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Multilateral Environmental Agreements**

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# JOINT RESPONSIBILITY BETWEEN THE EU AND MEMBER STATES FOR NON-PERFORMANCE OF OBLIGATIONS UNDER MULTILATERAL ENVIRONMENTAL AGREEMENTS

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This chapter explores the basis and manifestations of joint responsibility between the European Union (EU) and its Member States for non-performance of obligations contained in multilateral environmental agreements (MEAs).

Joint responsibility has often been advanced as an attractive solution where two or more actors contribute to damage and it is unclear what part of the damage is caused by whom.<sup>1</sup> Such proposals seem to be inspired by domestic law, where joint (or 'joint and several') liability is frequently used to solve liability questions involving multiple tortfeasors.<sup>2</sup> The principle also is relevant in domestic environmental law.<sup>3</sup>

Joint or joint and several responsibility has found a modest application in international environmental law. Some civil liability treaties provide for this principle.<sup>4</sup> A few treaties apply the principle to States, examples are the Outer Space Liability Convention<sup>5</sup> and the Law

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<sup>1</sup> J.E. Noyes and B.D. Smith, 'State Responsibility and the Principle of Joint and Several Liability', *Yale Journal of International Law*, 13 (1988), 225, R.P. Alford, 'Apportioning Responsibility among Joint Tortfeasors for International Law Violations', *Pepperdine Law Review*, 38 (2011), 233.

<sup>2</sup> Principles of European Tort Law, available at <http://www.egtl.org/>, Article 9:101(2): "Where persons are subject to solidary liability, the victim may claim full compensation from any one or more of them, provided that the victim may not recover more than the full amount of the damage suffered by him."

<sup>3</sup> Lucas Bergkamp, *Liability and Environment: Private and Public Law Aspects of Civil Liability for Environmental Harm in an International Context* (The Hague: Kluwer Law International, 2001), 298-306.

<sup>4</sup> Article IV of the International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1969, in force 19 June 1975) 973 UNTS 3; article IV of the Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage (London, 27 November 1992, in force 30 May 1996) 1956 UNTS 255; article 8 of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (London, 3 May 1996, not in force) 25 ILM 1406; article 5 of the IMO International Convention on Civil Liability for Bunker Oil Pollution Damage (London, 23 March 2001, in force 21 November 2008) 40 ILM 1493; article 4 of the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal (Basel, 10 December 1999, not yet in force) UN Doc. UNEP/CHW.1/WG.1/9/2; article 11 of the Convention concerning the regulation of Lake Lugano (Lugano, 17 September 1955, in force 15 February 1958) 291 UNTS 218. See also article VII of the Convention on the Liability of Operators of Nuclear Ships (Brussels, 25 May 1962, not in force) 57 AJIL 268; article II of the Protocol to amend the Vienna Convention on Civil Liability for Nuclear Damage (Vienna, 12 September 1997, in force 4 October 2003) 2241 UNTS 270; article II of the Vienna Convention on Civil Liability for Nuclear Damage (Vienna, 21 May 1963, in force 12 November 1977) 1063 UNTS 266; article 3 of the Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 29 July 1960, in force 1 April 1968) 956 UNTS 264; article 3 of the Protocol to amend the Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960 (Paris, 12 February 2004, not yet in force) <http://www.oecd-nea.org/law/paris-convention-protocol.html>.

<sup>5</sup> United Nations Convention on International Liability for Damage Caused by Space Objects (New York, 29 November 1971, in force 1 September 1972), art. IV.

of the Sea Convention (UNCLOS) in its provision on liability for damage caused by exploration of exploitation of the Area.<sup>6</sup>

In this paper I will focus on one particular application of the principle of joint responsibility: its application in cases of non-performance of obligations under MEAs by the EU and its Member States. The relevance of the principle in this context stems from the fact that while the EU and Member States have shared (external) competences in environmental law, for third States the allocation of competences between the EU and Member States can be unclear and it may be difficult or even outright impossible to identify who is responsible for what. Now that the EU has become a relatively powerful actor on the international environmental scene,<sup>7</sup> without fully replacing Member States as relevant actors in treaty regimes, joint responsibility may be seen as a proper response to the ‘jointness’ of the external conduct of the EU and its Member States. In the Commentary to the 2011 Draft Articles on the Responsibility of International Organizations (DARIO), the International Law Commission (ILC) pointed to mixed agreements between the EU and Member States (such as many MEAs) as one example of a situation where joint responsibility would exist.<sup>8</sup> Also the European Court of Justice (ECJ) suggested that non-performance of obligations under environmental mixed agreements can result in joint responsibility.<sup>9</sup>

The promise of joint responsibility for non-performance by the EU and/or Member States of international obligations under MEAs appears to be twofold. First, it could protect third States, who may find it difficult to identify who, in the often complex internal structure of EU law, is responsible for what. Joint responsibility would allow third parties to bring a claim to the EU, to one or more Member States, or to both, and leave it to them to sort the consequences out internally.<sup>10</sup> Tabau and Maljean-Dubois state with respect to the Kyoto Protocol that ‘it remains difficult to determine who will be held liable internationally and who

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<sup>6</sup> United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) UNTS 1833, (hereafter UNCLOS), art. 139 (stipulating that ‘damage caused by the failure of a State Party or international organization to carry out its responsibilities under this Part shall entail liability; States Parties or international organizations acting together shall bear joint and several liability.’) See the interpretation of this provision in the Advisory Opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area (1 February 2011) [www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_17/adv\\_op\\_010211.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf).

<sup>7</sup> See J. Vogler, ‘The European Union as an actor in international environmental politics’ *Environmental Politics*, 8 (1999), 24–48; and more generally C. Bretherton, & J. Vogler, *The European Union as a global actor* (London, Routledge, 2006).

<sup>8</sup> Report of the International Law Commission 2011, 63<sup>rd</sup> session, U.N. Doc A/66/10, (hereinafter: Commentary to the DARIO), par 1 of Commentary to art. 48.

<sup>9</sup> Case C-316/91, *European Parliament v. Council of the European Union* [1994], ECR I-623, I-660–661, at para. 29; Case C-316/91, *European Parliament v. Council of the European Union*, [1994] ECR I-00625, at para. 29. Case C-239/03, *Commission v. France* (‘Etang de Berre’), [2004] ECR I- 9325.

<sup>10</sup> Compare in a domestic context P. Bargren, ‘Joint and Several Liability: Protection for Plaintiffs’, *Wisconsin Law Review*, 2 (1994), 453, at 464 (noting that “Within the general framework of tort law, joint and several liability is seen as a way to relieve plaintiffs of the risk of insolvent, unavailable or otherwise protected defendants.”) See also European Group on Tort Law, *Principles of European Tort Law. Text and Commentary* (Springer, 2005), commentary to article 9:101: “Even where everyone is solvent, we believe it is possible seriously to underestimate the practical difficulties of the victim if he had the onus of pursuing all possible tortfeasors in order to be assured of full recompense for his loss.”

can be sanctioned'.<sup>11</sup> Such lack of clarity speaks in favor of joint responsibility. Similarly, joint responsibility can be relevant for 'non-compliance institutions' that are set up to supervise compliance with MEAs.<sup>12</sup>

Second, joint responsibility may serve as an incentive for the EU and Member States to clarify, either ex ante or ex post, who is responsible for what.<sup>13</sup> It might be hypothesized that the EU and Member States will want to prevent that they all are held responsible, and that this might lead them to make their respective responsibilities clear towards third parties. Whether or not this hypothesis conforms to practice is unclear, however. It might just as well be hypothesized that the EU and Member States may have reasons for leaving the divisions of powers, and the allocation of responsibility, unclear. Nonetheless, the external joint responsibility is reflected in an internal obligation to cooperate and to ensure that joint external obligations are implemented.<sup>14</sup>

Though joint responsibility thus has been advanced and occasionally recognized as a proper response to shared external competences of the EU and Member States, the conditions, contents and consequences of joint responsibility in the EU – Member States relationships are not well-understood. There have been very few cases where a joint responsibility was actually determined, let alone where it was implemented. Scholarship shows diverse views on the conditions (eg: does joint responsibility depends on 'joint obligations' and 'joint attribution?') as well as on the practical consequences of joint responsibility.<sup>15</sup>

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<sup>11</sup> See A.S. Tabau & M. Maljean-Dubois, 'Non-compliance Mechanisms: Interaction between the Kyoto Protocol System and the European Union', *European Journal of International Law*, 21 (2010) 749, 760.

<sup>12</sup> See generally on non-compliance mechanisms: G. Ulfstein et al. (eds.), *Making Treaties Work: Human Rights, Environment and Arms Control* (Cambridge University Press, 2007); M.A. Fitzmaurice, C. Redgwell, 'Non-compliance procedures and international law', *Netherlands Yearbook of International Law*, 31 (2000) 35; A. Ali, 'Non-Compliance Procedures in Multilateral Environmental Agreements: The Interaction between International Law and European Union Law' in T. Treves et al. (eds) *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements*, (The Hague, T.M.C. Asser Press, 2009) 521-534.

<sup>13</sup> E. Paasivirta and P.J. Kuijper, 'Does one size fits all? The European Community and the Responsibility of International Organizations', *Netherlands Yearbook of International Law*, 36 (2005), 169; P.J. Kuijper (2010). *Mixed Agreements Revisited, The EU and its Member States in the World*. In C. Hillion & P. Koutrakos (Eds.), *International Responsibility for EU Mixed Agreements*, 208-227 (Oxford-Oregon: Hart Publishing). Compare in a domestic context E. D. Cavanagh, 'Contribution, Claim Reduction, and Individual Treble Damage Responsibility: Which Path to Reform of Antitrust Remedies?', *Vanderbilt Law Review*, 40 (1987), 1298; Senator L. Pressler & K. V. Schieffer, 'Joint and Several Liability: A Case for Reform', *Denver University Law Review*, 64 (1987-1988), 679. Other authors have argued that joint and several liability discourages settlement. See L. A. Kornhauser and R. L. Revesz, 'Multidefendant Settlements: The Impact of Joint and Several Liability', *The Journal of Legal Studies*, 23 (1994), 41-76.

<sup>14</sup> Opinion 2/00, [2001] ECR I-09713 ('Cartagena Protocol'), at para. 18 ('In any event, where it is apparent that the subject-matter of an international agreement falls in part within the competence of the [EU] and in part within that of the Member States, it is important to ensure close cooperation between the Member States and Union institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the [EU]. An example in the implementation of MEAs is the Decision concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the Kyoto Protocol of 11 February 2004, 280/2004/EC, Official Journal of the European Union L 49, art 8; see on this F. Jacquemont, 'The Kyoto Compliance Regime, the European Bubble: Some Legal Consequences', in M. Bothe and E. Rehbinder (eds), *Climate Change Policy* (Eleven International Publishing, 2005) 388.

<sup>15</sup> Eg Jacquemont (n14) 372-373.

The aim of the Chapter then is to explore the concept of joint responsibility in the external relations of the EU and Member States under MEAs, and to explore the grounds and consequences of joint responsibility in this particular field of international law. The chapter primarily will develop the analytical categories that help us understand when joint responsibility is applicable and its implications. It also examines the (limited) practice in regard to joint responsibility.

The Chapter essentially advances three related arguments. First, in particular cases the lack of clarity about divisions of power within the EU can make joint responsibility a proper response in situations where the EU and/or the Member States have caused injury.

Second, and in apparent contradiction to the first point, the division of power between the EU and Member States may nonetheless limit the usefulness of joint responsibility. The role of power in determining responsibility (whether joint or not) indeed is a fundamental one.<sup>16</sup> It only may make sense to assign responsibility to actors who have authority over such acts, as only these actors will be in a position to induce change that is required to terminate the situations of non-performance.<sup>17</sup> In practice relevant actors have recognized the relevance of the location of actual power. Paasivirta and Kuijper observe that the ‘broad third party recognition that the [EU] and Member States have different roles and competences’, militates against the idea of joint, or joint and several responsibility.’<sup>18</sup>

Third, and directly related to the previous point, the concept of joint responsibility, being essentially based on a private law model, cannot be easily transplanted in public law-type context. While joint responsibility may function in international environmental law in a way that resembles its domestic tort law origins (for instance when two upstream riparian states cause damage to a downstream state), the subject-matter of this chapter resembles more a public law / administrative law type setting. The available practice is mostly that of non-compliance institutions under MEAs.<sup>19</sup> While these institutions do not make formal determinations on State responsibility,<sup>20</sup> it is submitted that their practice is relevant to the topic. Indeed, it would be to misrepresent that distinct nature of issue areas such as international environmental law by neglecting their role in search for a general doctrine of

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<sup>16</sup> C. Eagleton, *The Responsibility of States in International Law* (New York University Press, 1928), 208 (observing that Power breeds responsibility – States are only willing to accept responsibility for actions if they have authority over such acts.’), also cited in Paasivirta and Kuijper (n13) at 173 (also noting that ‘where there is power, there has to be responsibility and, ideally, legal rules to make such responsibility effective’). The debate on the relationship between power and responsibility of course extends beyond international law, see eg A. Schaap, ‘Power and Responsibility: Should We Spare the King’s Head?’, *Politics*, 20 (2000), 129.

<sup>17</sup> Article 29 & 30 Articles on the Responsibility of States for Internationally Wrongful Acts (ASR) Annex to U.N. Doc. A/RES/56/83 (Jan. 28, 2002); Articles 29 & 30 of the Draft Articles on the Responsibility of International Organizations (DARIO), ILC Report 2011, A 66/10, 52.

<sup>18</sup> Paasivirta and Kuijper (n13) 221; F. Hoffmeister, ‘Litigating against the European Union and its member States: who responds under the ILC’s draft articles on international responsibility of international organizations?’, *European Journal of International Law*, 21 (2010) 723 at 739.

<sup>19</sup> Ch. 12.

<sup>20</sup> M. Koskeniemi, ‘Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol’, *Yearbook of International Environmental Law*, 3 (1992), 123-162. See also A. Nollkaemper, D. Jacobs, ‘Shared Responsibility in International Law: a Concept Paper’, Amsterdam Law School Research Paper No. 2011-17 (SSRN, 2011), available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1916575](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1916575), 69-70 (referring in this context to ‘shared accountability’).

