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RESEARCH PAPER SERIES

SHARES Research Paper 10 (2012)

Shared Accountability of the European Union and its Member States within the Climate Change Regime

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Cite as: SHARES Research Paper 10 (2012), available at
www.sharesproject.nl

SHARED ACCOUNTABILITY OF THE EUROPEAN UNION AND ITS MEMBER STATES WITHIN THE CLIMATE CHANGE REGIME

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Abstract: This paper addresses the distribution of accountability between the European Union (EU) and its Member States under the current and future climate regime. Belonging to a field of shared competence between the EU and its Member States, the climate regime is, and will continue to be composed of 'mixed agreements', not distinguishing between the obligation of the EU and its Member States. Therefore, the question will arise how to determine the accountable entity in case of non-compliance. Under the current regime, a joint and proportional accountability rule applies to the 'European bubble' common emission reduction target. This rule seems perfectly suited to the nature of the EU, and should therefore be maintained in the next climate agreement. For the other commitments, third Parties, the Secretariat and the Kyoto Protocol Compliance Committee enjoy a margin of discretion to evaluate whether it is pragmatic to address non-compliance with regard only to the Member State concerned or to involve the EU in the process. This approach favours return to compliance. An *ad hoc* intra-European mechanism then should allow the designation of the actual accountable entity. Besides, to avoid holding a component of the 'European whole' accountable, while the actual accountable entity is another one, some intra-European actions for recovery are available to the EU, its Member States and even private persons situated within their territories.

1. Introduction

The relationship between the European Union (EU) and its Member States in the context of the United Nations Framework Convention on Climate Change (FCCC) and the Kyoto Protocol is a complex one. According to the Treaty on the Functioning of the European Union (TFEU), climate change is a matter of shared competence between the EU and its Member States,[1] and, as such, it is a field in which the EU, on the one hand, and each Member State, on the other, are competent.[2] Where competence is shared, the agreement is generally concluded by both the EU and its Member States. It is therefore a mixed agreement to which the EU and each Member State must give their consent. So, as with the FCCC and

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[1] The areas in which competences are shared are defined in Consolidated Versions of the Treaty on the Functioning of the European Union (TFEU), [2008] OJ C115/49, Article 4.

[2] M. T. Karayight, 'Why and to What Extent a Common Interpretative Position for Mixed Agreements?', *European Foreign Affairs Review* (2006), 445, at 445.

the Kyoto Protocol, any future international agreement on climate change would probably have to be a mixed agreement.

The EU's participation adds to, but does not substitute, that of the Member States. It is a complementary membership, which generates many difficulties, both internally and externally. These difficulties are inherent in mixed agreements, as they arise from the absence of a clear determination of competences and from the evolutionary character of competence sharing between the EU and its Member States. Competence sharing, which is in essence an internal issue, can therefore have consequences for third parties. This is particularly true in the case of non-compliance, because it may have consequences for which entity is responsible for a breach of the treaty.

Even though the FCCC and the Kyoto Protocol provide for a classical dispute settlement mechanism which may be activated to establish the responsibility of a Party in the case of non-compliance, it is much more likely that such a case would be addressed by the non-compliance mechanism put in place within the framework of the Kyoto Protocol, which establishes more of an accountability than a responsibility regime.[3] It is, however, important to acknowledge that such a mechanism may be abandoned in the context of a future climate change agreement and replaced by a less sophisticated 'Measurement, Reporting and Verification ('MRV') system'.[4]

Nevertheless, it is still relevant to explore the issue of shared accountability in this context. First, the Kyoto Protocol's non-compliance mechanism will be in effect until 2014, as the attainment of the emissions targets for the first commitment period will not be addressed before this date.[5] The Compliance Committee may even remain functioning for the second Kyoto Protocol commitment period that was agreed by the EU in Durban. Secondly, as mentioned above, any future international climate change agreement would probably be concluded by the EU and its Member States in the form of a mixed agreement. Thus the questions raised by this special situation are likely to arise in the future. Thirdly, one could argue that even if the next climate change agreement does not include a non-compliance mechanism, it will be necessary to reinstate one sooner or later in order to ensure the effective implementation of commitments enshrined in such an agreement.[6] From this perspective, a 'MRV system' should be regarded as a first step in establishing the pre-conditions for such a non-compliance mechanism. Finally, special rules developed within this framework may be useful more generally to deal with situations in which it cannot be established which of the

[3] This concept includes 'situations where quasi-judicial or political procedures might replace formal judicial procedures because they are the preferred process for 'policing' compliance by the actors involved in joint action, and, for international organizations, because of the near impossibility to find a judicial institution to litigate claims against international organizations'. See A. Nollkaemper, D. Jacobs, 'Shared Responsibility in International Law: A Concept Paper', forthcoming in: 33 *Michigan Journal of International Law* (2012) found at: <http:www.sharesproject.nl>, at 17.

[4] See S. Maljean-dubois, A-S. Tabau, 'From the Kyoto Compliance System to MRV: What Is at Stake for the European Union?', in: J. Brunee, M. Doelle and L. Rajamani (eds.), *Promoting Compliance in an Evolving Climate Regime* (Cambridge University Press, 2011), 317, at 317-338.

[5] To evaluate the achievement of the emission reduction target, different information will be necessary. However, this information will not be available before two years after the end of the first commitment period, given the delay in establishing them. But even in 2014, all the necessary data will not be communicated as, following the expert review team examination, the Parties will have an additional delay of 100 days to exchange permits in the international carbon market, bringing the final examination at least to April 2014.

[6] T. Treeves *et al.*, (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser Press, 2009).

different actors involved contributed to the breach of a treaty, especially when an international organization is among those actors. Indeed, it is possible to consider that such questions of accountability, short of formal responsibility, 'may be an area of potential growth for shared responsibility, e.g. a layer of legal processes short of international responsibility procedures which acknowledge burden sharing, good governance and global international administrative values.'[7]

Indeed, the special situation of the EU and its Member States within the framework of the Kyoto Protocol gives rise to delicate issues relating to its implementation, especially the way to deal with accountability in the event of non-compliance by the EU and/or its Member States. The main problem to solve will be determining who is accountable. This question raises some others: against whom may a third party bring an action: before the Compliance Committee, or before a classical international dispute settlement mechanism? On what criteria should the allocation of accountability be based in the event of non-compliance? What are the consequences of such an allocation of accountability in terms of 'return to compliance'?

