The 'Odd Couple': The Responsibility of the EU at the WTO

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Abstract

In this contribution, we address the issue of the international responsibility of the European Union in the area of trade, in particular within the framework of the WTO. We argue that this is a case apart from 'usual' approaches on international responsibility of international organisations in international law. We analyse how the EU has acted within WTO dispute settlement, especially concerning complaints launched against individual Member States, as well as the reactions of the WTO secretariat and other WTO Members over time. This yields that instead of abstract theoretical considerations about the 'veil of the organisation', a pragmatic approach prevails in which the Union consistently comes to the fore in defending its Member States, which is accepted by the outside world. This is due to two main reasons: First, the 'self-contained regime' of the WTO and its dispute settlement mechanism; secondly, the peculiar position of the EU and its Member States within the WTO. These features make the EU and the WTO an 'odd couple' on the international stage, including with regard to international responsibility. In this particular setting, the EU indeed asserts its itself internationally as a 'responsible' power – also to the benefit to third parties.

I. Introduction: The 'odd couple' of the EU and the WTO, a case apart for international responsibility?

When assessing the issue of the responsibility of the European Union (EU) under international law, the area of trade, and in particular the framework of the World Trade Organisation (WTO), provides a highly interesting as well as a highly peculiar case study. As one of the world's leading trade powers,[1] incurring responsibility for its behaviour in light of the obligations under WTO law is evidently an issue of great practical importance. In contrast to at times rather theoretical debates among scholars of international law, this is something which affects European citizens quite tangibly when

[1] see eg S Meunier and K Nicolaïdis, 'The European Union as a Trade Power' in C Hill and M Smith (eds), *International Relations and the European Union*, 2nd edn (Oxford, Oxford University Press, 2011).

European products and consequently companies and jobholders become the targets of countermeasures by the trading partners of the EU as a result of a lost dispute and lacking compliance in the eyes of the WTO Dispute Settlement Body (DSB).[2]

Beyond this practical relevance, in legal terms, the WTO and the EU could well be described as an 'odd couple' in international law. Both are rather the exception than the rule, above all due to their respective internal compulsory dispute settlement mechanisms. Albeit to varying degrees, both have been discussed in 'constitutional' terms.[3] Certainly, neither could be considered as just an 'average' international organisation (IO). Furthermore, with regard to the EU, the question of its responsibility within the WTO dispute settlement mechanism could be seen as a mirror of the debate on the international legal nature of the EU itself. Is the EU indeed an actor in its own right, albeit of a *sui generis* kind? Or is it in reality 'just' the most developed form of international organization',[4] of which the Member States remain the true masters? This raises questions also for the general evolution of the international system, as the EU is often seen as a model for other IOs.[5] For instance, the Andean Community[6] and the African Union[7] were designed following the template of the EU. In addition, it is argued that the constitutional features of the EU offer answers for dealing with legitimacy

[2] A prominent example for this are so-called 'carousel sanctions' implemented (or threatened) by the United States against the EU. See eg R Ford, 'Beef Hormone Dispute and Carousel Sanctions: A Roundabout Way of Forcing Compliance with World Trade Organization Decisions' (2002) 27 *Brooklyn Journal of International Law* 543; W Kerr and J Hobbs, 'Consumers, Cows and Carousels: Why the Dispute over Beef Hormones is Far More Important than its Commercial Value' in N Perdikis and R Read (eds), *The WTO and the Regulation of International Trade: Recent Trade Disputes Between the European Union and the United States* (Cheltenham, Edward Elgar, 2005).

[3] see eg from among the vast literature, respectively, on the WTO, E-U Petersmann, 'Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism' in C Joerges and EU Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and International Economic Law* (Oxford, Hart Publishing, 2011); R Howse and K Nicolaïdis, 'Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far' in R Porter, P Sauvé, A Subramanian and A Beviglia Zampetti (eds), *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (Washington, D.C., Brookings Institution Press, 2001); and on the EU, N Walker and S Tierney, 'Introduction: A Constitutional Mosaic? Exploring the New Frontiers of Europe's Constitutionalism' in N Walker, J Shaw and S Tierney (eds), *Europe's Constitutional Mosaic* (Oxford, Hart Publishing, 2011); and N Walker, 'The Place of European Law' in G De Búrca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge, Cambridge University Press, 2011).

