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Procedural Aspects of Shared Responsibility in the WTO Dispute Settlement System

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Procedural aspects of shared responsibility in the WTO dispute settlement system

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1. Introduction

An international actor[1] is responsible under international law when an act[2] attributable to it causes a breach of an obligation by which it is bound.[3] Sometimes third party actors can share elements of that responsibility. At the one end of the spectrum, a third party can fully share the responsibility of the primary party. More modestly, the acts of a third party can have a bearing on the responsibility of the primary party without this necessarily impacting on its own responsibility. There are two main ways in which this can happen: the first is when the same act is attributable both to the primary party and to the third party; the second is when the act of the primary party and a different act of the third party together cause the breach of the obligation of the primary party. This article looks at how, thus defined, third parties sharing elements of responsibility with a primary actor are taken into account in WTO dispute settlement proceedings.

It might be thought that, in practice, there is little chance that such problems would arising in WTO dispute settlement proceedings. The WTO has a broad, compulsory and exclusive jurisdiction, so a WTO complainant has the possibility of bringing an original action against (almost) any other party to which a relevant act is attributable.[4] But procedural questions remain as to how this might be done, and also as to how third parties that are not formal participants might be involved in the proceedings. Moreover, there is in some respects an increased likelihood that such questions can arise. At present, WTO Members include one international organization (the EU) together with its 27 member

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[1] In this article the term 'international actor' includes states and international organizations, and other actors with international responsibility, such as 'customs territories' that are WTO Members.

[2] In this article the term 'act' includes 'omissions'. The term used in the WTO Dispute Settlement Understanding (DSU) is 'measure', which, similarly, means 'any act or omission attributable to a WTO Member': WTO Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, WT/DS244/AB/R, adopted 9 January 2004, para 81.

[3] Article 2 of the Articles on State Responsibility (ARS), annexed to UNGA res 56/83, UN Doc A/RES/56/83, 12 December 2001; Article 4 of the Articles on the Responsibility of International Organizations (ARIO), annexed to UNGA Res 66/100, UN Doc A/Res/66/100, 27 February 2012.

[4] WTO dispute settlement proceedings are available not only for violations of WTO law, but also for 'non-violation' and 'situation' complaints: Article XXIII:1 of the General Agreement on Tariffs and Trade (GATT 1994) and equivalent provisions in the other WTO agreements. Special rules apply to the latter two types of complaint: Articles 26 of the WTO Dispute Settlement Understanding (DSU). There have been few decisions on 'non-violation' complaints, and, so far, none on 'situation' complaints.

states, and one state (China) along with its subnational entities (Hong Kong and Macao).[5] Such sharing of sovereignty can lead – and has led – to disputes on the proper attribution of a given act.[6] Nor is this situation confined to WTO Members. It is also possible that a challenged act challenged is attributable both to a WTO Member respondent and to an actor that is not a WTO Member, for example a customs union possessing international legal personality.[7] How a WTO panel or the Appellate Body would deal with this is an open question.

WTO law does not always provide an answer to such questions, and it is therefore appropriate make a brief remark on the role of non-WTO international law in WTO dispute settlement proceedings. The WTO Dispute Settlement Understanding (DSU) requires WTO panels and the Appellate Body to *interpret* WTO law in accordance with customary international law rules of interpretation,[8] but it does not contain an express 'applicable law' clause[9] concerning the *application* of international law in the disputes over which they have jurisdiction.[10] There are different ways of understanding this omission,[11] but the WTO tribunals have on the whole taken a cautious line.[12] For example, the Appellate Body has declared itself agnostic as to whether the principle of estoppel has any application in WTO law.[13] A proposal by the United States would confine WTO tribunals even further. It would allow them 'to consider how other adjudicative bodies have approached similar procedural issues' but only on the understanding that 'such consideration is a question of the body exercising its discretion as to how to manage its proceedings; … not a question of

[5] WTO Members comprise original WTO Members and newly acceded Members, who may be '[a]ny State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements' (Article XII:1 of the WTO Agreement). The original Members are GATT Contracting Parties have accepted the WTO Agreement in 1994, as well as the European Communities (now the EU), which is listed especially as an original WTO Member (Article XI:1 WTO Agreement) with the same number of votes as its member states (Article IX:1 WTO Agreement). Contracting Parties to the GATT were similarly identified as terms of 'governments' of 'customs territories' (Articles XXVI and XXX GATT 1947).

[6] See below at **p XXX**.

[7] See below at **p XXX [text to n 77].**

[8] Article 3.2 of the WTO Dispute Settlement Understanding (DSU).

[9] Cf Article 38(1) of the Statute of the International Court of Justice. See, generally, Lorand Bartels, 'Jurisdiction and Applicable Law Clauses: Where does a Tribunal Find the Principal Norms Applicable to the Case Before It?' in Tomer Broude and Yuval Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Oxford: Hart, 2011).

[10] On the difference between interpretation and application, see Anastasios Gourgourinis, 'The Distinction between Interpretation and Application of Norms in International Adjudication' (2011) 2 Journal of International Dispute Settlement 21, and in the WTO context, Isabelle Van Damme, 'Jurisdiction, Applicable Law and Interpretation' in Daniel Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (OUP, Oxford 2009) 298.

[11] Joel Trachtman, 'Book Review: Joost Pauwelyn, *Conflicts of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press, 2003)' (2004) 98 American Journal of International Law 855.

[12] Petros Mavroidis, 'No Outsourcing of WTO Law? WTO Law as Practiced by WTO Courts' (2008) 102 American Journal of International Law 421.

[13] WTO Appellate Body Report, *EC – Export Subsidies on Sugar*, WT/DS265/AB/R, adopted 19 May 2005, para 313.

interpreting a covered agreement in accordance with public international law.'[14] Where this would leave principles such as the indispensable third party rule is difficult to predict.[15]

Against the background of these introductory remarks, the remainder of the article can be briefly outlined. First, it sets out in more detail the situations in which situations of shared elements of responsibility can arise, both generally, and specifically in the context of WTO law. It next investigates the possibilities for formal participation of third parties in dispute settlement proceedings as co-respondents, joinder and intervention, as well as the possibilities for their informal participation by submitting *amicus curiae* briefs. Necessarily, these mechanisms are available for third parties in addition to those sharing elements of responsibility with a primary party. The article then considers the position of third parties sharing elements of responsibility that do not participate in dispute settlement proceedings – either because they have not been required to participate and do not wish to participate, or because they are unable to participate in any formal sense. There are two issues of importance: one concerns the means by which information can be obtained from such parties, the other concerns the extent to which their interests can be protected. The article concludes with some general reflections.