One of the purposes of a competence declaration in the context of a mixed agreement is to inform third parties about the extent of the respective responsibilities of the EU and its Member States in case of failure to implement the agreement. With such a declaration, the agreement allocates its binding effect between the EU and its Member States. One could argue that this is the case for the Kyoto Protocol.[8] However, according to its Article 24.2, this allocation depends on what the EU and its Member States 'decide'.[9] Further, such a declaration is very imprecise, stating only that the environment is a shared competence between the EU and its Member States. Yet these features imply that there are some consequences concerning the determination of who is accountable in the case of non-compliance, whether in the international (chapter 2) or the European legal order (chapter 3).

2. In the international legal order

The inability of third parties to determine precisely the extent of the respective competence of the EU and its Member States may lead to the principle of shared accountability. In such a case, it would also be conceivable that the accountability of one would be activated if the other, which has the competence to implement the primary obligation concerned in a case of non-compliance, did not respect its secondary obligation to return to compliance (i.e. subsidiary accountability). However, in the context of the climate change regime, the principle of shared accountability entails some specific requirements

[7] A. Nollkaemper, D. Jacobs, n. 3 above, at 79.

[8] Indeed, the Kyoto Protocol and the UNFCCC require such a declaration. See Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997; in force 16 February 2005), Article 24.3: 'In their instruments of ratification, acceptance, approval or accession, regional economic integration organizations shall declare the extent of their competence with respect to the matters governed by this Protocol. These organizations shall also inform the Depositary, who shall in turn inform the Parties, of any substantial modification in the extent of their competence'. This provision repeats *mutadis mutandis* the United Nations Framework Convention on Climate Change (New York, 9 May 1992; in force 21 March 1994), Article 22.3.

[9] Kyoto Protocol, n. 8 above, Article 24.2: '(…) In the case of such [regional economic integration] organizations, one or more of whose member States is a Party to this Protocol, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under this Protocol'. See also FCCC, n. 8 above, Article 22.2.

(section 2.1), and the activation of the subsidiary accountability of the EU and its Member States does not seem to be operational (section 2.2).

2.1. The specific requirements of the principle of shared accountability

One approach to dealing with shared responsibility, which is found in scholarship,[10] some treaties[11] and some case-law,[12] is to rely on the principle of 'joint and several responsibility'. This expression means that 'the victim can require the full amount of reparation from one of the responsible states, which in turn require compensation from the other responsible states which might have contributed to the damage'.[13] It may be argued that in the context of the Kyoto Protocol, such a general rule may not apply to the EU and its Member States (section 2.1.2.). This is even more true in the case of non-compliance by the 'European bubble',[14] with its common emissions reduction target. Indeed, in that respect, the Kyoto Protocol provides for a joint and proportional accountability (section 2.1.1.).

2.1.1 The 'bubble clause' establishing a joint and proportional accountability

The 'bubble clause'[15] states that the EU and its Member States can be held jointly accountable if they cannot achieve their common quantified emission limitation obligations laid down by Article 3 of the Kyoto Protocol. In addition, if the total combined level of emission reductions cannot be reached, each Member State is responsible for its own emission levels.[16] The performance of the 'European bubble' will only be assessed at the end of the first commitment period, so it is currently impossible to determine with certainty whether and how the 'bubble clause' will be applied.

It is unclear whether the clause will apply to the EU as a whole – with the effect of sanctioning all its Member States, including those which are compliant – or whether the sanctions will only extend to non-compliant Member States.[17] The text of the Protocol is not helpful in answering this question, and practice tells us very little. There are numerous international environmental agreements to which the EU is a party alongside its Member

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[10] See, for example, J. Noyes, B. Smith, 'State Responsibility and the Principle of Joint and Several Liability', 13:2 *Yale Journal of International Law* (1998), 225, at 225-267.

[11] See, for example, United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; in force 16 November 1994), Article 6.2.

[12] See, for example, Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Case n. 17, Advisory Opinion, Responsibilities and Obligations of States sponsoring Persons and Entities with Respect to Activities in the Area, [2011], at paragraph 201.

[13] A. Nollkaemper, D. Jacobs, n. 3 above, at 105.

[14] The 'European bubble' comprises the EU and its Member States at the moment when the Kyoto Protocol was ratified. The 'bubble clause' (Kyoto Protocol, n. 8 above, Article 4), provides the EU and its Member States with the possibility of taking a joint commitment translated into a common quantified emission reduction of emissions commitment of -8% by 2012 below 1990 levels.

[15] Kyoto Protocol, n. 8 above, Article 4.6: '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'.

[16] Ibid.

[17] F. Jacquemont, 'The Kyoto Compliance Regime, the European Bubble; Some Legal Consequences', in: M. Bothe and E. Rehbinder, (eds.), *Climate Change Policy* (Eleven Int. Pub., 2005), 351, at 351-406.

States, but the Kyoto Protocol is the only one establishing such a 'joint *and* proportional' accountability for its implementation.

However, it is likely that for the first commitment period (2008-12), the EU will not, on the basis of the 'bubble clause', be accountable for failure by the new Member States to reach their individual target, since the clause is not applicable to them.[18] If Article 4 of the Kyoto Protocol were to be maintained, the EU would not be able to negotiate a common objective as a 'bubble' composed of 27 countries for future commitment periods, because this article only applies to Kyoto Protocol Annex B Parties.[19] Certain Member States, such as Malta and Cyprus, are not Kyoto Protocol Annex B Parties. As such, they do not have any individual target to reach. Therefore, they cannot be held individually accountable at the international level.

2.1.2. The mixed nature of the climate change regime: joint or individual accountability

The EU and its Member States may be accountable jointly *or* individually for all other obligations (including, for instance, reporting commitments) according to the intra-European sharing of responsibilities. This source of potential accountability is not based on the 'bubble clause', but rather on the fact that the EU ratified the Kyoto Protocol alongside its Member States.[20] Theoretically, this joint or individual accountability may be activated by the failure of any of the Member States to fulfill any of their commitments, and even by new Member States which are party to the Kyoto Protocol Annex B for non-compliance with their individual emission reduction objectives.