(joint) responsibility that, if it exists at all, has proven to be of fairly little relevance in practice. However, as we will see below, their practice does cast doubt on the meaning and relevance of joint responsibility in a public order context.

I structure the Chapter by first exploring possible definitions of the concept of joint responsibility in general and then applying the concept to the relationship between the EU and Member States under MEAs. I then discuss the main conditions of joint responsibility and its consequences in the relationship between the EU and Member States under MEAs. In the final section I will draw some conclusions.

## **The concept of joint responsibility**

The term joint responsibility is not well established in international law. A few treaties use the term, often with the addition of ‘and several’.<sup>21</sup> Also a few judicial decisions have referred to it.<sup>22</sup> But these instances do not make it possible to identify a common definition in international law in the sense that the concepts of ‘responsibility’ or ‘reparation’ have a relatively generally accepted definition. There is little point in seeking to legally define a principle that is not established in general international law.

In order to shed some light on what may have been intended (for instance by the ECJ and the ILC) when they referred to the responsibility of the EU and Member States as a joint responsibility, we nonetheless can infer some elements from the use of the concept in international and domestic practice as well as in legal scholarship. As to the reference to domestic law: although we of course should be cautious against domestic analogies, it also may be said that where a particular meaning of a principle is so deeply rooted in domestic legal systems,<sup>23</sup> international law should not use the same term in a different meaning, unless compelling reasons that are linked to the specific structure of the international legal system speak against this.<sup>24</sup> While there may be compelling reasons that argue against a general introduction of the concept in international system (such as the lack of courts with compulsory jurisdiction) it is not obvious what such reasons would be that would speak for an entirely different meaning of the concept in those instances where it has been used.

For understanding this concept of joint responsibility, it is useful to recall the situation where *no* joint responsibility applies. If the EU and/or Member States commit an internationally

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<sup>21</sup> UNCLOS art 139; Convention on International Liability for Damage Caused by Space Objects, art. IV; see also R.P. Alford, ‘Apportioning Responsibility among Joint Tortfeasors for International Law Violations’, *Pepperdine Law Review*, 38 (2011) 233; see also: P. Wendel, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (Springer, 2007) 135; C.W. Jenks, ‘Liability for Ultra-hazardous Activities in International Law’ *Recueil des Cours*, 117 (1966).

<sup>22</sup> Advisory Opinion of the Seabed Disputes Chamber (n6); ICJ, *Oil Platforms (Islamic Republic of Iran v USA)* (Merits) [2003] ICJ Report 324-61 (Sep. Op. Judge Simma); Permanent Court of Arbitration, *Eurotunnel Arbitration (Channel Tunnel Group Ltd and France-Manche SA v France and UK)* (Partial Award), 30 January 2007, par 165-69.

<sup>23</sup> The European Group on Tort Law (n10) stated that “solidary liability is so deeply embedded in the European systems that to abandon it would be a profound shift in the balance of law.”, §3, 144.

<sup>24</sup> See on the usefulness of domestic analogies in this area *Certain Phosphate Lands in Nauru, Nauru v Australia*, Preliminary Objections, Judgment, (1992) ICJ Rep 240; ICGJ 91 (ICJ 1992), par. 48., Sep. Op. Judge Shahabuddeen, par. 53 .

wrongful act and no joint responsibility applies, each of them is responsible for the injury caused by its own, separate act.<sup>25</sup> In such a case we speak of individual, or ‘non-joint’, responsibility. If joint responsibility is to have any distinct legal meaning (and we have to assume that the relevant actors have intended such a distinct meaning when they have used the term), the principle of joint responsibility has to mean that when the EU and one or more Member States commit an internationally wrongful act that results in a single injury, both are responsible, not for the injury that they individually have caused, but for the *same*, undivided injury.<sup>26</sup>

I thus use the term joint responsibility to refer to the responsibility of the EU and some or all of the Member States for a single, undivided injury that is caused by an internationally wrongful act, and that is distributed to them separately, rather than resting on them collectively.<sup>27</sup>

Four aspects of this definition require brief comment: the definition of joint responsibility in terms of ‘injury’, the possibility of claims being directed against both the EU and Member States, the applicability of joint responsibility in situations of both concerted and non-concerted action and the distinction between joint responsibility and liability.

### *Responsibility for injury*

The definition of joint responsibility in terms of responsibility for injury caused by an internationally wrongful act may strike one as counterintuitive. The ILC did not define responsibility in terms of injury, but in terms of a wrongful act, that in turn is a function of breach of an obligation and attribution of the relevant conduct.<sup>28</sup> If responsibility is not defined in terms of injury, it would seem that also *joint* responsibility should not be defined in these terms. Yet, it is submitted that it is only meaningful to speak of joint responsibility if it refers to responsibility for an (undivided) *injury* arising from a wrongful act.

Defining joint responsibility in terms of responsibility for an (undivided) *injury* arising from a wrongful act is similar to use of the term joint liability in domestic law, which generally speaks of joint liability in a situation where the conduct of two or more actors result in a single damage.<sup>29</sup> I will come back to the distinction between injury and damage below, but the important point at this stage is that joint responsibility is not a joint responsibility for a wrongful act as such, but for the result arising from the act. It is precisely the fact that two or more actors contribute to a single injury, and that it cannot be determined who contributed

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<sup>25</sup> See for the term injury the discussion in the next subsection.

<sup>26</sup> See Kornhauser and Richard L. Revesz (n13) 435 (noting that joint and several liability is generally used when the damage is indivisible, i.e. it cannot logically be apportioned amongst the defendants), W.L. Prosser, ‘Joint Torts and Several Liability’ *California Law Review* Vol. 25 (1936) 422 (‘A tort is “joint,” in the sense which the American courts have given to the word, when no logical basis can be found for apportionment of the damages between the defendants’), Martin Hogg, ‘Causation and apportionment of damages in cases of divisible injury’, *Edinburgh Law Review* Vol. 12 No. 1 (2008) 99 (“‘indivisible injury’ [means] that the totality of the harm caused [can] not be divided into portions attributable to either of its two possible causes. Each causal contribution [can] therefore be said to be a cause of the whole indivisible loss.’).

<sup>27</sup> Nollkaemper & Jacobs (n20) 69.

<sup>28</sup> Art. 4 of the DARIO.

<sup>29</sup> Principles of European Tort Law art. 9.101; Advisory Opinion (n6) par. 201.

what part, that leads to the need to allow third parties to bring a claim for relief against all responsible actors, and thus to the need for joint responsibility.

This use of the term joint responsibility in terms of ‘injury’ appears to differ from the approach of the ILC in the ASR and the DARIO. The DARIO does recognize that an international organization and one or more states may commit the ‘same wrongful act’.<sup>30</sup> From the Commentary, it is clear that the ILC considered that that responsibility of two or more States or international organizations for the same wrongful act can be a joint responsibility.<sup>31</sup> Some of the examples given in the Commentary to Article 48 indeed concern ‘the same wrongful act’ (notably direction and control,<sup>32</sup> coercion,<sup>33</sup> circumvention of international obligations through decisions and authorizations<sup>34</sup>). In these cases there indeed is a *single wrongful act* for which, in the approach of the ILC, both the State and the organization are responsible.

There are however two problems with defining joint responsibility in terms of the ‘same wrongful act’ rather than in terms of the ‘same injury’.<sup>35</sup> The first is that it excludes the possibility to construe situations where an organization and a State commit different wrongful acts in terms of joint responsibility. One example (on which more below) is the situation where two or more states commit independent wrongs resulting in a single injury. Another example is aid and assistance (or ‘complicity’). There is good authority for the proposition that an aiding State/organization and the State/organization that is aided can be jointly responsible for the result produced by these separate acts.<sup>36</sup> This is in conformity with the situation in domestic law.<sup>37</sup> It appears that that ILC intended to follow this approach, and it used the term ‘joint responsibility’ to refer to responsibility triggered by aid or assistance to a State that commits an international wrong.<sup>38</sup> However, it is somewhat of a stretch to construe these separate wrongs as the ‘same wrongful act’, as the aiding State/organization is strictly speaking not responsible for the same wrongful act as the State that committed the principal wrong. Aid and assistance is defined precisely by the fact that it is a *separate*, not the same,

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<sup>30</sup> DARIO art. 48 (1) stipulates ‘Where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act.’

<sup>31</sup> Commentary to the DARIO, art 48 (par 2).

<sup>32</sup> DARIO art 15,.

<sup>33</sup> DARIO, art 16.

<sup>34</sup> DARIO, art 17, see also: N. Blokker, ‘Abuse of the Members, Questions concerning Draft Article 16 of the Draft Articles on Responsibility of International Organizations’, *International Organizations Law Review*, 7 (2010) 35; J. d’Aspremont, ‘Abuse of the Legal Personality of International Organizations and the Responsibility of Member States’, *International Organizations Law Review* (2007) 91.

<sup>35</sup> See critically on the failure to recognize the role of legal injury: B. Stern, ‘A Plea for "Reconstruction" of International Responsibility based on the Notion of Legal Injury’, in M Ragazzi (ed), *International Responsibility Today. Essays in Memory of Oscar Schachter* (Martinus Nijhoff, 2005) 93.

<sup>36</sup> L. May, *Sharing Responsibility* (University of Chicago Press, 1996) 37-38; I. Brownlie, *System of the Law of Nations: State Responsibility (Part 1)* (Oxford University Press, 1983) 191; A. Orakhelashvili, ‘Division of Reparation Between Responsible Entities’ in J. Crawford, A. Pellet, and S. Olleson, (eds), *The Law of International Responsibility* (Oxford University Press, 2010) 658.

<sup>37</sup> Principles of European Tort Law, art. 9.101(a).

<sup>38</sup> DARIO, art. 14. See also A. Reinisch, ‘Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts’, *International Organizations Law Review*, 7 (2010) 63.



wrong.<sup>39</sup> It might well be argued that it is only if aid and assistance has a certain scale, and the aiding state contributes to such an extent to the wrong, that we speak of joint responsibility.<sup>40</sup> But in that case aid and assistance would no longer be a separate wrong. If aid and assistance as such is to be considered as an example of joint responsibility, as the ILC apparently intended, that cannot be based on the concept of joint responsibility for the same wrongful act, but has to be defined in terms of the injury that results from that wrong.

The second and more fundamental problem with the approach of the ILC is that on its face it disconnects the question of joint responsibility from the consequences of such responsibility. In domestic legal systems, it does not refer some abstract responsibility for a single act, but rather to the possibility that injured parties can direct a claim to provide reparation for undivided injury at each of the responsible actors. In domestic tort law, such a claim generally is directed at reparation (whether monetary compensation or restitution in kind) for damage caused.<sup>41</sup> It would seem that if joint responsibility is to be a useful concept in international law, it should be defined in terms of what injured parties, or international institutions, can demand of each of the responsible States. The concept of injury seems pivotal for this.

In particular procedural settings, a determination of responsibility as such may be relevant, without getting to the point of reparation. That was the case in the *Oil Platforms Case*, where Judge Simma used the concept to construct a right of the United States to make a counterclaim.<sup>42</sup>

However, in the type of situations with which this chapter is concerned, joint responsibility cannot be considered apart from its consequences. Allowing injured parties to direct a claim at each of the responsible actors only makes sense if this is combined with reparation. Conversely, allowing third parties to direct a claim towards all responsible actors – which necessarily is based on the same injury – is the the reason why provision is made for joint responsibility at all. We thus have to link of concept of joint responsibility with that of reparation for injury. Significantly, the ILC has in a somewhat roundabout way recognized the pivotal role of injury. Article 31 reads: ‘The responsible international organization is under an obligation to make full reparation *for the injury caused* by the internationally wrongful act.’ Construing responsibility in terms of injury allows us to define, in cases of joint responsibility, the responsibility of each of the responsible actors in terms of their contribution to an undivided injury, and a resulting possibility that injured parties direct a claim to provide reparation *for the injury caused* to each of those responsible actors.

If the concept of injury is to fulfill its function as a basis for joint responsibility, it has to be broad one, and not to be limited to ‘damage’, as it the case in domestic tort law. It includes, in the context of the present chapter, legal injury that the non-performance of an obligation under a MEA causes towards the other parties that agreement. The consequence of (joint) responsibility then is that injury has to be removed- and full performance of the obligation is

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<sup>39</sup> H.P. Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press, 2011) 289.

<sup>40</sup> See on the need for differentiation B. Graefrath, ‘Complicity in the Law of International Responsibility’, *Revue Belge de Droit International* 29 (1996) 370-380 (stating that the article ‘seemed to leap the barrier between secondary and primary rules.’); Aust (n39) 219-220.

<sup>41</sup> Art 10.101 and 10.104 of the Principles of European Tort Law.

<sup>42</sup> *Oil Platforms (Islamic Republic of Iran v USA)* (Merits) [2003] ICJ Report 324-61 (Sep. Op. Judge Simma) (n22).

secured. It also can include material injury, including damage to property or to the environment that will, in terms of reparation, require restitution or compensation by the jointly responsible actors.

### *Individualization of claims*

Logically, if two or more actors contribute to an indivisible injury, there are two options for construing the procedural rights of injured parties. Either injured parties can only direct a claim against the responsible actors together, or they can direct a claim against the responsible actors separately.

There is very limited authority for the first construction. In *Hess v United Kingdom* (1975), the European Commission of Human Rights indeed suggested that joint responsibility might be non-severable. It held that the responsibility for Spandau prison was exercised on a Four Power basis and that the United Kingdom acted as a partner in the joint responsibility which it shared with the other three powers. It then found that ‘the joint authority cannot be divided into four separate jurisdictions’ and that therefore the United Kingdom’s participation in the exercise of the joint authority and consequently in the administration and supervision of Spandau Prison was not a matter within the jurisdiction of the United Kingdom, within the meaning of Article 1 of the Convention.<sup>43</sup>

As this case was tied to the specific role of the concept of ‘jurisdiction’ as a precondition for the Court’s exercise of jurisdiction, and as the Commission’s approach moreover has been relaxed by the Court,<sup>44</sup> it is doubtful that it is based on concept of joint responsibility that would necessarily entail a case against all parties together. Rather, it is a particular constellation for which joint responsibility is the potential *solution* – after all the principle sees precisely to situations where injury cannot be divided. It is also noteworthy that in somewhat comparable circumstances (also involving a common organ), the ICJ did not follow this approach. It rejected Australia’s reliance on a non-severable joint responsibility in the *Nauru* case.<sup>45</sup>

Indeed, there is strong support for the use of the concept of joint responsibility in terms of allowing a claim to be brought against each of the wrongdoing States and/or international organizations separately.<sup>46</sup> This aspect is often identified by addition of ‘joint and several liability’.<sup>47</sup> The use of ‘joint’ and ‘joint and several’ is, however, inconsistent, and it should

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<sup>43</sup> EComHR 28 May 1975, *Hess v United Kingdom*, no. 6231/73.