[4] J Klabbers, 'Contending approaches to international organizations: Between functionalism and constitutionalism' in J Klabbers and A Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Cheltenham, Edward Elgar, 2011), at 24 (fn 16). In this regard, Weiler and Trachtman speak of the EU as either *sui generis* or nirvana. JHH Weiler, and JP Trachtman, 'European Constitutionalism and Its Discontents' (1996-1997) 17 *Northwestern Journal of International Law & Business* 354, at 355.

[5] M Cremona, 'The EU as a Global Actor. Roles, Models, and Identities' (2004) 41 *CML Rev* 553, at 554.

[6] KJ Alter et al, 'Transplanting the European Court of Justice: the experience of the Andean Tribunal of Justice' (2011) 1 *Oñati Socio-Legal Series*, at 12.

[7] K Nicolaïdis and R Howse, '"This is my EUtopia…": Narrative as Power' (2002) 40 *J Common Mkt Stud* 767, at 768.

issues of IOs, including the WTO.[8] Against this backdrop, the way in which the Union and its Member States, which all remain full members of the WTO as well as participants in WTO dispute settlement, bear responsibility within the WTO could be seen either as a case apart, an exception, or the most advanced way of managing the international responsibility of a non-state entity such as the Union.

Consequently, the international responsibility of the EU in the WTO constitutes a good example for appraising the specificities which make the EU an international actor like no other,. In fact, the interrelation of the Union and its Member States in WTO dispute settlement highlights not only the special features of the EU, but also of its Member States as 'strange subjects' of international law,[9] i.e. subjects, which, while nominally sovereign, are significantly conditioned in their behaviour through their being members of the European Union. The relations between the EU and its Member States in the WTO dispute settlement system illustrate neatly how the ability of the Member States to bear responsibility is constrained in the international sphere by this very membership in the EU.

With this in mind, the present contribution shows how the special way in which the EU handles its responsibility at the WTO has a significant impact on its relations with its Member States and their role in the WTO dispute settlement system. More specifically, it argues that the institutional design of the WTO dispute settlement as well as the special features of the relations between the EU and its Member States in the field of trade render the latter almost invisible, hiding them behind the veil of the EU, which constitutes both an exception to the general rule of joint responsibility as well an example for a more advanced way of dealing with international responsibility. Moreover, this contribution shows that the other WTO contracting parties have come to accept, by and large, the invisibility of the EU Member States in WTO dispute settlement.

In order to elaborate these points, the contribution is structured as follows. First, after recalling the main issues surrounding the responsibility of the EU in international law in a more general way, we present the main aspects of the practice of the EU and its Member States as a target of trade disputes at the WTO. In the second part, we focus on

[8] M Cremona, 'The EU as a Global Actor. Roles, Models, and Identities' (2004) 41 *CML Rev* 553, at 554.
[9] B De Witte, 'The Emergence of European System of Public International Law: The EU and its Member States as Strange Subjects' in J Wouters, A Nollkaemper and E de Wet (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States* (The Hague, TMC Asser Press, 2009), at 252.

the factors that shape the pragmatic approach to responsibility of the Union. These are, on the one hand, the specificities of the WTO framework, and on the other the position of the EU and its Member States within the WTO.

II. Beyond the veil: The EU, its Member States and International Responsibility

Before turning to the 'odd couple' of the WTO and EU as such, the general debate in international law on the responsibility of international organisations will be recalled. This is the backdrop against which the actual practice within the WTO will be assessed, and which serves to highlight the particularity of this case study.

