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The Practice of Shared Responsibility in relation to The World Trade Organization and the European Union and its Member States in the WTO

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The Practice of Shared Responsibility in relation to The World Trade Organization and the European Union and its Member States in the WTO

James Flett[*]

1. Introduction

The notion of shared responsibility, as referenced in this chapter, refers to the situation in which two or more actors have attributed to them a single act; or are considered to have contributed, through their own acts, to causing injury.[1] Ultimately, what is to be apportioned (or not) is compensation for the injury, or countermeasures, where these are based on the injury. A related question is whether or not such responsibility is *exclusive* (each actor is responsible for its own acts or causal contribution, and not those of other actors) or *joint*. A further related question is whether or not one actor has *primary* responsibility, and another *subsidiary* responsibility.

This chapter first explores in general terms shared responsibility in World Trade Organization (WTO) law (section 2). To provide context, the main aspects of responsibility and shared responsibility in general international law are first summarised, particularly the Articles on Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility or ARSIWA)[2] and the Articles on the Responsibility of International Organizations (ARIO) (section 2.1).[3] That provides the structure for an explanation of the specificities of the constituent elements and consequences of responsibility in WTO law and the implications for shared responsibility (section 2.2). The key points are that compensation in WTO law is

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[1] See Chapter 1 in this volume, P.A. Nollkaemper and I. Plakokefalos, 'The Practice of Shared Responsibility: A Framework for Analysis', in P.A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2016), 1, at ___.

[2] Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA or Articles on State Responsibility); Commentary to the Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA Commentary).

[3] Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO); Commentary to the Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO Commentary).

voluntary and that, when it comes to countermeasures, econometrics permits the respondent's responsibility to be *isolated*, without ruling on the responsibility of any other actor. The conclusion (section 2.3) is that there are certain aspects of WTO law capable of *giving rise* to issues of shared responsibility, and equally capable of *resolving* them; but also certain aspects of WTO law that lend themselves nicely to *avoiding* issues of shared responsibility. In *practice*, the latter is what is happening, and this is likely to continue. In short, on the issue of shared responsibility, WTO law is full of potential; and probably always will be.

Second, this chapter examines the special case of the European Union (EU)[4] and its member states in the WTO (section 3). This issue has a (narrower) focus on: first, one particular aspect of shared responsibility (attribution, as opposed to causation); second, one particular aspect of attribution (with respect to an international organisation and its member states); and third, one particular situation (where both the international organisation (the EU) and its member states are each members of the international organisation (the WTO) determining responsibility). The WTO practice is reviewed (section 3.2); and critiqued (section 3.3). The conclusion is that WTO practice supports the view that responsibility is *concurrent*, but that the issue is generally moot, because compensation is voluntary; in almost all cases the EU is a respondent; and the right to retaliate against the whole contains within it the right to retaliate against a part. Consequently, this case law is of limited interest to the general assessment in section 2.

Furthermore, given the *specificities* of WTO law, this case law does not support a more general thesis that the external *responsibility* of the EU and its member states is to be parsed as a function of internal competence, especially on an exclusive basis (although this conclusion is without prejudice to the question of whether or not the general thesis itself is correct). In this respect, the role of the ARIO, and particularly the *lex specialis* rule, and the concepts of 'the rules of the organisation' and 'primary and subsidiary responsibility', have not yet been addressed in WTO litigation. However, as a matter of fact, this may never happen, because as long as the EU is respondent the issue will be moot, and, in light of the case law of the European Court of Justice (ECJ), the EU would not seek to disavow responsibility for a member state measure *affecting trade with another WTO member*.

[4] In this chapter, with the exception of case names and quotations, the term EU is also used to refer to the European Communities (EC).

2. A general assessment of shared responsibility in WTO law

2.1 Responsibility and shared responsibility in general international law

This section summarises the main elements of responsibility and shared responsibility in general international law, particularly the ARSIWA and the ARIO, and their relationship with WTO law. These documents inform the interpretation and application of WTO law, as a matter of law or fact, except to the extent of any conflict, in which case WTO law prevails. They provide the template for section 2.2.

2.1.1 Shared responsibility in the ARSIWA and ARIO

The ARSIWA address the question of whether a particular state or particular states are responsible for a particular act. They leave open the questions of whether such responsibility is exclusive or shared, and how contribution to the injury should be taken into account. The only rule is that compensation should not exceed the injury.

Like the ARSIWA, the ARIO address the question of whether particular international organisations or (in certain instances) states are responsible for a particular act. They leave open the questions of whether such responsibility is exclusive or shared, and how contribution to the injury should be taken into account. The only rule is that compensation should not exceed the injury.

The ARIO also introduce the concepts of primary and subsidiary responsibility. This suggests that primary responsibility, to make full reparation, will generally lie with the international organisation that authored the act, and secondary responsibility with the states members of the international organisation, taking into account their contribution to the injury. Subsidiary responsibility may be invoked insofar as the invocation of primary responsibility has not led to reparation.

To determine if a specific conduct is attributable to a state, it is necessary to apply the ARSIWA. The ARSIWA are without prejudice to any question of responsibility of an international organisation or of any state for the conduct of an international organisation.[5] To determine if a specific conduct is attributable to an international organisation (such as the

[5] Articles 47(1) and 57 ARSIWA, n. 2.

EU), it is necessary to apply the ARIO. The relevant parts of the ARIO are without prejudice to the responsibility of any state or international organisation.[6] Thus, there can be two measures, one attributable to the international organisation and the other attributable to the state, irrespective of the relationship between the two measures. There can also be one measure that is attributable both to the international organisation, and at the same time to the state.[7]

To determine if the conduct of an EU member state engages the responsibility of the EU, it is necessary to apply the ARIO, Part Two, Chapter IV.[8] Part Two, Chapter IV is without prejudice to the responsibility of any state or international organisation.[9] On the other hand, to determine if the conduct of the EU engages the responsibility of an EU member state, it is necessary to apply the ARIO, Part Five.[10] Part Five is without prejudice to the responsibility of any state or international organisation.[11] Thus, the outcome of these assessments and the assessments detailed in the preceding paragraph are independent.

In short, responsibility can be established by considering the EU; by considering the EU member state; or by considering the relationship between them in either sense. Such responsibility may be either exclusive, or shared.[12]

[6] Articles 19, 48(1) and 63 ARIO, n. 3.
[7] Article 48 ARIO, ibid.; ARIO Commentary, n. 3, Commentary to Part Two, Chapter II, para. 4.
[8] Part Two, Chapter IV of the ARIO, ibid., is titled: 'Responsibility of an international organization in connection with the act of a State or another international organization'.
[9] Article 19 ARIO, ibid.
[10] Part Five of the ARIO, ibid., is titled: 'Responsibility of a State in connection with the conduct of an international organization'.
[11] Article 63 ARIO, ibid.
[12] ARIO Commentary, n. 3, Commentary to Article 3, paras. 4and 6; Commentary to Part Two, Chapter II, para. 4; Commentary to Part Two, Chapter IV, para. 2; Commentary to Article 19; Commentary to Article 47, paras. 1-2; Commentary to Article 48, paras. 1-2; Commentary to Part Five, para. 2; Commentary to Article 62, para. 13; Commentary to Article 63, paras. 1-3. See also P.A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 MIJIL 359, 374. At page 383 Nollkaemper and Jacobs refer to exclusive responsibility in the specific context of the conduct of one entity placed at the disposal of another, but recognise that this is not a general proposition informing other parts of the ARSIWA and the ARIO (see at 384-385). The same approach is adopted in F. Messineo, 'Multiple Attribution of Conduct', SHARES Research Paper 11 (2012), available at www.sharesproject.nl. An advanced version of this paper has been published under the title 'Attribution of Conduct' as SHARES Research Paper 32 (2014), and was subsequently published as Chapter 3 in P.A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press, 2014), 60.

2.1.2 The relationship between the ARSIWA/ARIO and WTO law

The relationship between WTO law and other international law, including general international law, is discussed further below.[13] WTO law contains special rules of international law that govern the conditions for the existence of an internationally wrongful act, and the content and implementation of the international responsibility of WTO members (that is, with respect to the areas covered by Parts One to Three of the ARSIWA and the corresponding provisions of the ARIO). The *lex specialis* rules therefore preclude application of the ARSIWA and the ARIO in WTO law to that extent.[14] To the extent that there is no conflict, and particularly if WTO law is silent, the ARSIWA and ARIO may apply, and in any event the interpretation and application of WTO law may be informed by, or at least consistent with, the ARSIWA and the ARIO. Thus, the ARSIWA and the ARIO have been referred to in a number of WTO cases.[15] A well-known example of divergence is that, if the compliance obligation in the WTO is prospective only (and this remains a controversial question),[16] then the rules on restitution (that is, with respect to the past), and compensation in the ARSIWA and the ARIO[17] may have little if any role to play in WTO law.

[13] See section 2.2.2 below.
[14] Article 55 ARSIWA, n. 2, and Article 64 ARIO, n. 3 ('… to the extent …').
[15] *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, Appellate Body Report, 3 March 2005, para. 120 and footnote 51; *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe From Korea*, WT/DS202/AB/R, Appellate Body Report, 15 February 2002, para. 259 and footnotes 255 to 257; *European Communities – Regime for the Importation, Sales and Distribution of Bananas III (US) (Article 22.6 – EC)*, WT/DS27/ARB/ECU, Arbitration Panel Report, 24 March 2000, footnote 67; *Brazil – Export Financing Programme for Aircraft (Article 22.6 – Brazil)*, WT/DS46/ARB, Arbitration Panel Report, 28 August 2000, para. 3.44 and footnotes 45, 46 and 48; *United States – Tax Treatment for 'Foreign Sales Corporations' (FSC) (Article 22.6 – US)*, WT/DS108/ARB, Arbitration Panel Report, 30 August 2002, footnote 52 and paras. 5.58 to 5.60 and footnotes 67 to 69; *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, Panel Report, 10 November 2004, paras. 6.128 to 6.129 and footnotes 697 to 701; *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, Panel Report, 7 October 2005, para. 8.180 and footnotes 404 and 405; *EC – Selected Customs Matters*, Panel Report, n. 133, para. 7.552 and footnote 932; *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, Panel Report, 12 June 2007, para. 7.305 and footnote 1480; *Canada/United States – Continued Suspension of Obligations in the EC-Hormones Dispute*, WT/DS320/AB/R / WT/DS321/AB/R, Appellate Body Reports, 16 October 2008, paras. 382; *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/R, Panel Report, 15 November 2010, para. 7.120 and footnote 533; *United States – Countervailing and Anti-dumping Measures on Certain Products from China*, WT/DS449/AB/R, Appellate Body Report, 7 July 2014, paras. 305-316; *EC and Certain Member States – Large Civil Aircraft*, Appellate Body Report, n. 170, para. 685; *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R; WT/DS386/R, Panel Report, 18 November 2011, footnote 41.
[16] See generally, C.P. Bown and J. Pauwelyn, *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement* (Cambridge University Press, 2010).
[17] Articles 35 and 36 ARSIWA, n. 2; Articles 35 and 36 ARIO, n. 3.

2.2 The specificities of the constituent elements and consequences of responsibility in WTO law and their implications for shared responsibility

In light of the framework for responsibility in general international law, this section describes the specificities of the constituent elements and consequences of responsibility in WTO law: measure (2.2.1); obligation (2.2.2); attribution (2.2.3); causation (2.2.4); compensation (2.2.5); and countermeasures (2.2.6). It also deals with procedural aspects of WTO dispute settlement (2.2.7), and case law and practice (2.2.8). In WTO law there are no primary or secondary rules that address the issue of *shared* responsibility. However, there are a number of features of WTO law that imply that shared responsibility could arise. Thus, the approach is to identify the relevant rules relating to responsibility, and in each case explain their implications for the circumstances in which shared responsibility could arise.