<sup>44</sup> Also note that in *Al-Skeini v United Kingdom* (A. 55721/07, Judgment of 7 July 2011), par. 137, the Court explicitly Stated that the State’s obligations under Article 1 can be divided and tailored in accordance with the extent to which the State exercises control and authority over an individual.

<sup>45</sup> *Certain Phosphate Lands in Nauru, Nauru v Australia* (n24), par. 48..

<sup>46</sup> *Certain Phosphate Lands in Nauru*, Sep. Op. Judge Shahabuddeen (n24), par. 36-57; I. Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations*, (Martinus Nijhoff Publishers, 1998), 91.

<sup>47</sup> Kornhauser and Revesz (n13) 435 (noting that ‘Under joint and several liability, if the plaintiff litigates against two defendants and prevails against only one, it can recover its full damages from that defendant. In contrast, under non-joint (several only) liability, the plaintiff would only recover the portion of the damages attributable to the actions of the losing defendant.’); European Group on Tort Law, *Principles of European Tort Law. Text and Commentary*, Springer-Verlag, Vienna (2005), p.138 ([The term ‘solidary liability’] is used to describe the situation where each of a number of tortfeasors is individually liable for the whole of the damage suffered by the

be presumed that unless it appears that a different use was intended, the term joint responsibility likewise means that a claim can be brought against each of the responsible actors separately.<sup>48</sup>

Joint responsibility then means that all responsible actors (in the present context: the EU and Member States) are responsible for the injury caused by their wrongful act and that a claim can be directed against each of them separately. In other words, the responsibility of one is not reduced if the other is involved in the perpetration of a wrongful act.<sup>49</sup> This also is the approach of the ASR and DARIO. Leaving aside the problem of their focus on act rather than injury, discussed above, they stipulate that in a case of joint responsibility the responsibility of each State or organization can be invoked.<sup>50</sup>

### *Concerted and independent action*

Joint responsibility can both relate to injury arising out of concerted action between wrongdoing actors and to injury arising out of independent wrongdoing.

The non-controversial part of this proposition is that joint responsibility is can flow from concerted action. In the US, which has produced the most substantial literature on the topic, joint liability was imposed upon wrongdoers who were acting in concert, each being therefore responsible for the conduct of others.<sup>51</sup> This also is the meaning used in Article 139 of the UNCLOS. This concerted action requirement may extend the concept to such forms of co-participation as aid and assistance of one actor in the wrongful act of another or acts conducted by a common organ.<sup>52</sup> Also the ILC seemed to have relied on concerted action as basis for its (somewhat unarticulated) concept of joint responsibility. All examples given in the Commentary to Article 48 of DARIO refer to concerted, rather than independent action. Since in all these cases, there is some form of cooperation between the relevant actors, we also can refer to such joint responsibility as ‘cooperative responsibility’.<sup>53</sup>

On the other hand, there is authority for using joint responsibility to refer to undivided injury arising out of independent acts. One then could refer to the former as ‘concurrent’<sup>54</sup> or ‘cumulative’<sup>55</sup> responsibility, rather than cooperative responsibility. The Principles of European Tort Law provide that joint (or ‘solidary’) liability applies when ‘one person’s independent behaviour or activity causes damage to the victim and the same damage is also attributable to another person.’<sup>56</sup> In scholarship we also find uses of joint liability to cover

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victim. (...) It is essentially the same as the common law expression “joint and several liability” but we consider that to be very unclear.”)

<sup>48</sup> But it will in each case have to be determined which meaning was intended. A distinction between the concepts was for instance made in *Certain Phosphate Lands in Nauru*, Sep. Op. Judge Shahabuddeen (n24), par. 42.

<sup>49</sup> Orakhelashvili (n36) 657.

<sup>50</sup> Commentary to the DARIO, art. 48.

<sup>51</sup> J.W. Wade, ‘Joint Tortfeasors and the Conflict of Law’, *Vanderbilt Law Review*, 6 (1953) 464.

<sup>52</sup> See text to notes \_\_\_\_.

<sup>53</sup> See Nollkaemper & Jacobs (n20) \_\_\_\_.

<sup>54</sup> Wade (n51) 464.

<sup>55</sup> Nollkaemper & Jacobs (n20) \_\_\_\_.

<sup>56</sup> Art. 9.101 (1)(b).

liability arising out of non-concerted action.<sup>57</sup> The Seabed Chamber of the Law of the Sea Tribunal apparently accepted the possibility that two sponsoring States can be jointly and severally liable, even when they were not involved in a concerted action. The Chamber said that ‘the provisions of article 139, paragraph 2, of the Convention and related instruments dealing with sponsorship do not differentiate between single and multiple sponsorship. In principle the liability of a sponsoring State is based on a failure to take all necessary and appropriate measures to secure effective compliance by persons whom they have sponsored. Accordingly, the Chamber takes the position that, in the event of multiple sponsorship, each of these sponsoring States can be liable for failure to take all necessary and appropriate measures. If so, the liability is joint and several.’<sup>58</sup> Also Judge Simma’s use of the term joint responsibility in the *Oil Platforms case* referred to non-concerted rather than concerted action.<sup>59</sup>

The distinction between responsibility arising out of concerted and responsibility arising out of non-concerted action may legally be relevant. Each category may give rise to different legal consequences and different procedural issues. For instance, the fact that two or more of actors have engaged in concerted action, may provide a basis for claims between multiple wrongdoers that may be absent in cases of independent wrongdoing.<sup>60</sup>

However, such possible legal differences do not necessarily speak against the use of the principle of joint responsibility in situations of independent action. Indeed, it may be preferable to use the concept in a way that is similar to the concept as it is commonly used in domestic legal systems, thus including its use in situations of independent wrongdoing leading to a single injury. As noted above, where a particular meaning of a principle is so deeply rooted in domestic legal systems, international law should not use the same term in a different meaning, unless compelling reasons that are linked to the specific structure of the international legal system speak against this. Again, it is not obvious what such reasons would be.

In any case, under MEAs, the distinction between concerted and non-concerted action is not very relevant. Joint responsibility between the EU and Member States generally will involve some form of concerted action. It is difficult to envisage a case where the EU and Member States commit independent leading actions resulting in non-performance of international obligations under MEAs and subsequent undivided injury – though the possibility is not to be excluded.

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<sup>57</sup> Wade (n51) 464. See also A. Conant, ‘Recent developments in joint and several tort liability’, *Baylor Law Review*, 14 (1962) 423 (noting that “Two or more tortfeasors may be held jointly and severally liable, though the acts or omissions complained of are not joined, nor do the causes concur so as to create a single force or condition, if the injury is indivisible in the sense that evidence with which to make a division among tortfeasors is unavailable.”).

<sup>58</sup> Advisory Opinion of the Seabed Disputes Chamber (n6) par. 192). However, the Opinion is not very clear on this point, and it may be that the Chamber was simply giving a broad interpretation to ‘acting together’.

<sup>59</sup> *Oil Platforms (Islamic Republic of Iran v USA)* (Merits) [2003] ICJ Report 324-61 (Sep. Op. Judge Simma) (n22).

<sup>60</sup> The distinction is also related to the distinction between concurrent or joint causation on the one side and cases of alternative causation, on the other. See on the former Wade (n51) 464; Conant (n57) 424. The *Oil Platforms case* (n22) dealt with alternative causation, since it could not be established whether the mine that caused the damage was of Iraqi or Iranian origin (obviously it could not be both). The merits and implications of this distinction are left aside here.

## *Responsibility and liability*

In any case since the commencement of the work of the ILC on the topic, the dominant terminology for the conditions and consequences of international wrongs in international law is that of ‘responsibility’, not ‘liability’. The latter concept mainly has been relegated to the area of injurious consequences of acts not prohibited by international law and in particular to civil liability treaties.<sup>61</sup> It is in line with this prevailing use that in this Chapter I have used the term ‘joint responsibility’ rather than ‘joint liability’.

However, two comments should be made. First, use of terms is by no means consistent.<sup>62</sup> The English texts of some treaties do refer to liability. It is noteworthy that Article 235 of the UNCLOS provides ‘States are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.’ The former sentence may be understood as referring to the contents of primary obligations, whereas the second sentence certainly refers to the consequences of breach of such obligations.<sup>63</sup> Article 6 to Annex IX of the same Convention provides for ‘joint and several liability’ of the EU and Member States. It is not clear whether ‘liability’ in this context means anything else than ‘responsibility’ as used by the ILC.<sup>64</sup>

Second, many of the cases where the term (joint) liability is used, seems to pertain specifically to liability for *damage*. That certainly is true is for the use of the term in domestic law,<sup>65</sup> in civil liability conventions, as well as work the work of the ILC on allocation of loss in the case of transboundary harm arising out of hazardous activities.<sup>66</sup> It also is true for some treaties dealing with damage caused by States.<sup>67</sup> The use of the term liability than contains the connotation that compensation (or restitution) should be provided for the damage.<sup>68</sup>

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<sup>61</sup> Draft Principles on the Allocation of Loss in the Case of Transboundary Harm arising out of Hazardous Activities, *Report of the ILC on its 58<sup>th</sup> Session* (2006) (A/61/10) at 106

<sup>62</sup> See generally on the distinction M.B. Akehurst “International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law”, *Netherlands Yearbook of International Law*, 16 (1985) 3-16; A.E. Boyle, “State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A necessary distinction?”, *ICLQ* 39 (1990) 1-25; K. Zemanek, “State Responsibility and Liability”, in W. Lang, H. Neuhold, K. Zemanek (eds.), *Environmental Protection and International Law* (London: Graham & Trotman, 1991) 197.

<sup>63</sup> Quentin-Baxter, *Fifth report on international liability for injurious consequences arising out of acts not prohibited by international law*, 12 and 18 June 1984, UN Doc. A/CN.4/383, at para. 39.

<sup>64</sup> See also Quentin-Baxter, *Preliminary report on international liability for injurious consequences arising out of acts not prohibited by international law*, 24 and 27 June and 4 July 1980, A/CN.4/334, at p. 250-251; Quentin-Baxter, *Fifth report on international liability for injurious consequences arising out of acts not prohibited by international law*, 12 and 18 June 1984, UN Doc. A/CN.4/383, at para. 39.

<sup>65</sup> Eg Principles of European Tort Law art. 1.101 (‘person to whom damage to another is legally attributed is liable to compensate that damage’).

<sup>66</sup> Draft Principles on the Allocation of Loss in the Case of Transboundary Harm arising out of Hazardous Activities (n61).

<sup>67</sup> This seems to be the case eg in art. 232 of UNCLOS (‘States shall be liable for damage or loss attributable to them’), art 235(2) of UNCLOS also art. 7 of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (London, Moscow, Washington, 27 January 1967, in force 10 October 1967) 610 UNTS 205.

<sup>68</sup> Art. 10.101 and 10.104 of the Principles of European Tort Law.

It seems to follow that if the term ‘(joint) liability’, if it used, is concerned with compensation for damages. In a case where multiple tortfeasors together have caused damage, the plaintiff can collect the entire sum of compensation from either one of the defendants. This is also how the term is used in, for instance, the Outer Space Liability Convention<sup>69</sup> and in UNCLOS,<sup>70</sup> as well as in civil liability schemes attached to MEAs.<sup>71</sup>

The concept of joint responsibility is broader, and allows us to focus not (only) on damage and compensation, but rather on those consequences that are involved with removing the injury: continued performance<sup>72</sup> and cessation<sup>73</sup> and also re-establishment of the situation which existed before the wrongful act was committed.<sup>74</sup> For our purposes, it is in particular the latter concept that is relevant. No compensation claims seems to have been made against the EU and/or Member States in respect of joint non-performance of an obligation under a MEA that has resulted in damage.

This distinction between joint liability and joint responsibility can also be framed in terms of a distinction between a private law model of international responsibility (that is: in the context of claims of victim States for redress against one or a few responsible States) versus a public law model (that is: in the context of procedures and processes that essentially seek to uphold and ensure rule-conform conduct). Also given the fact that most of the practice involves non-compliance committees set up under MEAs (and thus has preeminently a public law character), in the remainder of this chapter we will speak of joint responsibility rather than joint liability.

### **The Concept of Joint Responsibility in EU-Member States Relations**

The concept of joint responsibility as defined above has direct relevance for the relationship between the EU and Member States under MEAs. We can distinguish two situations in which non-performance of an obligation under a MEA can result in joint responsibility as defined above. First, joint responsibility may be a response to the unclarity of a division of competences, which makes apportionment of the injury difficult or impossible and thus results in an undivided injury. Second, joint responsibility may result from specific situations in which the EU is responsible in connection with acts of Member States or vice versa, and the injury likewise is undivided.

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<sup>69</sup> Convention on International Liability for Damage Caused by Space Objects, art. IV.

<sup>70</sup> Law of the Sea Convention, Art 139.

<sup>71</sup> Eg. International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1969, in force 19 June 1975) (CLC), Art. 4 (stating that ‘When oil has escaped or has been discharged from two or more ships, and pollution damage results therefrom, the owners of all the ships concerned, unless exonerated under Article III, shall be jointly and severally liable for all such damage which is not reasonably separable.’) See also UNEP Guidelines for the Development of Domestic Legislation on Liability, Response Action and Compensation for Damage Caused by Activities Dangerous to the Environment, ‘Guideline 7, reproduced in UNEP, Report of the Governing Council, 11<sup>th</sup> Session (2010), A/65/25, at 18.

<sup>72</sup> Art. 29 of the DARIO.

<sup>73</sup> Art. 30 of the DARIO.