2. Elements of shared responsibility

As mentioned, there are two principal situations in which an international actor shares elements of responsibility with a third party. The first is when the act of the primary party is also attributable to a third party; the second situation is when the act of a primary party causes the breach of an obligation binding on the primary party in combination with an act of a third party. There are other situations of *related* responsibility, briefly discussed below, but these are distinguishable from these two categories of shared elements of responsibility, as strictly defined here.

2.1 Multiple attribution of acts

The first situation of shared elements of responsibility occurs when the same act is attributable to a primary party and a third party. This can happen in various situations, these being set out in the rules on international responsibility: thus, one actor might act via the organ of another,[16] or adopt the act of another.[17] It is quite possible – and for states, at least, even normal – for both parties to be

[14] This proposal was originally made in WTO Dispute Settlement Body, Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding, Further Contribution of the United States on Improving Flexibility and Member Control in WTO Dispute Settlement, Communication from the United States, WT/ TN/DS/W/82, 24 October 2005. It forms part of the 'Chairman's Text' compiling WTO Member proposals still under negotiation: WTO Dispute Settlement Body, Report by the Chairman to the Trade Negotiations Committee, TN/DS/25, 21 April 2011, A-1 at A-17.

[15] See below at p **XXX.**

[16] Art 6 ARS; Art 7 ARIO.

[17] Art 11 ARS; Art 9 ARIO.

responsible for the act, so long as there are relevant obligations binding on both parties.[18] There have not yet been any cases like this in WTO dispute settlement proceedings[19] and perhaps there never will be. Because of the almost universal nature of WTO membership, which comes with compulsory submission to WTO dispute settlement proceedings, it will usually be possible to direct the complaint towards the party in question without needing to rely on derivative attribution of this type.

Having said this, one can foresee proceedings involving shared elements of responsibility in at least three scenarios. One is where an act of a non-WTO Member is attributable to a WTO Member, and a complainant's best option is to target the WTO Member. Another is where a complainant addresses a complaint to the wrong party, and prefers to continue with the original action than commence proceedings against the logically more relevant party. This might occur in situations in which the constitutional relationship between the two WTO Members is uncertain. But both of these situations are unlikely to arise in practice. A third, and more common, scenario is where acts are attributable to both an international organization and one (or more) of its members.

This third scenario arises because a key attribute of international organizations is their capacity to bear responsibility independently of their members, and so the default position is that acts of the organization are not attributable to a member even when the organization acts through a member.[20] This represents an exception to the rule, stated above, that the responsibility of one state does not normally affect the responsibility of another. Questions of shared attribution of single acts between international organizations and their members have arisen on a number of occasions in the WTO in the context of the EU and its member states, and once involving the EC-Turkey customs union.[21] As mentioned, it is possible that an act adopted by a WTO Member could be defended on the basis that the WTO Member is merely implementing an act properly attributed to another international organization. How this would be

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[18] Arts 19 and 47 ARS; Arts 19 and 48 ARIO. In WTO Panel Report, *China – Payment Services*, WT/DS413/R, adopted 31 August 2012, China claimed that services supplied in Hong Kong and Macao were subject to the obligations of those separate WTO Members, and consequently it was not responsible: ibid, para 7.608. The Panel held that China's own obligations extended to services supplied from China to persons located in the territory of other WTO Members: ibid, para 7.619. Quite properly, it did not consider whether Hong Kong and Macao might also have had obligations in respect of these services, as this could not affect China's own responsibility.

[19] As discussed below, the EU declares that it is responsible under WTO law for its member states. It has been suggested that it is unclear whether this is on the basis that the conduct should be directly attributed to the EU as having been adopted by an EU organ, or that the EU adopts the acts of the Member States as its own: Esa Paasivirta and Pieter-Jan Kuijper, 'Does One Size Fit All?: The European Community and the Responsibility of International Organizations' (2005) 36 Netherlands Yearbook of International Law 169, 189, and the ILC in para 3 of its Commentary to Article 9 ARIO, Report of the International Law Commission, Sixty-Third Session, 2011, UN Doc A/66/10, para 88, p 95. From the reported wording of the argument it was more likely an argument for direct attribution, not adoption.

[20] Article 57 ARS expressly left this issue for the future; it was picked up in Arts 17, 61 and 62 ARIO.

[21] See below at **p XXX**.

handled in WTO dispute settlement proceedings, and what role, if any, would be given to the organization itself in such proceedings, in an interesting question.

2.2 Causally connected acts

A second category of shared elements of responsibility concerns situations in which a primary act and a third party's act combine to cause a breach of the primary actor's obligation. For example, if two actors contribute to an attack on a third, the primary party by supplying an aircraft carrier and the third party by mounting an attack from that aircraft carrier, the question would be whether the primary party has committed a breach of its obligations with respect to the attack. As can be seen from this example, the key issue in such cases is one of causation. There is no single test for legal causation, but most tests involve a consideration of the necessity and sufficiency of the acts in causing the given result. For example, in the case of subsidies, the Appellate Body has stated that a measure need not be necessary[22] nor sufficient to have caused the relevant injury; it is sufficient if the act is a 'genuine and substantial cause' of the injury.[23]

In the WTO, questions of causation arise at various stages of dispute settlement proceedings, not all of them comparable with the position in other systems of international law. First of all, questions of causation can arise at the stage of determining whether there has been a breach of an obligation. This is often overlooked, for two reasons. First, a number of WTO obligations are obligations to do something specific, such as carry out a risk assessment when adopting sanitary or phytosanitary measures,[24] or to provide for review of administrative acts.[25] For such obligations, the act (or omission) is itself the violation.[26] But there are also WTO obligations that are breached when a certain injury occurs, and for these obligations it is always necessary to demonstrate that there was causation between the act and the event. The reason this is almost never an issue in WTO law is that the relevant injury in WTO law is so easily caused that it is usually assumed that it has been caused. That is to say, WTO law protects not only *actual* market impacts but also *potential* market impacts. WTO panels

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[22] WTO Appellate Body Report, *US – Aircraft (Boeing)*, WT/DS353/AB/R, adopted 23 March 2012, para 914.

