
The WTO Treaty as a Mixed Agreement: Problems with the EC's and the EC Member States' Membership of the WTO

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Abstract

The article deals with the problems the joint membership of the EC and the EC Member States of the WTO causes with regard to their responsibility for breaches of the WTO Agreement. As a necessary preliminary question it first considers the problem whether both – the EC and the EC Members – are bound by the whole Agreement despite the fact that each of them has inner competences with regard to only parts of the Treaty. It concludes that both are fully bound by all Treaty provisions and cannot invoke lack of inner competences as an excuse for failures of treaty performance via other members of the WTO. Bearing this conclusion in mind, the article focuses on the real problem of responsibility of the EC and the EC Members, especially on the question of attribution of the failures of treaty performance of EC Members to the EC and vice versa. Here it reasons that the EC and EC Members are both at the same time fully responsible for each breach of the contract – no matter whether it was committed by an organ of the EC or of an EC Member. Finally this article looks at the consequences of these results for damages and litigation. It concludes that this is a case of joint and several responsibility and that the EC and the EC Members can at the choice of the complainant be sued either together or individually for the entire amount of the damages.

1 Introduction

Since the establishment of the European Communities the EC has created a wide range of external relations with non-member states through bilateral and multi-lateral agreements. A large number of these agreements have been concluded jointly

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by the EC *and* its Member States and form the group of so-called Mixed Agreements. Much has already been said in academic debate about the problems this mixity causes internally with regard to the division of competences between the EC and its Member States under EC law. However, little attention has been paid to the problems these Mixed Agreements cause with regard to the question of responsibility under international law.

The question becomes particularly striking in cases where the EC and its Members have not only signed an agreement with third states but where they have both even become members of multilateral organisations. Here, one of the most important examples is their joint membership of the World Trade Organization (WTO). Both joined the organization as original members when it was first established in 1994. While, however, the internal division of competences between the EC and its Member States with regard to the areas covered by the WTO Agreement has been clarified at least to a certain extent by the ECJ in its famous *Opinion 1/94*, the question of external responsibility towards third WTO Members (WTO Members which are not members of the EC) remains completely unclear.¹

This may increasingly become a problem within the WTO Dispute Settlement System as the procedural structures of the system are much stronger than the arbitration system under GATT. Unlike under GATT, every member of the WTO has a right to establish a panel – regardless of whether or not the other party involved agrees.² Furthermore, in practice, a decision of the Appellate Body of the Dispute Settlement Body (hereafter DSB) is automatically binding on the parties to a dispute, and a party may be sanctioned for non-compliance with the decision.³ Consequently, the EC and its Members, as well as other WTO members, got themselves into a difficult situation when the EC joined the WTO alongside its members: Third parties can easily get into a situation where they do not know whether the EC or its Members or both are to be held responsible for a breach of treaty provisions, and whether they are actually suing the right party. The EC Members, on the other hand, risk being forced to become parties to a panel in a situation in which, due to inner EC competence rules, the EC was responsible for the act of infringement and vice versa. The fact that such a scenario is not merely a theoretical problem but one that exists in practice was documented by the ‘LAN’ Case where the US disagreed with the EC on exactly this question.⁴

¹ *Opinion 1/94* [1994] ECR I–5267.

² See Art. 6 of the Understanding on Rules and Procedures governing the Settlement of Disputes (DSU), *World Trade Organization, The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Text* (2000), at 359.

³ See *ibid.*, Art 16; for a detailed study of the issue see Cottier, ‘Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European Union’, 35 *Common Market Law Review* (1998) 325 ff.

⁴ ‘LAN Case’ – *Customs Classifications of Certain Computer Equipment*, Panel Report, WT/DS62/R, WT/D67/R and WT/D68/R, 5 Feb. 1998, paras. 8.15, 8.16, and 8.72.

This article will therefore add some thoughts to the question if and how the responsibility for failures of treaty performance in the WTO is shared between the EC and its Members. It will first outline the special structural difficulties the WTO Treaty causes with regard to the joint membership of the EC and its Members. In a second step it will analyse to what extent the EC and/or the EC Members are each bound by the WTO Agreement. There the most crucial question will be whether and to what extent each of them could invoke its internal lack of competence for certain parts of the WTO Agreement as a justification for failures in treaty performance. In a third step, this article will analyse for what kind of wrongful acts the EC and/or its Members are responsible: Only for acts of their own organs? Or is the EC also responsible for the EC Members' organs and vice versa? Finally, the article will look at the problems of litigation: do complainants have to sue the EC and the EC Members together, or can they also sue each of them alone? Each for its share of the injury, or each for the whole injury?

However, it should be noted that this article mainly seeks to scrutinize the theoretical background of the problems described above. The actual practice of the EC/EC Members and other WTO Members in the field of the WTO Dispute Settlement System with regard to these theories cannot be fully analysed in detail in this article alone, but must be left to the relevant literature on this topic.⁵

2 Outline of the Special Problems Arising out of Joint Membership of the WTO Agreement

A *Mixed Agreement without Competence Clauses*

The problems with defining the responsibility of the EC and the EC Members for breaches of WTO treaty provisions begin with the special structure of the WTO Agreement. From the point of view of the EC and its Members, the WTO Agreement is a so-called 'mixed agreement', in the sense that the EC itself and its Members all became parties to the treaty because, by reason of the division of inner competences, none of them alone would have been competent to sign the treaty.⁶ Such joint membership is not uncommon in the practice of the EC and its Members, particularly in the case of association agreements.⁷ Mixed agreements, however, always create the problem that it is not absolutely clear which part of the treaty binds the EC and which the Members. In order to reduce this problem quite a few mixed agreements include at

⁵ In particular, J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (2001), 174–208; Cottier, *supra* note 3, at 325 ff.; G. Sacerdoti, A. Yanovich, and J. Bohanes (eds), *The WTO at Ten: The Contribution of the Dispute Settlement System* (2006).

⁶ Schermers, 'A Typology of Mixed Agreements', in D. O'Keefe and H.G. Schermers, *Mixed Agreements* (1983), at 25–26; M. Hirsch, *The Responsibility of International Organizations Toward Third Parties – Some Basic Principles* (1995), at 19; H.G. Schermers and N.M. Blokker, *International Institutional Law* (3rd edn., 1995), para. 1756.

⁷ See, *inter alia*, Euro-Mediterranean Association Agreements with Egypt (1 June 2004), Israel (1 June 2000), Jordan (1 May 2002), Lebanon (1 Mar. 2000), Morocco (1 Mar. 2000), and Tunisia (1 Mar. 1998). All these Agreement are available at the official website of the European Commission, at: http://ec.europa.eu/comm/external_relations/euromed/doc.htm. (last visited 24 July 2006).

least some kind of vague competence clause.⁸ The striking problem with the WTO Agreements is, however, that it does not mention any competence clause at all. The best one can get are Articles XI and XIV(1) of the Marrakesh Agreement, which permit all Members of GATT 1949 – which includes the then twelve EC Members and the EC itself – to become ‘original Members of the WTO’, but remain silent as to any kind of partition of membership between the EC and its Members.⁹

It is thus not clear from the Treaty at first glance whether the EC or the EC Members are bound by a provision. However, this is of course crucial for the question of responsibility and litigation – for only if a party is bound by a provision can it possibly infringe it. Thus, it will be the main task of this article first to clarify the nature of the membership of the EC and its Members – starting with the EC.

3 Responsibility of the EC

As shown above, the text of the WTO Agreement itself does not give any specific clue as to the extent to which the EC is bound by the provisions of the Treaty. Consequently, this problem has to be solved using general rules of international law. However, this cannot be done without clarifying first how far the legal capacity of the EC, under international law, actually extends. For only if the EC is actually *able*, as a *subject* of international law, to conclude the whole WTO Treaty can it possibly even be bound by it.

A Unlimited Legal Personality as a Precondition for full Responsibility

Under international law a body can act effectively only if it possesses legal personality.¹⁰ The EC can consequently be bound by the WTO Treaty only if it possesses such personality. Legal personality was traditionally thought to be owned only by sovereign states, but is now recognized also to be held by international organizations.¹¹

⁸ For a survey see: Feenstra, ‘A Survey of the Mixed Agreements and their Participation Clauses’, in O’Keefe and Schermers, *supra* note 6, at 207. Most of these competence clauses are not very precise, but at least they state that the term ‘party’ sometimes refers to the EC and sometimes to the EC Members, or clarify that the EC and its Members should be regarded as one single joint party. (See, *inter alia*, Agreement on the European Economic Area, *supra* note 7, at Art. 2.) Therewith, they make it clear that the treaty in question is not meant to bind the EC and the EC Members on all provisions, but that membership is shared. Some other clauses (most prominently the United Nations Convention on the Law of the Sea (1982) (UNCLOS), Annex IX) even try to eliminate this problem by listing more specifically which part of the agreement falls under the competence of the EC and which under the competence of the EC Members. However, as the *Sellafield* case shows, the success of such precise listing is more than doubtful: Despite the UNCLOS competence clauses not even the EC and its Members themselves agreed on the exact partition of competences between themselves: see Case C-459/03, *Commission v. Ireland (Sellafield)*, 30 May 2006, especially at paras 86–121.