<sup>74</sup> Art. 35 of the DARIO.

Before discussion these two categories, one preliminary point is in order. In this chapter we are concerned with joint responsibility that arises as a matter of international law between the EU and member states on the one hand and third states on the other, in one of the situations discussed in the previous section. This joint responsibility is related to, but has to be distinguished from the joint responsibility between the EU and member states, or between member states themselves, as a matter of EU law.

The distinction is not always apparent, also since the cases of the ECJ in which joint responsibility was recognized<sup>75</sup> are concerned with both dimensions. For instance, the ECJ said ‘the extent of the respective powers of the Community and the Member States with regard to the matters governed by the Protocol determines the extent of their respective responsibilities in relation to performance of the obligations under the Protocol’.<sup>76</sup> That may be true as a matter of EU law, but, will be further discussed below, certainly is not necessarily true as a matter of international law.

Moreover, the fact that both the EU and member states externally can be held responsible leads can lead to a joint responsibility as a matter of EU, whereby the EU and member states may be subject to certain obligations of EU law to prevent such responsibility or to deal with its consequences, notably the obligation to cooperate.<sup>77</sup> However, the fact that as a matter of EU law the member states between themselves, possibly with the EU itself, are jointly responsible to achieve a certain result in itself is not a necessary condition or consequence of the external joint responsibility as a matter of international law.

Also the ‘joint’ effects for member states of an external responsibility of the EU (whether individually or jointly) are not matters of joint responsibility in terms of international law. Obviously, if the EU is responsible, this may internally have effects for all member states (as it may happen that secondary legislation will have to be repealed or new legislation will have to be introduced). But such joint effects stay within the ambit of EU law and are only a consequence of responsibility under international law, and are not to be equated with it.<sup>78</sup> The distinction calls for some caution in assessing the relevance of the case-law of the ECJ that refers to joint responsibility.

#### *Joint responsibility as a consequence of an (unclear) internal divisions of power*

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<sup>75</sup> Eg Case C-316/91, [1994], ECR I-623, I-660–661, at para, 29; Case C-239/03, *Commission v. France (Etang de Berre)* [2004] ECR I– 9325.

<sup>76</sup> Opinion 2/00, [2001] ECR I-09713 (‘Cartagena Protocol’), at para 16.

<sup>77</sup> *Id.*, par 18 (‘ In any event, where it is apparent that the subject-matter of an international agreement falls in part within the competence of the Community and in part within that of the Member States, it is important to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the Community ..’)

<sup>78</sup> See generally C. Ahlborn, ‘The Rules of International Organizations and the Law of International Responsibility’, ACIL Research Paper No 2011-03 (SHARES Series), [www.sharesproject.nl](http://www.sharesproject.nl).

<sup>78</sup> That is: they may be a proper consequence of joint responsibility under international law, but the internal obligations of Member States that follow from an international responsibility of the EU themselves are not a manifestation of joint responsibility in international law.

Part of the reason for the reference to joint responsibility seems to lie in the fact that the EU and Member States have shared competences in respect to environmental protection,<sup>79</sup> which extend to the external level,<sup>80</sup> but the precise division of which often is unclear. Member States remain competence for treaty making beside the EU's shared treaty-making power, -as long as the EU has not acted at all, or has not regulated the matter fully.<sup>81</sup> The problem is that if, at least for third parties, often is unclear when this is or is not the case. It is the inability to apportion who contributed what part of the injury that justifies resort to joint responsibility.<sup>82</sup>

The root cause of the problem of unclarity of the division of powers in the external affairs lies in the autonomy of the EU legal order. The combined effect of *Van Gend and Loos*<sup>83</sup> and *Kadi*<sup>84</sup> is that the EU as a legal entity is autonomous from international law.<sup>85</sup> If we accept this claim to autonomy, it follows that, like States, the EU is a black box, and that how power is arranged within the EU therefore is largely irrelevant for the international responsibility towards third parties. Indeed, the ECJ has determined that in the case of a mixed agreement the division of competence between Member States and the Community is an internal question.<sup>86</sup> While the external joint responsibility of the EU and its Member States, where it exists in international law, is a matter of international law,<sup>87</sup> the question of who internally is responsible for what is largely an internal question.

While for many MEAs the EU has submitted a declaration of competence that seeks to make clear externally how competences are divided internally,<sup>88</sup> more often than not such

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<sup>79</sup> Under Article 4(2)(e) Treaty on the Functioning of the European Union, 30 March 2010, C 83/47 (TFEU). To remove all doubts that Member States retain competence, the Declaration in relation to the delimitation of competences stipulates that 'in accordance with the system of division of competences between the Union and the Member States as provided for in the TFEU, competences not conferred upon the Union in the Treaties remain with the Member States'. Declaration Annexed to the Final Act of the Intergovernmental Conference Which Adopted the Treaty of Lisbon, 12 December 2007, C83/344, nr 18.

<sup>80</sup> Article 191(4) TFEU. See generally on the external role of the EU in international environmental policy Vogler (n7); T. Delreux, 'The European Union in international environmental negotiations: a legal perspective on the internal decision-making process', *International Environmental Agreements*, 6 (2006) 231 at 235-236.

<sup>81</sup> Article 2(2) TFEU provides that when the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. See also A. Peters, 'Treaty Making Power', in Wolfrum, Rüdiger (ed), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2009, online edition, [www.mpepil.com].

<sup>82</sup> Case C-316/91, *European Parliament v Council of the European Union*, [1994] ECR I-625, 660-661.

<sup>83</sup> Case 26/62, *Van Gend and Loos*, 5 February 1963.

<sup>84</sup> Case C402/05 P & C 415/05 *Kadi and Al Barakaat*, 13 September 2008.

<sup>85</sup> See T. Schilling, 'The Autonomy of the Community Legal Order: An analysis of Possible Foundations', *Harvard International Law Journal* 37 (1996) 389, R. Barents, *The Autonomy of Community Law* (The Hague, Kluwer Law International, 2003), P. Craig and G. de Burca, *The Evolution of EU Law* (Oxford University Press, 2011).

<sup>86</sup> Ruling 1/78, *Ruling delivered pursuant to the third paragraph of Article 103 of the EAEC Treaty*, ECR 2151, at para. 35: 'In this connection it is not necessary to set out and determine, as regards the other parties to the convention, the division of powers in this respect between the Community and the Member States, particularly as it may change in the course of time. It is sufficient to State to the other contracting parties that the matter gives rise to a division of powers within the Community, it being understood that the exact nature of that division is a domestic question in which third parties have no right to intervene.'

<sup>87</sup> Article 5 of the DARIO stipulates that 'The characterization of an act of an international organization as internationally wrongful is governed by international law.'

<sup>88</sup> See eg the following Council Decisions: 88/540/EEC of 14 October 1988, OJ L297, 31 October 1988, 8-9 (Vienna Convention for the protection of the ozone layer and the Montreal Protocol on substances that deplete



declaration do not provide clarity to third parties. When declarations do not exist or are not clear, and relevant information is not acquired by a process of notification, the impossibility to apportion responsibility may result in joint responsibility. For instance, a third State can hardly be assumed to be informed by the Declaration to the Cartagena Protocol, stipulating that ‘The [EU] is responsible for the performance of those obligations resulting from the Cartagena Protocol on Biosafety which are covered by [Union] law in force.’<sup>89</sup> Even if a declaration is relatively clear, the evolving contents of that Union law may make such a declaration a rather unreliable guide.<sup>90</sup>

This combination of an unclear division of internal powers and external joint responsibility underpins the *Etang de Berres* case.<sup>91</sup> The Court followed Advocate-General Jacobs who had expressed that ‘[u]nder a mixed agreement the [Union] and Member States are jointly liable unless the provisions of the agreement point to the opposite’<sup>92</sup> and that the internal division of competence does not seem to be of any relevance for third States.<sup>93</sup> Joint responsibility will protect the interests of third parties to a treaty, ‘which should not be unduly burdened with enquiring under whose area of competence a specific matter falls.’<sup>94</sup>

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the ozone layer); 93/626/EEC of 25 October 1993, OJ L309, 13 December 1993, 1-2 (Convention on Biological Diversity); 94/69/EC of 15 December 1993, OJ L33, 7 February 1994, 11-12 (United Nations Framework Convention on Climate Change); 95/308/EC of 24 July 1995, OJ L186, 5 August 1995, 42-58 (Convention on the protection and use of transboundary watercourses and lakes); 98/216/EC of 9 March 1998, OJ L83, 19 March 1998, pp. 1-2 (United Nations Convention to combat desertification in countries seriously affected by drought and/or desertification, particularly in Africa); 2002/358/EC of 25 April 2002, OJ L130, 15 May 2002, 1-3 (Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of their obligation thereunder); 2002/628/EC of 25 June 2002, OJ L201, 31 July 2002, 48-49 (Cartagena Protocol on Biosafety); 98/685/EC of 23 March 1998, OJ L326, 3 December 1998, 1-4 (Convention on Transboundary Effects of Industrial Accidents).

<sup>89</sup> Council Decisions 2002/628/EC of 25 June 2002, OJ L201, 31 July 2002, 48-49.

<sup>90</sup> M. Cremona, ‘External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility and Effects of International Law’, EUI Working Papers LAW No 2006/22, 21; M. Björklund, ‘Responsibility in the EC for Mixed Agreements – Should Non-Member Parties Care?’, *Nordic Journal of International Law*, 70 (2001) 373, 377.

<sup>91</sup> Case C-239/03, *Commission v. France*, (Etang de Berre), [2004], ECR I- 9325, at para. 26-30. See also Paasivirta and Kuijper (n13) 199.

<sup>92</sup> Opinion of Advocate General Jacobs to Case C-316/91, *European Parliament v Council of the European Union*, [1994] ECR I-625, at para. 69.

<sup>93</sup> The same may be inferred from Advocate-General Tesouro’s opinion in the *Hermes* case; after emphasizing that the Final Act and the WTO Agreement ‘contain no provisions on competence and the Community and its Member States are cited as original members of equal standing’, he concludes that the division of competence is a purely internal matter. Opinion of Advocate General Tesouro Case C-53/96, *Hermes International v FHT Marketing*, [1998] ECR I-3603, at para. 13-14.

<sup>94</sup> S. Talmon, ‘Responsibility of international organizations: does the European Community require special treatment?’ in: M. Ragazzi (eds), *International Responsibility Today: Essays in memory of Oscar Schachter*, (Martinus Nijhoff, Leiden, 2005) 419; J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (The Hague, Kluwer Law International, 2001), 121-155. See also E. Stein, ‘External Relations of the European Community; Structure and Process’, *Collected Courses of the Academy of European Law*, 1 (1991) 115, 179 (noting that ‘[u]nless a mixed agreement provides unambiguously for a distinction between the [Union]’s and the Member State’s rights and obligations, a breach on the part of the [Union] or the Member States causes joint responsibility’). Similarly C. Tomuschat, ‘Liability for Mixed Agreements’ in D. O’Keefe and H.G. Schermers (eds.), *Mixed Agreements* (Deventer, Kluwer Law and Taxation Publishers, 1983) 130.

The result would be that if a Member State has agreed to certain international obligations, it can be responsible to third parties for non-performance, even though the EU has exercised its competence in this area. The latter fact thus is, in itself, not a defense to the responsibility of the Member State.<sup>95</sup> Conversely, if the EU would together with Member States be a party to a convention, it could be responsible for the non-performance of the treaty, also if it is only a Member State that could implement a particular obligation. The repercussions of such divisions would be a matter of internal EU law.

It should be noted that the lack of clear notification of limits on consent to be bound may well reflect an unwillingness to specify powers, and third parties may thus intentionally be kept in the dark. The EU and Member States may not wish to go down the road to lay out specifically who is responsible for what - perhaps also because responsibility may feed back on power. But if so, the result will be that although power may rest only with Member States or the EU, and only Member States or the EU as the case may be can secure return to legality, both are bound to comply with international obligation.

#### *Involvement of the EU in conduct of Member States and vice versa*

A specific set of circumstances where joint responsibility may be a response to an undivided injury arises when the EU is involved in a wrongful act of a Member State, or vice versa, and their exact contribution to the injury cannot easily be apportioned. If we take the DARIO and its commentary as a guide, two sets of cases can be distinguished.

The first category consist of cases where the EU is involved a wrongful act of a Member State and its contribution to the injury cannot be easily be apportioned. This may be the case where the EU would provide aid or assistance to a Member State that commits an international wrong,<sup>96</sup> if it would direct or control a Member State,<sup>97</sup> if it would coerce a Member State<sup>98</sup> and if it would circumvent its international obligations through decisions and authorizations addressed to Member States.<sup>99</sup> Each of these situations can lead to a responsibility of both the organization and the Member States.<sup>100</sup>

While the second (direction and control) and third (coercion) of these constructions do not appear to be very relevant for the relationship between the EU and its Member States in the context of MEAs, the first and the fourth situation might be relevant. As to aid and assistance, the EU may aid and assist, for instance through the provision of subsidies, a wrong by a Member State. An example is financial support for the building of a road or dam that would lead to a violation of the Convention on Biodiversity, and to a situation of joint responsibility.<sup>101</sup>

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<sup>95</sup> This is also made clear by *Matthews v The United Kingdom*, ECtHR, Appl.nr. 24833/94, 18 February 1999.

<sup>96</sup> DARIO, art. 14.

<sup>97</sup> DARIO, art 15.

<sup>98</sup> DARIO, art 16.

<sup>99</sup> DARIO, art 17.

<sup>100</sup> DARIO art. 19 Note, however, that in case of coercion the coerced state might be able to rely on a circumstance precluding wrongfulness, with the result that no joint responsibility will apply.

<sup>101</sup> As noted above, it is questionable though whether this situation satisfies the requirement of 'the same wrongful act', see text to notes 30-42.