[23] WTO Appellate Body Report, *EU and Certain Member States – Aircraft (Airbus)*, WT/DS316/AB/R, adopted 1 June 2011, para 1234. This causation test originates in the area of trade remedies, where it is used to determine whether imports (as opposed to a measure, as here) 'cause' injury. In these contexts a 'non-attribution' test is also applied to make sure that the identified injury is not attributable to other causes.

[24] Article 5.1 of the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement).

[25] Article X:3 GATT.

[26] It is tempting to term these 'obligations of conduct' as opposed to 'obligations of result', in line with the terminology adopted for a time by the International Law Commission (ILC). However, the ILC's definitions of these terms are blurred on this point. It said '[w]hat distinguishes the first type of obligation from the second is not that obligations "of conduct" or "of means" do not have a particular object or result, but that their object or result must be achieved through action, conduct or means "specifically determined" by the international obligation itself, which is not true of international obligations "of result".': para 8 of the ILC's Commentary on Draft Article 22 (1977) 2(2) Yearbook of the International Law Commission 13-14. The ILC abandoned the distinction in its final Articles on the grounds that it was unnecessary and confusing.

therefore ask, without much rigour, whether a particular measure is likely to have an impact on the market; it is only in rare cases that they require a demonstration that a given measure has had any such causal effect.[27] This rule is proved by one of the obligations in the area of subsidies, which, unusually, requires a complainant to demonstrate that a subsidy has caused certain defined 'adverse effects to the interests of other Members'.[28] Depending on the facts, this can be more difficult to demonstrate, in part because of other possible causes of those adverse effects, and so it is unsurprising that it is in this area that the Appellate Body has devised a formal causation test.

The second stage at which causation technically arises in WTO law is at the stage of meeting the conditions for a WTO panel to have jurisdiction. What is required is that a WTO Member 'considers' that a measure of another WTO Member has 'nullified or impaired' benefits accruing to it under the relevant agreement;[29] there are slightly different, but no more onerous, rules for subsidies cases.[30] So while theoretically the question of causation could arise, the fact that the test is subjective test, along with the rule that, at least in violation cases, nullification or impairment of benefits is presumed, in practice the question whether an act caused the nullification or impairment is never addressed at this stage.

In other systems of international law, it is usual for causation to arise in determining the correct amount of reparation.[31] This does not occur in the WTO, because, by way of exception to the usual rule, 'compensation' is only a voluntary remedy,[32] and need neither be offered nor accepted. But there is one final, and important, stage at which causation can be an issue. This is at the stage of retaliation, where the value of retaliatory measures must be 'equivalent' to the nullification or impairment of benefits that the measure has caused, or

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[27] WTO Panel Report, *Argentina – Hides and Leather*, WT/DS155/R, adopted 19 December 2000, para 11.21, referring also to WTO Appellate Body Report, *EC – Poultry*, WT/DS69/AB/R, adopted 23 June 1998, paras 126-7. In *Dominican Republic – Cigarettes*, WT/DS296/AB/R, adopted 20 July 2005, para 96, the Appellate Body held that an adverse market impact was caused by factors (the market share of the affected companies) that were independent of the measure at issue. This misunderstands the nature of a causation test, which is focused on the effects of dynamic events, not of static objects. Specifically, the market share of an affected company can no more be a cause of discrimination than being female can be the cause of sex discrimination. The true cause of the market impact was the measure adopted by the respondent. Whether that amounted to discrimination was a separate question.

[28] Article 5 of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement).

[29] Article 3.3 DSU. This repeats the language in the jurisdiction clauses of the various WTO Agreements, which, under Article 1.1 DSU, trigger its application: these include and are based on Article XXIII:1 GATT. Article 3.7 also states that the complaining WTO Member must 'consider' whether it would be 'fruitful' to bring an action; this is also presumed: WTO Appellate Body Report, *Mexico – Corn Syrup (Art 21.5 – US)*, WT/DS132/AB/RW, adopted 21 November 2001, para 74.

[30] Article 7.1 SCM (actionable subsidies) has a list of 'injuries' including nullification or impairment, while Article 4.1 SCM (prohibited subsidies), a notable exception, does not make any reference to 'injury' as a condition of jurisdiction but only requires that the WTO Member consider that a prohibited subsidy is being granted or maintained.

[31] Paras 12 and 13 of the ILC's Commentary to Article 31 ARS, Report of the International Law Commission on the work of its fifty-third session, 2001, UN Doc A/56/10, para 77, pp 93-94.

[32] Article 22.1 DSU.

'appropriate' in subsidies cases.[33] In this context, there has been some discussion of the correct identification of the injury,[34] but none, so far, on the appropriate causation test linking the act to that injury.

2.3 Other related situations

These situations of *shared* elements of responsibility, strictly speaking, are to be distinguished from a number of related situations. One, mentioned above, is when the responsibility of a third party is logically implicated in a determination on the responsibility of the primary party. This situation typically arises in the context of claims concerning the consequences of responsibility,[35] but it is also implicit in other claims based logically upon a finding of another actors' responsibility. Examples are where a primary respondent has aided and assisted, directed and controlled, or coerced an illegal act by a third party,[36] and, depending on the identity of the third party,[37] where the respondent is argued to have failed to prevent an illegal act. Much of what follows is relevant also to these situations, as well as others in which third party interests are involved.