When a mixed agreement requests a declaration of competence by the EU and its Member States, as the Kyoto Protocol does, it is this declaration which determines who, between the EU and its Member States, would be declared to be in non-compliance if a question of implementation arises. However, as the EU declaration is limited to a statement that the environment is a shared competence between the EU and its Member States, third parties – as well as the Kyoto Protocol Secretariat – may have difficulties in determining to whom a question of implementation should be directed.

This, as a matter of fact, implies a 'double legal effect' of the intra-European sharing of competence towards third parties. Indeed, one of the peculiarities of the Kyoto Protocol is that it dissociates the competence sharing clause[21] from the accountability sharing clause.[22] In other words, the Kyoto Protocol does not establish that the accountability of the EU and its Member States will be determined by reference to the extent of each other's competence as exposed in the competence declaration. Furthermore, in both cases the Kyoto Protocol only states that the sharing under these clauses is an intra-European issue.

Consequently, if the competence sharing declaration annexed to the EU ratification act has, in a strictly legal sense, to be taken into account by third parties, its vagueness and its disconnection from accountability sharing make it useless when referring the matter to the

[18] Kyoto Protocol, n. 8 above, Article 4.4. For the negotiation history of this article, see S. Oberthur and H. Ott, *The Kyoto Protocol: International Climate Policy for the 21st Century* (Springer-Verlag, 1999), at 146-147.
[19] L. Massai, 'Climate Change Policy and the Enlargement of the EU', in: P.G. Harris, (ed.), *Europe and Global Climate Change: Politics, Foreign Policy and Regional Cooperation* (Edward Elgar Publishing, 2007), 305, at 312.
[20] Kyoto Protocol, n. 8 above, Article 24.2.
[21] Kyoto Protocol, n. 8 above, Article 24.3.
[22] Kyoto Protocol, n. 8 above, Article 24.2.

Compliance Committee. It means that the 'European whole'[23] will be perceived by third parties as an undivided whole.[24] The accountability of its components may thus be engaged jointly.[25] But does it mean that the principle of joint and several accountability applies? Scholarship diverges on this question,[26] but it seems correct to consider that:

> (…) it is unlikely that the Community and the Member States can be held jointly and severally liable for all the obligations in the agreement, so that an aggrieved third Party would be entitled to seek full satisfaction from any of the Member States or the Community.[27]

That is why it is necessary to distinguish the admissibility of the claim seeking the establishment of accountability from the resulting attribution of accountability. The fact that the accountability of the EU and its Member States may be engaged jointly should not automatically imply joint attribution of accountability.

Indeed, the consecration of the intra-European character of the sharing of competences and accountabilities implies that the Compliance Committee Chambers take them into account at the stage of the attribution of accountability. In this case,

> (...) joint accountability implies that the submission of a question of implementation brought against the EU or its Member States or both of them is considered as a request of designation of the competent component among the Party that they form for third Parties.[28]

The Compliance Committee Chambers should therefore retain joint accountability of the EU and its Member States if the 'European whole' designates all of them as competent, and an individual accountability if only one competent entity is designated. It has to be noted, in this respect, that as the new Member States are not part of the 'European bubble', if they do not achieve their individual emission reduction targets, they are more likely to be designated by the 'European whole' and declared by the Committee as individually accountable. This

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[23] This expression means the European Union and its Member States. The 'European whole' has to be distinguished from the 'European bubble', n. 14 above.

[24] G. Gaja, 'The European Community's Rights and Obligations under Mixed Agreements', in: D. O'Keeffe, and H.G. Schermers, (eds.), *Mixed Agreements* (Kluwer Publisher, 1983), 133, at 133: 'When the agreement does not provide, directly or indirectly, for a distinction between the Community's and the Member States' rights and obligations, or when the criteria set out for the distinction cannot lead to a solution, the Community's and the Member States' obligations and rights must be taken with regard to non-Member State as an undivided whole.'

[25] In this sense, see ECJ, Opinion of the Advocate General Tesauro delivered on 13 November 1997, Case C-53/96, Hermès International v. FHT Marketing Choise BV, at paragraph 14; ECJ, Opinion of the Advocate General Jacobs delivered on 10 November 1993, Case C-316/911, Parliament v. Council, at paragraph 69; ECJ, Case C-316/91, Parliament v. Council, [1994] ECR I-625, at paragraph 29.

[26] For a positive answer, see M. Dolmans, *Problems of Mixed Agreements: Division of Powers within the EEC and the Rights of the Third States* (T.M.C. Asser Institute, 1985), at 81-85. For the opposite point of view, see M. Björklund, 'Responsibility in the EC for Mixed Agreements – Should Non-Member Parties Care?', 70:3, *Nordic Journal of International Law* (2001), 373, at 387-395. See also, in the sense of the latter approach, ECJ, Opinion of the Advocate General Mischo delivered on 27 November 2001, Case C-13/00, Commission v. Ireland, at paragraph 30.

[27] I. Macleod, I.D. Hendry and S. Hyett, *The External Relations of the European Communities* (Oxford University Press, 1996), at 159.

[28] Author's translation of 'l'affirmation de la responsabilité conjointe implique que la réclamation des tiers, qu'elle s'adresse à la Communauté ou à ses Etats membres ou à l'ensemble communautaire, est considérée comme une demande de désignation du sujet compétent parmi les composantes de l'unique partie qu'ils forment à l'égard de leur cocontractants'. E. Neframi, *Les accords mixtes de la Communauté européenne: aspects communautaires et internationaux* (Bruylant, 2007), at 538. On the process for such a designation, see developments *infra*.

does not mean that the EU should not be jointly accountable if, for example, its inventory does not contain reliable data on these countries' emissions. However, since non-Annex B new Member States, such as Malta and Cyprus, do not have any individual commitments under the Kyoto Protocol, individual accountability cannot be imposed on them, and nor should the EU be held jointly accountable, as its inventory does not have to comprise their emission data. If no information is given by the 'European whole' within a reasonable time, then the Chamber should retain the joint accountability of the EU and its Member States.