WTO law provides that members should not to adopt or maintain *measures* that are inconsistent with the covered agreements and nullify or impair the benefits of other members.[18] Non-violation complaints are possible,[19] but rare and to-date unsuccessful. There has never been a situation complaint.[20] The causing of an adverse impact is subject to a rebuttable presumption[21] that has rarely been challenged, and never successfully, although in specific instances causation and injury must be demonstrated.[22] Compensation is voluntary;[23] and countermeasures may be authorised to induce compliance.[24] Thus, the constituent elements of responsibility in WTO law are: the measure; the obligation; attribution to a WTO member; and causation of injury. The consequences are compensation and/or countermeasures.

[18] Article XXIII GATT, n. 32; Article 19 DSU, n. 35.
[19] Article XIII:1(b) GATT, ibid.
[20] Article XXIII:1(c) GATT, ibid.
[21] Article 3.8 DSU, n. 35.
[22] Notably, under Part III of the SCM Agreement, n. 52; and under Part V of the SCM Agreement, and the Anti-Dumping Agreement, n. 67, when applied by WTO members.
[23] Article 22.1 DSU, n. 35.
[24] Article 22, DSU, ibid.

2.2.1 Measure

The WTO Agreement[25] does not contain a provision that establishes its subject matter as measures. Nevertheless, many of its provisions use the term 'measure', and many others use other terms, such as 'law' or 'regulation', that are sub-sets of the term 'measure'. Thus, in WTO law, the existence of a measure is a necessary pre-condition to responsibility.[26] The concept of 'measure' in WTO law is broad.

First, in WTO law, a measure may be any act.[27] It does not have to be an act expressly prohibited, required or permitted by a provision of the WTO Agreement. It could be, for example, an act required or permitted by another international agreement.

Second, in WTO law, a measure may also be any omission. It does not have to be an omission with respect to something expressly required or permitted by the WTO Agreement. It could, for example, be an omission to do something required or permitted by another international agreement.

Third, in WTO law, a measure need not be written: its existence and precise content may be demonstrated with evidence other than a written text of the measure itself.[28] Linked to this, any provision of WTO law can be breached in law or in fact.[29] An in fact breach is not to be lightly assumed; demonstrating such a breach is a much more difficult task, involving a high threshold, and requiring particular rigour.[30] It is nevertheless possible.

Fourth, in WTO law, a measure need not be 'mandatory'. It may be a measure however it is characterised in municipal law, however it comes into existence, whether or not it is

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[25] Marrakesh Agreement Establishing the World Trade Organization, Marrakesh, 15 April 1994, in force 1 January 1995, 1867 UNTS 3 (WTO Agreement).

[26] *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, Appellate Body Report, 15 December 2003, para. 81.

[27] Ibid.

[28] *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ('Zeroing')*, WT/DS294/AB/R, Appellate Body Report, adopted 9 May 2006, and Corr. 1, DSR 2006:II, at 417, paras. 68-222; *EC – Approval and Marketing of Biotech Products*, Panel Reports, n. 156, see section VII.D.2.

[29] *European Communities – Regime for the Importation, Sales and Distribution of Bananas*, WT/DS27/AB/R, Appellate Body Report, 9 September 1997, paras. 232-234 (*EC – Bananas III*); *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R; WT/DS142/AB/R, Appellate Body Report, 31 May 2000, paras. 140-143; *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, Appellate Body Report, 4 April 2012, para. 175.

[30] *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, Appellate Body Report, 2 August 1999, paras. 167 and 168; *Canada – Aircraft (Article 21.5 – Brazil)*, WT/DS70/AB/RW, Appellate Body Report, 21 July 2000, paras. 47 to 49; *Zeroing*, Appellate Body Report, n. 28, paras. 196 and 198.

ambiguous, and whether or not it provides for discretion in its application.[31] In short, WTO measures may be soft law.

This broad concept of 'measure' has implications for the circumstances in which the responsibility of WTO members may be engaged: they are correspondingly broad. This in turn has implications for the circumstances in which responsibility may be *shared*.

In WTO law, it is possible to have a single measure, attributed to two or more WTO members. One example is the agreements referred to in Article XXIV of the GATT 1994[32] concluding customs unions or free trade areas. It seems difficult to construe such agreements as two separate measures, the first attributable to one WTO member, and the second attributable to the second WTO member. Viewed in isolation, neither would have any legal effect. They only acquire meaning, and legal effect, when viewed together, in the meshed complex of rights and obligations set out in the agreement itself. There is nothing in the covered agreements or the case law that would prevent such an agreement from being a measure, attributable to both WTO members.[33] In the trade field, such agreements are the typical example of the increasing incidents of cooperative action and responsibility referred to by Nollkaemper and Jacobs.[34]

Another obvious example would be mutually agreed solutions under the Dispute Settlement Understanding (DSU),[35] which must be consistent with the covered agreements, and which could also be a measure attributable to the two or more agreeing WTO members for the purpose of dispute settlement.[36]

The implications of developing this line of reasoning are obvious. Taken to its limit, it would mean that any international agreement concluded by at least one WTO member is capable of being a measure for the purposes of WTO law; and responsibility for its consistency with WTO law could be shared amongst all WTO members to which that measure is attributable,

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[31] *US-Corrosion Resistant Steel Sunset Review*, Appellate Body Report, n. 26, para. 93.
[32] General Agreement on Tariffs and Trade 1994, Marrakesh, 15 April 1994, in force 1 January 1995, 1867 UNTS 187 (GATT 1994).
[33] For example, in DS263 *EC – Measures Affecting Imports of Wine*, Argentina cited several bilateral agreements between the EU and third countries as measures at issue, claiming them to be inconsistent with various provisions of the covered agreements (WT/DS263/1 of 12 September 2002).
[34] Nollkaemper and Jacobs, 'Shared Responsibility in International Law', n. 12, at 362 and 368. See also: Messineo, 'Multiple Attribution of Conduct', n. 12, (in support of the thesis that a given conduct can be attributed to two or more states or international organisations at the same time).
[35] Annex 2 to the WTO Agreement, n. 25, Understanding on Rules and Procedures Governing the Settlement of Disputes, 1869 UNTS 401 (Dispute Settlement Understanding or DSU).
[36] Article 3.5 DSU, ibid.

that is, all those that have concluded such an international agreement. The only way of avoiding that conclusion would be to draw on conflict rules from general international law, including the Vienna Convention on the Law of Treaties,[37] in order to argue that, in such cases, the WTO adjudicator should decline jurisdiction. However, to-date, WTO adjudicators have not agreed to surrender jurisdiction when asked to do so.[38]

The broad concept of measure as encompassing *omissions* also increases the range of possible situations of shared responsibility. For example, counterfeit goods might be produced in one WTO member, but transit a second WTO member, before being sold in a third WTO member, causing injury. The third WTO member might complain about the actions of the first WTO member and the omissions of the second, both of which would be necessary causes, and could be substantial causes, and this could give rise to an issue of shared responsibility.[39]

The broad concept of measure as encompassing *unwritten* measures also increases the range of possible situations of shared responsibility. For example, one WTO member might direct and control another to impose an import ban. It would be quite likely that there might be no direct written evidence of a text directing and controlling the import ban. Nevertheless, if circumstantial evidence is capable of substantiating the existence of an unwritten measure, that may be sufficient. The complaining WTO member could then bring a case against both the WTO member adopting the import ban, and the WTO member directing or controlling, and this could give rise to an issue of shared responsibility.

Finally, the broad concept of measure as encompassing *non-mandatory soft law* also increases the range of possible situations of shared responsibility. For example, if, as outlined above, an agreement would be capable of being a measure for the purposes of WTO law, then it would appear that what is often termed a 'memorandum of understanding' (including agreements that declare themselves not to be agreements) might also be a measure, or evidence of an unwritten measure.

[37] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331.
[38] *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, Appellate Body Report, 6 March 2006, para. 53.
[39] A similar fact pattern arose in *EU and a Member State – Seizure of Generic Drugs in Transit*, DS408.

2.2.2 Obligation

WTO adjudicators have jurisdiction in disputes between WTO members concerning their rights and obligations under the covered agreements.[40] However, there is no single provision of the DSU that speaks clearly to the question of the applicable law. The applicable law certainly includes the covered agreements.[41] These are to be clarified in accordance with customary rules of interpretation of public international law.[42] However, there is uncertainty about the extent to which WTO adjudicators can apply other law, and particularly other international law. There are some instances in which other international law is incorporated by reference,[43] or referred to.[44] General international law has been referred to in many WTO reports.[45] Although rare in practice, parties can agree special terms of reference, which could refer to other obligations.[46]

It is clear that, absent incorporation by reference or special terms of reference, a WTO adjudicator would not have jurisdiction to consider a claim framed *only* by reference to an alleged breach of an obligation contained in a document that is not a WTO covered agreement. At the same time, it cannot be excluded that documents other than WTO covered agreements could be relevant in adjudication, as applicable law, as context, or as fact. Such other documents could contain rights or obligations invoked by either party in litigation.

For example, a complaining member could allege an in fact breach of the national treatment obligation in Article III of the GATT 1994. The countervailing explanation provided by the defending member could be that the measure is reasonable, because it is required by some other agreement to which both litigants are party. The complaining member might counter that the measure is not required by the other agreement, and actually prohibited by it. Thus, an assessment of the rights and obligations of the litigants under the other agreement could become central to, and even determinative of, the question of whether or not there is a breach of WTO law, and thus, whether or not the responsibility of the defending member is engaged.

[40] Article 1.1 DSU, n. 35. The covered agreements are listed in Appendix 1 of the DSU.
[41] Articles 1.1 and 7.2 DSU, ibid.
[42] Article 3.2 DSU, ibid.
[43] See for example the TRIPs Agreement, n. 101.
[44] See for example the SPS Agreement, n. 157; TBT Agreement, n. 69; and SCM Agreement, n. 52.
[45] See generally, J. Flett, 'Importing Other International Regimes into World Trade Organization Litigation', in M.A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2012), 261.
[46] Article 7.2 DSU, n. 35.

The same could arise if the other agreement would be raised as a defence pursuant, for example, to Article XX of the GATT 1994.

Thus, the question of how WTO law relates to other general or specific international law has implications for the circumstances in which the responsibility of WTO members may be engaged, or avoided. This in turn has implications for the circumstances in which responsibility may be shared.

2.2.3 Attribution

WTO law does not have a single set of provisions that speaks directly to the question of attribution, and certainly nothing like the ARSIWA or the ARIO. As a rule, the drafting of the WTO Agreement suggests an assumption that attribution, especially between two WTO members, will not generally be an issue, and this is confirmed by the case law. There has never been a case of co-respondents, nor a case of a single measure attributed to two WTO members (the cases involving the EU and its member states are discussed in section 3 of this chapter). The ARSIWA and the ARIO fill this gap, either as a matter of law or as a matter of fact. As outlined above, they allow for shared responsibility. Thus, in theory, the possibility for shared responsibility through shared attribution is as open in WTO law as it is in general international law. For example, one WTO member might acknowledge and adopt as its own the measure of another. Alternatively, one WTO member might aid or assist another in the commission of an inconsistent measure, or achieve a similar result through direction and control or coercion. However, WTO law is also well suited to avoiding issues of shared responsibility altogether, and in practice, this is what has been happening.