⁹ P. Eckhout, *External Relations of the European Union* (2004), at 205.

¹⁰ R. K. Gardiner, *International Law* (2003), at 212.

¹¹ J. Klabbers, *An Introduction to International Institutional Law* (2002), at 42; see also Lachmann, ‘International Legal Personality of the EC: Capacity and Competence’; 10 *Legal Issues of European Integration* (1984), 5.

The EC (then the EEC) is an international organization, founded by its Member States in 1957, and thereafter transformed and amended by means of various treaties.¹² Thus the rules for international organizations apply.¹³ Consequently, there is no doubt that the EC possesses legal personality.

What is, however, somewhat unclear is the extent of the legal personality of international organizations. There seems to be some dispute whether their personality is limited according to their limited competences or whether the personality *per se* is unlimited and independent of the limited competences of an organization. This question is crucial here: If the EC's legal personality were limited, logically the EC could only possibly be thought to be bound by those parts of the WTO Agreement for which it was competent. With regard to the rest of the Agreement, the EC would not even legally exist as a subject. Thus, it could, strictly speaking, not be thought to be bound by it even under *ultra vires* rules: A subject that *exists* only to the extent to which its competences reach can logically not exceed its competences. Consequently, responsibilities that derive from the WTO Treaty could bind the EC only as far as the EC was competent to conclude the Treaty.¹⁴

There are some strong indications that international organizations possess only limited legal personality. In particular, the ICJ in its famous *Reparation* Decision seems to affirm that view:

In the Opinion of the Court, the Organisation was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a *large measure of international personality* and the capacity to operate on an international plane—Accordingly, the Court has come to the conclusion that the Organisation is an international person. That is not the same as saying that . . . its legal personality and rights and duties are the same as those of a State.¹⁵

¹² Note: although the Treaty of Maastricht of 1992 established the European Union, this did not determine the independent legal personality of the European Community. See, *inter alia*, Pechstein, 'Völkerrechtspersönlichkeit der EG', in R. Streinz (ed.), *EUV/EGV, Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft* (2003), at 2355, para. 2. Note also that, arguably with its enormous number of competences and its strong legal structure which is completely interwoven with the national legal systems of its Member States, it comes close to being a sovereign (federal) state. However, the last word on the fate of the EC still lies in the hands of its Members, which are still able to dissolve the EC as a whole. The EC is consequently not a sovereign state (yet). See Pitschas, 'Die Völkerrechtliche Verantwortlichkeit der Europäischen Gemeinschaft und ihrer Mitgliedstaaten', 78 *Schriften zum Europäischen Recht* (2001), at 11.

¹³ In the academic world, there is some dispute whether it is necessary for third parties to recognize the legal personality of an international organization, or whether it is enough that the founding treaty of an organization assigns legal personality to it, or whether the mere fact that an organization exists and acts is sufficient. Here this question does not have to be discussed any further, as the EC fulfils all possible requirements: Art. 281 EC Treaty bestows legal personality upon the Community; the EC actually acts under international law (signing international treaties, etc.) and it is recognized by the vast majority of states and other international organizations: see Akande, 'International Organisations', in M. D. Evans (ed.), *International Law* (2003), at 273–276.

¹⁴ See, *inter alia*, Pitschas, *supra* note 12, at 31–32; Pitschas argues, however, that *ultra vires* performance is possible in the case of limited legal personality. See at 57–61.

¹⁵ *Reparation for Injuries Suffered in the Service of the United Nations* [1949] ICJ Rep 174, at 179 (emphasis added).

The same approach is taken in Oppenheim's International Law Commentary:

To the extent that bodies other than states directly possess some rights, powers and duties in International Law they can be regarded as subjects of International Law possessing international personality.¹⁶

However, this approach is imprecise. It confuses the *capacity* of an organization – meaning the ability of an organization under international law to conclude treaties – with the *competence* of an organization.¹⁷ Thus, it mixes the question of mere existence as a subject of international law with the question of what this subject is allowed to do.

The concept of unlimited legal personality seems convincing: first, because it causes no problems with *external ultra vires* acts, meaning acts where the organization (not a specific organ) exceeds its competences. Just like states, the organization can generally be held liable for such acts, and third parties will consequently be protected from unexpected internal rules and limitations of the organization they deal with.¹⁸ Second, and even more convincing, is a look at the 1986 Vienna Convention of the Law of Treaties between States and International Organizations (hereafter the 1986 VCLT), especially at Articles 27 and 46. Both Articles deal with the situation where an organization exceeds its competences and wants to invoke this fact as an excuse to evade its duties of treaty performance. The wording of these Articles is exactly the same as in Articles 27 and 46 of the 1969 Vienna Convention of the Law of Treaties between States. Such parallel wording indicates that the obligations of international organizations in that situation are regarded as similar to those of states. This of course can be true only if an organization, just like a state, has unlimited legal personality but limited competences, which it is only then able to exceed.¹⁹

Consequently, one must conclude at this point that the EC has unlimited legal personality (though unquestionably limited competences), and is therefore in principle able to bind itself to all provisions of the WTO Agreement, albeit that this may be *ultra vires* on the EC's internal level.

B Interpretation of the EC's Consent to the WTO Agreement in Accordance with the 1986 VCLT

Once it has been made clear that under international law the EC has capacity to be bound by all provision of the WTO Agreement, one can now proceed to scrutinize whether *in fact* the EC is a party to the whole Treaty. Therefore the consent of the EC

¹⁶ R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn., 1996), i, 16 (emphasis added); see also at 17–19. See also Govaere, Capiou and Vermeersch, 'In-Between Seats: The Participation of the European Union in International Organisations', 9 *European Foreign Affairs Review* (2004) 158.

¹⁷ Lachmann, *supra* note 11, at 6–7; Schermers and Blokker, *supra* note 6, at para. 1570, and at 981, note 19, take the same view. Their position is that the question whether an organization has legal personality 'needs an absolute "black and white" answer (yes or no)', whereas the question of competences is a relative one. Akande, *supra* note 13, at 273 is apparently of the same view. (He also separates the question of personality from that of competences.)

¹⁸ For a different view see Arnold, 'Der Abschluss gemischter Verträge durch die Europäische Gemeinschaft', 19 *Archiv des Völkerrechts* (1980–81) 432.

¹⁹ For a different view on the 1986 VCLT Art 46 see Pitschas, *supra* note 12, at 59–61.

to the WTO Agreement must be interpreted in accordance with international treaty law.

1 *Applicability of the 1986 VCLT*

International agreements between states are usually interpreted according to the rules of the 1969 VCLT. However, as far as the EC is concerned we are dealing with an agreement between states and an international organization. For such cases the ILC came up with the special draft of the Vienna Convention of the Law of Treaties between States and International Organizations or between International Organizations in 1986. In that convention Articles 17, 26, 27, 31, and 46 in particular are of interest for the interpretation of the WTO Agreement. Strictly speaking, however, the 1986 Convention has never come into force. Nonetheless, scholars refer to it. Besides, the wording of the relevant Articles is identical to that of the 1969 VCLT, which is recognized as a codification of customary international law.²⁰ As international organizations are in the same situation as states when it comes to the conclusion and performance of contracts one can thus also simply see those Articles of the 1986 Convention as analogous to the established rules of customary international law for states.²¹ Thus, Articles 17, 26, 27, 31, and 46 of VCLT 1986 are applicable in the case at hand.

2 *The EC's Consent to the Agreement*

The first question is now, of course, whether the EC actually consented to all parts of the WTO Agreement or whether it effectively consented to only those parts of the Treaty in which it is competent. VCLT Article 17 provides that the consent of an international organization to be bound by only parts of the Treaty is effective only if the Treaty so permits, or the other contracting states so agree. There is no such special agreement by the other contracting states. So the only question is whether there is any indication in the WTO Treaty set that permits partial consent. For such purpose, VCLT Article 31(1) demands to look at the 'ordinary meaning' of the Treaty terms in their context and in the light of the object and purpose of the Treaty itself. As already mentioned above, the WTO Treaty neither includes any kind of competence clause that would define to what extent the EC wished to be bound by the Treaty, nor does it even mention that membership of the WTO was supposed to be shared between the EC and its Members. The Marrakesh Agreement establishing the WTO comprises only Articles XI and XIV, which merely make it clear that all Members of GATT 1947 (which included all the then twelve Members of the EC) and the EC were able to become 'original Members of the WTO'. These Articles, however, do not elaborate

²⁰ Björklund, 'Responsibility in the EC for Mixed Agreements – Should Non-Member Parties Care?', 70 *Nordic Journal of International Law* (2001) 389.