Even more relevant is the possibility that an obligation of EU law would require one or more Member States to engage in acts that would lead to violation of their international obligations. Such obligations under EU law could either be based on a treaty to which the EU would become party, that automatically would become part of the legal order of the EU and as such would be binding for a Member State and direct that Member State to act in contravention of a(nother) international obligation.<sup>102</sup> They also could be based on secondary law that would oblige a Member States to commit an act that would be in contravention of an international obligation. In these situations, under the principles of the ILC, the EU and the Member State(s) could be jointly responsible.<sup>103</sup>

The second category consists of a reverse set of cases where a Member State is responsible in connection with a wrongful act of an international organization. These cases mirror the situations just mentioned: aid or assistance by a State in the commission of an internationally wrongful act by the EU,<sup>104</sup> direction and control exercised by a Member State over the commission of an internationally wrongful act by the EU,<sup>105</sup> coercion of the EU by a Member State<sup>106</sup> and circumvention of international obligations of a member of the EU<sup>107</sup>. Once again, each of these situations can result in a responsibility of both the organization and a Member State.<sup>108</sup> Perhaps with the exception of the last possibility, these situations seem hardly relevant for the EU in general and for the EU's position under MEAs in particular, however, and are further left aside.

Though not all such situations are likely to arise in the (non-)performance of obligations of MEAs, they have one aspect in common: the conduct of the EU and Member States is closely intertwined. In particular factual scenario's it may not be easy, or even impossible to apportion responsibility for the eventual injury between them, and joint responsibility will be the result.

Conceptually, it is not obvious that the two cases distinguished here (mixed agreements with an unclarified internal division of powers, and involvement of the EU in wrongful acts of Member States and vice versa) represent separate categories. The situations that the ILC identified in the latter category are rather heterogeneous and can only be understood as a manifestation of a more fundamental phenomenon, that indeed is common to both categories: if the EU and Member States both contribute to an injury, and for third parties it is not possible to determine who caused what, such injury can be treated as undivided and responsibility can be joint.

## **Bases of joint responsibility**

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<sup>102</sup> Case 181/73, *R.&V.Haegeman v Belgian State*, [1974] ECR 449, at para. 5 (stating that that the provisions of an international agreement concluded by the Community 'from the coming into force thereof, form an integral part of Community law.'). See also Paasivirta and Kuijper (n13) 197.

<sup>103</sup> Hoffmeister (n18) 727, Talmon (n94) 410.

<sup>104</sup> DARIO, art 58, see also: Reinisch (N38) 63.

<sup>105</sup> DARIO, art 59.

<sup>106</sup> DARIO, art 60.

<sup>107</sup> DARIO, art 61.

<sup>108</sup> DARIO, art. 63.

After having identified a concept of joint responsibility that captures situations where responsibility cannot be apportioned between the EU and Member States, it now has to be determined how such a joint responsibility can be construed in terms of the law of international responsibility. It is one thing to conceptualize joint responsibility on the basis of limited international practice and domestic analogies, it is quite something else to ground joint responsibility in international law. In particular, while it thus seems to be an accepted part of the concept of joint responsibility that injured parties can bring a claim against each of the responsible entities, it is not obvious that (in a case where damage is caused) international law provides a basis for claiming from each of the responsible parties the full amount of compensation, only on the ground that respective contributions to the injury cannot easily be apportioned.<sup>109</sup>

Despite the fact that the practice of the EU and Member States seems generally to fit to the concept of joint responsibility, there are only very few clear examples of treaty provisions that accept such joint responsibility. Article 6 of Annex 9 of the UNCLOS is the best example. It provides:

1. Parties which have competence under article 5 of this Annex shall have responsibility for failure to comply with obligations or for any other violation of this Convention.
2. Any State Party may request an international organization or its Member States which are States Parties for information as to who has responsibility in respect of any specific matter. The organization and the Member States concerned shall provide this information. Failure to provide this information within a reasonable time or the provision of contradictory information shall result in joint and several liability.

This provision thus stipulates that when it is unclear whether the EU or Member States have responsibility in respect of a specific matter, the EU and its Member States shall be jointly and severally liable. What this means, for instance in terms of reparation, is not plain, however.<sup>110</sup> We will return to this question in the next section.

Also the Kyoto Protocol provides for joint responsibility. According to the EU Declaration upon signature, “The [EU] and its Member States will fulfill their respective commitments under Article 3 (1), of the Protocol jointly in accordance with the provisions of Article 4.”<sup>111</sup> Article 4(6) stipulates:

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<sup>109</sup> See *Certain Phosphate Lands in Nauru* (n24), Sep. Op. Judge Ago (stating that ‘Even if the Court were to decide — on what would, incidentally, be an extremely questionable basis — that Australia was to shoulder in full the responsibility in question...’). Also the fact that in his Separate Opinion in the *Oil Platforms* case Judge Simma made a distinction between joint responsibility as a basis for responsibility and as a basis for reparation may be traced to this point; see *Oil Platforms (Islamic Republic of Iran v USA)* (Merits), Sep. Op. Judge Simma (n22)

<sup>110</sup> The authoritative commentary by Nordquist recognizes the unclarity, noting that the ILC had at time not yet turned its attention to responsibility of international organizations, ‘even less so too issues involved in “joint and several liability”’); see Myron H. Nordquist, *The United Nations Convention on the Law of the Sea, 1982: a commentary* (2002) at 462.

<sup>111</sup> Declaration upon signature of the Kyoto Protocol by the European Union ([https://unfccc.int/kyoto\\_protocol/status\\_of\\_ratification/items/5424.php](https://unfccc.int/kyoto_protocol/status_of_ratification/items/5424.php)).

If Parties acting jointly do so in the framework of, and together with, a regional economic integration organization which is itself a Party to this Protocol, each member State of that regional economic integration organization individually, *and together* with the regional economic integration organization acting in accordance with Article 24, shall, in the event of failure to achieve the total combined level of emission reductions, be responsible for its level of emissions as notified in accordance with this Article (emphasis added).<sup>112</sup>

The words ‘and together’ make clear that for the obligation covered by the European bubble, responsibility indeed will be joint rather than individual. If the common target would not be met, both the Member States individually in relation to their target, together with the EU would be held liable.<sup>113</sup>

Quite remarkably, however, the large majority of MEAs in which the EU and Member States does not contain an express provision on joint responsibility. If in these other situations joint responsibility is to be applicable, it will have to be based on other constructions. We will review three separate bases: breach of an international obligation that is binding on both the EU and on Member States, attribution of relevant conduct and attribution of responsibility.

### *Breach of an obligation binding for the EU and the Member States*

Joint responsibility of the EU and of Member States for non-performance can only arise when both the EU and the Member States are bound by the MEA in question and act in breach of that obligation.<sup>114</sup> We leave the various questions that may arise in the determination of whether or not conduct of the EU and Member States is in breach of an obligation aside, and focus only on the requirement that the obligation is binding for both the EU and Member States.

If the EU and Member States are not bound by the same obligation, no question of joint responsibility will arise. This is for instance the case for the CITES Convention,<sup>115</sup> the various IMO Conventions relating to marine pollution<sup>116</sup> and also for the Convention on Civil

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<sup>112</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997, in force 16 February 2005).

<sup>113</sup> Jacquemont (n14) 369, 372. Note that this only applies to the European bubble. For obligations outside this bubble, the Compliance Committee under the Kyoto Protocol has not approached questions of non-compliance by the EU and/or the Member States in terms of joint responsibility. Eg Enforcement Branch of the Compliance Committee, Final Decision, 17 April 2008, *Greece*, CC-2007-1-8/Greece/EB and Enforcement Branch of the Compliance Committee, 9 April 2008, *Further submission of Greece under section X, Decision 27/CMP1*, CC-2007-1-7/Greece/EB. See further section 5 below.

<sup>114</sup> Given our focus on responsibility arising under the same agreement, the relation between overlapping obligations stemming from different sources and joint responsibility is left aside here. See on this phenomenon Y. Shany, T. Broude, *Multi-sourced Equivalent Norms in International Law*, (Hart Publishers, 2011).

<sup>115</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora (adopted 3 March 1973, entered into force 1 July 1975) 993 UNTS 243.

<sup>116</sup> Eg International Convention for the Prevention of Pollution from Ships, 1973 (signed 2 November 1973, entered into force 2 October 1983) 1340 UNTS 184 (MARPOL Convention), as amended by Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (with Annexes, Final Act and International Convention of 1973) (signed 17 February 1978, entered into force 2 October 1983) 1340 UNTS 61. See for a discussion of the position of the EU in the IMO N. Liu and F. Maes, ‘The European Union

Aviation.<sup>117</sup> A dispute under the latter Convention illustrates the consequences. While the EU is not a party to the Convention, which established the International Civil Aviation Organization (ICAO) the EU had adopted a substantial body of legislation on air transport, that also regulates noise pollution. When it banned certain models of airplane from European skies for reasons of noise pollution, it could not assume the external responsibility in the ICAO. A State member of the ICAO then used a quasi-judicial procedure in the organization against the EU legislation by attacking all the EU Member States in the ICAO - even though they no longer had the power internally.<sup>118</sup>

It can be noted that if the EU is not bound to an international obligation, joint responsibility also will not arise in situations of aid and assistance,<sup>119</sup> direction or control<sup>120</sup> and 'circumvention'<sup>121</sup> - in the logic of the ILC, each of such forms of involvement only lead to responsibility of the EU is the organization itself would also be bound by the obligation in question.

In those cases where EU and its Member States are a party to a MEA, the presumption is that in principle they are bound by the entire agreement, unless anything else is agreed.<sup>122</sup> Third States will be entitled to demand performance of all treaty obligations by both the EU and the Member States.<sup>123</sup>

It is to be noted however, that the fact that both the EU and Member States are both bound by a MEA does not necessarily transform such obligations into joint obligations.<sup>124</sup> Each party is bound by the obligations it has accepted, and as such there remain individually binding on the respective parties. It seems that only when a specific agreement is made to this effect, or that the intention to enter into a joint obligation can be inferred from the circumstances, that we can speak of joint obligations. An example is the Kyoto Protocol; as stated in EU Declaration upon signature of the Kyoto, "The [EU] and its Member States will fulfill their respective commitments under Article 3 (1), of the Protocol jointly in accordance with the provisions of Article 4."<sup>125</sup> Another example are agreements entered into by the EU and Member States as

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and the International Maritime Organization: EU's External Influence on the Prevention of Vessel-Source Pollution', *Journal of Maritime Law and Commerce* 41 (2010) 581-894.

<sup>117</sup> Convention on International Civil Aviation (signed 7 December 1944, entered into force 4 April 1947) 15 UNTS 295.

<sup>118</sup> See K. E. Brown, 'The International Civil Aviation Organization is the Appropriate Jurisdiction to Settle Hushkit Dispute Between the United States and the European Union', *Pennsylvania State International Law Review*, 20 (2002) 465.

<sup>119</sup> Art. 14(b) of the DARIO.

<sup>120</sup> Art. 15(b) of the DARIO.

<sup>121</sup> Art. 17(1) of the DARIO.

<sup>122</sup> Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 20 March 1986, not yet entered into force) (1986) 25 ILM 543, art 26. Cf. ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion*, ICJ Rep. 1980, 73, 89-90, par 37: 'International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them . . . under international agreements to which they are parties'.

<sup>123</sup> Talmon (n94) 405.

<sup>124</sup> See on this concept Glanville Williams, *Joint Obligations*, London, 1949, cited in *Certain Phosphate Lands in Nauru*, Sep. Op. Judge Shahabuddeen (n24) par. 51. See also Nollkaemper and Jacobs (n20) on the concept of shared obligations.

<sup>125</sup> Declaration upon signature of the Kyoto Protocol by the European Union ([https://unfccc.int/kyoto\\_protocol/status\\_of\\_ratification/items/5424.php](https://unfccc.int/kyoto_protocol/status_of_ratification/items/5424.php)).

one party.<sup>126</sup> The distinction between situations where the EU and Member States are bound by the same agreement, on the one hand, and where they are bound by joint obligations is relevant for our purposes, since in the latter case joint responsibility for non-performance is implied, whereas in the former case the further step of attribution of conduct or responsibility is relevant.

Exceptions to the principle that where EU and its Member States are a party to a MEA, the presumption is that in principle they are bound by the entire agreement, can apply when power has shifted to the EU,<sup>127</sup> in particular when the EU acquires exclusive competences.<sup>128</sup> It follows from Article 216 that where the EU has acquired exclusive competences, in principle only the EU, not the Member States have the power to conclude an international agreement. Such transfers thus will preclude the possibility of joint responsibility.

However, transfers of power does not in itself alter the scope of international obligations entered into by Member States. In Opinion 2/2000 ('Cartagena Protocol'), the ECJ said that the extent of the respective powers of the Community and the Member States with regard to the matters governed by the Protocol determines the extent of their respective responsibilities in relation to performance of the obligations under the Protocol.<sup>129</sup> If this is true as a general proposition, it is only true as a matter of EU law, not international law. It is significant that the ECJ immediately explained the need for cooperation in the performance of international obligations, once again as a matter of EU law.<sup>130</sup> Also a WTO panel concluded that internal limitations on power do not automatically affect at the external plane the validity of agreements concluded by Member States even in regard to a treaty where Member States had transferred (exclusive) powers to the EU.<sup>131</sup>

It is suggested that this is only different when the transfer of power actually is reflected in the scope of the international agreement in question or, alternatively, in situations covered by Article 46 of the VCLT. As to the former possibility, divisions of powers can be reflected in the scope of the agreement though a declaration of competence.<sup>132</sup> These permit an international organization and its Member States to limit their consent to be bound by the treaty to matters in respect of which they have competence.<sup>133</sup> An example of such declarations that allow internal division of powers to acquire external relevance is Article 6 of Annex 9 of the UNCLOS, providing that the EU should indicate as to who has responsibility in respect of any specific matter.<sup>134</sup> If declarations of competence are clear and competence and obligations are distinguished, as a matter of the law of treaties the obligations indeed will

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<sup>126</sup> Case C-316 /91, *European Parliament v. Council of the European Union*, [1994] ECR I-00625, at para. 29; Talmon (n94) 408.

<sup>127</sup> Art. 2(1) TFEU stipulates that 'when the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts .

<sup>128</sup> Art. 3(2) TFEU.

<sup>129</sup> Opinion 2/00, [2001], ECR I-09713 ('Cartagena Protocol'), at para. 16.

<sup>130</sup> *Id.*, par 17.

<sup>131</sup> World Trade Organization Dispute Settlement Body, *European Communities – Customs Classification of Certain Computer Equipment (United States v European Communities)*, 5 June 1998, DS62; see Hoffmeister (n18) at 731.