2.4 Interests of WTO panels and the parties

The analysis above concerns theoretical actors, and it is appropriate to say a word about what this might mean in practice. Unfortunately, however, it is very difficult to generalize about the ways that these various third party interests might manifest themselves in WTO dispute settlement proceedings. The most one can say is that a WTO panel will generally wish to have access to as much evidence as possible.[38] One might think that, in addition to a WTO panel, a complainant would wish to involve third parties, at least for evidentiary reasons, but this depends on the evidence. If it weakens the case against the primary party, the complainant might prefer the third party to remain absent. And the same goes for the respondent, especially if the respondent is able to argue that proceedings cannot go ahead in the absence of an indispensable third party. As

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[33] Art 4.10 SCM Agreement. The difference between 'appropriate countermeasures' and 'equivalent retaliation' is discussed in WTO Arbitrator Award, *US – Upland Cotton (Article 22.6 DSU and Article 4.11 SCM – US)*, WT/DS267/ARB/1, 19 November 2009, paras 4.27-4.117.

[34] WTO Arbitrator Report, *EC – Bananas III (Article 22.6 – Ecuador)*, WT/DS27/ARB/ECU, 18 May 2000, paras 131-3 (not very clearly); Arbitrator Award, *US – Gambling (Article 22.6 – US)*, WT/DS285/ARB, 21 December 2007, paras 3.135-6, 3.178.

[35] Thus, in *Monetary Gold (Italy/France, UK and US) (Preliminary Question)* [1954] ICJ Rep 19, 30-33, Italy claimed to be entitled to certain gold from Albania as compensation for an international wrong. Because Italy's claim depended logically on a finding that Albania was internationally responsible, it could not proceed in the absence of Albania. Cf, for a refusal to make a determination due to an absence of jurisdiction not *ratione personae* but *ratione materiae*, WTO Appellate Body Report, *Mexico – Taxes on Soft Drinks*, WT/DS308/AB/R, adopted 24 March 2006, para 56.

[36] Aid or assistance (Art 16 ARS; Arts 14 and 58 ARIO, direction and control (Art 17 ARS; Arts 15 and 59 ARIO) and coercion (Art 18 ARS; Arts 16 and 60 ARIO).

[37] See, eg, *Bosnian Genocide (Bosnia/Serbia and Montenegro)* [2007] ICJ Rep 595. In *Corfu Channel (Merits) (UK/Albania)* [1949] ICJ Rep 4, at 22, by contrast, there was no need to determine the wrongfulness of a third party, and thus, *a fortiori*, of any third state.

[38] This is discussed below, at **XXX**.

for the third party itself, it may have an interest in giving its views on the acts and obligations of the primary party, and it might also seek to adopt those acts. For example, the EU not only participates in dispute settlement proceedings involving EU member states, but assumes responsibility for their acts.[39] On the other hand, this depends on the facts. So, for example, the EU did not participate at all in *Turkey – Textiles*, even though Turkey claimed that the acts at issue could be attributed to the EU, and, alternatively, to the EC-Turkey customs union.[40] In sum, panels have an interest in obtaining information, and absent third parties have an interest in remaining unaffected. Other than this, the procedural rules can work to the advantage of any party, depending on the facts.

3. Jurisdictional issues

3.1 Bringing third parties before a panel as co-respondents

The WTO dispute settlement system comprises a permanent Appellate Body and *ad hoc* panels that are established, at the request of a complainant, by the WTO Dispute Settlement Body (DSB), a WTO organ comprised of WTO Members. It is possible for the Dispute Settlement Body to decide not to establish a panel. However, according to the voting rules applicable to such decisions, this decision can only be made with the consent of the complainant. In practice, therefore, the WTO dispute settlement system is one of compulsory jurisdiction. But does this mean that a complainant can choose to bring an action against multiple co-respondents?

The question arises because, while the DSU foresees and regulates the establishment of multiple complainants,[41] it is silent on the possibility of multiple respondents. It is clear that, in many respects, the DSU assumes that actions will normally be brought against single WTO Members. For example, Articles 1.2 and 4.6 refer to the complainant and respondent as 'either Member',[42] and other provisions refer to the respondent Member in the singular,

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[39] The procedural aspects of this position are discussed in the next section. On the substance, see in addition to the cases cited there, there were three cases in which a WTO Panel accepted the EU's argument that member state acts should be attributed to the EU: WTO Panel Report, *EC – Geographical Indications (US)*, WT/DS174/R, adopted 20 April 2005, para 7.725 (with caveat noted above at n 18); WTO Panel Report, *EC – Biotech*, WT/DS291/R, adopted 29 September 2006, para 7.101, and WTO Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, adopted 11 December 2006, para 7.552, n 932 (in this case in relation to breach, not attribution); and see also the position of the Appellate Body in *EC and Certain Member States – Aircraft (Airbus)*, noted below at n 56. For the sake of consistency, this article uses the abbreviation EU even when technically the reference should be to the EC, meaning the 'European Communities'.

[40] WTO Panel Report, *Turkey – Textiles*, WT/DS34/R, adopted 19 November 1999. See below at **XXX**.

[41] Article 9.1 and Article 9.2 DSU. A co-complainant may request a separate panel report: Article 9.2 DSU, and WTO Appellate Body Report, *US – Offset Act (Byrd Amendment)*, WT/DS217/AB/R, adopted 27 January 2003, paras 300-317; cf Rule 23 of the Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010.

[42] Article 1.2 DSU concerns a conflict between parties to a dispute on whether normal DSU rules or one of the sets of 'special or additional rules or procedures' listed in Annex 2 should apply. Article 4.6 states that pre-dispute '[c]onsultations shall be confidential, and without prejudice to the rights of either Member in any further proceedings.'

as 'a' Member, 'the' Member, and 'the other' Member. However, the central provisions on the establishment of panels are Articles 6 and 7, and these are silent on the relevant point. Article 6.2 states that the complainant's request for a panel 'shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly', but it does not say anything about identifying the party (or parties) to whom the acts are attributed. The standard terms of reference referred to in Article 6.2 and set out in Article 7.1 also say nothing on the point. They are as follows:

> To examine, in the light of the relevant provisions in (name of the covered agreement/s cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document DS/... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement/s.

There is also the possibility of establishing a panel with non-standard terms of reference if the complainant requests non-standard terms of reference,[43] and (or) the parties otherwise agree.[44] Here, too, the text is silent on the possibility of multiple respondents.