In practice, the Compliance Committee Chambers, and before them, the authority submitting a question of implementation, will try to determine the degree of participation in the case of non-compliance by each competent entity. The Committee has, until now, proved to be pragmatic, identifying the effective implementing component of the 'European whole' when examining and reacting to a case of non-compliance, as in the case of Greece.[29] One can argue that this approach, which is directed towards effective return to compliance, should be maintained in the future.

2.2. A non-operational subsidiary accountability

As a party to the Kyoto Protocol and the FCCC, the 'European whole' is accountable for all the commitments resulting from the climate change regime, even if third parties have accepted the distribution of the binding effect of the Protocol and the FCCC within the contracting Party, which the 'European whole' is. Consequently, the Member States should be considered as the guarantors of the commitments contracted by the EU, and vice versa. Indeed, 'when the European Union and its Member States participate in a mixed agreement, they implicitly agree to assume the consequences of the violation of all the commitments contracted'.[30] This means that if the Party primarily accountable for an international obligation, identified according to the extent of the competences of each of the components of the 'European whole' – as for the Kyoto Protocol or according to the special clause previously mentioned – does not respect its secondary obligation to return to compliance, then the other Party should be held accountable on a subsidiary basis. The relationships between the EU and its Member States would then be based 'on their quality as subjects of international law in a complementary way, and it is this complementarity which is the basis for the notion of implicit guarantee'.[31]

But it is very likely that such a subsidiary accountability of the Member States and the EU at the reparation stage would not be valid for the climate change regime. Indeed, in the environmental field, accountability is a means to ensure that Parties are in compliance with their primary commitments. Consequently, accountability does not result from a breach of reciprocity of commitments implementation, or from an injury requiring reparation. Its objective is not to obtain reparation, *stricto sensu*, but to encourage return to compliance. Thus, a systematic joint and subsidiary accountability, which third parties might claim, would be contrary to the objective to react towards the actual accountable Party in a non-compliance

[29] Enforcement Branch of the Compliance Committee, Final Decision of 17 April 2008, Greece, CC-2007-1-8/Greece/EB.

[30] Author's translation of 'Lorsque la Communauté et ses Etats membres participent à un accord mixte, ils acceptent implicitement d'assumer les conséquences de la violation des obligations contractées dans leur ensemble'. E. Neframi, n. 28 above, at 583.

[31] Author's translation of 'Sur leur qualité en tant que sujet de droit international de façon complémentaire, et c'est cette complémentarité qui fonde la notion de garantie implicite'. Ibid.

situation. Practical considerations plead in this sense, as it is difficult to imagine, for instance, that the EU itself, rather than a Member State concerned, would elaborate and implement a 'compliance plan'[32] by such a 'consecutive measure'.[33]

It follows from the above that the designation of the competent authority by the 'European whole' is crucial. Therefore, it is necessary to take a closer look at the process leading to this designation, while not underestimating its limits.

3. In the European legal order

Apart from the special clause governing shared competences and accountabilities among the components of the 'European bubble' in the achievement of their greenhouse gas emission reduction targets, the Kyoto Protocol and the FCCC only state that the sharing of competences and accountabilities for their implementation is an intra-European issue. It is thus necessary to analyze the intra-European process leading to the designation of the accountable entity (section 3.1). However, it cannot be assumed that the Compliance Committee Chamber will follow this designation. It is also conceivable that the 'European whole' might find itself unable to designate the competent – and thus accountable – entity. In such a case, what are the intra-European recourse actions available (section 3.2)?

3.1. The designation of the accountable entity

What are the practical considerations (section 3.1.1.), the principles (section 3.1.2.) and the procedures (section 3.1.3) within the EU that govern the sharing of competences and accountabilities between the EU and its Member States in the implementation of the climate change regime?

3.1.1. A political compromise

A monist understanding of Article 216.2 of the TFEU, accepting the absence of a need for transformation of international agreements in European law, implies that the agreements are, from their entry into force, sources of legal obligations within the European legal order, as they bind the EU internationally. However, as Article 24.3 of the Kyoto Protocol establishes the existence of the sharing of competences between the EU and its Member States, the ratification of the Kyoto Protocol by the EU does not imply *ipso facto* the integration of its content within the European legal order. It will depend on the actual extent of the EU commitments. According to the *AETR case*,[34] in a field of shared competence it is only the commitments of the mixed agreement that will be applied by the EU which will integrate the sources of European law. It means that each normative intervention of the EU

[32] Conference of the Parties acting as the Meeting of the Parties of the Kyoto Protocol, Decision 27/CMP.1, Procedure and mechanisms relating to compliance under the Kyoto Protocol, FCCC/KP/CMP/2005/8/Add.3, at Section XV, paragraphs 2 and 3.

[33] 'Consecutive measures' designate the sanction that the Kyoto Protocol Compliance Committee may adopt. This argument raises the more general issue of the adaptation of 'consecutive measures' to the EU whole. For developments in that respect, see A-S. Tabau, *La mise en œuvre du Protocole de Kyoto en Europe* (Bruylant, 2011), at 406-413.

[34] ECJ, Case 22/70, Commission v. Council, [1971], ECR 263, at paragraph 17.

moves the extension of the boundaries of EU commitment. Moreover, the European Court of Justice (ECJ) has considered that as soon as a convention provision comes under 'an area which comes in large measure within the scope of Community competence',[35] or coincides 'in very large measure' with the subject matter of diverse European legislation,[36] it should be regarded as European. In both cases, indeed, there is 'a Community interest in compliance by both the Community and its Member States with the commitments entered into under those instruments'.[37]

However, the unity of the contracting Party which is the 'European whole' implies, according to some authors, that all the provisions of the treaty will have to be implemented, either by the EU or by its Member States. They consider that the mixed agreement statute as a convention act of the EU should not be limited to the provisions coming under its competence. According to this analysis, a mixed agreement which distributes its binding effect constitutes, in its entirety, a European convention act, and is itself inserted within the European legal order. Nevertheless, those authors concede that it does not affect the intra-European sharing of implementation competences.[38] The material sphere which was captured by the 'European whole' at the Kyoto Protocol ratification stage will thus be distributed among its components at the implementation stage. Yet, this distribution will, again, depend upon the actual exercise of the European competence when it results, from the TFEU, that it is shared, as in the environmental field.