²¹ Neframi, 'International Responsibility of the European Community and of the Member States under Mixed Agreements', in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations* (2002), at 199, also see note 19 of the same article; Gaja, 'The European Community's Rights and Obligations under Mixed Agreements', in O'Keefe and Schermers, *supra* note 6, at 138.

on the fact that both the EC and its Members were allowed to become ‘original Members of the WTO’ meant that their membership could be shared. However, a look at the ‘Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations’ that embodies all parts of the WTO Agreement (see its paragraph (1)) clarifies the situation. Paragraph (4) states:

‘The representatives agree that the WTO Agreement shall be open for accession as a whole, . . . by all participants pursuant to Art XIV thereof.’ The wording ‘accession as a whole’ leaves no room for doubts that the WTO Agreement was only supposed to permit parties to become full Members of the entire Agreement and that it did not permit any reservations or part-acceptations. Consequently, ‘original Members’ with regard to the EC could only mean ‘full Member’.²²

As a result, the EC had no chance under the WTO Treaty effectively to consent to only parts of the Agreement. Its consent must therefore be regarded as an acceptance of all parts of the WTO Agreement. Thus the EC is a full Member of the WTO on its own.

3 *VCLT Articles 27 and 46 and the Role of Opinion 1/94*

Although it is now clear that the EC consented to all parts of the WTO Agreement, the question still remains whether it could, at least in theory, escape responsibility for failures of treaty performance by claiming that, due to internal regulations, it was not competent to conclude all parts of the Agreement. As a result of the *pacta sunt servanda* rule of VCLT Article 26 all Treaty provisions the EC consented to are binding upon it. Furthermore VCLT Article 27 emphasizes that internal law provisions may not be invoked as justification for a party’s failure of treaty performance. Due to Article 27 this general rule is, however, limited by VCLT Article 46. That Article provides that an international organization cannot claim not to be bound by a treaty because of internal rules, unless this violation of internal rules was manifest to any other state at the time the organization consented to the treaty in question and concerned a rule of fundamental importance.²³ The second part of this condition is not problematic: an organization’s rules for the partition of competences are undoubtedly of fundamental importance to the organization and its Members. Thus the real problem is whether

²² In fact, during the whole process of negotiation of the Uruguay Round the EC had argued that the WTO Agreement was a ‘single undertaking’, meaning one single, indivisible treaty. See Bourgeois, ‘The EC in the WTO and Advisory Opinion 1/94: An Echernach Procession’, 32 *Common Market Law Review* (1995) 763 ff.; especially at 785. The fact that the Commission on behalf of the EC in the end consented to the Agreement ‘with regard to that portion . . . which falls within the competence of the European Community’ cannot alter this situation: Council Decision 94/800/EC of 22 December 1994 concerning the conclusion of the agreement reached in the Uruguay Round multilateral negotiations (1986–1994), 94/800/EC, OJ [1994] L 336/1.

²³ Art 46 VCLT 1986 states: ‘2. An international Organisation may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the Organisation regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance. 3. A violation is manifest if it would be objectively evident to any State or any international Organisation conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international Organisations and in good faith.’

the EC's lack of competence was 'manifest' to any state at the moment the EC consented to the Treaty.

In accordance with Article 46(3) a violation of internal rules of an organization is 'manifest' if it is 'objectively evident' to any state acting in accordance with normal state practice and in good faith. So, was the lack of competence of the EC for parts of the WTO Agreement 'objectively evident' for other states? One fact that speaks for the certain knowledge of third states of the limited competences of the EC with regard to the WTO Agreement is the mere fact that the Marrakesh Agreement in Article XIV(1) expressly allows the EC *and* the EC Members to become Members of the WTO. If third states opened up the possibility of joint membership for the EC and the EC Members, they must have assumed that one of them alone would not have been able to sign the whole Agreement.²⁴ Otherwise joint membership does simply not make sense. This is even more true as the ECJ gave its famous *Opinion 1/94* on the division of competences between the EC and the EC Members on 15 November 1994, just before the EC and the EC Members ratified the WTO Agreement and before the Agreement came into force on 1 January 1995.²⁵ The Commission had asked for this Opinion during the Uruguay negotiations, as it believed the EC was competent alone to conclude the Agreement – an assumption which the EC Members did not share.²⁶ Contrary to the GATT Members' ambitions to intensify their cooperation in trade matters through the creation of the WTO, some EC Members had, at the same time, reached a turning point regarding their willingness to transfer more sovereignty to the EC. The ECJ reacted to this change of attitude:²⁷ rather than allowing the EC to join the WTO on its own, it meticulously outlined in its *Opinion 1/94* to what degree the EC was competent to consent to the WTO Agreement and to what extent it fell under the shared competence of the EC Members and the EC itself.²⁸ Consequently, the Council on behalf of the European Community approved the Agreement only 'with regard to that portion . . . which falls within the competence of the European Community'.²⁹

Clearly as a result of the *pacta tertiis* rule this Opinion has no binding force on any country not a Member of the EC.³⁰ Nonetheless, the Opinion was disclosed to the

²⁴ Neframi, *supra* note 21, at 200; see also Tomuschat, 'Liability for Mixed Agreements', in O'Keefe and Schermers, *supra* note 6, at 130.

²⁵ The negotiations for the WTO Agreement ended with the signature of the 'Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations', *World Trade Organization, The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (2000), at 2, which embodies the WTO Agreement (see para. (1) [of what?]). It was signed in Marrakesh on 15 Apr. 1994, whereas the request for an Opinion of the ECJ was made by the EC Commission on 7 Mar. 1994.

See Hilf, 'The ECJ's Opinion 1/94 on the WTO – No Surprise but Wise', 6 *EJIL* (1995) 247–248.

²⁶ For a more detailed study of the background of the Council's opinion that the EC was competent alone to sign the WTO Treaty see, *inter alia*, Heliskoski, *supra* note 5, at 226–229.

²⁷ Sack, 'The European Community's Membership of International Organizations', 32 *Common Market Law Review* (1995) 1236.

²⁸ For a more detailed study of the legal and political background of *Opinion 1/94* see: Bourgeois, *supra* note 22, at 763 ff., especially at 785–786; Pescatore, 'Opinion 1/94 on "Conclusion" of the WTO Agreement: Is there an Escape from Programmed Disaster?', 36 *Common Market Law Review* (1999) 387.

²⁹ The Council on behalf of the EC approved the Agreement on 22 Dec. 1994. See Council Decision 94/800/EC, *supra* note 22, at 1.

³⁰ C. Chinkin, *Third Parties in International Law* (1993), at 25.

public before the EC and its Members declared their consent to the WTO Agreement by ratifying the document.³¹ Thus looking at this readily available statement any state would have been able to discover at the moment the EC consented to the WTO Agreement that the EC would have acted *ultra vires* if it had ratified the WTO Agreement alone.

All this evidence leads to the conclusion that third parties must have had at least some reasonable doubts whether the EC was competent to consent to the WTO Agreement alone. However, Article 46 VCLT demands more than mere doubts. The provision asks for a violation of internal rules to be ‘objectively evident’. This would be the case only if third WTO Members actually knew about *Opinion 1/94* at all.

The ICJ held in *Cameroon v. Nigeria* that ‘there is no general legal obligation for states to keep themselves informed of legislative and constitutional developments in other states which are or may become important for the international relations of these states’.³² The same must be true by analogy of a court’s clarification of the legal powers of an international organization, such as the ECJ’s *Opinion 1/94*.³³ On the other hand, the ICJ held in the same case that the lack of competence of the Nigerian head of state to sign the treaty in question could not be ‘manifest’ unless that limitation was at least properly publicized.³⁴ With regard to ECJ judgments and Opinions proper publication can be approved. This is especially true for the controversial *Opinion 1/94* which was almost immediately being discussed among scholars.³⁵ Furthermore, as the recent EC–Australian *Protection of Trademarks* case shows, WTO Members not directly involved are in fact aware of *Opinion 1/94* and use it in their own arguments.³⁶ The existence of *Opinion 1/94* thus seems to be reasonably well known.

However, knowledge of the mere existence of *Opinion 1/94* is not enough. Its content must still be ‘objectively evident’. This is only the case if it provides clear and easy rules for the EC’s competence limits with regard to the WTO Agreement, as no one can expect other states to examine complicated internal power-sharing mechanisms in detail. Such simple clarity is usually achieved only where competences for an agreement are ‘coexistent’, and not where the division of competences is achieved

³¹ Note that para. (4) of the ‘Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations’, *supra* note 25, leaves the form of consent up to joining Members’ discretion. Consent may be expressed ‘by signature or otherwise’ (emphasis added). So the moment of ratification of the WTO Agreement by the EC can be regarded as the moment of consent in the sense of VCLT Art. 14; see also Fitzmaurice, ‘Expression of Consent to be Bound by a Treaty as Developed in Certain Environmental Treaties’, in J. Klabbers and R. Lefeber (eds), *Essays on the Law of Treaties – A Collection of Essays in Honour of Bert Vierdag* (1998), at 61.

³² *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* [2002] ICJ Rep 275, at para. 266.

³³ See also L. Bartels, *Human Rights Conditionality in the EU’s International Agreements* (2005), at 151.

³⁴ *Cameroon v. Nigeria*, *supra* note 32, at para. 265; see also M.N. Shaw, *International Law* (5th edn., 2003), at 846–847.