<sup>132</sup> See the examples in (n86).

<sup>133</sup> Talmon (n94) 405.

<sup>134</sup> (n6).

be apportioned. External responsibility will then follow from the scope of competences, as notified to other States. The EU and Member States are only bound by their respective areas, and the competence of one excludes competence of the other. In the *Swordfish case* the division of competences was indeed mirrored in the scope of external obligation.<sup>135</sup> Another example of a declaration that provides at least some guidance on the matters that fall within the responsibility of the EU and that of Member States is the declaration of competence provided with regard to the Aarhus Convention.<sup>136</sup>

An alternative, or supplementary mechanism is to allow third parties to inquire into the division of power. The example given by the UNCLOS<sup>137</sup> was followed by other agreements, such as the Agreement on the promotion, provision and use of Galileo and GPS based satellite systems and related applications, concluded by the EU and the US<sup>138</sup> and the Energy Charter Treaty.<sup>139</sup>

However, if declarations of competence are not clear, and if not clarity is provided by a notification, the presumption has to be that both the EU and Member States are bound by the entire agreement, and third States can demand full compliance with both.

### *Attribution of conduct*

Being bound to the same obligation is a necessary, but not a sufficient condition for the joint responsibility of the EU and Member States under MEAs to be engaged. In the logic of the system of international responsibility as written down by the ILC, breach of an obligation has to be supplemented by attribution.

However, while there is broad acceptance that something is to be attributed to an actor who it to be held responsible, the question is what should be attributed. In the Articles on State Responsibility, a wrongful act presumes attribution of the conduct in question to the wrongdoing state. The approach is thus quite different from that in for instance the Principles of European Tort Law, where it is the damage that is to be attributed, not the conduct.<sup>140</sup> The difference is significant. While it non-problematic to say that the same damage can be attributed to (which mostly will mean: was caused by) two actors, it is quite something else to say, and it may not be immediate obvious what it means to say, that a particular *conduct* is to

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<sup>135</sup> Hoffmeister (n18) 739.

<sup>136</sup> Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, OJ L 124 (2005).

<sup>137</sup> Art. 6(2) of Annex 9 reads 'Any State Party may request an international organization or its Member States which are States Parties for information as to who has responsibility in respect of any specific matter. The organization and the Member States concerned shall provide this information. Failure to provide this information within a reasonable time or the provision of contradictory information shall result in joint and several liability'

<sup>138</sup> Agreement on the Promotion, Provision and use of Galileo and GPS Satellite-based Navigation Systems and related Applications, European Communities No. 2 (2008), 26 June 2004 (providing in Article 19 that 'If it is unclear whether an obligation under this Agreement is within the competence of either the [EU] or its Member States, at the request of the United States, the [EU] and its Member States shall provide the necessary information.')

<sup>139</sup> The Energy Charter Treaty (Lisbon, 17 December 1994, in force 16 April 1998), 34 I.L.M. 556 (1995).

<sup>140</sup> Principles of European Tort Law art. 1:101. This point is related to the earlier discussion on the role of injury in the determination of joint responsibility, see text to notes 28-42.



be attributed to two actors. Indeed, as will appear from the discussion below, if the principle of joint responsibility between the EU and its Member States would have to rely on attribution of conduct to both the EU and its Member States, its role would be marginal at best.

A first possibility is that a particular conduct indeed is attributed to both the EU and Member States. Though this construction raises fundamental questions that have hardly been explored in the literature, the ILC considered dual attribution to be a possible construction.<sup>141</sup> Assuming that both the organization(s) and/or States are bound by the obligation in question, joint responsibility may result.<sup>142</sup>

One relatively uncontested example (with little relevance for MEAs however) arises when the EU and member states conclude, as one party, a treaty with another party. Any action by either the EU or a member states then is attributed to the joint entity.<sup>143</sup> Another option is that states can put organs at the disposal of international organisations. There is some authority for the proposition that that such organs, while being subjected to effective control by the organisation, remain under the normative control of Member States, and their acts thus can lead to dual attribution.<sup>144</sup> This construction too has limited relevance for the position of the EU under MEAs, as it commonly is accepted that the construction of 'being put at the disposal' is not appropriate, since the EU does not exercise effective control over the Member States.<sup>145</sup>

Dual attribution might, nonetheless, be considered applicable for those areas that are under exclusive EU competence. Though the matter is contested, it is a compelling argument that in such cases, Member States are considered as agents of the EU.<sup>146</sup> In the example of the *Swordfish case*, while the fishing vessel in question was Spanish, the action by Chili was directed against the EU.<sup>147</sup> Also in several WTO cases, transfer of powers results in attribution of acts of member states to the EU. The fact that the actual conduct was in the

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<sup>141</sup> Commentary to the DARIO, p. 81 par 4 ('Although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded. Thus, attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State; nor does attribution of conduct to a State rule out attribution of the same conduct to an international organization.').

<sup>142</sup> Giorgio Gaja, *Second Report on Responsibility of International Organizations*, 2 April 2004, A/CN.4/541, at para. 8.

<sup>143</sup> Case C-316 /91, *European Parliament v. Council of the European Union*, [1994] ECR I-00625, par. 29; Talmon (n94) 408. This construction seems identical to dual attribution of acts of common organs, see Commentary to paragraph 2 of the commentary on Article 27 of the Commission's Draft Articles on State Responsibility of 1978, Yearbook of the International Law Commission, 1978, Vol. II, Part Two, p. 99; *Certain Phosphate Lands in Nauru*, Sep. Op. Judge Shahabuddeen (n24) par. 39.

<sup>144</sup> See e.g. N. Tsagourias, 'The Responsibility of International Organisations for Military Missions', in M. Odello, and R. Piotrowski (eds), *International Military Missions and International Law* (Martinus Nijhoff Publishers, forthcoming); T. Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers', *Harvard International Law Journal*, 51 (2010) 113-192.

<sup>145</sup> Paasivirta and Kuijper (n13) 212 ff.

<sup>146</sup> Talmon (n94) 410. See also DARIO, art 2 (d) and art. 5(2).

<sup>147</sup> Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community) (Order) ITLOS Case No 7. The Tribunal took positive note of the settlement reached between the two parties, thereby acknowledging the fact that the Union was (solely) competent to deal with the matter before and outside the Court; see Hoffmeister (n18) at 739.

hands of member states did not make a difference, as it was recognized that it is the normal mode of operation of EU law is that it is applied, implemented and executed by the authorities of the Member States.<sup>148</sup>

The question then is whether such attribution results in exclusive attribution. It has been said that under Article 6 of the DARIO, shared or divided attribution would not seem to be a permissible construction of attribution. In contrast to Articles 14-18, for which Article 19 expressly recognizes the possibility of responsibility of Member States next to the organization, the part in which article 6 is placed does not contain a similar clause. Attribution seems to be a black or white question: a person is either an organ or agent of an international organization *or* an organ or agent of a Member State.<sup>149</sup> But the matter is not entirely clear. The Commentary preceding Article 6 DARIO expressly recognizes the possibility of dual attribution,<sup>150</sup> and does not appear to exclude attribution under Article 6 from this possibility. Talmon notes that what now is Article 6 would allow for dual attribution, and if that is not considered desirable, a special provision to that effect should have been inserted.<sup>151</sup>

An argument in support of this construction is that it generally seems undesirable to base attribution (only) on power. While the examples of the WTO given above indicate that (just as the bindingness of obligations) attribution is influenced by the competence (or power) of respectively the EU and Member States,<sup>152</sup> competence in itself is a feeble basis for attribution. Using competence as a basis for attribution sits uneasily with the well-established principle that acts that exceed formal power, also can lead to responsibility.<sup>153</sup> Making attribution contingent on the scope of formal power would mean that an act for which a member state had no formal power is not attributed to that state but to the EU, as the state could not be responsible for *ultra vires* acts. Combined with the possibility that the EU may not be bound by the obligation in question, or that the EU may be bound but not be subjected to the jurisdiction of an international tribunal, that could result in an accountability gap. Joint

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<sup>148</sup> World Trade Organization Dispute Settlement Body, Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R (2000) (Canada challenged a French decree of 1996 banning asbestos. Even though only in 1999 the EU started the legislative process for a directive on this matter, the panel did not question the fact that the Union defended the case rather than France.); *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R; WT/DS292/R, WT/DS293/R (2006) (The Panel observed that ‘the European [Union] never contested that, for the purposes of this dispute, the challenged Member States measures are attributable to it and can be considered EC measures. Indeed, it was the European [Union] – and it alone – that defended the contested member States safeguard measures before the Panel.’), at para 7.101.

<sup>149</sup> P.J. Kuijper, ‘Introduction to the Symposium on Responsibility of International Organizations and of (Member) States : Attributed or Direct Responsibility or Both?’ *International Organizations Law Review*, 7 (2010), 9, 31 (noting that ‘According to the present wording of Article 4 of the Draft Articles, shared or divided attribution would not seem to be a permissible construction of attribution. Attribution seems to be a black or white question: is it an organ or agent of an international organization that has acted or the organ or agent of a Member State? The choice has to be made.’).

<sup>150</sup> Commentary to the DARIO, p. 81 par 4

<sup>151</sup> Talmon (n94) at 413.

<sup>152</sup> The ECJ also recognized that as a matter of EU law the extent of the respective powers of the EU and the Member States ‘with regard to the matters governed by the Protocol determines the extent of their respective responsibilities in relation to performance of the obligations under the Protocol; Opinion 2/00, [2001] ECR I-09713 (‘Cartagena Protocol’), at para. 16.

<sup>153</sup> Art. 7 ASR; art. 8 DARIO.

responsibility may (partially)<sup>154</sup> prevent such gaps. Article 17 of the DARIO partially may close that gap, that would result in responsibility of the EU for acts within its normative control, even though the conduct as such is attributed to the member state.<sup>155</sup>

A second situation in which attribution of conduct may lead to joint responsibility arises when the EU and Member States perform distinct actions that are separately attributed. For instance, the EU might adopt a directive that is implemented by Member States, and both the EU and the Member State might by these acts be in breach of an international obligation that is binding upon them. It is not improper to see this as a case of concerted action that can lead to joint responsibility.

In this situation it may not be obvious that we are dealing with indivisible injury - we might rather be dealing with two separate acts that are separately attributed. Nonetheless, the EU (and perhaps Member States) may have an interest to treat such situations as cases of joint responsibility, and to be regarded as joint defendants. This is the construction envisaged in the Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in July 2011.<sup>156</sup> When both the EU and the Member States have adopted legislative acts, or the latter acts within an area covered by EU law, the Court may be confronted with separately attributable acts, which are however closely related. The co-respondent mechanism would allow the EU to become a co-respondent to proceedings instituted against one or more of its Member States and vice versa, if EU law is called into question. The apparent aim is to secure a finding of joint responsibility against the EU and Member States, without making individual determinations, based on the scope of competences, of the EU and the Member States.<sup>157</sup> It can be observed that this envisaged form of joint responsibility is different from the conceptualization provided earlier, since it does not rest on claims against individual wrongdoing actors for the undivided damage. However, the Draft Agreement does not seem to bar the Court from making determinations of individual attribution against either the EU or a Member States in a case of joint responsibility.<sup>158</sup>

In regard to the position of the EU and Member States under MEAs, no comparable efforts appear to have been made to treat such cases as joint responsibility (with the apparent aim to leave the determination of the consequences to the internal legal order of the EU). Rather, such cases could be treated on two alternative basis. On the one hand, they could be considered in terms of attribution of responsibility, discussed below. On the other hand, it may not be obvious that using the concept of joint responsibility for a situation where both

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<sup>154</sup> For its could not provide a solution to the limited jurisdiction of international courts.

<sup>155</sup> Talmon (n94) 410. See further infra, text to notes 162-164.

<sup>156</sup> Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, CDDH-UE(2011)16, Strasbourg, 19 July 2011. See also CDDH-UE(2010)14, 22 Oct. 2010, para 9; and CCDH-UE(2011), para 37.

<sup>157</sup> See also JP Jacqué, 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms', 48 *Common Market Law Review* (2011) 1016.

<sup>158</sup> In principle, in a *Bosphorus* type situation a plaintiff might well decide to litigate against the EU rather than, as in the pre-accession period, against a Member State, but it does not seem that in such a situation the case could no longer be brought against the Member State. Compare T Lock, 'Walking A tight rope: the draft accession agreement and the autonomy of the EU legal order', 46 *Common Market Law Review* (2011) 1025 at 1039.

conduct of the EU and of one or more Member States results in injury has any added value. At least in the situation where we are concerned with legal injury (rather than damage where issues of causation may be more complex), it would seem possible to treat such situations under the traditional paradigm of individual responsibility.

### *Combined attribution of conduct and responsibility*

A quite different construction of joint responsibility applies where conduct remains attributable to the Member State, but the responsibility is attributed to the EU. This construction, which has been endorsed by the ILC in the DARIO, raises fundamental questions. It represents a departure from the starting point that a wrongful act, and responsibility, depends on the twin conditions of breach of an international obligation and attribution of conduct. The construction bears some (though partial, since responsibility is only attributed to one actor, with the responsibility of the other still being based on attribution of conduct) similarity with joint liability in domestic contexts - where liability is based on a contribution to damage, not on attribution of conduct. The foundations of the construction are very much undertheorized, and their relationship with the normal conditions of wrongfulness not at all well articulated.

The justification for the combination of attribution of conduct and attribution of responsibility seems to lie in the combination of actual conduct and control<sup>159</sup> exercised over that conduct. While the control is not of such a nature that it results in attribution of the conduct itself, it does contribute to the eventual wrong (and injury). The last step in the argument is then that since the contribution of the controlling state and the of responsibility may not easily be apportioned, joint responsibility may be a proper response.

