judgment of the Court or are (also) reparation for damages.
\textsuperscript{15} See Case C-304/02 Commission v. France (Fisheries Control)(ECJ, 12 July 2005). See also Luca Prete and Ben Smulders, op. cit. fn. 13, p. 51.
market function as it should, to the benefit of all. Reparations do not directly contribute to that; they create the risk that States may rest content “with paying for their sins.”

It is not that monetary reparations are not important. They do play a role, already foreseen in the EEC Treaty of 1958, when individuals or companies attempt to frustrate the broader competition created by the internal market. They have also come to play a role later in the development of the EU at the behest of the CJEU, when individuals or companies become the victims of the Member States’ negligence or their unwillingness to implement Union law properly. Especially in the latter guise they also have an important function in the enforcement of Union law. However, at the inter-state level they play no role, since they are seen as of limited use in maintaining overall economic and political integration at the agreed level.

One may believe that the European Union is an extreme example that will find no matches at the level of other international organizations or general international law. This would be to underestimate the roots of the EC/EU in the GATT/WTO.

3. Remedies in the GATT/WTO

In the GATT/WTO the web of mutual concessions in the tariff field and of services commitments, which is propagated throughout the membership by the mechanism of the Most-Favoured Nation (MFN) clause and the National Treatment (NT) provision, complemented by market-opening rules laid down in the different WTO agreements, forms the central pillar of the system. It is basically the same phenomenon as in the EU, only on a world-wide scale and at a much lower level of integration. However the need for all the Members to fulfil all of their obligations all of the time is, if anything, made even more explicit in the WTO Agreement than in the TFEU. Article XVI:4 of the WTO Agreement explicitly demands that each Member State ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided for in the WTO agreements. Again,

17 This deprecating slogan originated initially in the debate about the introduction of monetary reparations in the WTO.
18 Art. 101 TFEU and following articles.
19 Case C-6/90 Francovich v. Italy (Francovich) (ECJ, 19 November 1991).
as in the EU, conformity is all, because only that will maintain this web of concessions, commitments and rules at the agreed level.\textsuperscript{21}

The consequences for the dispute settlement system are even more extreme than in the EU. The Dispute Settlement Agreement (DSU) explicitly declares that the system is there to maintain the security and predictability of international trade.\textsuperscript{22} And unlike the EU, where at least some room was made for monetary compensation or fines, the WTO dispute settlement system seems explicitly to exclude that possibility. The first objective of the dispute settlement system, according to Article 3.7 DSU, is the withdrawal of the measures that have been ruled inconsistent with WTO obligations. Moreover, such withdrawal should be immediate. The panels and the AB can make recommendations to the Dispute Settlement Body (DSB) to the effect that a Member has breached its obligations and must bring itself into conformity\textsuperscript{23} - recommendations that will be invariably accepted because of the prevailing rule of negative consensus by which such recommendations must be adopted.\textsuperscript{24} These recommendations, therefore, amount to binding judicial decisions. In addition, panels and the AB may make suggestions to the culprit Member how to best go about bringing itself into conformity. Such suggestions, according to the text of Article 19(1) DSU are clearly not intended to be binding and have never been regarded as such by the DSB. Moreover, such suggestions are not particularly frequent.\textsuperscript{25}

Thus it would seem that going back to conformity through \textit{restitutio in integrum}, is the only remedy available in the GATT/WTO system. Indeed Members have always put great emphasis on their freedom to achieve conformity with their obligations and have seldom accepted the suggestions from the panel or the AB as to the method of putting themselves into conformity. Insofar as the possibility to make suggestions have been used, mainly by panels, to advance the idea of reparations, for instance by returning wrongfully imposed anti-dumping duties in the first years after the creation of the Tokyo Round Antidumping Code\textsuperscript{26} or by suggesting the pay-back by companies of prohibited export subsidies to their

\begin{footnotesize}
\textsuperscript{22} Art. 3(2) DSU.
\textsuperscript{23} Art. 19(1) DSU.
\textsuperscript{24} Arts. 16(4) and 17(14) DSU.
\textsuperscript{25} Peter van den Bossche, op. cit. fn. 21, pp. 255-256.
\end{footnotesize}
government, they have always met with the unwillingness of the countries concerned and often been severely criticized by many Members in the DSB, as with the Australian export subsidies case relating to automotive leather.