³⁵ See, *inter alia* Hilf, *supra* note 25; Neuwahl., ‘Shared Powers or Combined Incompetence? More on Mixity’, 33 *Common Market Law Review* (1996) 667.

³⁶ In its response to questions from the panel Australia explicitly refers to *Opinion 1/94* and roughly outlines that the EC’s competence for TRIPS was in some way shared with its Members: see *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS290, – Australia’s replies to questions posed by the panel to the parties following the second substantive meeting with the parties, Geneva, 26 Aug. 2004.

through a system of 'concurrent' competences. The system of 'coexistent' competences embraces a situation where a treaty contains two or more divisible parts, and where each part concerns either the exclusive competence of the EC or the exclusive competence of the EC Member States.³⁷ In this case it is easy for other states to see through the net of competence partition.³⁸

The term 'concurrent' competences on the other hand describes a situation where an agreement forms a whole that cannot be divided into two or more distinct blocks and where the EC and its Members both have competences over parts of the whole.³⁹ Here the division of competences is either so vague or so complicated that third states are either unable or at least cannot be expected to understand who is competent for what part of the Treaty. The extent of EC competences is as a result in such case anything but 'objectively evident'.

If one applies the classification of coexistent and concurrent competences now to the situation of the EC in the WTO one finds a mixed picture: According to the ECJ's *Opinion 1/94* the EC is fully competent as far as trade in goods is concerned.⁴⁰ Consequently, the EC is fully responsible for GATT. GATT is a part of the WTO Agreements that can easily be separated from the rest of the treaty package. To the extent that GATT is at issue, one can therefore speak of 'coexistent' competences. Thus, the EC's exclusive competence under GATT is 'manifest'.

However, the situation is inherently different for the rest of the WTO Agreements. *Opinion 1/94* sets out a rather confusing picture of competence partition for GATS and TRIPS. Both are split into smaller subdivisions. Under GATS the EC is said to be exclusively competent as far as 'cross-frontier supply' of services is concerned.⁴¹ Under TRIPS the EC is exclusively competent for the area of 'prohibition of release into free circulation of counterfeit goods'.⁴² It is already rather difficult clearly to excise these areas from the rest of the relevant Agreements as they often do not appear in pure isolation, but in connection with other acts that concern further parts of the Agreements. Nonetheless, the real problem for third states is even more acute: As far as GATS and TRIPS are concerned, *Opinion 1/94* is nothing but a snapshot, as the division of competences between the EC and the Member States is by no means static, but in a permanent process of change. First, Member States can agree to transfer new areas of competence to the EC organs. The EC Members did so explicitly with regard to the area of common commercial policy by the Nice Treaty amendment to Article 133. Arguably such process could still be monitored by third states.

Shifts of competence for external treaties from the EC Members to the EC can, however, also occur in two more ways: On the one hand the ECJ has developed the so-called *AETR Principle*, according to which the EC automatically gains external competence for a

³⁷ Rosas, 'Mixed Union – Mixed Agreement', in M. Koskeniemi (ed.), *International Law Aspects of the European Union* (1998), at 129–130.

³⁸ *Ibid.*, at 142.

³⁹ *Ibid.*, at 131.

⁴⁰ *Opinion 1/94*, *supra* note 1, at 5398–5399, paras 33–34.

⁴¹ *Ibid.*, at 4502, para. 47 and 5404, para. 53.

⁴² *Ibid.*, at 5409, para. 71.

certain field of concern if the Community is granted primary internal competences in the EC Treaty and if it has already made use of these competences by creating secondary law.⁴³ Hitherto, the area of service supplies in particular has been under constant change as the EC currently focuses its powers of harmonization and mutual recognition very much in this area. Competence partition in the areas of ‘consumption abroad’, ‘commercial presence’ and ‘presence of natural persons’ under GATS is therefore likely to face constant changes which are in no way obvious.⁴⁴ The same is true for the third type of competence shift in the EC. According to ECJ principles, the EC also holds competences for external treaties if it has primary internal competences for the relevant topic, but has not yet enacted secondary law, and if at the same time external competences are indispensable for the achievement of the internal objectives of the Community, meaning that secondary law would be to no avail without corresponding external treaties.⁴⁵ This rule leaves room for considerable discretion and it is often not even clear between EC organs and EC Members themselves. For third Members, this manner of competence partition is very unpredictable and largely inscrutable. For all WTO Agreements other than GATT, the EC competences are consequently not clearly separated or even divisible from the competences of its Member States. They are ‘concurrent’ competences.

The WTO Agreement is consequently a mixed system of ‘coexistent’ and ‘concurrent’ EC competences. Only GATT can be singled out as being fully, permanently, and exclusively within the competence of the EC. On the other hand, there is no subject area in the WTO Agreement that can be said to be completely outside the competence of the EC. The EC always holds powers for smaller parts of all subject areas included in the Agreement and its powers are capable of being extended by internal Community legal development. Thus the rules developed in *Opinion 1/94* are far too complicated to show exactly where the EC actually lacks competence for a special topic of the WTO Agreement.⁴⁶ Consequently at the time the EC consented to the WTO Agreement there was no source at all that told third states unequivocally for which parts of the WTO Agreement the EC lacked competence. Thus, VCLT Article 27 read together with Article 46 cannot be invoked. This article therefore does not need to scrutinize the actual effects such invocation would have in practice. The EC cannot even theoretically escape its obligations, and is thus bound by the WTO Agreement as a whole.

C Consequences for the Responsibility of the EC in the WTO

Now that it is clear that the EC is obliged to perform the whole of the WTO Agreement, the question follows for what kind of treaty-infringing acts is the EC actually responsible? Here it is of particular interest to discover what acts of what organs can be attributed to the EC.

⁴³ Case 22/70, *Commission v Council (AETR)* [1971] ECR 263, at 274–275, para. 16.

⁴⁴ See also Dashwood, ‘Implied External Competence of the EC’, in Koskenniemi, *supra* note 37, at 117–118.

⁴⁵ *Opinion 1/76* [1977] ECR 741, at 755–756, paras 3–4.

⁴⁶ See also Neframi., *supra* note 21, at 200.

1 Attribution of the Conduct of EC Organs to the EC

First, this article will analyse the attribution of wrongful acts of EC organs to the EC. Here one should first look more closely at the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts of States (hereafter the ILC Draft). Article 4 of the ILC Draft states that every state is responsible for the conduct of its own organs. At first glance it seems that this provision can be applied by analogy to international organizations without further problems. However, Article 57 of the ILC Draft states: '[t]hese articles are without prejudice to any question of the responsibility under International Law of an international organisation, or of any State for the conduct of an international organisation'. Consequently, the ILC Draft cannot simply be universally applied to the situation of international organizations.⁴⁷

However, that does not mean that the ILC Draft cannot be used as a guideline in order to answer the question of responsibility of international organizations in cases where it is appropriate. In fact the International Law Commission is currently preparing a new Draft on Responsibility of International Organizations using the ILC Draft on State Responsibility as such guidelines. As Gaja, the special rapporteur of the International Law Commission, states in his second and third reports on the responsibility of international organizations, the Commission does not seek to create a new system of rules with regard to responsibility of international organizations. On the contrary, it scrutinizes the ILC Draft on State Responsibility in order to analyse where its provisions can be adopted for a Draft on Responsibility of International Organizations.⁴⁸ This approach is only logical: The ILC Draft on State Responsibility is a codification, relying on the principles of international customary law for state responsibility. These customary rules have, of course, been developed by states and not by the (younger) international organizations. Nonetheless, international organizations are not born into a law-free environment but into this legal system of customary international law.⁴⁹ This system is, however, then consistent only if like situations are treated equally.⁵⁰ Consequently, analogies with customary international law of states can be drawn to the extent that the nature of a wrongful act of an international organization resembles that of a state.⁵¹

⁴⁷ *Commentaries to the draft articles on Responsibility of States for internationally wrongful acts*, adopted by the International Law Commission at its 53rd session (2001), Official Records of the General Assembly, 56th session, Supplement No. 10 (A/56/10), chap. IV.E.2; J. Crawford, *The International Law Commission's Articles on State Responsibility- Introduction, Text and Commentaries* (2002), commentary to Art. 57, at 360–361.

⁴⁸ G. Gaja, Special Rapporteur, *Second Report on Responsibility of International Organisations* (A/CN.4/541), International Law Commission, 55th session, Geneva, 3 May–4 June and 5 July–6 Aug. 2004, at paras 5–6; available at the official website of the United Nations at: http://untreaty.un.org/ilc/guide/9_11.htm (last visited 24 July 2006); G. Gaja, *Third Report on Responsibility of International Organisations* (A/CN.4/553), International Law Commission, 57th session, Geneva, 2 May–3 June and 5 July–5 Aug. 2005, paras 5–6, available at the official website of the United Nations at: http://untreaty.un.org/ilc/guide/9_11.htm (last visited 24 July 2006).