The text may be silent, but practice has emerged in support of the position that multiple co-respondents are indeed a possibility.[45] The first of these cases was *EC – Computer Equipment*, in which the United States had requested panels, in three separate proceedings, one against the EU and two against EU member states. This contradicted the EU's position that it assumes responsibility for the acts of its member states, and, accordingly, the EU objected to the establishment of separate panels for its member states in the Dispute Settlement Body.[46] After a proposal by the DSB Chairman, the Dispute Settlement Body decided not to establish separate panels in the cases against the member states, and instead to amend the terms of reference for the EU panel. The decision is reported as follows:

> 'To examine, in light of the relevant provisions in the GATT 1994, the matters referred to the DSB by the United States in documents WT/DS62/4, WT/DS67/3, and WT/DS68/2, and to make such

[43] Article 6.2 DSU.

[44] Articles 7.1 and 7.3 DSU. Article 7.3 DSU is 'subject to Article 7.1'. Whether the establishment of a panel with non-standard terms of reference requires the consent of the parties is unclear: *Australia – Salmonids*, Communication from the Chairman of the DSB, WT/DS21/5, 23 July 1999, para 3.

[45] In addition to the precedents mentioned here there is also a GATT precedent, but it is of limited value, as it predates the DSU. In 1962 Uruguay commenced proceedings against fifteen other GATT Contracting Parties, and while the Panel issued a single report was issued, it treated each complaint separately with an individual separate dispute settlement number. See GATT Panel Report, *Uruguayan Recourse to Article XXIII*, adopted 16 November 1962, L/1923, para 23, referring to 'fifteen separate reports'.

[46] WTO Dispute Settlement Body, Minutes of Meeting on 20 March 1997, WT/DSB/M/30, 28 April 1997.

> findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that agreement.' …
>
> Furthermore, the DSB should take note that the parties had agreed that the panel established on 25 February 1997, with the terms of reference as modified at the present meeting, would be able to consider, and rule upon, any matter that might have been considered if separate panels had been established in response to those panel requests.[47]

The result was that the panel in the proceedings known as *EC – Computer Equipment*, which acquired the DS numbers of the other two proceedings, possessed jurisdiction with respect to the acts of other EU member states. Technically, this process amounted to a decision by reverse consensus under Article 6.2 not to establish the other two panels and another decision under Article 7.1 and 7.3 to adopt non-standard terms of reference for the remaining panel listing the EU as sole respondent.[48]

EC – Computer Equipment was a case involving special terms of reference. It demonstrated that at least in such cases it was possible for multiple WTO Members to be joined as co-defendants in a single case. But it left open the question whether a panel operating with standard terms of reference could be established with multiple WTO Member defendants, and if so whether the agreement of the parties to the dispute was necessary. This question arose in *EC and Certain Member States – IT Products* in which, as before, the US, Japan and Chinese Tapei requested the establishment of a panel against the EU and its member states.[49] Again the EU objected to the establishment of panels against the member states. It said:

> On a procedural aspect, the EC must, once again, stress that it was the EC which bore the responsibility for the matter covered by the disputes, as this was a matter of exclusive EC competence. The EC was, therefore, the only respondent in these disputes. Naming member States on the panel requests was thus incorrect.[50]

The response of the United States was that 'because the EC member States had been named as respondents in the panel request, claims against the EC member States would be part of the Panel's terms of reference',[51] and this was also the result.[52] This is significant, because it demonstrates that even against the wishes

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[47] ibid.

[48] The Panel managed to avoid making any findings with respect to measures of the member states, for reasons that are not entirely clear: see WTO Panel, *EC – Computer Equipment*, WT/DS62/R, WT/DS67/R, WT/DS68/R, adopted 22 June 1998, paras 8.16; paras 9.1-9.2.

[49] WTO Dispute Settlement Body, Minutes of Meeting held on 29 August 2008, WT/DSB/M/255, 22 October 2008, para 6.

[50] WTO Dispute Settlement Body, Minutes of Meeting held on 23 September 2008, WT/DSB/M/255, 14 November 2008, para 49.

[51] ibid, para 50.

[52] In the end, the Panel found it unnecessary to address specific recommendations and rulings to the member states, but it sounded a warning that it would have been prepared to do so, if

of the parties to the dispute, at the request of the complainant, a panel will be established with multiple co-respondents.

It is true that these cases involve the EU and its member states, and it might be thought that they are not relevant to the case of other WTO Members. However, this depends on accepting the EU's position on the respective responsibilities of the EU and its member states. After *EC – Computer Equipment* and *EC and Certain Member States – IT Products* this cannot be taken for granted. As such, what these cases show is the possibility of joinder of co-respondents both with special terms of reference and, more importantly, with ordinary terms of reference – this time regardless the consent of the respondents.

3.2 Joinder by a panel

WTO panels have no express powers in relation to joinder, and are in this respect also bound by their terms of reference. Thus, in *Turkey – Textiles*, the panel stated that it had no power of compulsory joinder.[53] And in *EC – Computer Equipment*, the Panel declined a request by the United States to change the title of the proceedings to reflect include the names of Ireland and the UK on the grounds that it had not been agreed at the time the panel was established, and was in any case not necessary.[54] At most, the panel was prepared to concede that a 'change in the title might have been acceptable if it had been agreed upon by the parties to the dispute when they reached an agreement on the terms of reference of this Panel.'[55]

There is less certainty as to the corollary power to remove a co-respondent from proceedings, on the basis that it is not a proper party to the dispute. Certainly, it will not do this if it is not convinced that the respondent is not a property party. In *EC and Certain Member States – Civil Aircraft*, having not objected to the establishment of a panel listing the EC Member States as co-respondents, the EU brought up the issue before the Panel itself, requesting the Panel to remove the member states as co-respondents.[56] The Panel refused, holding that that the EU and its Member States were both fully responsible for their acts under WTO law. The Panel noted that it was irrelevant that the member states had not participated directly in the proceedings, and added that the title that had been given to the dispute was irrelevant to the substance of the member states' WTO obligations.[57] For the first time, the Panel also found that EU member states had

necessary: WTO Panel Report, *EC and Certain Member States – IT Products*, WT/DS375/R, WT/DS376/R, WT/DS377/R, adopted 21 September 2010, para 8.2.

[53] WTO Panel Report, *Turkey – Textiles*, above at n 38, para 9.11.