There are some WTO provisions that speak to the role of sub-state entities, private bodies, and supra-state entities (or international organisations), and in doing so touch on questions of attribution.

Thus, some WTO provisions indirectly relate to the question of attribution between a WTO member and its sub-state entities.[47] However, the more recent provisions, which would prevail to the extent of any conflict,[48] suggest that the possibility of a WTO member avoiding

[47] Article XXIV:12 GATT, n. 32; Article 13 SPS Agreement, n. 157; Articles 3 and 4 TBT Agreement, n. 69.
[48] General Interpretative Note to Annex 1A of the WTO Agreement, n. 25.

responsibility by attributing the measure only to a sub-state entity is very limited or non-existent. Such an argument will probably never be successfully invoked. The ARSIWA tend to confirm this.[49]

Similarly, some WTO provisions touch on the question of attribution between a WTO member and a private body, in the context of regulation.[50] The sense of these provisions is the possibility of attribution to the WTO member, as opposed to avoidance of attribution by the WTO member. Such issues are rare in the case law, but may become more common in the future, as states more frequently rely on private bodies in the context of an increasingly complex and transnational regulatory environment; whilst at the same time the WTO seeks to retain the power to review such matters.[51]

The question of attribution between a WTO member and a private body also arises in the Subsidies and Countervailing Measures (SCM) Agreement.[52] First, under the SCM Agreement, the actions of a private body may be attributable to the state if the private body is entrusted or directed by the state with the granting of a subsidy.[53] Related to this, a private bank, accused of being entrusted or directed, may be an interested party in a countervailing duty investigation, whose refusal to co-operate may result in inferences that may be adverse to the subsidising member and the putative beneficiary.[54] Second, the question of what constitutes a public body, and specifically whether it is an institutional or functional test, has been litigated, with the Appellate Body coming down in favour of a test of attribution, driven in large measure by the ARSIWA.[55]

Finally, some WTO provisions indirectly touch, in effect, on the consequences of attribution between a WTO member and a supra-state entity (or international organisation).[56] The sense of these provisions is that, to the extent that the measure is ultimately attributable to an

[49] Article 4(1) ARSIWA, n. 2.
[50] Article 13 SPS Agreement, n. 157; Articles 3 and 4 and Annex 1, paragraph 1 TBT Agreement, n. 69 (defining technical regulations as mandatory).
[51] Nollkaemper and Jacobs, 'Shared Responsibility in International Law', n. 12, at 374-377.
[52] Agreement on Subsidies and Countervailing Measures, Annex 1A to the WTO Agreement, n. 25 (SCM Agreement).
[53] Article 1.1(a)(iv) SCM Agreement, ibid.; *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, Appellate Body Report, 27 June 2005, paras. 106-116.
[54] *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea (DRAMS)*, WT/DS336/AB/R, Appellate Body Report, 28 November 2007, paras. 230-245.
[55] Article 1.1(a)(1) SCM Agreement, n. 52; *US – Anti-Dumping and Countervailing Duties (China)*, Appellate Body Report, n. 15, paras. 282-332.
[56] Article 3 SPS Agreement, n. 157; Article 2.4 TBT Agreement, n. 69.

international organisation to which all WTO members, or at least the litigants, are party, the measure will tend to be justified.

In all of these provisions, WTO law confines itself to the question of whether or not the measure is attributable to the WTO member cited as respondent. It is does not address the question of whether or not the measure is attributable to the sub-state entity, private body, or supra-state entity. None of these actors may appear in WTO litigation, unless invited to answer questions,[57] although they may file an *amicus curiae* brief.[58] Further, WTO law answers this question in a binary manner: either the measure is attributable to the WTO member cited as respondent, or it is not.

In the context of attribution, WTO law does not contain any concept of primary and subsidiary responsibility. These concepts could be imported from the ARIO.[59] The implication could be that invocation of primary responsibility leading to the possibility of reparation (that is, compensation) could be a pre-condition for the invocation of subsidiary responsibility;[60] although the without prejudice provisions of the ARSIWA and the ARIO discussed above rather suggest that the various responsibilities are independent. This could imply that a WTO complainant that wishes to pursue a WTO member in relation to a matter for which they may have only subsidiary responsibility (in terms of attribution) might be well-advised to also invoke the responsibility of the actor that may have primary responsibility, whether in the WTO jurisdiction or in some other jurisdiction.

2.2.4 Causation

WTO law provides that members should not adopt or maintain measures that are inconsistent with the covered agreements and nullify or impair the benefits of other members.[61] The causing of an adverse impact is subject to a rebuttable presumption[62] that has rarely been challenged, and never successfully. In specific instances causation and injury must be

[57] Article 13 DSU, n. 35.
[58] See generally J. Durling and D. Hardin, '*Amicus Curiae* participation in WTO dispute settlement: reflections on the past decade', in R. Yerxa and B. Wilson (eds.), *Key Issues in WTO Dispute Settlement: The First Ten Years* (Cambridge University Press, 2005), 221.
[59] Articles 48(2) and 62(2) ARIO, n. 3.
[60] ARIO Commentary, n. 3, Commentary to Article 48, para. 3, suggests that a subsidiary claim would have to be conditioned on a primary claim not resulting in reparation.
[61] Article XXIII GATT, n. 32; Article 19 DSU, n. 35.
[62] Article 3.8 DSU, ibid.

demonstrated.[63] Thus, whilst there is a general rule with exceptions on burden of proof, as a matter of law, causation of injury is an issue, or potential issue, in every case. This is not generally the case under the ARSIWA and the ARIO.[64]

In the context of Part III of the SCM Agreement, the Appellate Body has developed an understanding of causation according to which the test is neither one of necessity or sufficiency. A necessary cause might be too remote to justify engaging the legal responsibility of the WTO member to which the cause is attributable. On the other hand, the engaging of responsibility might be appropriate even if, taken in isolation, the cause in question would not have been sufficient. Thus, according to the Appellate Body, the question is whether or not there is a genuine and substantial relationship of cause and effect.[65] The term 'genuine' probably has a less important role to play in this test than the term 'substantial'. It could be relevant, for example, in a discussion of whether injury has been self-inflicted, through act or omission. Thus, the essence of the test is the term 'substantial'. This is very close to judicial deeming of responsibility.[66] The implication is that there is no limit to the number of entities potentially being substantial causes of the injury observed, and thus no limit to the number of entities potentially sharing responsibility.

This is probably also the essence of the causation tests under Part V of the SCM Agreement and the Anti-Dumping Agreement,[67] which permit 'cumulation' for the purposes of determining causation, subject to certain *de minimis* rules.[68] In other words, the volume of dumped or subsidised imports from more than one investigated country may be cumulated for the purposes of determining whether such imports caused the injury to the domestic industry that has been observed. The same test would probably be applied to any further attempts to rebut the presumption in Article 3.8 of the DSU. It would also appear to be, in essence, the relevant test in any other circumstances in which causation becomes an issue, such as when,

[63] Notably, under Part III of the SCM Agreement n. 52; and under Part V of the SCM Agreement and the Anti-Dumping Agreement, n. 67, when applied by WTO members.
[64] ARIO Commentary, n. 3, Commentary to Article 4, para. 3.
[65] *EC and Certain Member States – Large Civil Aircraft*, Appellate Body Report, n. 170, paras. 1231-1233.
[66] Thus, cumulative responsibility is not simply aggregation (Nollkaemper and Jacobs, 'Shared Responsibility in International Law', n. 12, at 368). Rather, in principle, each actor must be a substantial cause, although behind that illusive test there is more judgment than theory, so it is probably not destined to be the basis for further theoretical clarity (Nollkaemper and Jacobs, ibid., at 394-395 and 397-398). See also ARSIWA Commentary, n. 2, Commentary to Article 31, paras. 9-10, opining that, in international law as in national law, the question of remoteness of damage is not a part of the law which can be satisfactorily solved by a search for a single verbal formula.
[67] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Annex 1A to the WTO Agreement, n. 25 (Anti-Dumping Agreement).
[68] Articles 15.3 and 11.9 SCM Agreement, n. 52; Article 3.3 Anti-Dumping Agreement, ibid.

under Article III of the GATT 1994 or Articles 2.2 and 2.2 of the Technical Barriers to Trade (TBT) Agreement,[69] litigants argue about whether certain trade effects are caused by an origin neutral regulation, or rather by the actions of private parties.

All of these causation discussions also involve a consideration of so-called 'non-attribution factors', that is, other causes. However, it appears that, at least at the stage of original and compliance proceedings, the causation test is a binary one, at least with respect to each instance of alleged injury caused and the respondent WTO member. Thus, non-attribution arguments can break the genuine and substantial causal chain, or not. Beyond that, there does not appear to be any scope for calibrating the extent to which the respondent caused the injury, at least at the stage of original and compliance proceedings. As further discussed below, this probably changes in the context of compensation and arbitration panels considering countermeasures.

In short, the weak causation test adopted in the WTO case law simultaneously has two consequences. In the first place, it opens up the possibility of there being two or more WTO members being responsible for any given injury, and thus the possibility of shared responsibility. At the same time, it permits a WTO adjudicator to focus on a narrow issue of consistency that may be before it: this WTO member and this measure, based on what is essentially a legal fiction of substantial cause – without prejudice to the potential responsibility of others. As indicated above, in practice, it is the latter approach that is currently being followed.

Finally, the case law under Part III of the SCM Agreement has also developed a distinction between the concepts of 'aggregation' and 'cumulation'.[70] Aggregation refers to a situation in which similar subsidies are aggregated *before* assessing the question of causation. Thus, the question subsequently addressed is whether or not all the subsidies, taken together, are a genuine and substantial cause of the alleged injury. Cumulation, on the other hand, addresses the situation *after* the existence of subsidies causing injury has already been found, and addresses the question of whether or not other subsidies, without themselves necessarily being a genuine and substantial cause of the injury, can be considered to have contributed to the injury.

[69] Agreement on Technical Barriers to Trade, Annex 1A to the WTO Agreement, n. 25, 15 April 1994, in force 1 January 1995, 1869 UNTS 120 (TBT Agreement).
[70] *EC and Certain Member States – Large Civil Aircraft*, Appellate Body Report, n. 170, para. 1378.

Once again, this type of analysis is also probably destined to find its way into other contexts in WTO law where questions of causation arise, and could relate not just to other measures, but also other actors. Cumulation is not in the nature of a diminished standard of causation, because it depends upon an existing finding of causation). Thus, if all the requirements for a determination of responsibility are present, it is rather in the nature of *contributory* responsibility.

2.2.5 Compensation

WTO law provides that the provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable, and as a temporary measure pending the withdrawal of the measure that is inconsistent with a covered agreement.[71] Compensation in WTO law is voluntary, and rare.[72] It is entirely a matter for negotiation between the interested parties, although any mutually agreed solution must be consistent with the covered agreements.[73] Thus, reparation in the form of restitution (that is, with respect to the past), compensation and satisfaction[74] are not generally considered to be available in WTO law.

However, at the stage of compensation, if it is seriously considered, the issue of apportioning responsibility may become relevant. A defending WTO member is unlikely to agree to full compensation in circumstances where there is another actor also caught by the attribution or causation rules, even if in another jurisdiction. That would mean that the complaining member would be compensated in excess of the injury. However, since this is purely a matter of negotiation, WTO law has nothing to say about how responsibility, in terms of compensation, is to be shared in such circumstances.