The practice of panels and the AB, as well as that of the Members in the WTO organs, further confirms the strong attachment to conformity and *restitutio in integrum*. Moreover, it confirms that the fundamental reason for this approach is the importance of maintaining the desired level of liberalization among all the Members, also called the overall level of concessions. These concessions (and this includes the rules contributing to liberalization, such as TRIPs, or the rules limiting certain regulatory measures such as SPS and TBT) are not seen as guaranteeing a specific level of trade between the Members, but as protecting trade opportunities. Such trade opportunities enable the comparative advantage of each Member to find its fullest expression and to achieve the highest level of liberalization. It is these trade opportunities that the GATT and WTO are dedicated to upholding. That can only be achieved by demanding maximum conformity from the Members, even if they take measures that embody a constant threat to these trade opportunities rather than a firm breach of firm legal obligations. Moreover, trade opportunities have to be protected against laws that have not yet entered into force, but that would have limited them. Trade opportunities have to be equally protected, when laws, regulations and practices destroying them have already been withdrawn during the panel procedure, but could easily re-imposed or “switched on” again or where the general interest of the international trade system requires that they are known to be inadmissible. Thus panels and the AB do things that in other legal systems might be considered unusual, but these approaches are seen to be absolutely necessary for the upholding of the overall level of concessions and the resulting trade opportunities flowing therefrom and, therefore, in the final analysis serve as a mere judicial *restitutio in integrum*.

28 See Peter van den Bossche, op. cit. fn. 21, pp. 230-231.
30 Panel Report *US-Section 301 of the Trade Act*, para. 7.54 and 7.95-96. This is seemingly at odds with the differentiation that panels also often made between *as such* infringements and *as applied* infringements of GATT/WTO provisions. See further on this matter: P.J. Kuijper, “The Court and the Appellate Body, between Constitutionalism and Dispute Settlement, in: S.E. Gaines, B. Egelund Olsen & K.E. Sorensen eds., *Liberalising Trade in the EU and the WTO. A Legal Comparison*, Cambridge University Press, 99-137, at 122-126.
31 Panel Report *US – Superfund* (BISD 34S/136) para. 5.2.2.
32 Peter van den Bossche, op. cit. fn 21, 187-188, referring in particular to AB Report WT/DS267 *US-Upland Cotton*, para. 262.
Not only the panels and the AB have drawn back from imposing reparations, also the Member States have always shied away from putting this possibility into the system, even if there have been extensive discussions during negotiations and in the literature about the usefulness of such a reform.

If the above approach to recommendations and suggestions of panels and the AB is not entirely commonplace, the approach taken by the relevant provisions of the DSU to the compensation and countermeasures that should follow non-compliance with a panel or AB report that follows is well-known. Again the full weight of the rules comes down on the side of compliance and conformity with the obligations laid down in the WTO agreement. Prompt compliance with the recommendations and rulings of a panel or the AB is necessary (Art. 21(1) DSU). The implementation procedure laid down in Articles 21 and 22 and the surveillance by the DSB (Art. 21(6)) are primarily geared to bringing about compliance. And it is explicitly stated that full implementation of the recommendations and rulings with a view to returning to conformity with a Member’s obligations are preferred to compensation and to suspension of concessions and other obligations, which ought to be just temporary in nature (Art. 22(6) DSU).

In a system of inter-State dispute settlement that is so strictly aimed at conformity to existing obligations as the WTO - which is deemed to be achievable primarily by restitution - what are the likely consequences for an international organization like the EU, as far as its responsibility is concerned?

4. Consequences for the EU’s responsibility in the WTO

In a system that aims so strongly for conformity as the WTO it is likely that the so-called competence model of EU responsibility will prevail. Return to conformity implies, as we saw earlier, that all laws, regulations and administrative practices of a Member must be in line

33 Consolidated document of the Chair of the Dispute Settlement Negotiations in the Doha Development Agenda, doc. WTO xxx
with the WTO obligations. The relevant Member here is the EU, and not the Member States, since in the field of the customs union and trade, which especially since the Lisbon Treaty is co-terminous with, if not broader than, the terrain covered by the WTO agreements, the EU is exclusively competent. Hence the EU and its organs have the necessary legislative power that must ensure such conformity after a panel or AB report. Moreover, that legislative power is exercised in the field of trade largely through EU Regulations that have direct applicability in the Member States and that must be implemented and carried out in a uniform way by the authorities of the Member States, in accordance with implementing legislation adopted by the Commission. Moreover, the Commission is also the body that is charged with implementing and applying, through specific acts such aspects of trade policy as safeguards, anti-dumping and countervailing duties. Such measures entail the application of “administrative practices”, explicitly prescribed or habitually followed by the Commission.