[54] WTO Panel Report, *EC – Computer Equipment*, above at n 46, para 8.17.

[55] ibid.

[56] WTO Panel Report, *EC and Certain Member States – Aircraft (Airbus)*, WT/DS316 /R, adopted 1 June 2011, paras 7.169-7.177.

[57] ibid, para 7.177. Somewhat inconsistently, the EU also requested that the individual Member States should have the right to comment on interim report and for this purpose to receive copies translated into French and Spanish: ibid, para 7.177. The EU also asked for translations of French and Spanish text in the interim report to be translated into English: ibid, para 6.17.

violated their WTO obligations and recommended that take appropriate remedial action.[58]

In this case, the Panel refused to remove co-respondents from a case, but this was because it decided, as a matter of law, that these were proper respondent. It is an open question what would happen if a Panel decided that a respondent was not a proper respondent. It could be argued that a Panel would exercise its inherent powers to prevent an abuse of process by removing such a respondent from the proceedings.[59] However, for the reasons mentioned in the introduction, this is most unlikely to occur. It is much more likely that the Panel would deal with such a situation by finding that the relevant respondent has not violated any WTO obligations. Treating a systemic issue as a substantive issue can be diplomatically adept, even if it is jurisprudentially less satisfying.[60]

4. Intervention by third parties

The foregoing has discussed the possibility of complainants joining third parties in dispute settlement proceedings – at least when they are themselves WTO Members. But should third parties themselves wish to participate in dispute settlement proceedings, they also have certain options.

The first is available to third parties who are also WTO Members. Under Article 10 of the DSU (as elaborated in Appendix 3 paragraph 6), third party WTO Members with 'a substantial interest in a matter' may participate in WTO panel proceedings, and third parties who have intervened at the panel stage have similar rights at the appellate stage.[61] Third parties have express rights to submit their views to panels, and in a number of cases certain third parties with a special interest in the proceedings have been granted enhanced third party rights, such as a right to participate in additional hearings and to see the

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[58] ibid, paras 8.5-8.7. The treatment of this ruling on appeal is most interesting. The Appellate Body stated that 'to the extent we have upheld the Panel's findings … as set out in paragraph 8.2 of the Panel Report, or such findings have not been appealed, the Panel's recommendation … that "the Member granting each subsidy found to have resulted in such adverse effects, 'take appropriate steps to remove the adverse effects or … withdraw the subsidy'", stands.' But it then recommended that 'that the DSB request the *European Union* to bring its measures, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the SCM Agreement, into conformity with its obligations under that Agreement.' See WTO Appellate Body Report, *EC and Certain Member States – Aircraft (Airbus)*, above at n 21, paras 1417 and 1419 (emphasis added).

[59] Andrew Mitchell and David Heaton, 'The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law as Required by the Judicial Function' (2010) 31 Michigan Journal of International Law 559, 596-602.

[60] The Appellate Body dealt with the hierarchy between the Appellate Body and Panels in a similar way. When a WTO Panel expressly deviated from an earlier Appellate Body ruling, the Appellate Body did not find that the Panel had failed to discharge its functions under Article 11 DSU, but contented itself with overturning the substance of the Panel's findings: WTO Appellate Body Report, *US – Stainless Steel*, WT/DS344/AB/R, adopted 20 May 2008, para 162.

[61] Article 17.4 DSU; Rule 24 Working Procedures for Appellate Review, above at n 39. There are proposals to delete the 'substantial interest' requirement, and to institutionalize and add to the enhanced rights: see 'Chairman's Text', above at n 13, A-7 to A-8, B-3 to B-4, and B-18 to B21.

submissions of the other parties.[62] In *EC – Hormones*, the Appellate Body said that a decision by the Panel to grant a third party a right to participate in a second substantive meeting (a hearing) 'falls within the sound discretion and authority of the Panel, particularly if the Panel considers it necessary for ensuring to all parties due process of law.'[63]

The requirement of 'substantial interest' includes not only commercial interests, but also systemic interests, which means that in reality all WTO Members have a *de facto* right to participate as third parties in WTO dispute settlement proceedings.[64] There is no restriction on the arguments that can be made, and WTO Members have intervened on all sides of a dispute. Finally, it is worth noting that third parties are expressly permitted to bring a complaint on the same matter against any respondent in case in which they were third parties, and this has been done.[65] There have been cases in which third parties have intervened on the side of the respondent but none, so far, in which their own responsibility has been implicated.

Official participation is not the only option available to third parties wishing to have a voice in dispute settlement proceedings. As an alternative to official third party status, WTO Members – and other third parties – are able to present their views as an *amicus curiae*. This mechanism is not found in the Dispute Settlement Understanding, but the institution of *amicus curiae* submissions is well established in WTO dispute settlement practice, even if it has encountered resistance among the WTO Members. In one case, an *amicus curiae* brief was submitted by a state, and WTO Member, and considered by the Appellate Body. This occurred in *EC – Sardines*,[66] when Morocco, a WTO Member, which had neglected to join the panel proceedings as a third party, wished still participate at the Appellate Body stage, once it realized its interest in the proceedings. It may be inferred that non-WTO states and international organizations, along with private parties, may also submit *amicus* briefs. However, whether these will have an impact is difficult to say. The Appellate Body's acceptance of the brief from Morocco, as with an earlier decision seeking to regulate the submission of unsolicited *amicus* briefs,[67] prompted significant disquiet among the WTO

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[62] A compilation of these cases is set out in WTO Panel Report, *US – Aircraft (Boeing)*, WT/DS353/R, adopted 23 March 2012, para 7.16. In this case, the Panel refused Brazil's request for enhanced third party status on the basis that it had only a systemic and not a commercial interest in the proceedings: ibid, para 7.17. See also 'Chairman's Text', ibid.

[63] WTO Appellate Body, *EC – Hormones*, WT/DS26/AB/R, adopted 13 February 1998.

[64] From 1996-2012, 170 of 182 panel proceedings and 102 of 109 Appellate Body proceedings included third parties. There have been third parties in every set of proceeding since 2002, and in recent years the number of third parties in any given proceedings has exceeded five. The statistics are available at http://www.worldtradelaw.net/dsc/database/partiespanel.asp and http://www.worldtradelaw.net/dsc/database/partiesab.asp (subscription service).