Nonetheless, when the Kyoto Protocol provisions become part of the European 'acquis', and when the EU has effectively exercised its shared competence, this exercise of competence does not necessarily have a 'preemptive effect' on the Member States' competence.[39] It is, moreover, common that a similar provision of an international environmental agreement comes under the non-exclusive powers of the EU, for one part, and under non-exclusive powers of Member States, for another. In this case, the issue of the determination of the bearer of international rights and duties linked to this provision cannot be entirely resolved by the usual criteria of inter-European sharing of competences. In other words, the accountability in the case of non-compliance of a Kyoto Protocol commitment, in the strictly legal sense, will often be attributable to the EU and its Member States at the same time, as 'co-holders' of shared competences and powers.

When the implementation of competences and powers remains shared between the EU and its Member States, the determination of the accountable entity in a case of non-compliance will thus necessarily imply an intra-European negotiation process. This negotiation will aim to establish which, between the EU and its Member States, is the most able to represent the interests of the 'European whole' before the Compliance Committee, or any other judicial and quasi-judicial institution, and to return to compliance. It will, thus, only be governed by political compromise and strategic considerations. This is all the more true as the European judge will not be able to settle in law the power conflicts that might arise in this context. The ECJ has interpreted widely its role of control of the compatibility of international

[35] ECJ, Case C-13/00, Commission v. Ireland, [2002], ECR I-2943, at paragraph 16.
[36] ECJ, Case C-239/03, Commission v. France, [2004], ECR I-9325, at paragraph 28.
[37] Ibid., at paragraph 29.
[38] E. Neframi, n. 28 above, at 602-612.
[39] N.A. Neuwahl, 'Joint Participation in International Treaties and the Exercise of Power by the EEC and its Member States: Mixed Agreements', 28, *Common Market Law Review* (1991), 717, at 717-740.

agreement with the European Treaties,[40] whether by extending its jurisdiction to competence sharing[41] or by accepting annulment proceedings against Council decisions on international agreement ratification.[42] It has, however, always limited its control to the nature of the competence involved, whether exclusive or not, without examining the details of the distribution.[43] This distribution is all the more difficult to establish when the implementation powers remain shared. However, this political compromise is guided by the principle of sincere cooperation.

3.1.2. A political compromise guided by the principle of sincere cooperation

The European Treaties do not include provisions regarding the decision power and the European procedure that is to apply in the case of seizure by an international judicial or quasi-judicial organ against the EU or its Member States.[44] However, under Article 4.3 of the Treaty on European Union (TEU) the Member States bear an obligation to abstain from any measure that might prevent the realization of the aims of the European Treaties, to take all the measures that might permit the implementation of European obligations, and to facilitate the accomplishment of the EU's mission. The ECJ based its decision on the generality of this provision to ensure external relations coherence.[45]

It ruled that the obligation of close cooperation between the Member States and the European institutions 'must also apply in the context of the European Economic Community Treaty since it results from the requirement of unity in the international representation of the Community'.[46] It reiterated this idea, based on a logical requirement, by considering that:

> (…) where it is apparent that the subject-matter of an agreement or convention falls in part within the competence of the Community and in part within that of the Member States, it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfillment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the Community.[47]

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[40] In this sense, see *inter alia*, P. Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford University Press, 2004), at 227-232 and 243-246.

[41] See for instance ECJ, Case 2/91, Advisory Opinion, Convention n. 170 of the International Labour Organization concerning safety in the use of chemicals at work, [1993] ECR I-01061.

[42] See, for instance, ECJ, Case 165/87, Commission v. Council, [1988] ECR 5545.

[43] The only judgment in this sense comes from a particular situation, as what was at stake was an agreement concerning the sharing of competences between the Commission and the Council of 19 December 1991 about FAO meetings, a question that might not be solved without an *in concreto* examination of the provisions concerned. See ECJ, Case C-25/94, Commission v. Council, [1994] ECR I-1498.

[44] A. Rosas, 'The European Union and International Dispute Settlement', in: L. Boisson de Chazournes, C. Romano, R. Mackenzie, (eds.), *International Organizations and International Dispute Settlement, Trends and Prospects* (Transnational Publishers, 2002), at 64-70.

[45] E. Neframi, 'L'exercice en commun des compétences illustré par le devoir de loyauté', in: P-Y. Monjal and E. Neframi, (eds.), *Le 'commun' dans l'Union européenne* (Bruylant, 2009), at 179-201; E. Neframi, 'The Duty of Loyal Cooperation: Recent Developments', 47:2, *Common Market Law Review* (2010), 323, at 323-359.

[46] Case 2/91, n. 41 above, at paragraph 36.

[47] ECJ, Case 1/94, Advisory Opinion, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228.6 of the EC Treaty, [1994] ECR I-05267*,* at paragraph 108.

Finally, in *Commission v. Ireland*, the Court based its decision on Article 10 of the European Community Treaty (ECT), holding that 'the obligation of close cooperation within the framework of a mixed agreement involved, on the part of Ireland, a duty to inform and consult the competent Community institutions prior to instituting dispute-settlement proceedings'[48] against the United Kingdom within the framework of the United Nations Convention on the Law of the Sea.

The obligation between the Member States and the European institutions to cooperate is thus undeniable. However, its content remains unclear. It varies depending on concrete situations and fields, which is to say depending on the importance of the national interests at stake. Thus, to support the exclusive competence of the EU, the Commission stressed the difficulties resulting from the management of a shared competence with the Member States and underlined the risks involved: 'The Community's unity of action vis-à-vis the rest of the world will thus be undermined and its negotiating power greatly weakened'.[49] Such a consideration might also be applied to the climate change regime. Nevertheless, in its advisory opinion, the ECJ was only able to answer that 'resolution of the issue of the allocation of competence cannot depend on problems which may possibly arise in administration of the agreements'.[50]