In short, if the WTO wants to ensure conformity of laws, regulations and administrative practices, it is to be expected that its judicial and administrative organs will take care that, whether or not Member States’ authorities need to act in order to apply such EU laws, regulations and administrative practices, their acts will be (co)-attributed to the EU and/or that the EU alone will be held responsible for them. Only its organs can effect the restitution that has been ordered by panels or the AB and ensure that such conformity will come about. Some examples from panel practice, where the attacking Member wanted to hold not only the EU, but also Member State(s) responsible, will confirm this.

An important early case in this respect is the so-called LAN equipment case. This was a case originally brought by the US against Ireland and the UK and the EU separately, because the customs authorities of the two Member States had allegedly reserved incorrect customs treatment to LAN equipment. According to the European Commission, defending the EU before the Panel, this was a typical example, where the national authorities of Ireland and the UK were bound to carry out customs rules and administrative practices of the EU, which should accordingly be held responsible. After the cases were merged the panel indicated the EU as solely responsible for the treatment of LAN equipment at the border. However, it was

36 See Art IX:1 WTO Agreement which states that the EU (then the three Communities) is one of the original Members of the WTO.
37 See Art. 3(1)(a) and (e) jo. art. 207 TFEU.
38 See Art. 207 (2) TFEU
40 Ibid., para 4.14
not entirely clear whether the panel accepted that Member State authorities were acting as agents of the EU in the field of its exclusive competence or on the basis that the EU had directly assumed responsibility for the actions of its Member States’ authorities. According to the ILC in its commentary on its draft articles on the responsibility of international organizations (DARIO) it was the latter. However, as Delgado Casteleiro and Larik have pointed out, this conclusion is not justified, as the Commission had not argued on behalf of the EU that the latter was willing to accept responsibility regardless of the attribution of the acts. To the contrary, it had specifically advanced the agency approach as basis for the attribution of the Member States’ acts to the EU engaging its responsibility.

In another customs case, the EU had to respond to an almost systemic attack on its customs regime as to be so excessively decentralized that it was inherently contrary to the uniformity and prompt dispute resolution requirements of Article X:3(a) and (b) of the GATT. Here there was no doubt that the panel accepted the Commission’s agency approach to the Union’s responsibility, if any, in this case:

[The panel concludes that the authorities in the Member States – including customs authorities designated for that purpose by the Member States and independent bodies, such as a judicial authority or an equivalent specialized body – act as organs of the European Communities when they review and correct administrative actions taken pursuant to EC customs law.]

This aspect of the panel report was not touched by the AB.

Earlier in the EC-Geographic Indications case, the panel followed an approach comparable to that of the panel in Selected Customs Matters in a case in the field of TRIPs. Trade related aspects of intellectual property at the time were not yet exclusive EU competence, as they are after Lisbon. Nevertheless, the Member States carried out EU legislation (a directive) in that case. That seems to have been enough to accept EU responsibility. The same situation applied in EC-Asbestos, which was about a French measure implementing an EC ban on the use of asbestos, and in EC-Biotech, where Member States implemented (or, from the point of view

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41 Ibid., para 8.16.
44 Panel Report WT/DS315/R, EC- Selected Customs Matters, para. 7.553.
46 Panel and Appellate Body Reports WT/DS135/R, and WT/DS135/AB/R EC-Measures Affecting Asbestos and Asbestos Containing Products, para. 3.35.
of the complainants, US, Canada and Argentina, did not implement sufficiently speedily) the EU legislation on the approval for marketing of genetically modified products. In all these cases, the fact that the origin of the legislation was the EU (in fields, where shared competence applied and was exercised by the EU) and that the EU had the instruments to discipline the Member States, if necessary, through infringement procedures, seems to have been a consideration in bringing these cases against the EU and in the panels and AB not addressing that decision. In the background the fact that it was the EU that would have to modify the legislation or to enforce it more stringently must have played a role.

The borderline case seems to have been the *Airbus* case, where in spite of the EU’s exclusive trade policy competence over subsidies and countervailing duties and its wide-ranging power over State aids of the Member States, the panel hid behind the formal argument of the double membership of the EU and its Member States. It argued that the rights and obligations of the Member States as WTO Members were not diminished by any responsibility the EU might bear for their acts.

One can speculate to what extent doubts about the extent to which the Union organs would have been capable to make the Member States comply played a role in this approach, in particular given the enormous sums of subsidization that were involved.