2.2.6 Countermeasures

WTO law provides that, as long as the WTO inconsistent measure has not been withdrawn, and absent compensation, the complaining member may, as a last resort, seek authorisation to

[71] Article 3.7 DSU, n. 35.
[72] Article 22.1 DSU, ibid.
[73] Article 3.5 DSU, ibid.
[74] Articles 34-39 of the ARSIWA, n. 2, and Articles 34-39 of the ARIO, n. 3.

suspend concessions, that is, to adopt countermeasures.[75] The purpose of countermeasures is to induce compliance, not to permanently re-balance trade.[76] Countermeasures must be equivalent to the nullification or impairment caused by the inconsistent measure attributed to the defending WTO member.[77] The nature of the countermeasure is a matter for the complaining member,[78] but typically takes the form of a prohibitive tariff on an historically observed value of trade, equivalent to the value of trade observed or deemed to have been prevented by the inconsistent measure.

Nothing precludes the complaining member from taking countermeasures *de jure* against only part of the territory of the defending member. For example, the prohibitive tariff could be applied only to goods originating or coming from a particular region (although this might generate a risk of circumvention and be difficult to enforce). Similarly, nothing precludes the complaining member from taking countermeasures *de facto* against only part of the territory of the defending member. For example, the complaining member might choose a product associated with a region that has sufficient political influence within the defending member to bring about compliance, and this is fairly typical in practice.[79]

Evidently, at this stage of quantification, it becomes increasingly difficult to shy away from the difficult question of apportioning or sharing responsibility, even if that question has remained unresolved in the original and compliance proceedings. One might take the view that, if the purpose is to induce compliance, rather than re-balance trade, it does not really matter if the total actual or potential countermeasures exceed the injury. However, the better view is almost certainly that retaliation must be equivalent to the injury attributed to, and caused by, the defending WTO member; and that injury attributable to, or caused by, other actors should be discounted. In other words, non-attribution factors (that is, other causes), even if insufficient to break the causal link at the stage of original or compliance proceedings, must be accounted for in any calculation of countermeasures. Given that, as outlined above, the case law has already recognised the concept of 'cumulation', which is in the nature of

[75] Articles 3.7 and 22 DSU, n. 35.
[76] See generally, Part I (Background and goals of WTO retaliation), Bown and Pauwelyn, *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement*, n. 16, 23-146.
[77] Article 22.4 DSU, n. 35.
[78] Article 22.7 DSU, ibid.
[79] See generally, Part IV (The domestic politics and procedures for implementing trade retaliation), Bown and Pauwelyn, *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement*, n. 16, 235-316.

contributory responsibility, there does not appear to be any reason why this same approach would not apply in the context of apportioning injury.[80]

This almost certainly implies the use of a sophisticated econometric model, in which the non-attribution factors are capable of being expressed. This works in the following way. In a first step, it is necessary to construct a working model of the market, including the effects of the WTO inconsistency, based on known historical data and using well-established formulae that express equilibrium between supply and demand. The formulae also provide for unknown and unobservable non-attribution factors (typically contributory acts by the complaining member or its firms). By comparing the output of the model with the actual situation, it is possible to estimate the value of the unobservable non-attribution factors. These are then accounted for in the calibration of the model. Finally, compliance is simulated by the removal of the WTO inconsistency. The difference in output with and without the simulation is the injury caused by the respondent WTO member. The injury caused by other factors is discounted, although it is never, as such, an output of the modelling exercise.

This issue is yet to clearly emerge in the case law for a number of reasons. First, there have not been many arbitration panels. Second, the arbitration panel reports do not always fully explain the basis of the quantification. No doubt there are confidentiality issues associated with this paucity, although the final reports should be comprehensible for other WTO members.[81] Third, the early arbitration panels probably did not adopt a particularly sophisticated approach, this being in part a function of the limited resources available to the WTO Secretariat. Econometric modelling can be expensive, and may only be used in cases of such economic importance that industries are prepared to pay for it.

However, there is one case in which what is essentially the same issue arose, but from a slightly different perspective.[82] In a prohibited subsidies case, driven by the specific language of the SCM Agreement authorising countermeasures that are 'appropriate' rather than 'equivalent', the complaining WTO member proposed a metric based on the amount of the subsidy, which was accepted by the Arbitration Panel, albeit with a separate individual opinion indicating dissent. The problem is obvious. No doubt the subsidy caused injury to

[80] See generally, C.J. Tams, 'Countermeasures against Multiple Responsible Actors', in P.A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press, 2014), 312. An earlier version is available as SHARES Research Paper 35 (2014) at www.sharesproject.nl.
[81] *Japan – DRAMS*, Appellate Body Report, n. 54, para. 279.
[82] *US-FSC*, Arbitration Panel Report, n. 15.

several WTO members. If these several WTO members would pursue the matter against the defending member, apparently they would all be entitled to retaliate in the amount of the subsidy. In fact, since the subsidy was prohibited, and arguably no showing of injury would be necessary, every WTO member could obtain the same result against the defending member. Given the number of WTO members, the gearing between the breach, expressed in terms of the amount of the subsidy, and the total potential countermeasures, would be 1:160. The Arbitration Panel reasoned that the relevant obligation was an *erga omnes* obligation owed to the entire WTO membership, and allocation was not possible. This certainly looks like an efficient tool for inducing compliance. However, it is not really about sharing responsibility; but rather about, in effect, multilateralising the mechanism for achieving compliance.

In short, WTO arbitration panels clearly have the tools to apportion responsibility, but this tends to be done not by apportioning as such, but rather by identifying the responsibility of the single WTO member whose measure has been found inconsistent, and leaving the question of the responsibility of any other entity on one side. In other words, the issue of shared responsibility is avoided.

2.2.7 Procedural aspects of WTO dispute settlement[83]

WTO dispute settlement is mandatory for the defending member. It is for the complaining member to identify the respondent (that is, invoke the responsibility of a particular WTO member). A panel will then be automatically established at the request of the complaining member.[84] The panel report will be automatically adopted upon request, unless appealed,[85] in which case the appellate body report and the panel report as modified by the appellate body report will be automatically adopted upon request.[86] This means that the problem of the indispensable third party that arises before the International Court of Justice,[87] for example, does not arise in the WTO, at least with respect to other WTO members. If a third WTO

[83] See L. Bartels, 'Procedural Aspects of Shared Responsibility in the WTO Dispute Settlement System' (2013) 4(2) JIDS 343, a prepublication version is available as SHARES Research Paper 16 (2012) at www.sharesproject.nl.
[84] Article 6.1 DSU, n. 35.
[85] Article 16.4 DSU, ibid.
[86] Article 17.14 DSU, ibid.
[87] P.A. Nollkaemper, 'Issues of Shared Responsibility before the International Court of Justice', in E. Rieter and H. de Waele (eds.), *Evolving Principles of International Law, Studies in Honour of Karel C. Wellens* (Leiden-Boston: Martinus Nijhoff, 2011), 199.

member is indispensable, and the complaining member wishes to pursue the matter, it may simply cite the third WTO member as co-respondent or respondent in a new proceeding. With respect to non-WTO states and entities, the flexibilities in the WTO law of attribution and causation outlined above would almost certainly permit a WTO adjudicator to avoid the issue, with the possible exception of the situation in which the other entity would have primary responsibility and the WTO member cited as respondent only subsidiary responsibility.

There is a provision in the DSU that deals with multiple complainants.[88] However, it does not necessarily lead to a single report. Rather, it provides for a single panel. The principle is that the rights and obligations of the various parties should not be in any way impaired, compared to the rights and obligations that they would have enjoyed had separate panels examined the complaints. In particular, any party can request separate reports. Often, what happens is that a single document is issued by the adjudicator that is common to the two cases, and the final two pages contain separate findings and recommendations for each case.

There is no such provision for multiple respondents. Leaving aside the EU and its member states, no complaining member has ever attempted to cite co-respondents. The EU itself has never contested the principle. Even if the citation of co-respondents would be possible (outside the special case of the EU and its member states), the principles of Article 9 of the DSU would probably apply. The rights and obligations of the parties, including the co-respondents, would have to remain unaffected. Separate reports could be requested. Thus, the questions of attribution, causation, and countermeasures would not be affected. Citing co-respondents does not imply shared responsibility in WTO law.

WTO law allows the possibility of other WTO members to elect to participate in disputes as third parties, at the stage of consultations if they have a substantial trade interest,[89] and in the litigation if they have a substantial interest, including a systemic interest.[90] As in the case of sub-state entities, private bodies, or supra-state entities, they may also be asked questions,[91] or file an *amicus curiae* brief. However, in all of these situations, WTO law confines itself to the question of whether or not the measure is attributable to the WTO member cited as respondent. It is does not address the question of whether or not the measure is attributable to

[88] Article 9 DSU, n. 35.
[89] Article 4.11 DSU, ibid.
[90] Article 10 DSU, ibid.
[91] Article 13 DSU, ibid.

another WTO member or actor. Further, WTO law answers this question in a binary manner: either the measure is attributable to the WTO member cited as respondent or it is not.

2.2.8 WTO case law and practice

A case that nicely illustrates how the preceding observations play out in practice is *Turkey – Textiles*.[92] The EU and Turkey agreed to form a customs union, which was notified to the WTO under Article XXIV of the GATT 1994. Like all such notifications, save one, a WTO decision on the matter, requiring consensus, was indefinitely pending. An organ of the customs union, the Association Council, acting unanimously, adopted a decision requiring Turkey to align its external customs regime with that of the EU. The EU already had in place certain quantitative restrictions on textiles compatible with WTO law. However, Turkey did not, and WTO law precluded the adoption by any WTO member of *new* quantitative restrictions. Thus, in adopting a Turkish measure to align with the EU, as part of the customs union, and as required by the decision of the Association Council, Turkey breached WTO law, and India complained. India chose to bring a case only against Turkey, not the EU. The EU decided not to participate as a third party. Turkey argued that it could not be held responsible alone. The Panel reasoned that it could not compel participation by the EU (although it put questions to the EU that the EU answered). It attributed the Turkish measure to Turkey and found it to breach WTO law. The Panel reasoned that the customs union could be WTO compatible if, instead of imposing the restrictions at the Turkish border, they would be imposed at the border between the EU and Turkey. This is something that would have implied amendment of the decision of the Association Council, but essentially the Panel saw that as a problem for Turkey and eventually the EU.

It seems reasonably clear in this case that primary responsibility for the decision of the Association Council lay with the Association Council and subsidiary responsibility, on a joint and several basis, with the EU and Turkey, to whom the decision of the Association Council was also attributable. India could have brought cases against both the EU and Turkey, citing the decision of the Association Council as a measure at issue, attributable to both. India could then have sought compensation from both the EU and Turkey, although since compensation is voluntary in WTO law this is a somewhat theoretical possibility. India could also have sought

[92] *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, Appellate Body Report, adopted 19 November 1999, DSR 1999:VI, 2345.

countermeasures against both the EU and Turkey, although it is not clear that this would have been any more effective than directing countermeasures only at Turkey.

Also in theory, Turkey could have brought a case against the EU, citing the decision of the Association Council as the measure at issue, attributable to the EU, and claiming it to be WTO inconsistent, on condition of such a finding being made in the case brought by India against Turkey. Turkey could then have sought that the cases be heard by a single panel, pursuant to Article 9 of the DSU and the principles set out therein. The result would have been that Turkey could have sought to share the burden of any compensation with the EU, although, as already indicated, this is somewhat theoretical, since compensation is voluntary. Also in theory, Turkey could have sought countermeasures against the EU to achieve compliance with respect to the decision of the Association Council. However, in practice, it seems evident that such an adjustment would be achieved in any event following negotiations between the EU and Turkey.