The coordination between the Member States and the European institutions is thus a 'remedy for different drawbacks of competence sharing'.[51] It must give an answer in practical terms to the question of who speaks on behalf of the 'European whole', whether at the negotiation stage, or submitting or responding to a 'question of implementation'. However, 'the principle of sincere cooperation, insufficiently operational, often demonstrates its limits'.[52] The solution may come from additions to the Treaties. The Nice Treaty extended the procedural rules of Article 300.2 of the ECT, that is to say a Council decision adopted with a qualified majority after a proposition by the Commission, 'for the purpose of establishing the positions to be adopted on behalf of the Community in a body set up by an agreement, when that body is called upon to adopt decisions having legal effects'. Furthermore, the practice may also be improved on a case-by-case basis, by the adoption of measures of cooperation for a specific convention. The ECJ has already recognized that the principle of sincere cooperation may be materialized by an agreement between the European institutions.[53] The Commission decision of 10th February 2005, laying down rules implementing the decision concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the Kyoto Protocol, organizes cooperation in the context of this special Treaty.[54]

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[48] ECJ, Case C-459/03, Commission v. Ireland, [2006] ECR I-04635, at paragraph 179.
[49] Case 1/94, n. 47 above, at paragraph 106.
[50] Ibid., at paragraph 107.
[51] Author's translation of 'Palliatifs apportés aux inconvénients du partage des compétences'. A. Fenet, *Droit des relations extérieures de l'Union européenne* (Litec, Coll. Objectif droit, 2006), at 75.
[52] Author's translation of 'le principe de coopération loyale, insuffisamment opératoire, montre souvent ses limites', Ibid.
[53] ECJ, Case C-25/94, Commission v. Council, [1996] ECR I-1469. See the commentary of P. Eeckhout, n. 40 above, at 212-215.
[54] Commission of the European Communities Decision of 10 February 2005 laying down rules implementing Decision n. 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, 2005/166/EC, [2005] OJ L55/57.

3.1.3 The duty of sincere cooperation in the context of the climate change regime

The Kyoto Protocol states that:

> (…) in the case of such [regional economic integration] organizations, one or more of whose member States is a Party to this Protocol, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under this Protocol.[55]

As indicated previously, this provision implies that the EU and its Member States have a role to play in the determination of the responsible entity for the implementation of the commitment examined by the Compliance Committee. However, contrary to other mixed agreements,[56] the Kyoto Protocol neither expressly provides for, nor organizes, the consultation of the 'European whole'. Therefore the question to be asked is whether there are European procedures which do.

It is possible to take the view that the procedure laid down in Article 21 of the 2005/166/CE decision[57] organizes this designation, even if this procedure does not eliminate all the uncertainties in this regard. This article establishes very precise time periods for the exchange of information between the components of the 'European whole' when one of them is under an international review procedure. The answer provided by the Member States and the EU is also strictly framed. The idea is that as soon as a Member State is concerned with a question of implementation before the Compliance Committee, it informs the EU and other Member States about it in order to 'coordinate their response to the review process'. This process also applies when the EU is concerned with a question of implementation before the Compliance Committee.

Nevertheless, this concerted reaction only concerns the international examination of 'obligations under Decision 280/2004/EC'. This material restriction means that the components of the 'European whole' will answer jointly to the 'international examination' only if its purpose is an obligation which has been transposed into European law. Only the entity concerned with the question of implementation will have the possibility to formulate the concerted reaction of the 'European whole'. This concerted reaction seems logical, as in these cases the Member States and the EU will be jointly accountable for the execution of the obligation concerned. Indeed, all the provisions of this decision, which transposes into European law the majority of the obligations entailed in the Kyoto Protocol, are at the same time part of the powers of the EU and of the Member States. The former supervises the commitments that the latter are required to implement, generally keeping a margin of discretion. From then on, instead of providing for a procedure permitting the EU to indicate who is the effective debtor of the obligation examined, this decision establishes a consultation procedure in order to give a common answer, whichever is the entity concerned by the review.

This permits protection of the interests of third parties, while creating the possibility for the 'European whole' to act as one on the external scene. In these conditions, it is very

[55] Kyoto Protocol, n. 8 above, Article 24.2.

[56] See Annex IX to the United Nations Convention on the Law of the Sea, n. 11 above, Article 6.2: '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.'

[57] Commission Decision, 2005/166/CE, n. 54 above.

unlikely that the entity designated by a question of implementation raises, in the field covered by the decision, a preliminary incompetence exception.

This concerted reaction is possible because the objective of the compliance procedure is more in favor of a return to compliance than the obtaining of reparation for the injury caused. The reactions of the Party concerned with the examination not only serve the purpose of a fair trial. They also give that Party the opportunity to return to compliance before the question of implementation leads to a non-compliance declaration. The consultation between the components of the 'European whole' may contribute to this return to compliance. If warned sufficiently early, each component may be able to help the Party concerned to return to compliance by the activation of more or less binding processes, which might go as far as the submission of the case to the European judge. However, the non-compliance declaration addressed to Greece twice in the same case shows that this procedure is not always sufficient to avoid non-compliance cases.[58]

However, if the question of implementation raised before the Compliance Committee concerns a provision of the Kyoto Protocol which is not included in decision 280/2004/CE, would the entity concerned with the request be able to inform the Chamber of the Compliance Committee of its incompetence and, if so, under which procedure? In the intra-European context, despite the absence of an *ad hoc* procedure, it is possible that the simple exchange of information between the components of the 'European whole' would be enough to permit them to determine the accountable Party. Internationally, it might be specified in the reaction of the Party concerned by the question of implementation examined by the Compliance Committee. But if the procedure is already engaged, would it not be too late? Furthermore, does this reaction aim to indicate this type of precision on the effective extent of the competences of each of the components of the 'European whole' at a given moment? Are the Chambers of the Compliance Committee obliged to take this into account? The provisions of decision 27/CMP.1, as well as those of the rules of procedure of the Compliance Committee, are imprecise in this regard. Hence, without practical application, it is difficult to answer these questions. Nevertheless, it appears logical to go back to the Kyoto Protocol's non-compliance procedure philosophy, to take the view that it is in the interests of the Chambers of the Committee to direct their examination towards the actual accountable Party in a case of non-compliance. If they have any doubts on this point, they will probably take into account the indications given in that respect by the Party concerned.