5. Remedies in the European Convention on Human Rights

As a preliminary matter it is important to recall that the European Convention on Human Rights (ECHR) is a treaty with a less homogeneous scope than the WTO agreements and thus meets with a much less homogeneous EU competence. The WTO agreement is about trade and trade related matters and that ground is almost totally and after the Lisbon Treaty possibly entirely covered by exclusive EU competence. By contrast the ECHR, as a treaty covering human and fundamental rights essentially covers all the areas of EU and Member State activity. As a consequence all variants of EU competence may be met from exclusive Member State power to exclusive Union competence and every conceivable mix in between.

48 Panel report WT/DS 316/R *EC and Certain Member States - Large Civil Aircraft* paras. 7.174-7.175. This approach by the panel is from an internal constitutional view extremely dangerous for the EU and totally leaves to one side the earlier cases mentioned above. The Appellate Body left this part of the report basically unchanged.
The dispute settlement system of the ECHR is, of course, rather different from that of the WTO. It has been intended as judicial from the beginning and has not de facto become so, as the WTO system has. Moreover, it is a system in which complaints of individuals against the State in whose jurisdiction they find themselves are central.\textsuperscript{49} State-to-State litigation, the only game in the WTO, is quite exceptional in the ECHR. This brings with it that the most important barrier to admissibility in ECHR litigation is the exhaustion of local remedies, a notion that, even in cases where private complaints are behind cases started by Members, has never taken any root in the WTO dispute settlement system.\textsuperscript{50} As far as the power of the ECtHR is concerned, it is a court with exclusive powers over disputes concerning the interpretation of “its” treaty, just as is the case with the WTO panels and the AB.\textsuperscript{51} In the ECHR-system, the Court gives its judgment just as the panels and the AB do in the WTO; this judgment is binding and should be carried out by the State party in question.\textsuperscript{52} This obligation of the State is carried out (or not?) under surveillance of the Council of Ministers of the Council of Europe (CoE), just like the WTO DSB exercises surveillance over the implementation of panel and AB reports.\textsuperscript{53} The crucial difference here is that the DSB has clearly defined powers in the last instance to authorize the winning Member to apply countermeasures against the losing Member.\textsuperscript{54} The ECHR has no such system of regulated countermeasures. The action to be taken by the CoE Council of Ministers against a non-conforming State is vague and not defined.

Apart from Article 46 of the ECHR laying down the State’s obligation to accept a judgment of the ECtHR as binding and to carry it out, there is, primarily at the level of the individual, under Article 41 ECHR also the power of the Court to afford just satisfaction to the injured party, if internal law allows only partial reparation.\textsuperscript{55}

\textsuperscript{49} The broad interpretation of the term “jurisdiction” by the European Court of Human Rights has become rather famous, see Marko Milanovic, Extraterritorial Application of Human Rights Treaties, Oxford University Press 2013.

\textsuperscript{50} For an, in practice unsuccessful, attempt to argue in favour of some application of this principle in the WTO, see P.J. Kuijper, ‘The Law of GATT as a Special Field of International Law: Ignorance, further refinement or self-contained system of international law’ XXV NYIL 1994 227-257, at 233-238.

\textsuperscript{51} Cf. Art. 55 ECHR and Art. 23(1) DSU.

\textsuperscript{52} Cf. Art. 46 ECHR and Art. 23(6) DSU.

\textsuperscript{53} Ibid.

\textsuperscript{54} This is the so-called authorization of suspension of concessions or other obligations laid down in Article 22 DSU. See Peter van den Bossche, op. cit. fn. 21, pp. 298 ff.

\textsuperscript{55} The terminology of this article is curious to say the least in the light of the usual meaning of the terms reparation and satisfaction under international law. See Arts. 34 ASR and ARIO, above fn. 7 and accompanying text. According to these articles, restitution, compensation and satisfaction are different kinds of reparation. Moreover, the Article also deviates from general international law in that it seems to accept that internal law can
Implicitly the combination of Articles 41 and 46 therefore seemed to accept that States will afford (monetary) compensation, if necessary, next to satisfaction and may not be under an obligation in the first place to provide for *restitutio in integrum*. Or to put it in a more friendly manner, it permitted the ECtHR to behave as an old-fashioned administrative court of one of the ECHR parties: the administrative decision is quashed and the administration can redo the decision in a lawful manner and at best the damage from the faulty decision must be repaired. Indeed, the Court seems to have regarded this for many years as the normal situation.56 In the literature it is well-established that the Court from the beginning until the early- to mid-nineties basically issued declaratory judgments on breaches of one or more provisions of the ECHR, fairly routinely accompanied with an order directed to the Member State in question to afford monetary reparations for material and moral damages suffered as a consequence of the breach of the human rights of the person in question. “Just satisfaction” in reality thus meant monetary damages, which moreover were often of a rather limited amount.57