⁴⁹ Pauwelyn, 'The Role of Public International Law in the WTO, How Far can We Go?', 95 *AJIL* (2001) 538.

⁵⁰ See on this topic Bleckmann, 'Zur Verbindlichkeit des allgemeinen Völkerrechts für internationale Organisationen', 37 *Zeitschrift für ausländisches Internationales Recht* (1977) 107.

⁵¹ Pitschas, *supra* note 12, at 46–47.

Applying these principles, the question whether the EC is responsible for the acts of its organs can now be answered: just like any state, the EC acts through its own organs, which are answerable to the EC. Thus the conduct of these organs must be attributed to the EC, just as the conduct of state organs is normally attributed to the states they belong to. Consequently, the EC is responsible for all wrongful acts of its organs under the WTO Treaty.

2 Attribution of EC Member States' Conduct to the EC: The Problem of 'Effective Control'

A more difficult question, however, is whether acts of EC Member States' organs which infringe WTO provisions can also be attributed to the EC. Such violating acts can occur in one of three different forms: (1) an EC Member's organ 'correctly' enforces WTO infringing rules which were enacted by the EC; (2) an EC Member's organ enforces a correct EC law in a manner which violates the WTO; (3) an EC Member's organ enacts and/or enforces a purely national rule that violates WTO rules.

Once again, in order to solve the problem of attribution in these situations, one might want to look at guidelines from the ILC Draft. Its Article 6 states that: '[t]he conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under International Law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed'. This Article at first glance seems to be strong evidence that acts of the Member States' organs should be attributed to the EC. The EC 'borrows' EC Members' organs in order to fulfil its obligation under the WTO Treaty in two situations: first, the EC does not have organs to *enforce* the legislative acts it takes in order to comply with WTO obligations, and thus needs the relevant EC Member's organs in order to do so. Secondly, the EC needs the relevant EC Members' organs to enact and enforce their own legislation in cases where the EC does not have competence over such measures, but is nevertheless obliged to enact or apply legislation under the WTO Treaty. Hence Article 6 of the ILC Draft seems suitable to regulate the question of attribution of the conduct of EC Member State organs to the EC.

However, the ILC commentary on Article 57 states that Article 6 of the ILC Draft is not meant to give any information about the responsibility of an international organization for organs of other states that act on behalf of an international organization.⁵² Thus one can only fall back on the fundamental principles of attribution under international law that underlie the ILC Draft, and see if, on the basis of these, the same solution will be found for the EC as for states under Article 6 of the ILC Draft.

⁵² *Commentaries, supra* note 47, at 361, para. (3): '[j]ust as a State may second officials to another State, putting them at its disposal so that they act for the purposes of and under the control of the latter, so the same could occur as between an international Organisation and a State. The former situation is covered by article 6. As to the latter situation, if a State second officials to an international Organisation so that they act as organs or officials of the Organisation, their conduct will be attributable to the Organisation, not the sending State, and will fall outside the scope of the Articles'.

A similar approach is taken by the ILC with regard to its Draft on Responsibility of International Organizations. As Gaja in his Second Report points out, under customary international law the basic rule of attribution is that the entity that has 'effective control' over the organ that commits a wrongful act is responsible for it.⁵³ This does not mean that the EC would necessarily alone be responsible for acts of the EC Members' organs. It can also be the case that the EC shares controlling power with the Member States. Thus Member States may be responsible at the same time.⁵⁴ However, the EC's 'effective control' over EC Members' organs in cases where these organs perform WTO obligations is more doubtful. At first glance, at least in the above three scenarios, this seems not to be the case, as legislation is enacted and/or enforced as a result of national decision-making. However, if one looks more closely at control mechanisms provided by the EC Treaty one must come to the conclusion that the EC does in fact have at least some degree of control over EC Members' organs via the ECJ. This mechanism will be explained in more detail below.

With regard to international treaties concluded by the EC Article 300(7) of the EC Treaty provides: '[a]greements concluded under the conditions set out in this Article shall be binding on the institutions of the Community *and on Member State*'.⁵⁵ Thus, according to internal EC law, EC Members are equally bound *under EC law* to comply with treaties that have been concluded by the EC. As a result of various ECJ judgments, this is also true for mixed agreements, at least as far as those parts of such agreements that fall mainly under the EC's competence are concerned.⁵⁶ Thus EC Member States' organs are obliged correctly to perform obligations of such treaties where they are competent to do so. The same duty arises out of Article 10 of the EC Treaty, which obliges the EC Members to co-operate with the EC in order to enable the EC to perform its obligations. If an EC Member does not fulfil these duties it can be *forced* to do so through infringement proceedings before the ECJ under Article 226 of the EC Treaty.⁵⁷ Thus the EC has an effective measure at hand to force EC Members to make sure their organs act in accordance with the WTO Agreement.⁵⁸ The EC thus has a certain degree of 'effective control' over EC organs.

⁵³ Gaja, *Second Report*, *supra* note 48, at para. 40 ff.; also see Hirsch, *supra* note 6, at 64.; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)* [1986] ICJ Rep 14, at 64–65, para. 115; in fact such responsibility is accepted by the UN for wrongful acts of national troops under UN command during peacekeeping missions: see *Report of the Secretary-General on Financing of United Nations Peacekeeping Operations (A/51/389)*, paras 7–8.

⁵⁴ Hirsch, *supra* note 6, at 65; Crawford and Olleson, 'The Nature and Forms of International Responsibility', in M. Evans, *International Law* (2003), at 457; see also Gaja, *Second Report*, *supra* note 48, at paras 6–7.

⁵⁵ Emphasis added.

⁵⁶ Case C-13/00, *Commission v Ireland* [2002] ECR I-2943, at 2944, para. 2 and 2948–2949, paras 14–15; see also Case C-239/03, *Commission v France* [2004] ECR I-9325, at 9338–9340, paras 22–31; *Sellafeld Case* *supra* note 8, especially at paras 80–85 and 126–127; Case 12/86, *Commission v. Germany (Demirel)* [1987] ECR 3719, at 3751, paras 8–9.

⁵⁷ Bartels, *supra* note 33, at 229.

⁵⁸ See in fact the ECJ's decision in Case C-61/94, *Commission v Germany* [1996] ECR I-3989, at 4011–4012, paras 14–15, where the ECJ allowed such proceeding.

However, the question is whether the EC can also force its Members by means of the ECJ to comply with treaty obligations that result from those parts of an agreement that are within the competence of the EC Members and not the EC.⁵⁹ In the *Demirel* case this question was explicitly left open by the ECJ.⁶⁰ Likewise, in later judgments the ECJ did not decide the question, as it was always required to adjudicate on cases where it regarded the provisions in question as falling mainly within the competence of the EC.⁶¹

With regard to Article 300(7) of the EC Treaty, some scholars have doubted that the EC Members were obliged to comply with EC treaty obligations where the EC was not competent for a certain treaty provision.⁶² According to their view Article 300(7) binds the Member States only to treaties that have been concluded in accordance with the conditions of Article 300. They argue that Article 300(1) makes it clear that Article 300 embraces only situations 'where *this Treaty provides* for the conclusion of Agreements between the Community and one or more States or International Organisations'.⁶³ Thus, in those areas where the EC did not have competence to conclude the WTO Treaty the EC Members would not be bound by the WTO Agreement *via the EC*. The EC thus could not rely on Article 300(7) of the EC Treaty to institute infringement proceedings under Article 226. However, this interpretation seems incorrect as it disregards the role of Article 300(6), which provides that EC organs, as well as Member States, can ask the ECJ to give its opinion on the question whether the envisaged agreement is compatible with a treaty. Thus, Article 300 includes a mechanism to prevent the EC from concluding agreements in areas where it is not competent. If such mechanism is not used, Member States should not subsequently be allowed to escape their responsibility under Article 300(7). Agreements which are then concluded *ultra vires* the EC must consequently come under Article 300(7) of the EC Treaty.⁶⁴ *A fortiori* this must also be true where an Opinion on the conclusion of an envisaged treaty was given and the EC failed to comply with it!

In the case at hand, the Commission actually asked the ECJ for its Opinion (*Opinion 1/94*) and in complying with it ratified the WTO Agreement alongside the EC Member States. Given that the WTO Agreement does not contain any competence clauses, it must have been clear to the EC as well as to the EC Member States that the EC would only be able to consent to the WTO Agreement as a whole, and would thus have to consent to parts of it without being competent

⁵⁹ The question whether the EC concluded this part of the Agreement *ultra vires* does not have to be decided here. Arnold argues that this part of the agreement was actually concluded *ultra vires*. See Arnold, *supra* note 18, at 436 ff.; Gaja takes the opposite position. See Gaja, *supra* note 21, at 137.

⁶⁰ Case 12/86, *Commission v. Germany (DEmirel)* [1987] ECR 3719, at 3751, paras 8–9.

⁶¹ Case C–13/00, *Commission v. Ireland* [2002] ECR I–2943, at 2944, para. 2, and 2948–2949, paras 14–15; see also Case C–239/03, *Commission v. France* [2004] ECR I–9325, at 9338–9340, paras 22–31; *Sellafield Case*, *supra* note 8, especially at paras 80–85, 126–127.