[65] WTO Appellate Body Report, *India – Patents (EC)*, WT/DS79/AB/R, adopted 22 September 1998, para 7.21.

[66] WTO Appellate Body Report, *EC – Sardines*, WT/DS231/AB/R, adopted 23 October 2002, paras 161-168.

[67] WTO General Council, Minutes of Meeting held on 22 November 2000, WT/WT/GC/M/60, 23 January 2001.

Membership,[68] and there are proposals to overturn the Appellate Body's practice on this point.[69] Pending any such decision, it is possible that WTO panels and the Appellate Body will simply find any such *amicus* briefs to be of no assistance in the cases before them. This would accord with their current practice.

5. Non-participating third parties

The foregoing has considered situations in which, voluntarily or by compulsion, third parties sharing elements of responsibility with the primary respondents in a dispute are able to participate in dispute settlement proceedings. This section considers the position of third parties that are absent from dispute settlement proceedings. This situation raises questions relating to the ability of a WTO Panel to obtain factual information from such parties, and concerning the protection of their legal interests. In both respects, the procedures discussed have implications not only for third parties sharing aspects of responsibility with the primary respondents, but also for third parties whose interests – and potentially their own responsibility – is at stake.

5.1 The evidentiary powers of WTO Panels with respect to absent third parties

In the WTO dispute settlement system, fact-finding is exclusively left to the WTO panels. In this respect, WTO panels have very broad powers. Article 13 of the DSU grants panels an express power to seek information from any source, private or public. Indeed, according to the Appellate Body, panels even have a duty to exercise this power, to ensure fairness to the parties and to enable them to exercise their functions properly.[70]

The 'sources' from which panels may seek information include states and international organizations,[71] including all WTO Members. Moreover, WTO Members have a duty to respond promptly and fully to requests made by panels for information.[72] These powers are spelled out in greater detail in Annex V of the Agreement on Subsidies and Countervailing Measure (SCM), which focuses expressly on WTO Members in whose markets the challenged subsidy is alleged to have an effect. In such cases, however, the responsibility of such third parties is not implicated.

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[68] WTO Dispute Settlement Body, Minutes of Meeting held on 23 October 2002, WT/DSB/M/134, 29 January 2003.

[69] Draft Article 13.3 DSU, in 'Chairman's Text', above at n 13, A-10.

[70] WTO Appellate Body Report, *US – Aircraft (Boeing)*, above at n 20, para 1144 (emphasizing fairness to the complainant) and para 1145 (emphasizing the functions of the panel). On the other hand, it is not for a panel to make a case for the parties: WTO Appellate Body Report, *US – Continued Zeroing,* WT/DS350/AB/R, adopted 19 February 2009, para 347.

[71] Article 13 has been used as a basis for obtaining information from international organizations: the IMF in WTO Panel Report, *India – Quantitative Restrictions*, WT/DS90/R, adopted 22 September 1999, paras 5.12, the WCO in WTO Panel Report, *EC and Certain Member States – IT Products*, above at n 50, para 2.3, and WIPO (WTO Panel Report, *US – Section 211 (Havana Rum)*, WT/DS176/R, adopted 1 February 2002, para 8.13.

[72] WTO Appellate Body Report, *Canada – Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, para 187.

More generally, the sanction for non-compliance with the duty to respond is that adverse inferences may be drawn from a failure to provide evidence.[73] This is a sanction that, by definition, only applies to participants in dispute settlement proceedings, not to third parties. In short, there is no way for a panel to obtain information by compulsion from absent third party WTO Members, nor, *a fortiori*, from absent third party non-WTO Members.

5.2 The indispensable third parties principle

Absent third parties can give rise to evidentiary problems in dispute settlement proceedings, but they can also cause more fundamental legal problems. In some international judicial systems, there is a rule that proceedings cannot proceed in the absence of an indispensable third party. This is a rule that, for obvious reasons, is of particular importance to third parties that share elements of responsibility. But does such a rule apply in WTO dispute settlement proceedings? And if it does, when would it apply?

On the first question, one might think that, as a rule of public international law of long standing, most famously articulated in *Monetary Gold*, the answer would be obvious.[74] Indeed, it might be argued that in this respect a WTO panel and the Appellate Body would have no choice. The words of the arbitral tribunal in *Larsen v Hawaiian Kingdom*, faced with the same question, are apposite:

> While it is the consent of the parties which brings the arbitration tribunal into existence, such a tribunal, particularly one conducted under the auspices of the Permanent Court of Arbitration, operates within the general confines of public international law and, like the International Court, cannot exercise jurisdiction over a State which is not a party to its proceedings.[75]

It may be, in other words, that WTO panels and the Appellate Body are here faced with a constraint on their power that is imposed on them by international law. To ignore this constraint, it could be argued, would be to commit a violation of international law for which the WTO would be responsible.

Against this, as noted above, WTO panels and the Appellate Body are very reluctant to apply rules of international law, beyond those relating to interpretation, or to admit that they are applying such rules.[76] And in this case it would be difficult to pretend that such a decision to reject an claim or defence on the basis that it would infringe the legal position of a third party could not be qualified as the exercise of an adjudicative body's 'discretion as to how to manage its proceedings'.[77] And yet, ironically, this same consideration could be

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[73] ibid, para 203.

[74] *Monetary Gold*, above at n 33.

[75] *Larsen v Hawaiian Kingdom*, Permanent Court of Arbitration, 5 February 2001, para 11.17.

[76] See above at page **XXX**.

[77] See above at page **XXX.**

an incentive for a panel or the Appellate Body to apply the indispensable third parties rule, to the extent that it might otherwise have to determine a third party's responsibility under a non-WTO rule. These countervailing factors make it difficult to predict how a WTO panel or the Appellate Body would respond to an argument requiring it to pronounce on the responsibility of an absent indispensable third party.

Nonetheless, for present purposes it is not necessary to dwell on the circumstances in which the WTO adjudicative bodies could be faced with the indispensable third parties principle, because none of these involves third parties sharing aspects of responsibility with a primary party. This has nothing to do with the WTO. It has to do with the indispensable third parties principle.