However, as from the early ‘nineties the ECtHR was increasingly confronted with certain types of cases, often from States from Eastern Europe and Russia in particular, which had recently acceded, but also from a country like Greece. In these cases, which often concerned consistent refusal of State authorities to return certain immovable assets or to liberate incarcerated persons, even after judgments of national courts to that effect, a simple declaratory judgment clearly would not work anymore. In response to these and similar cases, the ECtHR began to couch the operative part of its judgments in terms of *restitutio in integrum*, i.e. the return of the property to its rightful owners or the liberation of persons unlawfully incarcerated.58 As could be expected, the new States parties to the Convention (but also some parties of longer standing) had more difficulty with obeying such judgments than with paying damages *ex post facto*.

The burden of seeing to it that such judgments were carried out in conformity with the States’ obligation to accept such judgments as binding then fell largely on the shoulders of the

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56 It is interesting to note that in some administrative law systems, the patience of the administrative courts with the administration begins to wear thin and the courts become bolder in complementing their annulment of administrative action by strong prescriptions on how to act lawfully. See, for example, Ombudsman of the Netherlands, Report 2012/199 (14 December 2012).


58 Ibid.
Council of Ministers under Article 46 of the Convention. The limited means that the Council of Ministers has at its disposal meant that in the long run the implementation of such judgments that ordered *restitutio in integrum* inevitably left much to be desired. As has been pointed out, the new trend in the case law of the Strasbourg Court thus petered out after some ten years of trying. The resulting picture is mixed: restitution has gained in acceptance in the system of remedies of the ECHR as applied by the Court, but there is also greater realism about what can be achieved with it, as long as draconian sanctions are unlikely to be applied by the Council of Ministers against one of their own. Monetary reparation and, in some cases, restitution now exist and are used next to one another in the remedies system of the ECHR to a greater degree than in the past. How does this mesh with the recently proposed rules on attribution to and responsibility of the EU after its accession to the ECHR, as contained in the draft accession agreement?

6. The draft accession agreement of the EU to the ECHR

6.1 Brief description of provisions relating to obligations, attribution and responsibility

It is not the intention here to analyse in detail all of the latest (and probably final) version of the draft accession agreement of the EU to the ECHR. We will concentrate on the issues that relate directly to two of the concepts mentioned in the title of these comments, namely attribution and responsibility. The draft accession agreement does not in any way modify the regime of remedies as applied by the ECtHR. We will analyse the provisions on attribution and responsibility in their relation to each other and compare the resulting position with respect to the responsibility of the EU in relation to the ECHR to the position in the WTO, as set out above, and also to the provisions of the ARIO. After that we will be able to draw some tentative conclusions in a final section.

The draft Accession Agreement contains a limited number of actual amendments to the ECHR and for the rest interprets, and elaborates on, these amendments. Thus Article 1(1) of the Accession Agreement contains the amendment to Article 59 of the Convention, which allows the UE to accede to the Convention, while paragraphs 3 and 4 of that Article contain

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59 Nifosi-Sutton, op. cit. fn. 56, p. 56.
important explanations of the consequences of such accession that will be discussed below. Similarly Article 3(1) of the Accession Agreement contains the new paragraph 4 to Article 36 ECHR, which lays down the bare bones of the so-called co-respondent mechanism, which is then developed in greater detail in paragraphs 2 through 8 of Article 3. However, on a legal level there is really no difference between the amendments and the interpretation and elaboration of them, as Article 1(2) of the Accession Agreement states that the whole Agreement is an integral part of the Convention.61

Article 1, apart from enabling the EU accession to the ECHR, also purports to lay down what are called the effects of that accession, more in particular (1) with respect to the obligations resting respectively on the EU or the Member States, (2) with respect to attribution of acts contrary to these obligations, and finally (3) in respect of the co-respondent mechanism, which at the same time can become a co-responsibility instrument.62 As to obligations, Article 1(3) details that the Union will bear obligations only for acts, measures or omissions of its institutions, bodies, offices, agencies or persons acting on their behalf.63 As to attribution, there are some very interesting provisions in Article 1(4), which seems to have been added at the last moment during the meeting of early April, when the final draft of the text was established.64 This paragraph essentially seeks to establish attribution of all acts that are allegedly contrary to the ECHR obligations and are not the kinds of acts, measure or omissions within the meaning of Article 1(3) for which the ECHR imposes obligations on the EU, to the Member States. Such attribution should still remain with the Member States, if they act in the implementation or execution of EU acts, measures or decisions. In practice this

61 This is somewhat curious, since it means that an agreement between the States parties to the Convention with a non-member international organization becomes an integral part of the ECHR, after which the non-member International Organization hopefully becomes a Member.