⁶² I. MacLeod, I. D. Hendry, and S. Hyett, *The External Relations of the European Communities* (1996), at 131–132.

⁶³ Emphasis added.

⁶⁴ See, for a more detailed argument, Bartels, *supra* note 33, at 229–231.

(alone). Consequently, the Member States cannot subsequently argue that the Agreement was not concluded in accordance with Article 300 of the EC Treaty. They are thus (internally) bound to implement the whole WTO Agreement – regardless of whether or not the EC was competent to conclude a part of it.⁶⁵ The EC can thus force them by means of Article 226 of the EC Treaty to comply with the whole WTO Agreement.

As a result of the described internal control mechanism the EC consequently has effective control over EC organs performing WTO obligations. However, this control mechanism has one weakness: it comes into play only when a wrongful act has already been committed and is not a tool to *prevent* the EC Members' organs from violating WTO rules in the first place. Thus, through that mechanism the EC can only ensure that an EC Member's organ does not continue a measure which infringes the WTO.⁶⁶

Controlling actions *in advance* is – at least to a certain extent – thinkable only under scenarios (1) and (2). In these situations it is the EC itself that enacts the rules which EC Member States' organs have to enforce. Thus it is the EC that *orders what* the organs have to enforce. However, under scenario (2) the real extent of the EC's factual control is limited. While in scenario (1) the Member State has no choice but to implement an infringing act of the EC, under scenario (2) a Member State can in fact have discretion regarding the manner of implementation. In such cases it is thus the EC Member and not the EC that decides whether or not an EC rule will in the end infringe WTO provisions. As Gaja convincingly points out in his third report, in such cases an international organization cannot be held responsible for the conduct of a Member State.⁶⁷ Consequently, while the EC has universal power to control acts of the EC Members' organs *ex post*, it can only effectively control their actions in advance where it itself enacts the rules which these organs have to enforce and where Member States do not have discretion regarding the manner of implementation. Where EC Members' organs enforce measures that have been enacted by means of purely national procedures, the EC has no chance to control the enactment or the enforcement procedure in advance. Consequently all acts of EC Members' organs can be attributed to the EC – but only to a certain degree.

3 Attribution to the EC of Responsibility for Wrongful Acts of EC Members' Organs

However, attributing conduct is not the only way of *attributing responsibility* to the EC. As Gaja in his second and third reports shows, responsibility for acts of states' organs that international organizations use in order to fulfil their own treaty obligations can be attributed to the organization by reason of the simple fact that the organization

⁶⁵ This conclusion may also be reached based on the duty of co-operation of EC Member States towards the EC codified under Art. 10 of the EC Treaty. See, in favour of this, Bartels, *supra* note 33, at 232–233; Gaja, *supra* note 21, at 140; Heliskoski, *supra* note 5, at 229.

⁶⁶ On the issue of 'non-matative control' see also Gaja, *Third Report*, *supra* note 48, at paras 35–36.

⁶⁷ See G. Gaja, *Third report*, *supra* note 48, at para. 30/31.

fulfils its duties through these organs. Otherwise the organization could shirk its responsibility through 'outsourcing'.⁶⁸

Consequently, the question of attribution of responsibility is in the end a simple question of risk allocation: If an organization freely decides to undertake a commitment which it can fulfil only through organs of its Member States, and if it at the same time knows that it will not be able to control the conduct of those organs *ex ante*, then obviously the organization must bear the risk that the organs may infringe its obligations. Consequently, the organization ought subsequently not to be allowed to escape responsibility by arguing that it had no opportunity to prevent the organs it used to fulfil its duties from performing wrongful acts. Otherwise in cases where only the EC but not the Member States is a member of a Treaty and the EC uses an EC Member's organ to fulfil its duties *no one* can be held responsible for a resulting wrongful act, and the risk of such infringement will shift from the EC to the injured state.⁶⁹

D Conclusion regarding the EC's Responsibility

Thus one must conclude that the EC is responsible for all treaty violations by its own organs and the organs of the Member States – be it through attribution of conduct or through simple attribution of responsibility. However, strictly speaking, this is the case only where organs of the EC and/or EC Members act in order to fulfil obligations of the EC. Whether the EC is also responsible in cases where those organs fulfil obligations of EC Members is another question. In the specific case of the WTO Agreement this question can easily be answered: As both the EC and its Members are bound by all treaty obligation there is simply no possible situation in which these organs would act in order to fulfil an EC Member's duty and not at the same time in order to fulfil a duty of the EC. Each act always fulfils two obligations at a time. The EC is thus responsible for all acts.

However, this does not yet answer the question to *what extent* the EC is responsible. As mentioned before, the responsibility of the EC does not necessarily rule out the simultaneous responsibility of the EC Members. Thus the question can be answered only by analysing how far the EC Members are responsible for wrongful acts of EC organs and their own organs. This will be done below.

4 Responsibility of EC Member States

With regard to the responsibility of the EC Members, again the question is whether they are each bound by the whole WTO Agreement. Furthermore, it is again necessary to

⁶⁸ G. Gaja, *Second report, supra* note 48 para. 11.: 'Responsibility of an Organisation does not necessarily have to rest on attribution of conduct to that Organisation. It may well be that an Organisation undertakes an obligation in circumstances in which compliance depends on the conduct of its Member States. Should Member States fail to conduct themselves in the expected manner, the obligation would be infringed and the Organisation would be responsible. However, attribution of conduct need not be implied. Although generally the Organisation's responsibility depends on attribution of conduct, a point which is reflected in draft article 3 this does not necessarily occur in all circumstances.'; also G. Gaja, *Third report, supra* note 48, at para. 36.

⁶⁹ *Ibid.*, at para. 36.

analyse to what extent the EC Members are responsible for the wrongful acts of their own organs, and to what extent the acts of EC organs or the responsibility for such acts can be attributed to them.

A EC Members as Full WTO Members

1 EC Member States' Consent to the WTO Agreement: Every Individual State is a Full Member

Unlike with the EC there is no issue with the EC Members about the extent of their legal capacity. States are the original subjects of international law and undoubted bearers of unlimited legal personality.⁷⁰ Hence, there is no doubt that under international law the EC Members were able to become full Members of the WTO.⁷¹ Whether they are obliged to refrain from doing so by national rules is, of course, another question. Similarly, the question whether the EC Member States in fact consented to all provisions of the WTO Agreement is now easy to answer: As shown above in connection with the EC, the WTO Agreement does not provide any opportunity to select only parts of the Agreement. Consequently, the consent of the EC Members must be interpreted as consent to the whole package. Every single EC Member State is thus a full individual Member of the WTO.

2 Lack of Competence as a Justification for Failure of Treaty Performance?

The only remaining problem in this context is whether a Member State could invoke its limited competences to consent to parts of the EC Treaty as a justification for failures of treaty performance under VCLT Article 27 read together with Article 46.⁷² Clearly such invocation could take place only in cases falling within scenario (3) above, and not in cases where the EC Members are merely implementing a Community act.⁷³

As clarified above, an invocation of VCLT Article 27 in connection with Article 46 was possible only with GATT. Due to the clear separation of competences with regard to that part of the Agreement *Opinion 1/94* made it 'objectively evident' that the EC was exclusively competent. Thus it was also 'objectively evident' that EC Members did

⁷⁰ Akande, *supra* note 13, at 272.

⁷¹ Neframi, *supra* note 21, at 200.

⁷² The rules that transfer competence to the EC, and thereby indirectly limit the competences of the EC Members, can be regarded as 'provisions of internal law' of the EC Member States in the sense of VCLT Art. 46. These rules come from primary EC law or are developed through decisions of the ECJ. Hence, they are primarily rules of the EC as an international organization and not of the Members of the organization. However, here the speciality of the EC's legal system comes into effect: primary as well as secondary EC law is either directly effective or enforced by implementation (in the case of directives) in every EC Member's legal system and consequently part of the applicable law of every Member State. Likewise, ECJ judgments are directly binding on EC Members. Hence, EC competence rules can be regarded as 'provisions of internal law' of the EC Members in the sense of Art. 46. On this topic see M. Ahl and T. Deisenhofer, *Europarecht* (3rd edn., 2003), at 48–49.

⁷³ The relevant scenarios (1), (2), and (3) are developed above at 850.

not have the competence to consent to that part of the WTO Agreement when they ratified the Treaty.

The actual practice under GATT 1947 proves this theory: Third WTO Members have since 1974 never brought any case against a single EC Member, but always against the EC (or EEC). Similarly, during the same period no EC (EEC) Member brought a case against any WTO Member under GATT 1947.⁷⁴ All WTO Members accepted this practice even though the EC (EEC) was not even a Member of GATT 1947! GATT 1947 was incorporated into the WTO Agreement without any material changes. Consequently, also because of the previous practice, it was ‘objectively evident’ to other WTO Members that the EC Member States were not competent with regard to GATT. Thus, in theory, the EC Member States are able to invoke VCLT Article 27 read together with Article 46 as an excuse for failures in treaty performance.