What is required for the application of the indispensable third parties principle is a definitive determination as to the legal situation of the third party. This may involve issues not involving its responsibility, such as its territory, or perhaps its status, especially in the case of an international organization.[78] Insofar as it involves the third party's responsibility, however, a determination as to that responsibility must be necessarily entailed by the determination at issue.[79]

There are two circumstances in which this can happen. The first is where the determination of the third party's responsibility is a logical precondition to the determination at issue. As noted above, this occurs in the case of claims based on the consequences of wrongful acts (as in *Monetary Gold*), or based on norms otherwise derivative of wrongful conduct. The second is where there is an identity between both the act and the obligation of the primary party and the third party, such that a determination on the primary party's responsibility is necessarily also a determination on the third party's responsibility. The double identity of act and obligation is critical. If the act is not identical, the principle cannot apply.[80] Where the act is identical but the obligation is not identical, the

[78] In WTO Panel Report, *Turkey – Textiles*, above at n 38, at paras 9.36-9.43, the Panel rejected an argument by Turkey that its measures should be attributed to the EC-Turkey Customs Union, on the grounds that the entity lacked legal personality. Such a finding might have consequences for the customs union (if the panel was wrong), but it does not affect its responsibility. So while it is relevant to the indispensable third parties principle it is not necessary to discuss this scenario in this article.

[79] Thirlway correctly emphasizes that the connection must be logical, not temporal: Hugh Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989, Supplement, 2010: Parts Nine' (1998) 69 British Yearbook of International Law 1, 49-51 and 'The Law and Procedure of the International Court of Justice 1960–1989, Supplement, 2010: Parts Nine and Ten' (2011) 81 British Yearbook of International Law 13, 82.

[80] In the WTO, see WTO Panel Report, *Turkey – Textiles*, above at n 38, para 9.10. In the International Court of Justice, see eg *Armed Activities (DRC/Uganda)* [2005] ICJ Rep 116, para 203; *Military and Paramilitary Activities (Nicaragua/US) (Jurisdiction)* [1984] ICJ Rep 432, paras 84-86. In his Separate Opinion in *Oil Platforms (Iran/US)* [2003] ICJ Rep 161, para 82, Judge Simma thought it relevant that the primary and third parties had not 'acted in concert'. This may have something to do with his reported view (which is difficult to understand) that Article 47 ASR, providing for multiple responsibility for the same act, only covers cases of concerted action. For this report, see Christine Ahlborn, 'Joint Responsibility in International Law: Revisiting the Oil Platforms Case', A Comment on Bruno Simma's SHARES Lecture', 13 June 2012, at

principle also cannot apply.[81] And identical means not only identical on paper, it means identical taking into account the application of equitable and interpretive principles. In *Nauru*, for example, it might have been highly likely that the same obligation would have been breached by all three of the states to which the act was attributable, but this could not be said for certain, and, that being the case, the indispensable third parties rule was inapplicable. The only norms which can *necessarily* said to be identical for any given third party and primary party are *jus cogens* norms, and consequently, for this category of cases, the indispensable third parties rule can only apply when there is shared attribution of an act and a claimed violation of a *jus cogens* norm.

If these conclusions are correct, it follows that the indispensable third parties never applies to third parties sharing elements of responsibility with a primary party, as these are defined in this article, with one rare exception. It never applies to the second category, concerning causally connected acts, because here the act of the third party is distinct from the act of the primary party. And it never applies to the first category, concerning shared attribution of single acts, because there is no necessarily shared obligation – the exception concerns obligations with *jus cogens* status. (Of course, as noted, this does not mean that the principle has no application in WTO dispute settlement proceedings, insofar as it could still apply in situations of related but not shared responsibility.) On the other hand, what this also means is that there is no risk that absent third parties sharing elements of responsibility with a primary party are at risk of their responsibility being determined in WTO dispute settlement proceedings. The indispensable third parties principle does not apply precisely because there is no need.

6. Conclusion

This article has looked at the ways in which the WTO dispute settlement system deals procedurally with third parties that share elements of responsibility with a primary party. It identified two situations in which this can occur: first, when the same act is attributable to the primary party and the third party, and second, when the act of the primary party causes a breach of an obligation binding on that party in combination with the act of a third party.

In both of these situations, as in others concerning different third party interests and related but not shared responsibilities, there are significant possibilities for the third parties to participate voluntarily in WTO dispute settlement proceedings. Panels have significant powers to obtain information from third parties, WTO Members have a virtually automatic right to participate as formal third parties in dispute settlement proceedings, and non-WTO Members can submit *amicus curiae* briefs to panels and to the Appellate Body.

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http://www.sharesproject.nl/joint-responsibility-in-international-law-revisiting-the-oil-platforms-case-a-comment-on-bruno-simmas-shares-lecture/.

[81] *Phosphate Lands in Nauru (Nauru/Australia)* [1992] ICJ Rep 240, para 55.

More complicated questions arise when a third party with shared elements of responsibility does not wish to be involved in the proceedings. WTO Member third parties can be compulsorily named as co-respondents, although not at any later stage of proceedings. This occurs at the request of the complainant, which means that there is no way to make sure that such co-respondents do actually share elements of responsibility with the primary party. That determination occurs during the proceedings, at which point the WTO adjudicative bodies would most likely deal with the issue by finding as to responsibility, rather than by applying a procedural rule to remove a non-responsible co-respondent.

All WTO Members are also obliged to answer requests for information by a WTO panel, even if it is not evident how this obligation can be enforced against Members not party to proceedings. This applies equally to all third party WTO Members, regardless of whether they share elements of responsibility with the primary party. Non-WTO Members, by contrast, are under no compulsion to participate in WTO dispute settlement proceedings, and absent non-WTO Members are also not at risk of adverse determinations on their legal responsibility. However, this is not because of any special features of the WTO; it is because it is never necessary, except in the case of *jus cogens* norms, that a tribunal determining the responsibility of a primary party will have to make a determination on the responsibility of a third party with merely shared *elements* of responsibility. There are certainly circumstances in which international tribunals, including the WTO adjudicative bodies, will be placed in this situation, but these are not the cases with which this article is concerned.