A. Attribution, the veil of the organisation and secondary responsibility

As a starting point, it should be borne in mind that rather than providing for reparations for injury, the rules on the responsibility of international organisations concern the allocation of powers, and subsequently allocation of responsibilities for any possible damage caused.[10] Logically, the main discussions focus on how the rules of attribution allocate the responsibilities between the IO and its members. In other words, the debate revolves around the question of who has committed the wrongful act and consequently has to remedy it: the IO or its member states? Analysing the complexities of the internal structure of the IO (a structure in which its members assume a predominant position)[11] thus raises many legal questions concerning the allocation of responsibilities pertaining to, *inter alia*, the porosity of the institutional veil of the IO,[12] its '*volonté distincte*'[13] or

[10] A Nollkaemper, 'Constitutionalization and the Unity of the Law of International Responsibility' (2009) 16 *Indiana Journal of Global Studies* 538.
[11] N Blokker, 'Preparing articles on responsbility of international organizations: Does the International Law Commission take international organizations serieously?' in J Klabbers and A Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Cheltenham, Edward Elgar, 2011), at 321.
[12] see eg PJ Kuijper, 'Introduction to the Symposium on Responsbility of International Organizations and of (Member) States: Attributed or Direct Responsbility or Both?' (2010) 7 *International Organizations Law Review* 9; C Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Oxford, Hart Publishing, 2007), at 255.
[13] Klabbers, above n 4, at 11.

the dichotomy between autonomy and accountability of the organisation and its members.[14]

Accordingly, the analysis of the responsibility of the EU and its Member States is going to revolve around these issues in one way or another. The multi-layered nature of the EU, in which the Member States implement the *acquis communnautaire,* including international agreements concluded by the Union, logically poses the question of who bears responsibility as well. Should we understand that EU Member States are to be considered as EU 'organs' when they are implementing EU law? Or, instead, should we refuse the possibility of a *dédoublement fonctionnel* on the side of the Member States, and accept that regardless of the fact that organs of the Member States are implementing EU law, they continue to be organs of these Member States? Many scholars have answered this question arguing in favour of the joint and several responsibility of the Union and its Member States, especially in mixed agreement settings.[15] One of the main arguments supporting the joint and several responsibility of the EU and its Member States is to be found in the case-law of the Court of Justice of the EU (CJEU). In a case concerning the European Development Fund (*Parliament v Council*),[16] according the Court of Justice:

> […], in the absence of derogations expressly laid down in the [Lomé] Convention, the Community and its Member States as partners of the ACP States are jointly liable to those latter States for the fulfilment of every obligation arising from the commitments undertaken, including those relating to financial assistance.[17]

However, even though certainly not an erroneous ruling,[18] the CJEU's statement is nonetheless to be qualified. First, as Kuijper rightly stressed, this concerned a bilateral

[14] R Collins and N White, 'Moving Beyond the *Autonomy-Accountability* Dichotomy: Reflections on Institutional Independence in the International Legal Order' (2010) 7 *International Organizations Law Review* 1, at 1.
[15] see eg International Law Commission, Second Report on Responsibility of International Organizations by Mr. Giorgio Gaja, Special Rapporteur, Fifty-fifth session, 2 April 2004, A/CN.4/541, para 65; E Neframi, 'International Responsibility of the European Community and of Member States under Mixed Agreements' in E Cannizzaro (ed), *The European Union as an Actor in International Relations* (The Hague, Kluwer Law International, 2002); M Cremona, 'External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law', FIDE National Reports 2006; M Björklund 'Responsibility in the EC for Mixed Agreements' (2001) 70 *Nordic Journal Of International Law* 373.
[16] CJEU, Case C-316/91 *Parliament v Council* [1994] ECR 661.
[17] *ibid*, para 29.
[18] see the comment of the European Commission to Art 9 of the Draft Articles on the Responsibility of International Organizations (DARI), International Law Commission, Responsibility of international

mixed agreement.[19] This factor was acknowledged in by the Court in the same judgment by stating that 'in accordance with the essentially bilateral character of the cooperation, the obligation to grant "the Community's financial assistance" falls on the Community and on its Member States, considered together.[20]

Therefore, the joint and several responsibility of the EU and its Member States should be constrained to international agreements of a bilateral nature, and should not be extended automatically to multilateral ones like the WTO agreements. Moreover, when viewed within the larger context of the case law of the Court of Justice on mixed agreements, it can be inferred that, even though the Court speaks about liability, it is perhaps focusing on the binding character of the agreement. In other words, it is concerned rather with a general responsibility to comply with the obligations flowing from the agreement than with a specific responsibility arising from the commission of a wrongful act. The Court would be confirming that the EU is bound by the totality of the international agreements it has concluded, regardless of the competence involved, unless it is expressly provided otherwise.