The argument is essentially based on the normative control that the EU exercises over large parts of the subject-matter covered by MEAs. Whenever the EU adopts directives in such areas as habitat protection or marine pollution and Member States adopt national legislation implementing such directives, they act within normative sphere of EU law. The power of the Member State in respect of the subject matter is accordingly reduced, not only internally, but also externally. The *Mox Plant case* illustrates this point. The ECJ observed that the substance of the UNCLOS provisions in question was covered by EU law, and that the complaints relating to the international transfer of radioactive substances fell within another EU law instrument.<sup>160</sup> As the EU had exercised its competence with respect to environmental protection when acceding to UNCLOS, the dispute was not of an international nature, but a dispute over the interpretation and application of Union law over which it enjoyed exclusive jurisdiction.<sup>161</sup>

It may be inferred that when EU law governs both the substantive legality of and the available remedies for a measure, the EU exercises normative control over it. It will only be the Union

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<sup>159</sup> The term control is here used in a loose sense, not to be equated with effective control in art. 7 of the DARIO.

<sup>160</sup> Case C-459/03, *Commission of the European Communities v. Ireland* [2006] ECR I-4635; P.J. Cardwell & D. French, 'Who decides? The ECJ's Judgment on Jurisdiction in the Mox Plant Dispute', *Journal of Environmental Law*, 19 (2006), 121.

<sup>161</sup> Under what now is Article 344 TFEU.

which could modify or allow the modification of such measure in order to bring it into line with an international norm. The internal regulatory competence of the Union for matters falling within the scope of the Treaty is translated into the EU's international responsibility for measures taken under its normative authority.<sup>162</sup> If injury results, the argument that the EU should be jointly responsible next to the Member State(s) in question is persuasive.

The DARIO reflect the weight of evolution of normative control, though in a somewhat complicated manner.<sup>163</sup> If the EU adopts a regulation or directive that require a Member State to act in violation of an international obligation, that could entail the responsibility of the EU. This could be based on Article 16 (direction and control)<sup>164</sup> and more expressly on Article 17 (that deals with wrongful acts based on decisions of international organizations). For instance, the EU could adopt a regulation, or a directive leaving little discretion, that would require Member States to violate, say, the Biodiversity Convention. The Member States that would implement the regulation or directive would commit an internationally wrongful act. However, the EU that had adopted the regulation or directive would, apart from its possibility acting in direct breach of the Convention itself, also incur a derived responsibility on this basis, leading to joint responsibility.

From the perspective of the nexus between power and responsibility such joint responsibility makes sense. While in this scenario the wrongfulness of the acts by Member States is a given – it is after all that Member State to whom the act is attributed, the organisation would be responsible if the Member States, under the rules of the organisation, *had* to carry out an act that would be wrongful according to the international obligations resting upon the organization. That act, could only be withdrawn or changed by the EU, not by the Member States.

For non-compliance institutions under MEAs this construction does not appear to be very relevant. Apart from the fact that formal responsibility is not a relevant category for such institutions, they may be able to establish both for the EU and for the Member State in question that they were in non-compliance.

However, in the rare situation where a third State may seek to invoke responsibility of the EU and/or Member States, the construction discussed here is relevant. A hypothetical example may be based on the facts of the *Mox Plant* case, with a non EU State, say Iceland, substituted for Ireland. In such case, the direct alleged wrong would still be committed by the UK, but that would, as acknowledged by the ECJ, be acting in the normative sphere of EU law. In such a situation there arguably would, in the ILC's logic, probably exist a situation of joint responsibility, with the conduct being attributed to the UK and the responsibility to the EU.

The fundamental question in this hypothetical remains, however, on what basis the EU would be responsible vis-à-vis the UK and on what basis Iceland could invoke the responsibility of the EU. Even if the obligation that was 'circumvented' could be construed as being owed to

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<sup>162</sup> Hoffmeister (n18) at 723.

<sup>163</sup> The notion of 'circumvention' that as a constitutive element of art. 17 DARIO has no place in the argument immediately above, that is based on normative control.

<sup>164</sup> Commentary to DARIO, article 16, par. 4-5.

the Iceland,<sup>165</sup> the problem is that responsibility, and thus presumably also invocation is not based on a breach of *that* obligation. This is yet another manifestation of the fact that a system of joint responsibility functions much easier, and has a much more coherent basis, if it is based on contribution to (undivided) injury, rather than on attribution of conduct, whether or not supplemented with attribution of responsibility.

It is to be added that in such a case, the treaty in question will be part of EU law, and the regulation or directive adopted by the EU, and requiring action by Member States, will be unlawful under EU law. Hence it is questionable whether Member States should comply with such a regulation or directive at all. It can indeed be argued that in such cases Member States are not longer justified in acting as they would otherwise have acted, and that precisely in that fact lies the justification for Member States responsibility.<sup>166</sup> However, this is another instance where the logic of the internal EU system and the system of international responsibility collide: since the EU is a closed system, non-obedience is not an option and as long as the impugned regulation or directive has not been attacked, non-compliance would be illegal as a matter of EU law.

## Consequences

It appears from the above that in certain circumstances the responsibility between the EU and the Member States can be characterized as joint. Apart from the situations covered by specific treaty provisions (such as UNCLOS and the Kyoto Protocol), this may be the case when both the EU and Member States are bound by an MEA, and when conduct and/or responsibility could be attributed to both. The main rationale for resorting to the rather unusual (at least in international law) construction of joint responsibility is the unclarity in the relations between the EU and Member States as to who caused what.<sup>167</sup> The main response that the principle in theory allows for is that third parties can bring a claim against each of the wrongdoing Member States and/or the EU separately. Such a claim could be directed at obtaining full reparation for the undivided injury from either of them.<sup>168</sup>

The true test of the concept of joint responsibility for EU-Member State relationships under MEAs, then, lies in degree and way in which such consequences occur and/or relevant in relation to non-performance of international obligations under MEAs. I approach this question in two parts. First I will review to (limited) practice, mainly in the context of non-compliance

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<sup>165</sup> That will then be based on art. 43(b)(ii) of the DARIO (providing that a State is entitled as an injured State to invoke the responsibility of an international organization if the obligation breached is owed to a group of States or international organizations including that State and the breach of the obligation specially affects that State).

<sup>166</sup> Orakhelashvili (n36) 247.

<sup>167</sup> See on the situations in which joint (or shared) responsibility arise also P.J. Kuijper, 'Introduction to the Symposium on Responsibility of International Organizations and of (Member) States : Attributed or Direct Responsibility or Both?', *International Organizations Law Review*, 7 (2010) 9, 31 (noting that 'Shared responsibility is very necessary in areas of shared competence between international organizations and Member States, but probably results not so much from the exceptional situation described in Articles 16 and 62 of the Draft Articles, but simply from an error of the Member States in implementation or a misconception regarding the boundary between Member States and organization competence').

<sup>168</sup> However, as noted earlier, it is questionable whether general international law provides for such a consequence if contribution to injury cannot be easily apportioned. See also See *Certain Phosphate Lands in Nauru*, Sep. Op. Judge Ago (n107).

bodies. Thereafter I will discuss the limits of a joint responsibility paradigm in a public order context, when the overriding need is to identify who needs to do what to ensure performance of obligations – also if this involves a determination of the division of powers between the EU and Member States.<sup>169</sup>

### *Individualization of responsibility*

It has been suggested that in non-compliance proceedings, this would mean that a committee simply would conclude that the EU and the Member States have failed to comply and will determine and apply the consequences of non-compliance. The responsibility and consequences for non-compliance then would have to be determined on the basis of EU law within the EU.<sup>170</sup> This is similar to the construction that is advanced in the Explanatory report to the Draft Agreement on the Accession of the EU to the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>171</sup> These arguments do not so much appear to be based on the logic of joint responsibility,<sup>172</sup> as on the specific nature of the EU-Member States relationships, and in particular the perceived need to protect the autonomy of the EU legal order.

However, where both the EU and Member State(s) are bound by the obligation in question and that the act and/or responsibility is attributable to both, it does not appear that this claim to autonomy bars third States or international institutions to addressing claims or determinations of wrongfulness to both. In any case the (limited) practice of non-compliance institutions does not provide support for such a limitation of power of international institutions.

Indeed, the point of joint responsibility is that an injured State (or international institution) is not required to refrain from addressing a claim to one or more Member States until the EU has failed to provide reparation or vice versa. Whereas injured States or international institutions are not required to refrain from addressing a claim to any of the responsible entities, neither are they required to address all parties. Somewhat paradoxically, the ‘jointness’ of responsibility thus translates in a possible individualization of claims. Just as it is, in a domestic context with a joint liability system, perfectly legitimate for injured person to address a claim primarily to that person (among a multiplicity of responsible persons) who

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<sup>169</sup> I leave the question of the internal consequences of joint responsibility within the EU aside, as these are only governed by EU law, not international law. But note that the ECJ highlighted the importance of cooperation in this context, Opinion 2/00, (‘Cartagena Protocol’), [2001] ECR I-09713, at para. 18. See also Case C-316/91, *European Parliament v. Council of the European Union* [1994] ECR I-00625, at para. 35 (the competence to implement the Community’s obligation under the Lomé Convention is shared and that the obligations must be performed by them together). See for an example of internal effects Commission Decision laying down rules implementing Decision No 280/2004/EC of the European Parliament and of the Council concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the Kyoto Protocol, OJ 2004 OJ L 49, which establishes procedures for exchange of information and coordination, which gives an opportunity for the party(es) concerned to return to compliance before the question of implementation leads to a non-compliance declaration..

<sup>170</sup> Jacquemont (n14) 372 ff.

<sup>171</sup> Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, CDDH-UE(2011)16, Strasbourg, 19 July 2011.

<sup>172</sup> As was suggested by Australia in the Nauru case, *see supra* text to (n24).

has the best prospects of providing most of the funds,<sup>173</sup> so in international law it is perfectly compatible with the logic of joint responsibility that claims are directed at that actor who may provide best changes to provide the relief sought.

Although in theory joint responsibility might imply that claims are directed against both the EU and Member States for the same injury, in practice such claims overwhelmingly are individualized. This is illustrated by the fact that Canada challenged in the WTO only the Union, not France for the French asbestos decree, apparently in the knowledge that the SPS and TBT Agreements as well as the GATT fell under the exclusive competence of the Union in the field of the common commercial policy.<sup>174</sup> It does not appear that this was based on France not being bound or not being in breach of the WTO Agreement,<sup>175</sup> but still only an action against the EU was considered useful. The same argument may have been relevant in the *Swordfish* case here Chili brought an action against the EU, not also against the Member State concerned.

In some cases, the practice of individualization seems to be induced by that fact that even though an agreement is binding for the EU and Member States as a whole, particular obligations are directed to one or the other party. Thus, whereas the EU and Member States in the Kyoto Protocol have accepted joint responsibility in regard to the European bubble, they have not done so in regard of other obligations under the Protocol. These remain individualized. For instance, when Greece had exceeded the maximum allowable CFC production<sup>176</sup> for the basic domestic needs of Article 5 Parties in 2005, that failure was attributed to Greece alone. The Meeting of the Parties cautioned Greece with action under article 4 of the Protocol.<sup>177</sup> Likewise, when Romania was not in compliance with the Guidelines for national systems for the estimation of anthropogenic greenhouse gas emissions by sources and removals by sinks under Article 5(1) of the Kyoto Protocol. Romania's eligibility to participate in the mechanisms was suspended.<sup>178</sup>

In non-compliance proceedings under the Aarhus Convention concerning Lithuania.<sup>179</sup> the Committee considered the nature of the obligation in combination with the nature and scope of the competences of the EU, in order to arrive at the conclusion that though the EU was formally bound by the entire agreement, could not be held in violation of particular articles. With regard to access to justice, while the Committee noted that it did not determine a possible failure of compliance of the EU, as it could not determine whether procedural issues relating to remedies are part of the EU competence (or of the Member States themselves) and therefore, it could not conclude whether or not the EU failed to comply with the Convention.

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<sup>173</sup> Bargren (n10) 464.

<sup>174</sup> Hoffmeister (n18) 739.

<sup>175</sup> Compare WTO DSU, *European Communities – Customs Classification of Certain Computer Equipment* (*United States v European Communities* (n125),

<sup>176</sup> Montreal Protocol on Substances that Deplete the Ozone Layer, Annex A, group I.

<sup>177</sup> Report of the Nineteenth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, Montreal, 21 September 2007, UNEP/OzL.Pro.19/7.

<sup>178</sup> Enforcement Branch of the Compliance Committee of the Kyoto Protocol, Pre-liminary Finding, CC-2011-1-6/Romania/EB, 8 July 2011.

<sup>179</sup> United Nations Economic and Social Council, Report by the Compliance Committee, *Compliance by the European Community with its obligations under the Convention*, ECE/MP.PP/2008/5/Add.10, 2 May 2008, [http://live.unece.org/fileadmin/DAM/env/pp/compliance/CC-23/ece\\_mp.pp\\_c.1\\_2009\\_2\\_add.1\\_eng.pdf](http://live.unece.org/fileadmin/DAM/env/pp/compliance/CC-23/ece_mp.pp_c.1_2009_2_add.1_eng.pdf). Ch. 12.



57.... when considering the structural characteristics of the Party concerned, and the general division of powers between the [EU] and its Member States, it is not clear to the Committee whether procedural issues relating to remedies are part of the [EU] competence. In the absence of further information on this issue, the Committee cannot conclude that the [EU] fails to comply with Article 9(4) of the Convention.<sup>180</sup>

This is a rather friendly response to the failure of the parties to provide full information, that significantly deviates from the formal situation that was sketched above (in case of absence of clear notification, joint responsibility results).

A comparable approach was taken in a case against Albania. A communicant alleged that the Community, through the European Investment Bank (EIB), was not in compliance with the Convention by virtue of its decision to finance the construction of a Thermo-Power Plant (TEPP) in Vlora without ensuring proper public participation in the process.. The Committee held that while the environmental impact assessment procedure undertaken by Albania was not in compliance with Article 6 of the Convention, :

36. ... EIB has no legal authority of its own to undertake its own EIA procedure on the territory of a State, as this would constitute an administrative act falling under the territorial sovereignty of the respective State. The Bank has to rely on the procedures undertaken by the responsible authorities of the State..<sup>181</sup>

On this basis the Committee found the EU not to be not in compliance with the Convention.