62 See Art. 3(7) of the draft Accession Agreement

63 Moreover, Art. 1(3) second sentence reads: “Nothing shall require the Union to perform an act or take a measure for which it has no competence under EU law.” In the explanation of the text it is argued that this sentence is necessary to respond to the requirement of Article 2 of Protocol no. 8 to the Lisbon Treaty. However, the relevant phrase there reads as follows: “The [Accession] Agreement […] shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions.” A perfectly neutral non-affectation clause in Protocol 8 has thus been turned into a “shall not exceed its powers” clause in the Accession Treaty. In order to neutralize the effect of this distortion one should perhaps propose the following additional phrase: “Nothing shall require a Member State of the EU to perform an act or to take a measure for which it has no competence under EU law.” This would at least truthfully convey to the High Contracting Parties of the ECHR that the EU Member States have transferred certain powers to the EU exclusively and in their entirety, see Art. 3 TFEU. Since Protocol 8 is primary law, the Accession Agreement may well be “incompatible with the Treaties” within the meaning of Article 218(11) TFEU, at least if one wants to give due weight to the spirit of Article 2 of Protocol 8.

64 Cf. the last documents before the 47+1(2013) 008 document discussed here. See also on this point Enzo Cannizzaro, “Postscript to Chapter 12”, in: Malcom Evans and Panos Koutrakos eds., The International Responsibility of the European Union, European and International Perspectives, Oxford and Portland 2013, 359-360.
will mean that very few cases that come before the ECtHR will be attributable to the EU, since as was pointed out earlier Member States authorities are the authorities that carry out, apply and implement most of EU law, even in areas that fall under exclusive Union competence.

Nevertheless, such lack of attribution will not stand in the way of the EU functioning as co-respondent in cases coming before the ECtHR, as is laid down in Article 1 of the draft Accession Agreement.65 The co-respondent system works in two ways. The EU can become co-respondent in a procedure directed against an EU Member State, if the case calls into question the compatibility of a provision of Union law (both under TEU and TFEU secondary law) with the rights protected by the ECHR. Clearly, the EU, represented by the Commission as guardian of the TFEU66, has an interest in such cases. A Member State can be come co-respondent in a procedure directed against the EU, if it appears that the compatibility of provisions of primary EU law with ECHR provisions is at issue. Here it is clear that the Member States, as parties to the TEU and TFEU and other primary, law have a strong interest in the outcome. A co-respondent is a party to the case, not a mere intervener.67 Consequently, the obligation of Article 36(1) to accept the judgments of the ECtHR as binding and carry then out rests on co-respondents. Thus the co-respondent system in reality becomes a co-responsibility system, where the ECtHR can even decide to put all responsibility on the shoulders of one co-respondent.68 Finally in the co-respondent system the admissibility of an application (i.e. the exhaustion of local remedies) shall be judged without reference to the participation of the co-respondent.69 An exhaustion of local remedies in two legal systems, Member State and European Union system, as a consequence of the accession of the EU was not acceptable. Hence special acrobatics were necessary in order to give the EUCJ a chance to express a viewpoint on the case, even if it had not been given a chance to do so in accordance

65 Art. 1(4) Accession Agreement in fine.
66 It is generally said that the European Commission is the guardian of the Treaty, that is to say that it is charged broadly with the task to keep the Member States’ fidelity to the Treaty requirements under constant surveillance and, if necessary, start the first step of the infringement procedure of Arts. 258-260 TFEU.
67 See art. 36(4) Convention, as contained in Art. 3(1) of the draft Accession Agreement.
68 Art. 3(7) draft Accession Agreement.
69 Art. 36(4) Convention, last sentence, as contained in Art. 3(1) of draft Accession Agreement: “The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings.”
with the preliminary ruling procedure, in spite of its being in principle watertight.\textsuperscript{70} This is a rather sad example of externalization of internal constitutional difficulties by the EU.\textsuperscript{71}