The Court recognized that fact in *Hermes*, where it ruled 'that the WTO Agreement was concluded by the Community and ratified by its Member States without any allocation between them of their respective obligations towards the other contracting parties.'[21] Consequently when no instrument apportioning the obligations between the EU as its Member States has been provided, the EU and its Members States are bound and, in principle, responsible for the agreement in its entirety.

However, the fact that the international obligations contained in an international agreement have not been apportioned between the EU and its Member States does not mean that, in the event that one of them commits an internationally wrongful act, both will be jointly liable. While the EU and its Member States are bound by all the obligations enshrined in the agreement, their responsibility will vary depending on the kind of internationally wrongful act committed and the rules of attribution and responsibility which apply to that wrongful act. Thus, there will be situations in which

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organizations: Comments and observations received from international organizations, Sixty-third session, 14 February 2011, A/CN.4/637, at 25.

[19] PJ Kuijper, 'International Responsibility for EU Mixed Agreements' in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited: The EU and Its Member States in the World* (Oxford, Hart Publishing, 2010), at 210.

[20] Case C-316/91 *Parliament v Council* [1994] ECR 661, para 33.

[21] Case C-53/96 *Hermès* [1998] ECR I-3603, para 24; see also 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, Oxford University Press, 2006), at 453.

the responsibility would be borne jointly by the EU and its Member States (for instance if they aid or assist each other in the commission of the wrongful act).[22] But there are also other scenarios in which the EU will be the only one responsible (for instance if an action of the Commission breached an obligation enshrined in a Union agreement).[23] Depending on how the internationally wrongful act was committed, the responsibility will vary accordingly.

B. A pragmatic approach to responsibility

The WTO constitutes a very interesting example for assessing the question of the international responsibility of the EU. Despite their nominal full membership and despite having been targeted as defendants by other WTO members, the Member States of the EU remain passive and let themselves be defended by the Union, which in turn is accepted by the third parties and the WTO organs. In fact the whole discussion on the joint and several liability of the EU and its Member States in the WTO is put aside in favour of sole responsibility of the Union in the WTO dispute settlement System.

In terms of numbers, the EU is not only one of the major players in international trade, it is also a very active player in trade dispute litigation.[24] Out of the 438 disputes that have been submitted to WTO dispute settlement,[25] the EU has participated either as claimant, respondent or third party in 266 of them.[26] Of these 266 disputes, 70 were defensive cases, 111 as a third party, and 85 as claimant.[27] In contrast, EU Member States have only participated in 13 disputes in one way or another.

[22] see Art 14 read jointly with Art. 19 of the DARIO.
[23] see Art 6 of the DARIO.
[24] S Billiet, 'The EC and the WTO Dispute Settlement: The Initiation of Trade Disputes by the EC' (2005) 10 *EFA Rev* 197.
[25] see the WTO website under: <http://wto.org/english/tratop_e/dispu_e/dispu_status_e.htm>. Last consulted: 1 June 2012.
[26] To compare, the US has been involved in 310 disputes, Japan in 152, Canada in 125, China in 124, India in 116, and Brazil in 106. The figures are as of 1 June 2012 and can be found at: <http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm>.
[27] *ibid*

Table 1 The EU and its Member States in the WTO dispute settlement system

	Complainant	Third Party	Respondent	Total
European Union[28]	87	118	70	275
Member States[29]	0	0	13	13