A comparable pragmatic approach concerns the performance of under annex IX to the Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution to abate Acidification, Eutrophication and Ground-Level Ozone.<sup>182</sup> The EU reported that implementation of the measures required by annex IX was the responsibility of its Member States. The Implementation Committee accepted this argument and as a consequence considered the obligations in question *not to be applicable* for the EU.<sup>183</sup> For instance, in regard to the obligation for publication and dissemination of an advisory code of good agricultural practice to control ammonia emissions, the report States:

177. One Party, the [EU], reported that implementation of the measures covered by Annex IX was the responsibility of its Member States; as a consequence, the Committee considered the obligation not applicable for that Party.<sup>184</sup>

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<sup>180</sup> Idem, par. 57.

<sup>181</sup> United Nations Economic and Social Council, Report by the Compliance Committee, *Compliance by the European Community with its obligations under the Convention*, ECE/MP.PP/2008/5/Add.10, 2 May 2008, [http://live.unece.org/fileadmin/DAM/env/pp/compliance/CC-23/ece\\_mp.pp\\_c.1\\_2009\\_2\\_add.1\\_eng.pdf](http://live.unece.org/fileadmin/DAM/env/pp/compliance/CC-23/ece_mp.pp_c.1_2009_2_add.1_eng.pdf).

<sup>182</sup> Protocol to the 1979 Convention on Long-range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-Level Ozone (Gothenburg, 30 November 1999, in force 17 May 2005).

<sup>183</sup> United Nations Economic Commission for Europe, *Tenth Report of the Implementation Committee*, 26 September 2007, ECE/EB.AIR/2007/3.

<sup>184</sup> Idem, par. 176.

In regard of the Non-Compliance Procedure for the Montreal Protocol,<sup>185</sup> the EU had reported the export of ozone-depleting substance to Kazakhstan by a Dutch company. The export represented a situation of possible non-compliance with the provisions of Article 4 of the Protocol. The EU explained that while it was responsible for licensing and reporting on trade in ozone-depleting substances, Member States were responsible for the enforcement of customs legislation. The representative of the Secretariat explained that responsibilities of the EU regional and Member States were divided and that ‘In the present case, it was therefore the EU, not the Member State, that was in a position of potential non-compliance.’<sup>186</sup> It can be observed that in this case, if indeed the Netherlands would have been in violation of EU law, it would have been for the Commission to start an infringement procedure against the Netherlands, which then also would have had the aim of bringing the Netherlands in line with its international obligations.

Three comments can be made on this practice. First, the examples indicate that while in cases where the EU had not before the event made clear a division of powers and, joint responsibility in theory was applicable, third States or an international body could have proceeded to hold both the EU and Member States to comply with the treaty, the non-compliance committees nonetheless have attempted to identify the actual competences, and base determinations of ‘responsibility’ on such competences.

Second, the institutions do not bother to explain their practice in terms of binding nature of the agreement as a matter of law of treaties, breach or attribution, but rather resort to a more pragmatic reasoning.<sup>187</sup> This may of course be explained by the fact that they are not asked or empowered to make formal determinations of responsibility, but it also may be induced by the consideration that it makes little sense to address a recommendation of performance to a party that does not have the power to secure the result of full performance of an obligation.

Third, in some of these cases, the EU and Member States *ex post facto* attempted to clarify the situation and to identify the locus of competence to redress the situation. This may reflect the duty of cooperation between the EU and its Member States, who may reassure for third States ‘that the European side will come up with a clear identification of which of them bears the international obligation in question (separately or jointly).’<sup>188</sup> If such clarifications are made, even if after the event, there may be little point (in any case when there is no material damage) to pursue a formal approach and to hold the EU and Member States responsible on the ground that at the time of the breach no clarification of division of power was given.

### *The role of divisions of power*

The practice of individualization of determinations of non-compliance can be interpreted in different ways. It could reflect a conviction on the part of the relevant institutions that there

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<sup>185</sup> Report of the Implementation Committee under the Non-Compliance Procedure for the Montreal Protocol on the work of its 46th meeting, Montreal, 7 & 8th August 2011, UNEP/OzL.Pro/ImpCom/46/5, par 60.

<sup>186</sup> *Id.* par 71.

<sup>187</sup> A. Ali, ‘Non-Compliance Procedures in Multilateral Environmental Agreements: The Interaction between International Law and European Union Law’ in T. Treves et al. (eds) *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements*, (The Hague, T.M.C. Asser Press, 2009) 521-534 at 532.

<sup>188</sup> Hoffmeister (n18) at 744.

was no issue of joint responsibility, but rather individual attribution to Member States (perhaps because these had the actual power in regard to the issue at hand, or because this approach has the advantage of simplicity). All examples mentioned above could be relied on in support of that proposition. But it also it true that none of these cases excludes joint responsibility – after all the prime defining feature of joint responsibility is that an action may be brought against individual wrongdoing actors. The fact that an action is *only* brought against individual wrongdoing actors can never be conclusive evidence against the existence or recognition of a principle of joint responsibility.

The limited practice does suggests, however, that even where it is unclear who caused what, and the factual and mixed factual/legal situations thus fit in the concept of joint responsibility, the divisions of competences within the EU may limit the possibility or usefulness of joint responsibility. The practice of individual claims and determination of non-compliance may be evidence of a recognition that in view of the division of powers, it is more efficient to bring action against some actors (those who wield the actual power over the conduct in question) than in regard of others.

The underlying reason is that the prime consequence of (joint) responsibility in the context of MEAs is return to legality. Formal claims of responsibility and compensation are exceedingly sparse in international environmental law. It is the function of return to legality that is most important - and of course is implied by the very notion of the illegal act.<sup>189</sup> It is true that non-compliance mechanisms are preferred by States since they leave them more freedom and room to negotiate.<sup>190</sup> Nonetheless, much of the practice of non-compliance institutions has only one major aim: securing a situation in which the defaulting organization or State(s), as the case may be, are able to secure performance of their obligation.<sup>191</sup> Combined with the principles of continued performance and cessation,<sup>192</sup> this means that in such a situation of joint responsibility, each State or organization is presumed and expected to secure performance of the primary obligations. Given the diplomatic nature of non-compliance committees, and given that return to legality is the prime consideration, it is doubtful that joint responsibility has much relevance in such a context.<sup>193</sup>

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<sup>189</sup> Permanent Court of International Justice, *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits), 1928, P. C. I. J. Reports Series A No 17, 47 ((‘The essential principle contained in the actual notion of an illegal act- ... is that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.’).

<sup>190</sup> Koskenniemi (n20); G.W. Downs, K.W. Danish and P.N. Barsoom, ‘The Transformational Model of International Regime Design: Triumph of Hope or Experience?’, *Columbia Journal of Transnational Law*, 38 (2000), 465, 482.

<sup>191</sup> See with respect to the Kyoto non-compliance procedure Jacquemont (n14) 358 (stating that the general approach adopted by the non-compliance committee is ‘to reinstate and facilitate compliance rather than to impose negative consequences for non-compliance’).

<sup>192</sup> Art. 29 and 30 DARIO.

<sup>193</sup> See also Julio Barboza, *Sixth report on international liability for injurious consequences arising out of acts not prohibited by international law*, 15 March 1990, A/CN.4/428, at para. 55 (noting that the solution of joint liability ‘appears more suited to legal proceedings than to a claim through the diplomatic channel’).

Significantly, for private operators, joint liability was the preferred solution; see Julio Barboza, *Seventh report on international liability for injurious consequences arising out of acts not prohibited by international law*, 16 April 1991, A/CN.4/437, at para. 60.

This explains why injured States or international institutions address claims and findings to the EU or to Member States, whoever has best prospects of to ensure performance of the obligations.<sup>194</sup> The fact that the EU and / or Member States may not be able to make full reparation for an externally undivided injury because the internal powers are limited, may limit the usefulness of joint responsibility. The inability of all wrongdoing actors to provide the funds that are necessary is a well-known problem in the application of joint and several liability in domestic law.<sup>195</sup> These problems are compounded if what is sought is a return to legality. It may not be very efficient, nor provide much legal certainty, to hold Member States responsible if only the EU has the power to change the situation, for instance by amending a regulation, or to hold the EU responsible when only the Member States can (and as a matter of EU law are obliged to) implement a particular treaty or directive.

This shows that despite the autonomy of the EU legal order, internal rules can produce, be it in this context in a rather informal way, external effects. This relates to a more general point. Whereas Article 5 DARIO states that the characterization of an act of an international organization as internationally wrongful is governed by international law, it could not include a statement that the rules of the organization, that in its definition includes the constituent instruments of an organization,<sup>196</sup> would be irrelevant to the characterization of that wrongful act.<sup>197</sup> For at least part of EU law (namely the treaties themselves) is ‘simply’ international law, and as such capable of creating legal effects in the international legal order.<sup>198</sup> In this respect, the division of internal competences within the EU will have external effects, despite the claim to autonomy of EU law.

This is not necessarily inconsistent with joint responsibility. However, it does signal that joint responsibility does not mean that for a third party it is irrelevant to whom a claim is addressed. For instance, the fact that in the WTO challenged only the Union, not France for the French asbestos decree, apparently in the knowledge that the SPS and TBT Agreements as well as the GATT fell under the exclusive trade competence of the Union,<sup>199</sup> can be explained on this basis. It does not appear that this was based on France not being bound or not being in breach of the WTO Agreement<sup>200</sup> – but rather that the competence lay with the EU, and only an action against the EU offered a prospect of a change of policy. The *Swordfish* case can be understood on the same basis.<sup>201</sup> Likewise, the fact that non-compliance institutions under MEAs have directed themselves against either the EU or against Member States, even where an obligation is binding on the EU and Member States, seems to be induced the consideration that even though the EU formally may, next to its Member States, have accepted an obligation to perform all obligations of a treaty, they may not be able to perform

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<sup>194</sup> Compare D. Miller, ‘Distributing Responsibilities’, *Journal of Political Philosophy*, 9 (2001), 453, 460 (noting that Miller rightly argues that remedial responsibility should rest in large part on who is best placed to put it right). See also in the context of peacekeeping Dannenbaum (n144) 114.

<sup>195</sup> Bargren (n10).

<sup>196</sup> DARIO, art. 2(b).

<sup>197</sup> DARIO, article 5, par 2.

<sup>198</sup> See, with further references, Ahlborn (n78).

<sup>199</sup> Hoffmeister (n18) 739.

<sup>200</sup> Text to (n175).

<sup>201</sup> Hoffmeister (n18) 739.

particular obligations that by their very nature are directed at States rather than international organizations and may not held to perform that obligation.<sup>202</sup>

## Conclusions

The relationship between the EU and Member States under MEAs is one of the uncontested examples where joint responsibility can be relevant. Joint responsibility may be a solution to the problem of diffusion of competences and obligations, which may make it unclear for third parties who acts, who causes injury and who may be able to ensure a return to legality. By allowing all parties to be held jointly responsible, it may prevent that multiple parties pass the buck, and may allow for full reparation by either party, making it unnecessary for a victim to try to sort out who was responsible for what and needing to hold responsible multiple parties.

The relevance of joint responsibility can perhaps best be seen the perhaps somewhat hypothetical situation where actual damage has been caused to a third state, and that state would bring a claim against the EU and/or Member States. In such cases, a string of questions would arise. Take the aforementioned example of the Mox Plant case, in which Iceland (as a non-Member State) rather than Ireland would be the plaintiff state. Under the logic of the DARIO, Iceland could then bring a claim against the UK and/or the EU. But this would raise a series of questions. One is that an international court may have jurisdiction in regard to the UK, but not to the EU. If the plaintiff State would proceed with a claim against the UK, the court then might face a problem under the indispensable parties rule.<sup>203</sup> If the court would not see a barrier to its jurisdiction, and rule in favour of Iceland, a separate question would arise: on what basis could Iceland bring a claim against the EU?<sup>204</sup> And how would damage between the UK and the EU be divided?

All of these questions have remained largely theoretical, however, now that practice essentially has followed a more public/administrative approach to non-compliance. One particular prominent consequence of the specific institutional context of MEAs is that the practice does not provide any support for a principle that would allow injured parties (or for that matter international institutions on behalf of third states) to claim full reparation from either of the responsible parties (though it should be added that it also does not refute such a principle - the point is that given the nature of non-compliance proceedings, that simply is not a relevant category).

The limited practice that does exist, overwhelmingly points to individual determinations of non-compliance by either the EU or Member States. This need not say much for the recognition of joint responsibility. Apart from the fact that these non-compliance procedures

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<sup>202</sup> M.J.F.M. Dolmans, *Problems of Mixed Agreements* (T.M.C. Asser Instituut, 1985) 82 (noting that ‘the [Union] cannot violate an obligation to effectively implement a provision of the Convention itself, since it cannot undertake such an obligation. Thus, the [Union] is not to be held responsible for wrongful implementation as such.’).

<sup>203</sup> The question whether the indispensable parties rule applies in a situation where the relevant party is an international organization is contested; see A Nollkaemper, ‘Issues of Shared Responsibility Before the International Court of Justice’ (April 8, 2011). Amsterdam Law School Research Paper No. 2011-01. Available at SSRN: <http://ssrn.com/abstract=1805696> at 23-24.

<sup>204</sup> This relates to the concept of attribution of responsibility, see text to (n159-166).

are not binding, the individualization of determinations of non-compliance can either contravene or support the principle of joint responsibility.

However, also taking into account that no questions of compensation for damage have arisen, it is hard to see what in this particular issue-area the added value of joint responsibility has been. The practice has above all been pragmatic. Often, it has become clear in the course of the procedure who can do what to secure performance, and any directions are addressed to the actors who at that stage appear to have the power to secure performance.

Though joint responsibility is a response to internal divisions of power that in themselves have no immediate effect, through various mechanisms internal divisions of power push themselves outward, in particular through declarations of competence, but more significantly through practice. That practice appears to be based on pragmatic and sound grounds - why would non-compliance institutions bother to address actors who do not hold the power to undo the situations and ensure performance of the obligation. Eventually, responsibility needs to follow power. This helps to explain why joint responsibility is not a very efficient approach - though it may be a means of last resort when it can even in non-compliance proceedings not be sorted out who has the power for what.

From the perspective of the EU, this practice may perhaps sit uneasily with the ideal of a fully autonomous legal order in which final authority for divisions of power is located internally, but that is a different logic than the logic that governs the external legal relations between the EU and Member States on the one hand and third parties on the other, in the international legal order.