6.2 Analysis of the relevant provisions of the Draft Accession Treaty

First of all, it should be briefly recalled that ARIO has introduced the possibility that international organisations may bear responsibility without attribution.\textsuperscript{72} However, the Accession Treaty even seems to introduce the possibility of responsibility without obligation. Article 1(1), 1(3) and 1(4) of the Accession Agreement in combination can potentially lead to the situation in which the EU will not only have no act attributed to it, but will even bear no obligation, and notwithstanding the absence of any obligation will still bear co-responsibility and perhaps even full responsibility for breach of the law of the ECHR, if and when the E CtHR so decides. Perhaps this is highly unlikely, since in any situation where a Member State carries out some Union act, there will also be an underlying act, measure or omission by a Union institution or body within the meaning of Article 1(3) first phrase of the Accession Agreement. However, this will not be the case in a situation where an EU Member State claims to have an obligation to act derived directly from the TEU or TFEU, while the EU institutions will have taken no action whatsoever that would qualify under the first phrase of Article 1(3). This is not an unrealistic scenario. Is it really correct to say that in such a situation the EU will bear not even an obligation under the ECHR, if a provision of its founding treaties might be found contrary to (presumably) the obligations under that Convention?

Secondly, it is important to point out that there may be a relation between the reference to the question of admissibility (and thus of the exhaustion of local remedies being judged without

\textsuperscript{70} See art. 3(6) of the draft Accession Agreement, which gives the EUCJ a chance to express its opinion on the compatibility between Union (secondary) law and the ECHR, if it has not yet had the opportunity to do so. Since the preliminary ruling procedure is an incident in the national procedure and the national court, after having asked a preliminary question to the EUCJ, will not decide the case before having received the replies to its questions from Luxemburg, normally exhaustion of national remedies will imply that the EUCJ’s judgment has been taken into account in the national procedure.

\textsuperscript{71} To put it bluntly, Art. 3(6) has been put into the Accession Agreement, because the EU and its Member States do not trust the national Supreme Courts and other courts of last instance always to put questions to the EUCJ, even when the obligation to do so of Article 267, third sentence TFEU applies.

\textsuperscript{72} See art. 17 ARIO, according to which an international organization can be responsible for acts of its Member States without attribution of a wrongful act to its own organs, if it has caused the Member States in question to take measures that are not contrary to the States’ obligations, but to the obligations of the IO. It thus constitutes a circumvention scenario. Moreover, in a certain sense the ARIO articles on Aid and Assistance, Coercion and Direction and Control are also examples of responsibility without attribution.
reference to the co-respondent system, as laid down in the amendment of Article 36 of the 
ECHR\textsuperscript{73}) and the very stringent provisions on attribution of all acts of the Member States 
exclusively to them, even if they implement or execute Union law, as laid down in Article 
1(3) and (4) of the Accession Agreement. Although this is not clarified in the explanatory 
memorandum, it is quite likely that in order completely to secure that the exhaustion of local 
remedies would take place in only one jurisdiction\textsuperscript{74} it was deemed useful to restrict 
attribute to one EU Member State as well. This may not have been strictly necessary, but 
given the rather enigmatic formulation of the last sentence of the proposed Article 36(4) of 
the Convention\textsuperscript{75}, a double safety system was deemed necessary.

This double safety system makes any evolution as has taken place in the WTO case law, 
where the agency approach to the Union’s responsibility was largely accepted by the Panels, 
highly unlikely. The total attribution of any act of execution or implementation of Union law 
to the relevant Member State as laid down in Article 1(4) of the Accession Agreement makes 
this impossible. However, as has been shown, this strict rule on attribution is mitigated by the 
co-respondent system.

This is the point where we should return to what we have learned from the system of remedies 
employed by the ECtHR, namely that the way in which the Court uses the provisions of 
Articles 41 (just satisfaction) and 46 (binding force and execution) has evolved from nearly 
complete reliance on monetary compensation, through strong emphasis in certain cases on 
\textit{restitutio in integrum}, to a situation where it is likely that it will rely on both remedies. We 
have seen that in the WTO where, because of the nature of the obligations under the the WTO 
agreements and of their final objective, \textit{restitutio in integrum} remains by far the most 
important remedy, it was important that the EU be the international person to which acts taken 
(even by Member States) in the implementation of EU law should be attributed and that be 
held entirely responsible for their non-conformity with WTO law. After all only its 
institutions could provide the desired restitution in an area of near-exclusive Union power, 
such as trade.