Thus, what this case illustrates is that mechanisms do exist in WTO law to deal with issues of shared attribution and shared responsibility. However, since compensation is voluntary, and the remedy is compliance, engaging such mechanisms is not generally perceived as necessary by complaining members. India was content to pursue a case only against Turkey, by implication on the basis of its joint and several liability, as an effective means of achieving compliance, and nothing in WTO law precluded India from taking that course of action.

Similarly, in *China – Electronic Payment Services*,[93] China argued that there was no legal basis for US claims against China relating to services supplied in Hong Kong and Macao, on the grounds that a member's schedule only implicates the provision of services in the territory of that member. According to China, the United States should have pursued any such issues directly with Hong Kong and Macao, on the basis of the rights and obligations of the United States, Hong Kong and Macao. The Panel rejected that argument on the ground that China's scheduled obligations also related to services provided from China to the territories of other WTO members. The United States had not cited Hong Kong or Macao as respondents and there would have been no basis, and no need, for the Panel to consider what their responsibilities might or might not have been.[94]

[93] *China – Certain Measures Affecting Electronic Payment Services*, WT/DS413/R and Add. 1, Panel Report, adopted 31 August 2012, DSR 2012:X, 5305.
[94] Ibid., paras. 7.606-7.624.

2.3 Conclusion

It appears from the preceding discussion that, of the two main mechanisms of shared responsibility, that is, shared attribution and particularly (and more importantly) shared causation, neither is particularly developed in WTO law (which is contractual in nature), and particularly in WTO litigation. Shared attribution has not yet arisen in some 500 or so cases (leaving aside the special case of the EU and its member states, discussed below in section 3). The same is true of shared causation, not least because in most circumstances causation is presumed. Put simply, the WTO lends itself very well to slicing disputes by WTO member and by measure.[95] This is substantially helped by the fact that jurisdiction is compulsory; the substantive question is consistency; compliance is prospective; compensation is voluntary; and countermeasures are rare. Even at the stage of countermeasures, the broad terms in which the WTO causation rule is cast (genuine and substantial), combined with econometrics, permits the responsibility of the respondent member to be isolated and quantified without implying anything about the responsibility of others, and without calculating a total amount of injury that is then apportioned. If responsibility is not shared in the sense of bringing co-respondents or injury together in the first place, then the problem of working out how to share responsibility, in the sense of apportioning liability, simply never arises.

In short, in theory, there are certain aspects of WTO law capable of giving rise to issues of shared responsibility, and equally capable of resolving them. On the other hand, there are also certain aspects of WTO law that lend themselves very nicely to *avoiding* issues of shared responsibility altogether. In *practice*, the latter is what has been happening, and what is likely to continue happening. In other words, on the issue of shared responsibility, WTO law is full of potential; and probably always will be.[96]

[95] In other words, it is probably one of the best examples of a field of current international law that is based on the notion of independent international responsibility, presumably because states view trade interests as close to issues of sovereignty (Nollkaemper and Jacobs, 'Shared Responsibility in International Law', n. 12, at 364-365, 381-383 and 385).

[96] In other words, it is not the case that WTO law fails to provide conceptual or normative tools for allocating responsibility between a plurality of actors (see Nollkaemper and Jacobs, ibid., at 364-365 and 388-393), but rather that WTO members are not making use of the possibilities that exist, because they do not need to do so.

3. The special case of the EU and its member states in the WTO

3.1 Introduction

The EU and its member states are not the only example in WTO law in which one WTO member stands in a special relationship to another. Other examples include China and Hong Kong; China and Macao; and Chinese Taipei. There are also situations in which a WTO member stands in a special relationship to a non-WTO state or territory. A well-known example is Denmark and the Faroe Islands. These issues have rarely arisen in WTO law, are somewhat theoretical, and outside the scope of this chapter. Rather, this section focuses on the relationship that has generated a certain amount of case law and academic comment: that between the EU and its member states.

The problem of the responsibility in WTO law of the EU and its member states is only focused on certain aspects of the broader discussion. It focuses on: one particular aspect of shared responsibility (attribution, as opposed to causation);[97] one particular aspect of attribution (with respect to an international organisation and its member states); and one particular situation (where both the international organisation (the EU) and its member states are each members of the international organisation (the WTO) determining responsibility).

Both the EU and its member states are founding members of the WTO,[98] although there is no declaration of competences, and no division of competences is indicated by the terms of the WTO Agreement itself. In *Opinion 1/94*,[99] the European Court of Justice found all of the Annex 1A agreements relating to goods to be within the exclusive competence of the EU, and the General Agreement on Trade in Services (GATS)[100] and Trade-Related Aspects of Intellectual Property Rights (TRIPs)[101] to be mixed. The situation has since evolved, notably because Article 207(1) of the Treaty on the Functioning of the EU (TFEU)[102] now refers to 'the commercial aspects of intellectual property'.[103] The ECJ case law continues to evolve,

[97] If, at the level of attribution, the question is in practice *moot* (as we discuss below), the issue of causation never arises.
[98] Article XI:1 WTO Agreement, n. 25.
[99] *Opinion 1/94*, Opinion of the Court of 15 November 1994, [1994] ECR I-5267 (*Opinion 1/94*).
[100] General Agreement on Trade in Services, Annex 1B to the WTO Agreement, n. 25 (GATS).
[101] Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C to the WTO Agreement, ibid. (TRIPs).
[102] Consolidated Version of the Treaty on the Functioning of the European Union, (2012) OJ C 326/47 (TFEU).
[103] *Daiichi Sankyo*, Case C-414/11, Court of Justice, Judgment, 18 July 2013, not yet reported in the ECR, paras. 45-61.

but currently supports the view that the EU has competence and responsibility on an exclusive basis, or at the very least on a shared basis.[104]

3.2 WTO case law and practice

This section reviews all 88 WTO cases against the EU and/or one of its member states,[105] particularly: who was respondent (or co-respondent); what measures were at issue; whether the issue of attribution arose expressly or by implication; and if so, how it was addressed. The cases are summarised in Table 1. Special attention is paid to the cases in which the issue of attribution has been addressed in a panel report. This issue has never been addressed by the Appellate Body. The cases are listed by DS number and grouped into five main types: trade remedies (dumping, countervailing duties, safeguards); customs (tariffs, quotas, tariff quotas, preferences, valuation, classification); regulatory measures; subsidies; and intellectual property.

3.2.1 Trade remedies

There are 14 trade remedies cases in which other WTO members have sought review of measures adopted by organs of the EU, particularly the Council or the Commission, in the fields of anti-dumping, countervailing duties and safeguards. The complaining member has always initiated the case only against the EU. There has been no discussion of whether or not the EU is responsible for these measures. That has simply been assumed.

EU anti-dumping, countervailing, and safeguard measures are executed by EU member state customs authorities, who are responsible for keeping imports under review and ensuring that goods are classified correctly; origins are declared correctly; and corresponding duties or safeguard measures are correctly applied. Nevertheless, in such cases, complaining WTO members have only identified as measures at issue the EU acts. They have not sought to identify as measures at issue any acts of EU member states, including acts executing an EU act that is a measure at issue. This may be because WTO law places some constraints on that

[104] *Parliament* v. *Council*, Case C-316/91 [1994] ECR I-625, paras. 29-33; *Hermès International* v. *FHT*, Case C-53/96, [1998] ECR I-3603, para. 24; *Commission* v. *Ireland*, Case C-13/00, [2002] ECR I-2943, Opinion of Advocate General Mischo, para. 33.
[105] No EU member state has ever attempted to initiate a WTO dispute.

possibility.[106] It may also be because complaining members have assumed that this is unnecessary and would add nothing to their case. That assumption is almost certainly correct, given the prospective nature of WTO compliance obligations.[107]

Nevertheless, it is interesting to compare the approach adopted by complaining WTO members in such cases with the approach that some of them have adopted in some cases in the customs field, discussed below in section 3.2.2. It is striking that, although the fields of trade remedies and customs are very similar in terms of the division of internal EU competences, the former has not generated any case law on shared responsibility, whereas the latter has. This is probably because, in the trade remedies field, there is a measure adopted at EU level that relates to the specific WTO complaining member and to a specific product, and imposes a specific duty or other constraint. Such measures involve the application of general secondary EU law to a set of past facts, in order to justify the adoption of an EU measure that will be applied to future imports. It therefore provides, at least intuitively, an obvious place to start.

The position in the customs field is slightly different. EU rules do establish classification and duty rules that will be applied to future imports in a general sense, but not on the basis of the application of those rules to a past set of facts relating to a particular WTO member and product. Thus, when problems arise, they are problems about the interpretation and application of EU law to particular imports, and such problems are often addressed as a matter of first impression at the level of the EU member state customs authorities. A typical example is the issuance of a binding tariff information. Although such measures adopted by EU member state customs authorities are fully subject to control at EU level, it is their bottom-up character (as opposed to the top-down character of trade remedy measures) that probably triggers excessively cautious complaining WTO members to cite them as measures, and hence to cite as respondents their authors: the EU member state concerned. The point is that this distinction between the trade remedies cases and the customs cases is irrational. It may be that, with the passage of time, other WTO members come to understand this, and eventually adopt a similar approach in cases from both categories, citing only the EU as respondent.

[106] See, for example, Article 17.4 of the Anti-Dumping Agreement, n. 67.

[107] In the *Zeroing* cases, n. 28, the EU successfully included executive US measures (up to final liquidations) as measures at issue and successfully argued that their adoption after the end of the reasonable period of time for compliance constituted non-compliance, whether or not they had been suspended as the result of municipal law injunctions. The EU further argued that the associated amounts should be included in the computation of nullification or impairment by the Article 22.6 Arbitration Panel. The cases were settled days before the arbitration panel was due to issue its report, so the outcome is unknown, although it is likely, based on past case law, that this argument would have been rejected by the arbitration panel. How the Appellate Body would see this issue is an open question.

3.2.2 Customs

There have been 28 cases in the customs field. Almost all of these have been brought only against the EU. Four cases are of particular interest.[108]

EC – Computer Equipment[109] concerned the customs classification of computer equipment. The United States claimed that it should be classified as 'automatic data processing machines' at a lower rate of duty. The EU argued that it should be classified as 'telecommunications apparatus' at a higher rate of duty. The case also involved a dispute about the classification of personal computers that could be used as television receivers (PCTVs). The United States claimed that they should be classified as 'computers that can receive television signals' at a lower rate of duty. The EU argued that they should be classified as 'television receivers that can also function as computers' at a higher rate of duty. The Panel focussed its analysis on whether, during the Uruguay Round negotiations, the EU was actually classifying the products as specified by the United States, thus creating a legitimate expectation that it would continue to do so. It reached that finding with respect to the computer equipment, but not the PCTVs.[110] The finding with respect to the computer equipment was reversed on appeal.[111]

With respect to the computer equipment, the measures at issue included a Commission Regulation classifying the computer equipment as 'telecommunications apparatus'. They also included two subsequent binding tariff information letters (BTIs) from the Irish customs authorities re-classifying the computer equipment as 'telecommunications apparatus'. Similar letters had been sent by the United Kingdom (UK) customs authorities. With respect to PCTVs, the principal evidence adduced by the United States was a UK value-added tax (VAT) and Duties Tribunal decision upholding a customs administration determination classifying a PCTV as a 'television receiver'.