In practice though, Article 46 VCLT will never be invoked in Dispute Settlement Proceedings. First, the Member States themselves will not invoke it simply because they do not speak in the WTO when GATT is at issue. In such proceedings, only the EC speaks on behalf of the Members and the Members themselves do not interfere with this because they have a duty of co-operation under Article 10 of the EC Treaty and under *Opinion 1/94*.⁷⁵

The EC on the other hand will also not invoke VCLT Article 27 in connection with Article 46 VCLT for the following reason: Article 46 states that a state/international organization ‘may not invoke the fact that its consent to be bound *by a treaty* has been expressed in violation of its internal law regarding competence to conclude treaties *as invalidating its consent* unless . . .’.⁷⁶ As can be seen from the text, Article 46 does not refer to *parts* of a treaty or parts of a party’s consent to be void, but rather speaks of ‘*a treaty*’ and ‘*its consent*’. Thus it speaks of consent to a treaty *as a whole*. As has been explained above, the WTO Agreement is a treaty which can be accepted only as a whole. Consequently, if the EC, on behalf of the EC Member States, were to invoke the lack of competence of the EC Members to consent to GATT it would render the *whole consent* of the relevant EC Member(s) to the *whole WTO Agreement* invalid. Invoking Article 27 in connection with Article 46 would thus in the end mean that the EC Members were no longer WTO Members and the EC would remain a Member by itself. However, avoiding such a situation was the very reason for their joint Membership in the first place!

Consequently, the EC is obliged by internal rules not to invoke Article 27 in connection with Article 46 as an excuse for wrongful acts of the EC Members, and in fact has never done so. Thus Article 27 in connection with Article 46 is of mere theoretical

⁷⁴ For cases before 1985 see Petersmann, ‘Annex: Article XXIII GATT Dispute Settlement Proceedings 1948–1985. Chronological and Country-wise Lists’, in M. Hilf, F.G. Jacobs, and E.U. Petersmann (eds), *Studies in Transnational Economic Law: The European Community and GATT* (1986), iv, 353. For cases before 1994 see WorldTradeLaw.net Home, ‘GATT Penal Reports/Working Party Reports/Other Rulings’, available at <http://www.worldtradelaw.net/reports/gattpanels/>, last visited 24 July 2006; see also P. Pescatore, *WTO/GATT Dispute Settlement, Digest with Key Words & Summaries* (1997).

⁷⁵ *Opinion 1/94*, *supra* note 1, at 5419, paras 106–109; see also Hilf, *supra* note 25, at 11–12.

⁷⁶ Emphasis added.

interest but of no practical use. The EC Members are thus bound by all provisions of the WTO Agreement and can, in practice, not evade their obligations thereunder.

B Consequences for the Responsibility of the EC Members in the WTO: For Which Acts Are They Responsible?

Thus, it remains for us only to clarify the extent of the responsibility of the EC Members. Therefore, one again needs to ask whether the EC Members are responsible for wrongful acts of their own organs, and likewise for violating acts of EC organs.

1 Attribution of the Conduct of EC Members' Organs to the Relevant EC Members

As explained above with regard to the EC, the act of an organ of a legal entity is generally regarded as an act of the entity itself.⁷⁷ Wrongful acts of an EC Member's organ must therefore generally be attributed to the relevant Member (see Article 4 of the ILC Draft). However, one could ask whether the fact that the EC is responsible for acts of EC Member States' organs which violate the WTO debars the EC Members from themselves being responsible. Article 7 of the ILC Draft provides that when a state 'lends' one of its organs to another state the second state is responsible for the acts of those organs if they fulfil duties of the receiving state. However, as explained above in the case at hand, the EC Members' organs not only fulfil duties of the EC under the WTO Agreement, but also always fulfil an obligation of the EC Member in question. Consequently, the organ's act must be attributed to both the EC and its Members simultaneously.⁷⁸ EC Members are consequently (at least to a certain degree) responsible for all acts of their respective organs which violate the WTO. There may possibly be one exception to that rule, namely the case where EC Members' organs act in order to perform duties of the EC that derive from concessions, for example under GATT Article II, that were *exclusively* made by the EC.⁷⁹ The analysis of this possible exception would have to include a detailed study of a possible secondary responsibility of the EC Members which cannot be discussed in greater detail here.⁸⁰

2 Attribution of the Conduct of the EC Organs to the EC Members States

A different question is, however, whether the EC Members are also responsible for wrongful acts of EC organs. Here one can again work with the criterion of 'effective control'. For that purpose one can also again look at *ex post* control mechanisms in

⁷⁷ Crawford and Olleson, *supra* note 54, at 454–455; *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 and corrigendum (A/56/10 and Corr. 1)*, ch. IV, sect. E.2, para. 11 of the commentary, at 90.

⁷⁸ Gaja, *Second Report*, *supra* note 48, at paras 7–8.

⁷⁹ See for this topic the '*LAN Case*', *supra* note 4, especially at paras 3.1–3.3, 8.16, 8.72, and 9.1–9.2; see also *Customs Classifications of Certain Computer Equipment*, *Appellate Body Report*, AB-1998-2.

⁸⁰ In that case a secondary responsibility of the Member States is possibly debarred by the independent legal personality of the EC as an international organization. In favour of this view are Schermers and Blokker, *supra* note 6, at para. 1585; Klabbers, *supra* note 11, at 311; Pitschas, *supra* note 12, at 266, who approves liability of Members of an international organization only in cases of external *ultra vires* acts of the organization. This is, however, a result of his view that international organizations have limited legal personality; see Akande, *supra* note 13, at 274. For an opposite view see Hirsch, *supra* note 6, at 146–148.

the EC Treaty. Following Article 300(7) of the EC Treaty not only EC Members but also all EC organs are bound by international treaties concluded in accordance with Article 300 of the EC Treaty. Thus one might think that every EC Member could force the EC using the mechanisms of Article 230 or Article 232 of the EC Treaty to make its organs comply with the WTO Agreement, just as the EC can do under Article 226 of the EC Treaty. However, in its famous *Banana* judgment the ECJ denied the Member States such an opportunity with regard to GATT 1994.⁸¹ Although heavily criticized in academic literature, this decision de facto blocks the Member States' ability to control EC organs' conduct by means of the ECJ.⁸² Consequently, in the current situation there is no effective *ex post* control mechanism for the EC Members.

As well as lacking an effective *ex post* control mechanism, the Member States also lack any ability to prevent wrongful acts of EC organs. EC decisions are made by independent EC organs free of any control by Member States. Even in cases, such as that of the Council, where these organs are manned by officials of the Member States, the measures of such organs cannot be regarded as decisions of joint representatives of the Member States, but as a new independent decision of the EC itself.⁸³ Otherwise, this would undermine the idea of the EC as an independent legal subject under international law and reduce it to a joint *object* of the Member States.

As the EC Members have neither *ex ante* nor *ex post* effective control over the acts of the EC organs under the WTO Agreement, the *conduct* of the EC organs can in no way be attributed to the EC Members.

3 Attribution to the EC Members of Responsibility for the Wrongful Acts of EC Organs

However, it has already been explained above that attribution of conduct is not, in all circumstances, the only reason for the liability of a legal entity.⁸⁴ An organization can also be responsible because it consciously made a commitment that it would have to use organs it might be unable to control when it wanted to fulfil this commitment. The organization is then liable for the risk of wrongful acts of the organs it agreed to use in the first place. The same must also be true for the EC Members when they make commitments which they can carry out only through the acts of EC organs. They are in exactly the same position as the EC and must therefore be treated in a similar manner. This view was also affirmed by the European Court of Human Rights (ECtHR) in the *Matthews* case. There, the UK was held responsible for an EC Council Decision to deny British nationals living in Gibraltar the right to vote for the EU Parliament.⁸⁵ The UK unsuccessfully claimed that it was unable to control the Council's conduct and was thus not responsible for the act. The Court instead ruled that, as the EC had undertaken the obligation contained in Article 6 of the European Convention on

⁸¹ Case C-280/93, *Germany v. Council (Bananas)* [1994] ECR I-4973, at 5072–5073, paras 105 and 109.

⁸² For critics see Wünschmann, 'Geltung und Gerichtliche Geltendmachung völkerrechtlicher Verträge im Europäischen Gemeinschaftsrecht', in S. 91 *Schriften zum Europäischen Recht* (2001) 188 and authors cited there at n. 278 of the same article.

⁸³ See Pitschas, *supra* note 12, at 50–51 and 218.

⁸⁴ This is explained in more detail above at 853–854.

⁸⁵ *Matthews v. UK*, App. No. 24833/94, (1999) 28 EHRR 361, at 372, paras 26–35.

Human Rights to guarantee the right to vote, it was responsible for the EC's denial of this right, even though it did not have effective control over the EC's Decision.⁸⁶ This view was upheld by the ECtHR in the *Bosphorus* case. There the Court also confirmed that any state was in principle responsible for complying with its obligations under the European Convention on Human Rights. This was so regardless of the question whether it was competent to act independently with regard to an obligation under the Convention, or whether it had transferred sovereignty regarding the obligation in question to another international institution.⁸⁷

One can thus conclude that the EC Member States are responsible for all wrongful acts of their own organs as well as for all wrongful acts of the EC's organs.