Table 1[30] shows that the mixed character of WTO agreements[31] is not really reflected in the practice of WTO dispute settlement. None of the EU Member States has initiated any kind of dispute or intervened as third party in any area.[32] This includes cases concerning the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement, where Member States had retained competences as explicitly confirmed by the CJEU.[33] Furthermore, a closer look at the disputes involving Member States reveals that not all Member States gave been subject to complaints, and most of the time they are not the only respondents. As Table 2 shows, first, not all Member States have been involved in dispute settlement procedures. In fact, only 11 Member States have ever participated in WTO disputes. Secondly, Table 2 also reveals that in most of these disputes the EU ended up intervening, either because it was targeted alongside its Member States,[34] or because the EU was the party that agreed on a solution to the dispute.[35]

[28] The data also includes disputes brought against the EU and any number of its Member States.
[29] The data also includes joint disputes with the EU. However, those brought against two or more Member States over the same-subject matter are counted as one dispute.
[30] The data is taken from <http://www.wto.int/english/tratop_e/dispu_e/dispu_by_country_e.htm>. Last consulted: 1 June 2012.
[31] see CJEU, *Opinion 1/94* [1994] ECR I-05267.
[32] There are cases in which current EU Member States brought complaints to the WTO prior to their accession to the EU. These concerned the Czech Republic, Hungary and Poland.
[33] CJEU, Case C-431/05 *Merck Genéricos* [2007] ECR I-7001, para 47; see also already CJEU, Joined Cases C-300/98 and C-392/98 *Dior and Others* [2000] ECR I-11307, para 48.
[34] This was the case in the following disputes: WTO, Panel Report, *European Communities – Customs Classification Of Certain Computer Equipment,* WT/DS62/R, WT/DS67/R And WT/DS68/R, 22 June 1998, Modified By The Appellate Body WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R; WTO, Request for Consultations, *France – Measures relating to the Development of a Flight Management System*, WT/DS173/1, 31 May 1999; WTO, Request for Consultations, *European Communities – Measures relating to the Development of a Flight Management System*, WT/DS172/1, 31 May 1999; WTO, Notification of Mutually Agreed Solution, *European Communities – Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, WT/DS124/2, 26 March 2001; WTO, Notification of Mutually Agreed Solution, *Greece – Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, WT/DS125/2, 26 March 2001; WTO, Request for Consultations, *European Union and a Member State – Seizure of Generic Drugs in Transit*,

Table 2.Cases brought against EU Member States in the WTO dispute settlement system.

	Single respondent	Respondent with other MS	Respondent with the EU and other MS	Total
Belgium		1	2	3
Denmark	1			1
France		1	3	4
Germany			2	2
Greece		1	1	2
Ireland		1	2	3
Nether-lands		1	1	2
Portugal	1			1
Spain			2	2
Sweden	1			1
UK			3	3

Table 2[36] shows that since the creation of the WTO, Member States have been targeted individually on three occasions. These three disputes concerned TRIPS-related issues.[37] Furthermore, it should be noted that in those disputes in which the Member States were alone, as well as in those in which they were targeted jointly but without the EU, the

WT/DS408/1, WT/DS409/1, 19 May 2010; WTO, Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, WT/DS347/1, 30 June 2010; WTO, Notification of Mutually Agreed Solution, *Ireland – Measures Affecting the Grant of Copyright and (WT/DS82) - European Communities – Measures Affecting the Grant of Copyright and Neighbouring Rights*, WT/DS115/3, 13 September 2002.

[35] This occurred in the following disputes: WTO, Notification of Mutually Agreed Solution, *Belgium – Administration of Measures Establishing Customs Duties for Rice*, WT/DS210/6, 20 January 2002; WTO, Request for Consultations, *Belgium – Measures affecting Commercial Telephone Directory Services*, WT/DS80/1, 13 May 1997.

[36] The data is taken from <http://www.wto.int/english/tratop_e/dispu_e/dispu_by_country_e.htm>. Last consulted: 1 June 2012.