The United States initially requested consultations only with the EU.[112] The consultation request identifies the Commission Regulation as a measure, and further states that, since that

[108] As Table 1 indicates, in DS72 New Zealand brought a case against the EU that also related to measures authored by the United Kingdom, but the mutually agreed solution was concluded only with the EU.
[109] *European Communities — Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, Appellate Body Report, adopted 22 June 1998, DSR 1998:V, 1852 (*EC – Computer Equipment*).
[110] *European Communities — Customs Classification of Certain Computer Equipment*, WT/DS62/R, WT/DS67/R, WT/DS68/R, Panel Report, adopted 22 June 1998, as modified by the Appellate Body Report, DSR 1998:V, ibid., 1891, paras. 8.60-8.62 and 8.63-8.72.
[111] *EC – Computer Equipment*, Appellate Body Report, n. 109, paras. 74-99.
[112] WT/DS62/1.

time, various EU member state customs authorities had reclassified the computer equipment. It also asserts the reclassification of the PCTVs, referring by way of example to the UK VAT Tribunal decision. The Panel was established on 25 February 1997 with the standard terms of reference.[113] In the meantime, the United States requested consultations with the United Kingdom[114] and Ireland.[115] These consultation requests refer only to the measures taken by the United Kingdom and Ireland respectively. According to the United States, it did this because 'it was told during consultations with the EU that there was no centralized EU customs authority and that the Community could not control the classification practices of member State customs authorities'.[116] Since there is no formal written record of consultations, which are confidential,[117] it may be impossible to know for sure what might have been said or misunderstood during the consultations. The Panel Report also includes the EU explanation that the matters covered by the dispute were within the exclusive competence of the EU and that it acknowledged responsibility.[118] The EU, United Kingdom and Ireland informed the United States that additional consultations would not be entered into. The United States requested the establishment of panels. At the Dispute Settlement Body (DSB) meeting, the parties agreed to special terms of reference,[119] which consisted of modifying the standard terms of reference adopted in DS62, so as to include the panel requests in DS67 and DS68.[120]

During the panel proceedings, the United States requested the Panel to specify which defending party was responsible. The Panel stated that it would focus first on the customs authorities in the EU, including those located in Ireland and the United Kingdom, and would then revert to the issue. Subsequently, having made findings of inconsistency with respect to the EU, the Panel found it unnecessary to rule with respect to the United Kingdom and Ireland.[121] The United States also requested that the title of the dispute be changed to include the United Kingdom and Ireland. The Panel declined on the grounds that this was not

[113] *EC – Computer Equipment*, Panel Report, n. 110, paras. 1.1-1.3.
[114] WT/DS67/1.
[115] WT/DS68/1.
[116] *EC – Computer Equipment*, Panel Report, n. 110, para. 4.12.
[117] Article 4.6 DSU, n. 35.
[118] *EC – Computer Equipment*, Panel Report, n. 110, para. 4.10. See also ARIO Commentary, n. 3, Commentary to Article 9, para. 3.
[119] Article 7 DSU, n. 35.
[120] *EC – Computer Equipment*, Panel Report, n. 110, paras. 1.4-1.11 and 4.9-4.15.
[121] Ibid., paras. 8.15-8.16 and 8.72.

reflected in the special terms of reference; and in any event the title was just a question of convenience.[122] These issues were not raised in the appeal.

Looking at the case from the perspective of the United States, it is difficult to see what it might have been seeking to gain by initiating additional cases against the United Kingdom and Ireland. The Commission Regulation was clearly attributable to the EU. Assuming success on the question of the classification and tariffs applicable to the computer equipment, the EU would be obliged to ensure compliance with respect to the EU as a whole. In the event of non-compliance, the United States would be entitled to retaliate against the EU as a whole, or part of it. Thus, adding further measures adopted by the United Kingdom and Ireland that were merely implementing the EU measure adds nothing. Perhaps the United States had doubts about the attribution of the decision of the UK VAT Tribunal to the EU. However, it seems clear that, in exercising the functions of classification and determination of tariffs, the national authorities of the United Kingdom were, in this particular case, acting as agents of the EU in the performance of functions determined by the EU, within the meaning of Article 6 of the ARIO (although these did not exist at the time). In any event, it seems equally clear that the EU acknowledged the measures, pursuant to Article 9 of the ARIO.[123] Thus, here too, the United States already had the broader remedy, encompassing the narrower remedy, so the addition of the United Kingdom and Ireland would add nothing.

Looking at the case from the perspective of the EU, it seems clear from the outset that the matters in dispute were clearly matters of exclusive EU competence, that were clearly having trade effects vis-à-vis other WTO members. It also seems clear that it would necessarily be the EU that would act in the WTO with respect to these matters. The addition of the United Kingdom and Ireland does not appear to have been of any consequence, other than perhaps irritation at an external actor failing to recognise the competence of the EU with respect to the matters raised, although it appears that this may have been triggered by a miscommunication during consultations.

The Panel appears to have understood that there was nothing of substance behind these aspects of the dispute, which presumably explains why it employed classic techniques of judicial avoidance in order not to rule on them: by exercising judicial economy;[124] and by dealing with the issue of the title of the case as it did, referring to the particular circumstances

[122] Ibid., para. 8.17.
[123] Ibid., paras. 4.10-4.14.
[124] Ibid., paras. 8.15-8.16 and 8.72.

of the special terms of reference.[125] Objectively, it is clear that the case involved both measures attributable to the EU and other measures attributable to the United Kingdom and Ireland. It is equally clear that the EU was also responsible for the UK and Irish measures, because the UK and Irish authorities were, in this particular case, acting as agents of the EU, in the performance of functions assigned to them by the rules of EU law.[126] This is so even if the conduct of the EU member states would have exceeded their authority or contravened EU law.[127] It is also clear that the EU assumed responsibility not only for its own acts but also those of the EU member states.[128] In these circumstances, the Panel Report supports the proposition that, once the responsibility of the EU was established, the additional responsibility of the United Kingdom and Ireland was moot.

In *Belgium – Administration of Measures Establishing Customs Duties for Rice*,[129] the United States complained that measures taken by Belgium with respect to customs duties on rice were WTO inconsistent.[130] The United States asserted that Belgium had been advised by the EU to take such measures.[131] The case resulted in a mutually agreed solution notified by the United States *and the EU*.[132] It records that the Belgian authorities had re-determined the duties in question.

The matter did not proceed to adjudication, so the question of responsibility was not addressed in any report. The drafting of the mutually agreed solution and particularly the actors to which it would refer was a matter of negotiation. In this case, the United States accepted a mutually agreed solution notified *only by the EU*. Presumably, the United States was content to operate at least on the basis of a theory of representation, and also having regard to the language of the mutually agreed solution, which referred to the actions of the Belgian authorities. It is particularly worth noting that, once the complaint had been settled, there was no interest for the United States in pursuing the case and asking for a report addressed *only to Belgium*. Thus, this case confirms the general proposition that, in WTO law, if a complaining member is capable of establishing the responsibility of the EU, and obtaining a result on that basis, then establishing *in addition* the responsibility of the EU member state

[125] Ibid., para. 8.17.
[126] Article 6 ARIO, n. 3.
[127] Article 8 ARIO, ibid.
[128] Article 9 ARIO, ibid. See also ARIO Commentary, n. 3, Commentary to Article 9, para. 3.
[129] *Belgium – Administration of Measures Establishing Customs Duties for Rice*, WT/DS210/1.
[130] Ibid.
[131] WT/DS210/2 and WT/DS210/2/Rev.1, para. 6.
[132] WT/DS210/6 of 2 January 2002.

is moot. That the evidence of this proposition emerges not in a panel report, but rather following a calculus of the complaining member resulting in its acceptance of a mutually agreed solution *only with the EU* does not diminish the force of the observation. If anything it strengthens it, because it directly reflects the interests of the complaining member, and is not filtered through uncertainties that might cause a panel, focussed on other issues, to hesitate and take refuge in open-ended statements.

In *EC – Selected Customs Matters*,[133] the United States claimed that the EU administered its customs rules in a non-uniform manner, inconsistently with Article X(a) of the GATT 1994; and that the fact that decisions of EU member state customs tribunals are only effective in the relevant EU member state, as opposed to throughout the EU, is inconsistent with Article X(b) of the GATT 1994.

In the main part of the case, under Article X(a) of the GATT 1994, the United States was substantially unsuccessful. The US claims of non-uniform administration with respect to particular products in particular areas, including tariff classification, customs valuation, and customs procedures were rejected,[134] with the exception of one product with respect to which the EU had eliminated the problem by the time of the interim report.[135]

With respect to the claim under Article X(b) of the GATT 1994, the claim was rejected by the Panel, and the finding was upheld on appeal, because Article X(b) of the GATT 1994 does not require the decisions of a particular tribunal to be effective throughout the territory of the defending member.[136]

It was in this context that the Panel summarised its understanding of EU municipal law, including that the customs authorities in EU member states act as organs of the EU when they review and correct administrative actions taken pursuant to EU customs law.[137] However, this statement was not relevant to the determination actually made, which was that Article X(b) of the GATT 1994 does not require the decisions of such tribunals to be effective throughout the territory of the EU. Further, the Panel did not state that the EU had *exclusive* responsibility for

[133] *EU – Selected Customs Matters*, WT/DS315/R, Panel Report, adopted 11 December 2006, as modified by WT/DS315/AB/R, Appellate Body Report, DSR 2006:IX-X, 3915.
[134] Panel Report ibid., para. 8.1; Appellate Body Report, ibid., para. 309(b).
[135] Appellate Body Report, ibid., paras. 244-260.
[136] *EU – Selected Customs Matters*, Panel Report, n. 133, paras. 7.546-7.556; Appellate Body Report, ibid., paras. 288-304.
[137] Panel Report, ibid., paras. 7.546-7.553.

such matters, but rather that the EU and its member states would 'concurrently bear the obligations contained in the WTO agreements'.[138]

In *EC and its Member States – IT Products*,[139] the United States, Japan and Chinese Taipei brought claims against various EU classification and tariff measures. The EU notified the Panel that it would participate as the sole respondent and bear full responsibility for any breach of WTO law. The EU submitted that it has had exclusive competence with respect to all tariff matters since 1968, pursuant to Article 133 of the Treaty establishing the European Community.[140] It argued that the role of customs authorities of the EU member states is limited to applying measures previously enacted by the EU. Further, it argued that EU member states are required under EU law to apply the implementing measures taken by the EU, and are prevented from taking any remedial action on their own until the EU has adopted the required implementing measures to comply with any recommendation by a panel. Because the complainants had only brought 'as such' claims against measures enacted by the EU, the EU argued that there was no basis to direct findings against EU member states for measures that EU member states have no power to repeal or amend. Consequently, addressing recommendations to each EU member state would serve no purpose.[141]

The complainants argued for the inclusion of EU member states as respondents. They noted that EU member states are WTO members in their own right. The complainants argued that both the EU and its member states play a role in the application of duties, and that national customs authorities in EU member states issue binding tariff information documents, interpreting and applying EU law. They considered that the internal legal relationship between the EU and its member states cannot diminish the rights of other WTO members to exercise their rights under the WTO Agreement. The complainants stated also that they had exercised their rights to bring claims against the EU as well as the EU member states, and the terms of reference of the Panel reflected this.[142]

The Panel recalled that Article 3.3 of the DSU refers to 'measures taken by another Member'. It noted that the complainants' joint panel request was addressed to the EU and its member

[138] Ibid., para. 7.548.
[139] *EC and its Member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R / WT/DS376/R / WT/DS377/R, Panel Reports, adopted 21 September 2010, DSR 2010:III, 933-DSR 2010:IV, 1567 (*EC and its Member States – IT Products*).
[140] Treaty Establishing the European Community, (1992) OJ C 244/6.
[141] *EC and its Member States – IT Products*, Panel Report, n. 139, para. 7.80.
[142] Ibid., para. 7.81.

states, and that the complainants claimed that both the EU, and its member states accord tariff treatment to certain products that is WTO inconsistent. The Panel recalled that EU member states are members of the WTO and concluded that it did not consider it necessary to determine at the outset whether to rule on the claims against EU member states. It noted that the claims were against measures promulgated by the EU and not particular applications of those measures. The Panel stated that it would consider the extent to which the EU and its member states had failed to comply with their obligations.[143]

Subsequently returning to this issue, the Panel considered that it was not required to make, and did not make, findings with respect to member states' application of the EU measures that were challenged 'as such'. Moreover, the Panel considered that findings with respect to the measures adopted by the EU would provide a positive solution to the dispute. In reaching this conclusion, the Panel recalled that the EU had assured the Panel that, to the extent the it were to find that any of the measures specified in the joint panel request breach WTO obligations, the EU would bear full responsibility.[144] Consequently, the recommendations were addressed only to the EU.