\textsuperscript{73} See art. 3(1) of the Accession Agreement, see also not 54 and accompanying text above.
\textsuperscript{74} If necessary with the EU preliminary question procedure included.
\textsuperscript{75} See fn. 54 above.
This recalling of the situation in the WTO context immediately puts into sharp focus the differences with the ECHR dispute settlement system, where *restitutio in integrum* is by no means as important as in the WTO and where monetary reparation was for a long time the only serious remedy and remains even now at least as important as restitution. Moreover, litigation before the ECtHR may arise in all areas of EU activity and in most of these areas shared powers, as defined under Article 4 of the TFEU, are the rule. In short, the importance of the fact that the EU will be the one and only to be able to provide for *restitutio in integrum* counts for much less, both from the perspective of ECHR system of dispute settlement and from the perspective of the EU power to remedy the unlawful act under the ECHR. In the case of monetary compensation a Member State may be a much surer provider of funds than the EU, at least in the eyes of the other, non-EU, contracting parties to the ECHR. Nevertheless, it could not be excluded after the ECtHR’s case law of the period 1995-2005 that the Court would demand *restitutio in integrum*, and that given the fact that a State had acted in implementation of EU law, the EU would be the only possible actor able to provide for such restitution, for instance by adapting its institutions’ practices or amending its legislation. In that case responsibility of the EU would be desirable.

However, there was also the presumed desire among the negotiators to make it absolutely clear that exhaustion of local remedies would have to be exercised within the jurisdiction of one EU Member State only. As mentioned earlier the solution they found for that wish was exclusion of attribution to the EU, also in cases where the Member State had acted in implementation of EU law. Thus responsibility could not follow the WTO path of attribution by agency. Therefore, the negotiators had to create a new case of responsibility without attribution beyond those already created by the ILC in ARIO, which they did by equating the co-respondent system (which was in any case desirable for the full information of the ECtHR on Union law in these procedures) with a co-responsibility system. Whether this end justified the incidental consequence that potentially there could be EU responsibility not only without attribution, but also without obligation, is a question that we leave for what it is for the moment.

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76 See section 6.1 above.
7. Conclusion

The idea behind these comments on the trio Attribution – Responsibility – Remedy in relation to the EU was to proceed at a preliminary test of some broad ideas that flowed from earlier work with another author on the international responsibility of the European Union. This work was written primarily from an internal point of view of the EU and strongly coloured by the DARIO draft and the questions raised by EU “internal rules of the organization” and how they influenced systems of responsibility external to the EU. However, in the latest product of this collaboration the idea was advanced that the international agreements or regimes within which the EU had to function would probably also exercise a considerable influence on how such internal factors as the competences of the EU and the question whether or not Member States could be seen as agents of the Union in certain instances, would play out in that context. In particular the feeling existed that in quite some instances only the EU, because of its considerable and even exclusive powers in some instances, could provide the necessary remedy for the responsibility incurred. These ideas were not yet further developed at the time.

These comments seek to take a preliminary look at these ideas (1) in connection with the WTO dispute settlement system and the remedies applied by it, and (2) in connection with the draft rules on the EU participation in the ECtHR dispute settlement system after future EU accession to the ECHR.

In the WTO dispute settlement system there is a hitherto unique combination of ample recognition of the virtually exclusive EU competence in the field of customs and international trade combined with a persisting extreme preference for the remedy of restitutio in integrum. This results in ideal case for full EU attribution and responsibility, where the intervening Member State action of implementation or execution of EU law or decisions is easily regarded as a mere incident of agency for the EU.

By contrast the dispute settlement system and the remedies favoured by the ECtHR showed that, though the remedies system is important, other idiosyncrasies of the system in which the EU will function as a contracting party or a Member can also exert considerable influence over the position the EU will have in this system. In the case of the ECHR this was the importance of the exhaustion of local remedies for the question of admissibility of complaints before the ECtHR. In casu this entailed a strong preference for attribution of the alleged

77 See fn. 4 above.
breaches of human rights by Member States, even if these acted largely or entirely on the basis of Union law, exclusively to the Member States. However, this necessitated the need for a compensatory mechanism since, even though restitution is of less importance in the ECHR system than in the WTO, it is nevertheless used by the ECtHR. In many of those cases the EU is the only one likely to provide such restitution. Thus a mechanism of co-responsibility without attribution was created for the EU in order to enable it to act in conformity with a restitution order of the Court and modify Union laws or practices.

This result of our preliminary research seems to point in the following direction. It is not just the question of the scope of EU exclusive powers that determines the degree to which the EU will bear sole responsibility or there will be shared responsibility for certain wrongful acts. The system of responsibility within which the EU operates will also be of considerable importance, more particularly its remedies. If *restitutio in integrum* is the favourite remedy, as it is likely to be in many free trade or economic integration agreements that are equipped with dispute settlement systems, the environment for exclusive EU responsibility in areas of exclusive EU competences or of important EU, but still shared, powers, will be more favourable than in a system in which compensation is the favourite remedy.