5 Responsibility and Litigation: Joint or Joint and Several?

It is now clear that the EC and its Members are responsible for wrongful acts of all their respective organs. What this analysis, however, does not yet clarify is *how* they are responsible and what that means in terms of litigation. The practice of the EC/EC Members and other WTO Members in dispute settlement proceedings does not seem yet to be very illuminative. One case in which this problem actually arose was the *LAN* case.⁸⁸ In that case, the US held both the EC and the EC Members Ireland and the UK responsible for an alleged breach of tariff concessions under Article II of GATT 1994. Therefore, the US tried to establish separate parallel panels against the EC and the two EC Members. The EC on the other hand argued that – if at all – only it, and not the Member States, could possibly be held responsible, and therefore a panel could be established only against the EC. In a compromise, the parties finally agreed to establish only one panel to consider the US's claims against both the EC and Ireland and the UK.⁸⁹ This case clearly shows the conflict between a third member's interest in suing the EC and/or the EC Members as fully and independently responsible members of the WTO, and on the other hand the EC's and EC Members' interest in not letting the DSB or a third WTO Member interfere with their internal rules of competence. Unfortunately, this case does answer the question how this conflict is going to be solved in the future, particularly because the case at hand dealt with concessions granted by the EC. As mentioned above, such case might represent a possible exception with regard to the question of responsibility and the question of litigation.⁹⁰

However, the main reason this case is not really suitable as a precedent is that the Panel report is not very revealing on the question of who was actually the proper party to the dispute on the side of the EC/EC Members. Although the US asked the panel to define the proper party, it avoided ruling on this question.⁹¹ The joint litigation

⁸⁶ *Ibid.*, especially at 374, para. 34.

⁸⁷ *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, App. No. 45036/98 (2005), at 43–45, paras 151–157.

⁸⁸ '*LAN Case*', *supra* note 4.

⁸⁹ *Ibid.*, at paras 1.1–1.11.

⁹⁰ This reasons for a possible exception in this case are discussed in more detail above at 857 and at nn. 79 and 80.

⁹¹ '*LAN Case*', *supra* note 4, at paras 8.15–8.16, and 8.72.

in this case should therefore be seen as a way of avoiding a general answer to the question of responsibility and litigation than as a guide for future proceedings.

Thus, a look at the practice of the WTO members does not lead to a satisfactory systematic answer to the problem. Consequently the question has to be considered under the general rules and approaches of international law. Generally, in a situation where there is more than one responsible party there are three plausible solutions, all known to international law: (1) Joint liability of the parties and an obligation on the complainant to sue the parties together. On such assumption the complainant's claim was declared inadmissible by the ICJ in the case on *Monetary Gold Removed from Rome in 1943* in which Albania, the allegedly primary responsible party, was not a party to the dispute along with other responsible parties.⁹² Furthermore, the same approach was also (unsuccessfully) taken by Australia in the *Nauru Phosphate Land* case.⁹³ (2) There could be joint liability of the parties and the complainant could have a choice either to sue both parties together or each separately, but only for its share of the damages. This seems to have been the ECtHR's approach in *Ilascu and others v. Moldova and Russia*, where each country was condemned to paying its own share of the damages but there is no indication that the complainants were actually forced to sue the parties together.⁹⁴ (3) There could finally be joint and several liability of the parties and the complainant could have a choice either to sue the parties together or the party of its choice alone for the *whole* of the damages. This approach was favoured by Judge Simma in his dissenting Opinion in the *Oil Platforms* case on the ground that the damages could not be apportioned between the liable parties.⁹⁵

The first two options assume that the parties involved are only *partly* responsible to the complainant for the damage caused, whereas the third assumes that in fact each party is for some reason fully responsible to the injured party for the damage and can at best claim contributions from the other parties responsible.⁹⁶ So the crucial question in first place is whether the EC and its Members are each only *partly* liable for damage caused by any of their organs or whether each of them, in relation to the injured party, is alone *fully* responsible for the damage. For the following reasons, *full* responsibility seems to fit the scenario best: In the situation here at hand it is not the case that each of the parties 'adds' a bit of wrongdoing to a conglomerate of infringing acts and omissions that finally *together* causes one lot of damage. Instead, here there is only *one* act that causes the infringement and consequently the damage. The responsibility for this one act is, however, only a question of perspective. From the perspective of the EC the responsibility for the act can be fully attributed to the EC because the EC used the organ in question to fulfil *its obligation*. This obligation is not shared with the EC Members, but parallel to the independent obligations of the EC

⁹² *Monetary Gold Removed From Rome In 1943 (Italy v. France, United Kingdom and United States of America)* [1954] ICJ rep. 19, at 32.

⁹³ *Certain Phosphate Lands in Nauru (Nauru v. Australia)* [1992] ICJ rep. 240, at 260–262, paras 54–57.

⁹⁴ *Ilascu and others v. Moldova and Russia*, 48787/99 (2005) 40 EHRR 46, at 110–112, paras 484–490.

⁹⁵ *Oil Platforms (Islamic Republic of Iran v. USA)* [2005] ICJ rep. 802, Separate Opinion of Judge Simma, at para. 65; see also Bartels, *supra* note 33, at 160.

⁹⁶ *Ibid.*, at 160.

Members under the WTO Agreement. Consequently, responsibility for cases in which the EC's obligation is not correctly fulfilled is likewise not shared with the EC Members but lies parallel to the responsibility of the EC Members for the incorrect performance of their own obligations.

If one looks at the same scenario, but focusing on an EC Member, one observes exactly the same situation: The EC Member uses the acting organ to fulfil its own obligation under the WTO Agreement. Thus it is *fully* liable to other parties if the organ that performs the obligation on its behalf fails to do so properly. Thus both sides are *each fully* responsible for the damage caused because they have both undertaken a 'full obligation' which they have not fulfilled where an organ acts wrongfully. The fact that these treaty violations always happen simultaneously as a result of a single act cannot change that situation. In fact, the only reason the complainant cannot sue *each* party for the full amount at the same time is the rule under Article 47(1) of the ILC Draft on State Responsibility that an injured state may not claim more from a plurality of states responsible than the value of the actual damage caused.

Consequently, in the situation at hand *joint and several liability* must be the proper solution.⁹⁷ The complainant can choose to sue the parties responsible together or just one of them for the whole amount of the damages. This is, of course, especially harsh for the EC Members as they have at the current stage of practice no chance of forcing the EC by means of court proceedings before the ECJ to bring acts of its organs into compliance with WTO rules. However, as also explained above, the responsibility of the EC Members for acts they cannot control arises out of the Members' free choice to shoulder such risk when they consented to the WTO Agreement. There they voluntarily undertook obligations which they could fulfil only through organs they were not able to control. This risk can subsequently, if something actually goes wrong, not be shifted to the injured third party.

The fact that the EC and its Members, in practice, will be far from willing to accept such a harsh regime in WTO Dispute Settlement Proceedings, and that, due to the economic power of the EC, other WTO Members will probably be forced to find a compromise with the EC, is another matter to be discussed and cannot be discussed here any further.⁹⁸

6 Conclusion

We must thus summarize the position as follows. The EC has unlimited legal personality under international law and was thus able to bind itself to the whole WTO Agreement, be it within its competences or not. Due to the lack of any competence clause in the WTO Agreement, the EC is bound by all provisions of the Treaty. As it was not 'manifest' to third parties at the time at which the EC consented to the Treaty for which parts of the Agreement the EC lacked competence, the EC cannot escape its treaty obligation by invoking internal rules of the division of competence. As a consequence, the EC is responsible for the performance of all its obligations under the

⁹⁷ Gaja takes a similar view in his *Second Report*. See: Gaja, *Second Report*, *supra* note 48, at para. 8.

⁹⁸ For a detailed study of this question see especially Heliskoski, *supra* note 5, at 174–208.

Treaty. Therefore it is fully responsible for all wrongful acts of all organs it uses to fulfil these obligations, be they EC organs or EC Members' organs.

The EC Members are likewise each bound by all WTO provisions, with no chance in practice of evading these obligations. Thus, each of them is also fully responsible for the acts of the organs it uses in order to fulfil its WTO obligations – be they acts of its own organs or of EC organs. As each act of each organ is at the same time an act fully fulfilling an obligation of the EC and one of the EC Member State(s) in question, the EC and the Members are each fully responsible at the same time for any wrongful act of any organ. The EC and the EC Members consequently have *joint and several responsibility* under the WTO Agreement and can, at the complainant's choice, either be sued together or individually for the whole of the damage caused.

Looking at this solution however, one should be aware of the fact that this article was not able to include all possible aspects in its analysis. In particular, questions of an additional possible secondary liability of the EC Members for obligations of the EC could not be considered, nor could the relations of EC Members between themselves with regard to the WTO. Such analysis must be left for further studies.