This case differs from the preceding cases because the only measures at issue were EU measures. Unlike the previous cases, there were no measures at issue attributable to the EU member states. There would not appear to be any basis to attribute the EU acts to the EU member states on the basis of the ARSIWA. Thus, the only basis for attribution to the EU member states would have been the proposition that they were responsible for the EU acts on the basis of Part Five of the ARIO. This is implausible. This was not a case of aid or assistance,[145] coercion,[146] circumvention,[147] or acceptance.[148] Nor was it a case of direction and control, because, in participating in the adoption of the EU acts in question, the EU member states would have acted in accordance with the rules of the organisation.[149] Furthermore, the complaining WTO members in this case did not develop any arguments along these lines, nor adduce any evidence in support of such propositions. Thus, the Panel's conclusions were correct, and might have been stated even more explicitly: the complainants had not demonstrated that the measures at issue were attributable, as a matter of exclusive or

[143] Ibid., paras. 7.82-7.89.
[144] Ibid., para. 8.2 and footnote 1937.
[145] Article 58 ARIO, n. 3.
[146] Article 60 ARIO, ibid.
[147] Article 61 ARIO, ibid.
[148] Article 72 ARIO, ibid.
[149] Article 59 ARIO, and particularly Article 59(2) ARIO, ibid.

shared responsibility, to any EU member state. They had only demonstrated that the measures were attributable to the EU. However, the key to the Panel's finding is the fact that all the claims were directed against EU measures 'as such'. Thus, the finding is without prejudice to the question of what shared responsibility, if any, the EU member states might bear. Thus, once again, the issue was moot.

3.2.3 Regulatory measures

There have been 20 cases in the regulatory field. Almost all of these have been brought only against the EU. There are three cases of interest.[150]

In *EC – Scallops*,[151] Canada, Peru and Chile complained that a French Order concerning the trade description of scallops was WTO inconsistent. The French measure did not implement EU law, but the EU had competence to regulate in the sector and often did, and the French measure had to be notified to the EU. The case was brought against, and conducted by, the EU. It resulted in mutually agreed solutions communicated by Canada, Peru and Chile, *and the EC*, annexing a letter from France with the text of a revised order.[152] The (unadopted) Panel Reports contain no discussion of the respective responsibilities of the EU and France.

In *EC – Asbestos*,[153] Canada claimed that a French measure banning asbestos was inconsistent with the TBT Agreement and the GATT 1994. According to Canada, the measure was adopted because of a political need to assuage an alarmed French population. French politicians were said to fear criminal liability following media reports of diseases linked to asbestos, and other recent public health crises.[154] The EU rejected Canada's assertion that France's ban was an isolated and irrational act arising out of a wave of panic. Rather, it was part of a long development in EU member states and in EU municipal law progressively

[150] As Table 1 indicates, in DS443, DS452 and DS459 cases have been brought against the EU and certain member states, relating to EU measures and member state measures promulgating the EU measures. It remains to be seen how these pending cases play out, but there is no reason to believe that the outcomes would alter the analysis set out in this chapter.
[151] *European Communities – Trade Description of Scallops – Request by Canada*, WT/DS7/R, 5 August 1996, Panel Report, unadopted, DSR 1996:I, 89; *European Communities – Trade Descriptions of Scallops – Requests by Peru and Chile*, WT/DS12/R, WT/DS14/R, Panel Report, 5 August 1996, unadopted, DSR 1996:I, 93 (*EC – Scallops*).
[152] WT/DS7/12 of 19 July 1996; WT/DS12/12, WT/DS14/11.
[153] *European Communities – Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS135/AB/R, Appellate Body Report, adopted 5 April 2001, DSR 2001:VII, 3243 (*EC – Asbestos*).
[154] *EC – Asbestos*, WT/DS135/R, Panel Report, 18 September 2000, para. 3.26.

restricting the use of asbestos, culminating in a new directive to be imminently adopted providing for an EU-wide ban by 1 January 2005, with EU member states free to ban sooner if they so wished.[155] As a matter of fact, therefore, the EU was rapidly catching up with France and had just about done so during the panel proceedings, rendering the issue of attribution substantially moot.

In *EC – Approval and Marketing of Biotech Products*,[156] Argentina, Canada, and the United States successfully claimed that the EU legislation requiring prior-approval of biotech products was the subject of a '*de facto* moratorium' between June 1999 and August 2003, resulting in undue delay within the meaning of Annex C(1)(a) and Article 8 of the SPS Agreement;[157] and this was also true for twenty-one pending applications for approval. The Panel also found nine safeguard measures adopted by Austria, France, Germany, Greece, Italy and Luxembourg WTO inconsistent. Such safeguard measures were provided for in EU legislation, which allowed EU member states to adopt national measures excluding biotech products, following approval at Community level, in the event that they would have new scientific information.[158] The Panel Report found that, also as regards the safeguard measures, the EU was the responding party. This was a direct consequence of the fact that the complainants directed their case against the EU, and not individual EU member states. The Panel also noted that the EU did not contest attribution under international law and had assumed the defence of the safeguard measures.[159] The interest of this case is that it was brought only against the EU, and the issue of possible attribution to EU member states was discussed. The fact that the acts in question were attributable to the EU notwithstanding the fact that the EU, acting through its organ, the European Commission, considered them inconsistent with EU law, is a specific example of the operation of the rules regarding excess authority.[160]

Taken as whole, these regulatory cases extend to situations in which the EU is not *obliging* the EU member states to adopt a regulatory measure. They also include situations in which the EU is merely *authorising* an EU member state to adopt a measure, as is sometimes done,

[155] Ibid., paras. 3.29-3.49.
[156] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Add. 1 to Add. 9 and Corr. 1, Panel Reports, adopted 21 November 2006, DSR 2006:III, 847 (*EC – Approval and Marketing of Biotech Products*).
[157] Agreement on the Application of Sanitary and Phytosanitary Measures, 15 April 1994, in force 1 January 1995, 1867 UNTS 493, Annex 1A to the WTO Agreement, n. 25 (SPS Agreement).
[158] *EC – Approval and Marketing of Biotech Products*, Panel Reports, n. 156, paras. 8.13-8.62.
[159] Ibid., para. 7.101.
[160] Article 8 ARIO, n. 3; Article 7 ARSIWA, n. 2.

for example, in EU directives.[161] In fact, they extend to situations in which EU law does not expressly authorise a regulatory measure; but rather an EU member state simply adopts a regulatory measure, purporting to exercise its residual regulatory autonomy under the terms of the EU treaties. In WTO law, the correct parlance would be that the measure adopted by the EU member state is a measure at issue 'as such'. At the same time, the measure adopted by the EU, such as a directive, might not be a measure at issue 'as such', but also a measure at issue 'as applied'. This is just as true for EU treaty provisions as it is for EU directives. In fact, a better way to approach thinking about this scenario is less in terms of the nature of the measure, and more in terms of whether it is capable of restricting trade between WTO members. From this perspective, it is perfectly correct to see the EU as an appropriate respondent in all these cases; and the addition of the EU member state as an additional respondent as being moot.

3.2.4 Subsidies

There have been 14 cases in the subsidies field. There are two cases of interest.

In *EC – Commercial Vessels*,[162] Korea claimed that a Council Regulation,[163] aid schemes based upon it in Germany, Denmark, the Netherlands, France and Spain, and Commission decisions approving such aid schemes, were WTO inconsistent, particularly with Article 23.1 of the DSU, which prohibits self-help. Korea brought the case against the EU, but during the proceedings also sought findings and recommendations addressed to the EU member states. The EU had stated that it was the proper respondent and assumed full responsibility under international law, including with respect to the EU member state measures. The Panel considered it sufficient, in the circumstances of the case, to address its recommendations to the EU,[164] and eventually found all the measures to be WTO inconsistent.[165]

[161] Article 17(2) ARIO, ibid. (circumvention through authorisation).
[162] *European Communities – Measures Affecting Trade in Commercial Vessels*, WT/DS301/R, Panel Report, adopted 20 June 2005, DSR 2005:XV, 7713 (*EC – Commercial Vessels*).
[163] Council Regulation (EC) No. 1177/2002 of 27 June 2002 concerning a temporary defensive mechanism to shipbuilding, (2002) OJ L 172/1.
[164] *EC – Commercial Vessels*, Panel Report, n. 162, paras. 7.32-7.33.
[165] Ibid., para. 8.1(d).

This case merits five comments. First, as in the case of *EC – Biotech*, the EU member states had not been cited as co-respondents in the consultation or panel request, and the outcome may also be understood in that light.

Second, the case is interesting because it relates to subsidies. The EU treaties confer on the EU, acting through the Commission and the Council, the obligation to supervise the granting of state aids in the EU. Thus, the situation is different from the trade remedies and customs cases, insofar as the EU never *obliges* an EU member state to grant a subsidy. It is rather similar to the regulatory cases, insofar as the organs of the EU supervise such measures, and where appropriate authorise them.

Third, consistent with this, Council Regulation 1177/2002, which merely authorised state aid, was found WTO inconsistent. This is a nice illustration of the fact that the character of a measure as authorising does not speak to the question of attribution. The measure was clearly attributable to the EU. Further, it was WTO inconsistent notwithstanding the fact that it did not mandate the granting of subsidies.

Fourth, consistent with this, the state aids themselves, having been authorised (but not granted) by the EU, were considered attributable to the EU. This was not a case of the EU member states acting as the organs or agents of the EU.[166] However, it could be construed as a case of aid or assistance, insofar as the EU, acting through its organs, assisted in the commission of the act by authorising it as a matter of EU law.[167] It might also be construed as a situation of control,[168] if that term would be understood as being responsible for oversight. Finally, it would appear to be caught by the concept of 'circumvention' through authorisation.[169]

Fifth, the Commission decisions authorising the state aids were also found to be WTO inconsistent. They were clearly attributable to the EU. That they were themselves found WTO inconsistent reflected the doctrine on the absence of any requirement that measures mandate a WTO inconsistency, and probably also reflected the character of the particular obligation at issue: Article 23 of the DSU, which prohibits self-help.

[166] Article 6 ARIO, n. 3.
[167] Article 14 ARIO, ibid.
[168] Article 15 ARIO, ibid.
[169] Article 17(2) ARIO, ibid.

In *EC and Certain Member States – Large Civil Aircraft*,[170] the United States brought a case against the EU and certain EU member states, Germany, France, the United Kingdom and Spain. The United States alleged that the co-respondents had granted subsidies to 'Airbus' with respect to large civil aircraft. The EU, and not the member states, acted throughout the proceedings.