3.2. Intra-European actions for recovery

As explained above, the international accountability of the EU and its Member States may be jointly activated. It is also conceivable that only the accountability of the EU would be retained in the case of non-compliance by one of its Member States and that a Member State would bear, as a result, the consequences of a non-compliance declaration against the EU by the Compliance Committee. Finally, it cannot be excluded that the consequences of the international accountability of the EU and/or its Member States may cause injury to private persons situated in their territories, especially those concerned with the European Union Emission Trading Scheme (EU ETS). If the Compliance Committee and the third parties are

[58] Enforcement Branch of the Compliance Committee, Greece, n. 29 above and Enforcement Branch of the Compliance Committee, Decision of 9 April 2008, Further submission of Greece under section X, Decision 27/CMP1, CC-2007-1-7/Greece/EB.

not obliged to take this fact into account, what are the means at the disposal of these entities in the European legal order to designate the actual accountable Party in the case of non-compliance, or to adopt measures favoring a return to compliance, or even to obtain reparation for their injury?

Different kinds of proceedings may be foreseen that might be assimilated to some action for recovery. This notion, coming from French civil law, is defined as 'the action exercised by someone who executed an obligation to which another was bound in order to obtain reimbursement'.[59] This definition does not exactly correspond to what is meant by action for recovery, all the more so as the notion does not exist as such in European law. Nevertheless, this expression is the one that appears to be the most appropriate to designate judicial action before a national or European judge after a first decision of the Compliance Committee, and in reaction to it.

Four hypotheses need to be considered: an infringement proceeding against a Member State following a non-compliance declaration of the EU; an annulment proceeding or action for failure directed against a European institution by a Member State; a proceeding directed against a Member State by a private person before a national judge; and an extra-contractual liability proceeding directed against a European institution by a private person. But these different hypotheses might not have the same chance of success.

It is thus conceivable that the European Commission might blame the Member States for non-compliance with the provisions of a mixed agreement, through an infringement proceeding after the activation of the international accountability of the EU. However, it is uncertain whether the Member States would be able to bring an annulment action or an action for failure against the European institutions because of the limited invocability of the Kyoto Protocol and its secondary law before the European judge.[60] They might do so in two situations: if their accountability was retained instead of that of the EU, or if the 'consecutive measures' adopted against the EU were *in fine* borne by the Member States. The international accountability of the Member States within the framework of a mixed agreement, associated with the specificities of the EU, would thus illustrate the disadvantages of submitting the annulment proceeding to the invocability conditions. It would consequently be possible to agree with the idea that:

> the principle of asking the Member States to respect international agreements concluded by European institutions is not compatible with a limitation to their right to engage a proceeding through an examination of the possibility for them to invoke the Treaty.[61]

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[59] Author's translation of 'Action récursoire: l'action exercée par celui qui a exécuté une obligation dont un autre était tenu, contre ce dernier afin d'obtenir sa condamnation à ce qui a été exécuté'. R. Guillien, J. Vincent, *Lexique des termes juridiques* (Dalloz, 1999), at 18.

[60] A-S. Tabau, S. Maljean-Dubois, 'Non-compliance Mechanisms: Interaction between the Kyoto Protocol System and the European Union', 21:3 *European Journal of International Law* (2010), 749, at 762. It should, however, be noted that the invocability of the Aarhus Convention has been accepted by the Court. See CJEU, Case C-240/09, Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky, [2011], not yet published.

[61] Author's translation of 'le principe de demander aux Etats membres de garantir le respect des accords internationaux conclus par les institutions communautaires n'est pas compatible avec une limitation de leur droit de recours par le biais d'un examen portant sur la possibilité pour eux d'invoquer le traité'. M.J. Hahn, G. Schuster, 'Le droit des Etats membres de se prévaloir en justice d'un accord liant la Communauté. L'invocabilité du GATT dans l'affaire République fédérale d'Allemagne contre Conseil de l'Union européenne', 99:2, *Revue Générale de Droit International Public* (1995), 367, at 373.

However, this notion has to be considered in the specific context of the climate change regime. First, cases of subsidiary accountability of the EU and its Member States will probably not occur. Next, it is far from clear that a suspension of the eligibility of the EU to participate in the flexibility mechanisms would result effectively in an interdiction of the Member States to participate in them.[62] Finally, it is unlikely that the EU would be held jointly accountable with one of the Member States that had reached its individual emission reduction target. In every case, Member States would still have at their disposal the infringement proceeding against those in a situation of non-compliance,[63] even if the practical as well as the political interests in taking such an approach have yet to be demonstrated. The limits linked to the potential non-invocability of the Kyoto Protocol before the European judge will thus probably not lead the Member States to assume the failure of the EU without having the means to act judicially when faced with such a situation.

However, it is possible to take the view that the situation of private persons is different. Indeed, private persons might suffer the damages associated with the consecutive measures pronounced by the Compliance Committee against their state or the EU. This would be the case, in particular, if the suspension of the eligibility to participate in the flexibility mechanism led to the freezing of the credits issued from Clean Development Mechanism projects on the registry account of this private person. If they decided to bring a claim against their Member State because of this freeze, the result of the claim would depend upon the interpretation given by the European judge regarding the 'binding'[64] character of this decision of the Compliance Committee. Yet it is very likely that because of its automatic nature and the absence of discretion for the Member State in this regard, the national judge, as well as the European judge, would regard the freezing of the account, and consequently, the transferring of credits, as not illegal.

Such a conclusion would also certainly be reached if a private person was looking to engage the extra contractual responsibility of the European institution because of the decision of the Community Independent Transaction Log (CITL) forbidding a national registry administrator to transfer such credits. In this sense it is possible to refer by analogy to the *Dorsch Consult v. Council and Commission* case, in which the European Court of First Instance (CFI) stated that:

> in the circumstances of this case, the alleged damage can be attributed not to the adoption of Regulation n. 2340/90 but only to United Nations Security Council Resolution n. 661 (1990) which imposed the embargo on trade with Iraq. It follows from the foregoing that the applicant has not demonstrated the existence of a direct causal link between the alleged damage and the adoption of Regulation n. 2340/90.[65]

Similarly, it would be possible for the Court to consider that the injury invoked by the applicant in this hypothesis would not result from the decision of the CITL to forbid the transfer of credits,[66] but from a decision of the Compliance Committee pronouncing the suspension of eligibility of the Member State concerned to participate in the flexibility mechanisms. Furthermore, the CFI has held that given the absence of any margin of discretion