The EU requested the Panel to determine that the *only* proper respondent was the EU, because it alone is responsible, and has acknowledged that it is responsible, in WTO law, with respect to the measures at issue. The Panel refused. It considered that whatever responsibility the EU bears for the actions of its member states did not diminish their rights and obligations as WTO members.[171]

This case is in line with the previous case law, which leaves open the possibility of EU member states being held responsible in the WTO for their measures, without prejudice to the responsibility of the EU. The question of whether or not the EU was responsible was not raised. However, the EU acknowledged responsibility. Furthermore, as indicated above, its internal rules confer on the EU, and specifically, as a general rule, the Commission, the authority and the obligation to supervise aids granted by EU member states. Pursuant to those treaty provisions, the Commission had decided that the measures in question do not constitute aid, because they do not affect trade between EU member states. The case is therefore very similar to the *EU – Commercial Vessels* case, the main difference being that, from the outset, the United States identified the four relevant EU member states as co-respondents.[172]

3.2.5 TRIPs

There have been 12 cases in the intellectual property field. There is only one case of interest. A number of the older cases were brought against EU member states, reflecting the fact that at the relevant time the EU did not have competence in certain areas relating to intellectual

[170] *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, Appellate Body Report, adopted 1 June 2011, DSR 2011:I, 7 (*EC and Certain Member States – Large Civil Aircraft*).
[171] *EC and Certain Member States – Large Civil Aircraft*, WT/DS316/R, Panel Report, 30 June 2010, paras. 7.169-7.177.
[172] The issue of the proper respondent was not raised on appeal. At the conclusion of the appeal proceedings, the Appellate Body noted that the Panel's recommendation, referring to 'the Member granting each subsidy', stands; but addressed its own recommendation only to the EU (*EC and Certain Member States – Large Civil Aircraft*, Appellate Body Report, n. 170, paras. 1416-1418).

property. Nevertheless, with the exception of one case, these cases were settled by the member state and the EU. Given the current terms of the TFEU, it is unlikely that such cases would today be brought only against the EU member state.

In *EC – Trademarks and Geographical Indications*,[173] the principal claims by the United States and Australia were that the measure at issue, Council Regulation (EEC) No. 2081/92 of 14 July 1992[174] on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, was inconsistent with national treatment obligations in the TRIPs and the GATT 1994.

Geographical indications identify a good as originating in the territory of a member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin. Members are required to provide the legal means for interested parties to prevent the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin, in a manner which misleads the public as to the geographical origin of the good. Council Regulation 2081/92 sets out the conditions for the registration of geographical indications in the EU. Article 12(1) provides that, without prejudice to international agreements, the regulation could apply to an agricultural product or foodstuff from a third country, on condition that such third country would have equivalent arrangements, and provide reciprocal protection to corresponding agricultural products or foodstuffs from the EU. The complainants argued that this provision applied to WTO members; whilst the EU argued that it did not. The Panel agreed with the complainants.[175] The consequent breaches of the national treatment obligations duly followed.[176]

It was in the specific context of a discussion of the correct interpretation of Article 12(1) of Council Regulation 2081/92 that the Panel noted that there were various executive authorities involved in the implementation of the regulation, including member states. It recalled that the EU had indicated that these 'act *de facto* as organs of the Community, for which the

[173] *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by Australia*, WT/DS290/R, Panel Report, adopted 20 April 2005, DSR 2005:X, 4603; *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by the United States*, WT/DS174/R, Panel Report, adopted 20 April 2005, DSR 2005:VIII, 3499 (*EC – Trademarks and Geographical Indications*).
[174] (1992) OJ L 208/1.
[175] *EC – Trademarks and Geographical Indications*, Panel Report, n. 173, paras. 7.52-7.103.
[176] Ibid., paras. 7.213 and 7.238.

Community would be responsible under WTO law and international law'.[177] The Panel noted that the submissions of the EU were made on behalf of all the executive authorities of the EU, and committed and engaged the EU.[178] The Panel referred to these findings subsequently in later parts of the Panel Report.[179] The essential thrust of the reasoning in those subsequent parts of the Panel Report is that the various issues were assessed from the perspective of the EU, not from the perspective of a particular EU member state.

Thus, this is not a case in which questions of attribution between the EU and EU member states were raised. The case was brought against the EU, with respect to an EU measure, and the defence conducted accordingly. Whether or not the EU member states also shared responsibility was of no practical consequence as a matter of WTO law.

4. Conclusion

The purpose of this chapter is to shed light on the issue of shared responsibility in WTO law, with particular reference to practice. That question has been dealt with in general terms in section 2 of this chapter, which concluded that, whilst WTO law may allow for issues of shared responsibility to be explored, in practice this has not been happening. Complainants choose the respondent that suits them, and WTO law looks at the narrow question of whether the measure at issue is attributable to the selected respondent, without prejudice to the question of whether or not any other actor is implicated in terms of attribution. Causation is usually presumed. When causation is litigated, WTO law looks at the narrow question of whether the selected respondent and measure at issue caused the injury, without prejudice to the question of whether or not any other actor is implicated in terms of causation. Since compensation is voluntary, WTO law has nothing to say about how it might be apportioned among different actors, this being purely a question of negotiation. Even where countermeasures have been authorised, WTO law concerns itself with the narrow question of what nullification or impairment the WTO inconsistency has given rise to, without prejudice

[177] See also ARIO Commentary, n. 3, Commentary to Article 64, para. 4.
[178] *EC – Trademarks and Geographical Indications*, Panel Report, n. 173, paras. 7.97-7.98.
[179] Ibid., footnote 130, referring to paras. 7.269 (finding a formal difference in treatment between registration with a '*de facto* organ of the Community' and registration with a third country government); 7.339 (finding a formal difference in treatment between an objection to be filed with a '*de facto* organ of the Community' and an objection to be filed with a third country government); 7.450 (finding that the EU had not demonstrated why such requirements are necessary); and 7.725 (rejecting a US most favoured nation treatment claim that erroneously relied on persons from other EU member states being 'the nationals of any other country').

to whether or not any other actor or measure might also be responsible for some of the nullification or impairment.

These general conclusions remain valid in the context of the special case of the EU and its member states in the WTO.

The only additional factor is that the member states are part of the EU, and that the broad right to adopt countermeasures against the EU contains within it the narrow right to adopt countermeasures against only one member state, as a matter of law or as a matter of fact. This means that, if the EU is responsible, which was recognised to be the case in all but one of the 88 cases to-date, whether or not one or more member states are jointly responsible is moot. Furthermore, in such situations, as a matter of practice, EU member states are not generally clamouring to defend themselves. This is increasingly an extremely complex and resource intensive process. They are happy to leave it to the Commission, as required by EU law, and for the consequences of any breach to be shared.

The difficult case would be that in which a member state is exclusively responsible. To make the EU responsible in such a case would give rise to the possibility of countermeasures against the EU as a whole (for the same amount, but more diffuse). This case may be more of a hypothetical than a real problem. Out of the 88 cases in Table 1, this only appears to have occurred once, and the outcome would be different today, given the that the TFEU now refers to 'the commercial aspects of intellectual property'. In practice, and given the current case law of the ECJ, any measure that actually irritates a trade partner and gives rise to a case is very likely to fall within at least joint EU competence. Even in a marginal case, a complaining member is likely to apply countermeasures as a matter of fact to the member state at the root of the problem. And even if that would not occur, the problem is very likely to be solved by bringing pressure on the member state to comply, also eventually by using EU municipal law infringement proceedings.[180] On the other hand, an EU member state in such a position would not be able to effectively force the EU to join as co-respondent,[181] because EU law would preclude it from bringing a WTO case against the EU.

[180] Based on the principle that EU law must, where possible, be interpreted so as to be in conformity with the EU's international obligations, the ECJ would have to construe the scope of such infringement proceedings sufficiently widely to comply with Article XVI:4 of the WTO Agreement, n. 25, which requires WTO members to ensure conformity of their municipal law with WTO law.
[181] See the discussion of Turkey's options in the *Turkey-Textiles* case, n. 92 above.

There is, in the literature, a related but different and more general discussion going on, about how other international law jurisdictions, adjudicators, and actors should approach the question of who is responsible: the EU and/or one or more of its member states.[182] One proposition is that external responsibility must follow internal and external competence divisions between the EU and its member states, and this on an *exclusive* basis, it being for the EU to say, based on its rules of organisation, where the line is to be drawn. Related to this argument are the propositions that the ARSIWA and the ARIO are ill-suited to addressing this problem; that the ARIO refer to the 'rules of the organisation', meaning here the EU rules on the division of competence between the EU and its member states; that EU law is *lex specialis*; and that the WTO case law discussed in this chapter supports such an argument.

It is not the purpose of this chapter to contribute directly to that general discussion, but rather to shed light on the issue of shared responsibility in WTO law. However, the following observations may be made in this respect. First, it is likely that the ARSIWA and the ARIO will continue to inform the interpretation and application of WTO law.[183] Second, the WTO case law to-date does not really support a theory of *exclusive* attribution following *exclusive* EU competence. Rather, if anything, the case law suggests that responsibility may be *concurrent*. However, at the same time, the case law suggests a recognition that, given the specificities of WTO law, once the EU is responsible, the question of whether or not a member state is jointly responsible is moot.[184] Third, these cases pre-date the ARIO, and it remains to be seen how the provisions referring to *lex specialis*, the 'rules of the organisation', and 'primary and subsidiary' responsibility may play out in any future WTO cases in which this issue arises. In this respect, it may well prove difficult to persuade a WTO adjudicator that EU authored internal rules constitute *lex specialis* that effectively bind a third WTO member when selecting among potential respondents (the EU and its member states), at least as long as the latter remain WTO members. However, as a matter of fact, this problem may never arise, because as long as the EU is respondent the issue will be moot, and, in light of the

[182] See, for example: P. Eeckhout, 'The EU and its Member States in the WTO – Issues of Responsibility', in L. Bartels and F. Ortino (eds.) *Regional Trade Agreements and the WTO Legal System* (Oxford University Press, 2006), 449; P.J. Kuijper and E. Paasivirta, 'EU International Responsibility and its Attribution: From the Inside Looking Out', in M. Evans and P. Koutrakos (eds.), *The International Responsibility of the European Union: European and International Perspectives* (Oxford: Hart, 2013), 35; F. Hoffmeister, 'Litigating against the European Union and its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?' (2010) 21(3) EJIL 723.
[183] See n. 1512.
[184] Messineo, 'Multiple Attribution of Conduct', n. 12, at 15-17 (concurring).

case law of the European Court of Justice, the EU would not seek to disavow responsibility for a member state measure affecting trade with another WTO member.

That being said, if one steps back and looks at the broader practice of WTO members (as opposed to only WTO adjudicators) a slightly different picture emerges. There are a number of cases, particularly in the subsidies and the intellectual property field, where complaining members, and particularly the United States, have, to their potential disadvantage, sought to identify *only* a member state as respondent. It appears that what may have been driving this is, indeed, an attempt to parse external responsibility as a function of internal and external competence. The result was misguided with respect to subsidies (which the EU has responsibility for supervising), and is out of date with respect to intellectual property (given that the TFEU now refers to the 'commercial aspects of intellectual property'). But the attempt may comfort the proposition that the general thesis is correct.

Finally, taken as a whole, it is possible that, particularly in the future, the practice of WTO members may be driven less by the conviction that the EU 'rules of the organisation' determine the matter, and more by enlightened self-interest. Thus, other WTO member should, and probably have by now, well understood that once it is clear that the EU is responsible, there is no advantage to also citing as co-respondents any EU member state. They may also have understood that, in fact, there may be disadvantages in doing so, because that risks to generate additional issues that will only serve to complicate and delay the case. From this perspective, one may expect that, as time goes on, other WTO members will eventually refrain from citing any EU member state as co-respondent.