[62] For developments in that regard, see A-S. Tabau, *La mise en œuvre du Protocole de Kyoto en Europe*, n. 33 above, at 408-412.
[63] TFEU, n. 1 above, Article 259.
[64] Kyoto Protocol, n. 8 above, Article 18.
[65] CFI, Case T-184/95, Dorsch Consult v. Council and Commission, [1998] ECR II-667, at paragraph 74.
[66] A-S. Tabau, S. Maljean-Dubois, n. 60 above, at 752-755.

for the Member States and the EU to implement Security Council resolutions, a control of legality of the executive act of this resolution would imply challenging the legality of the resolution itself. Yet,

> the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court's judicial review and (…) the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law. On the contrary, the Court is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations.[67]

If the resolutions of the Security Council are distinct in many ways from a decision of the Compliance Committee, it is not impossible that the European judge might follow the same type of reasoning to remove from its control of legality a Member State or European act implementing the decision of the Compliance Committee without any margin of discretion.

Finally, the European judge does not formally exclude the possibility of an extra contractual responsibility of the EU without any fault. But in this hypothesis, the applicant has to establish that its injury is special and abnormal. In that respect, the CFI considered that:

> In the case of damage which economic operators may sustain as a result of the activities of the Community institutions, damage is, first, unusual when it exceeds the limits of the economic risks inherent in operating in the sector concerned and, second, special when it affects a particular circle of economic operators in a disproportionate manner by comparison with other operators.[68]

It concluded that:

> It has not been established in the present case that the applicant suffered, as a result of the incompatibility of the Community regime governing the import of bananas with the WTO agreements, damage in excess of the limits of the risks inherent in its export operations.[69]

The reasoning of the Court was based on the fact that the eventuality of a suspension of the tariff concession, a measure provided by World Trade Organization law, is one of the vicissitudes inherent to the actual world trade system. Such a conclusion might be transposed to the Kyoto Protocol framework. By choosing to participate in the flexibility mechanisms to attain their emission reduction targets in the framework of the EU ETS, the operators accepted the rules of the game. In the event that the transfer of credits between their account and that of the Member State is frozen, they will thus not be able to plead an abnormal injury, excluding any kind of responsibility of the central administrator of the CITL.

4. Conclusion

[67] CFI, Case T-306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission, [2005] ECR II-3533, at paragraph 276, and ECJ, Cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat International Foundation v. Council and Commission, [2008] ECR I-6351. In a previous case (ECJ, Case C-84/95, Bosphorus, [1996] ECR I-03953), the Court agreed to interpret a regulation implementing a Security Council Resolution and to examine its conformity with the proportionality principle and human rights. For a comment, see H. Labayle, R. Mehdi, 'Le contrôle juridictionnel de la lutte contre le terrorisme : les "black lists" de l'Union dans le prétoire de la Cour de justice', *RTDE* (2009), 231, at 231-265.

[68] CFI, Case T-383/00, Beamglow Ltd v. European Parliament, Council of the European Union and Commission of the European Communities, [2005] ECR II-05459 at paragraph 208.

[69] *Ibid*., at paragraph 209.

The analysis of the rules and principles governing the determination of who is accountable for non-compliance within the climate change regime within the special Party constituted by the 'European whole' does not entirely remove uncertainties, but some clarifications appear.

The Kyoto Protocol's express provision for an original joint and proportional accountability seems perfectly suited to the nature of the EU, while giving to third parties the guarantee that 'the Community does not hide behind its Member States nor Member States behind the Community'.[70] Nevertheless, this clause raises some unanswered questions. In the case of non-compliance by the 'European bubble' with its common emissions reduction target, would the applicant authorities be entitled to submit a question of implementation to the Compliance Committee against the EU or its defaulting Member States independently, or should they bring such an action against both of them? In the case of the latter hypothesis, should they do so with a joint or separate submission(s)? The silence of the Kyoto Protocol and its secondary law on these points is confusing. One thing, however, seems clear: contrary to the EU declaration of competences, the intra-European bubble sharing of accountability is known. Thus, it should be taken into account by third parties for the submission of a question of implementation related to the achievement of the 'European bubble' target. Hence Member States that are in compliance with their individual targets should not be held accountable, even if the accountability of the EU may indirectly impact upon them.

It is likely that the future international agreement on climate change will encompass an extended 'bubble clause'. However, the enforceable character of the emissions reduction targets remains unclear, especially if the non-compliance mechanism is abandoned. The issue of shared accountability would then lose some of its relevance. It follows from the Copenhagen and Cancun agreements that the 'MRV system' will not aim to determine accountability, but to promote the comparability between FCCC Annex I Parties bottom-up target and to build confidence. If an action is, nevertheless, brought before a classical dispute settlement body, that body should use the principle of joint and proportional accountability of the EU and its Member States, as it reflects the actual extent of the commitments of each other. However, for this to happen, besides the agreement of each Party involved, the *ratione personae* competence of this dispute settlement organ will have to include international organizations.

This research about the actual accountable entity is also at the core of the joint – but not several, nor cumulative – or individual accountability principle that governs the attribution of accountability between the components of the 'European whole' in the case of non-compliance with Kyoto Protocol commitments other than the common reduction target. It has been shown that, in this regard, the applicants before the Compliance Committee have great latitude in submitting a question of implementation, which the Chambers also have in attributing corresponding accountability. Both may concern the EU and/or its Member States. This favors the protection of the interests of third parties and, more generally, assists with the legal security of their treaty relations with the components of the 'European whole'.

In order not to affect the European legal order at the same time, there are some intra-European mechanisms to designate the accountable entity, which may have external effects. These mechanisms are not perfect and should be consolidated. Nevertheless, they may help to

[70] C-D. Ehlermann, 'Mixed Agreements. A List of Problems', in: D. O'Keeffe, H.G. Schemers, (eds.), *Mixed Agreements* (Kluwer, 1983), 1, at 5.

avoid holding accountable a component of the 'European whole', where the actual accountable entity is another one. However, even in such a case, some intra-European actions for recovery are available to the EU, its Member States and even to private persons situated within their territories. It might be especially relevant if, for instance, one Member State was brought before the International Court of Justice on the grounds of the principle of joint and several accountability.