[37] WTO, Notification of Mutually Agreed Solution, *Denmark – Measures Affecting the Enforcement of Intellectual Property Rights*, WT/DS83/2, 13 June 2001; WTO, Notification of Mutually Agreed Solution, *Portugal – Patent Protection under the Industrial Property Act*, WT/DS37/2, 8 October 2010; WTO, Notification of Mutually Agreed Solution, *Sweden – Measures Affecting the Enforcement of Intellectual Property Rights*, WT/DS86/2, 11 December 1998.

proceedings either resulted in a mutually agreed solution reached by the parties, or have been formally pending for years.[38] Consequently, in these disputes no panel has pronounced itself on the substance or the responsibility of the Member State for breaching a WTO obligation.

This rather modest role played by EU Member States in WTO dispute settlement is the result of two factors inherent in the WTO and the position of the EU in the latter. First, by favouring negotiation at all stages, WTO dispute settlement procedures allow the EU to intervene at any given moment. A good illustration of this practice is the dispute *Belgium – Administration of Measures Establishing Customs Duties for Rice*, in which the US brought a claim against Belgium regarding the application of customs duties for rice. It appeared that the Belgian customs authorities were not correctly implementing the 'Schedule of Specific Commitments of the European Communities and their Member States LXXX, a part of the GATT 1994'.[39] In the end, a mutually agreed solution was adopted. At first sight it would seem logical that the solution would be agreed between Belgium and the US, since Belgium was the respondent party. However, the parties that reached an agreement were the US and the EU.[40] This single example shows how the dispute settlement system allows for parties not involved in the dispute not only to intervene but also negotiate on behalf of their Member States and eventually resolve the dispute.

Moreover, the intervention by the EU at any stage of the dispute takes place not only in controversies over a matter which clearly falls under the exclusive competence of the Union – such as the custom duties for rice – but also in areas where the its competence may be less clear, e.g. in disputes concerning the application of the TRIPS agreement before the entry into force of the Lisbon Treaty. For instance, in *Ireland – Measures*

[38] WTO, Request for Consultations, *Belgium – Certain Income Tax Measures Constituting Subsidies*, WT/DS127/1, 11 May 1998; WTO, Request for Consultations, *France – Certain Income Tax Measures Constituting Subsidies*, WT/DS131/1, 11 May 1998; WTO, Request for Consultations, *Greece – Certain Income Tax Measures Constituting Subsidies*, WT/DS129/1, 11 May 1998; WTO, Request for Consultations, *Ireland – Certain Income Tax Measures Constituting Subsidies*, WT/DS130/1, 11 May 1998; WTO, Request for Consultations, *Netherlands – Certain Income Tax Measures Constituting Subsidies*, WT/DS128/1, 11 May 1998.

[39] WTO, Request for Consultations, *Belgium – Administration of Measures Establishing Customs Duties for Rice,* WT/DS210/1, 19 October 2000.

[40] WTO, Notification of Mutually Agreed Solution, *Belgium – Administration of Measures Establishing Customs Duties for Rice*, WT/DS210/6, 2 January 2002.

Affecting the Grant of Copyright and Neighbouring Rights,[41] it was also the EU that ultimately responded and reached a solution.

The second factor that favours EU participation in disputes brought against its Member States has to do with the rules governing the relationship between the EU and its Member States. First, most cases brought against EU Member States concern issues falling within the scope of EU competence (either exclusive or shared). This has been the case in all the disputes concerning the GATT or GATS in the pre-Lisbon setting. Continuing with the example of *Belgium – Administration of Measures Establishing Customs Duties for Rice,* the mutually agreed solution 'recognised that the Belgian authorities were acting under EU law.'[42] Consequently, the solution to the dispute was reached by the EU. It can be easily sustained that in the WTO, the EU intervenes in any dispute which touches upon the scope of EU law. Second, if a Member State objected to intervention by the Union in a dispute that concerned issues falling under the scope of EU Law, the Commission could easily open infringement proceedings against this Member State for breaching its duty of cooperation. Therefore, especially in the post-Lisbon setting, the scope of EU competence in relation to the WTO and the duty of cooperation favour participation of the EU in disputes brought against its Member States.

In any case, one has to distinguish the fact that the EU partakes in any dispute which touches upon an element of EU law, the nature of the competence of the Union which is involved, and the acceptance by third parties and the panels of the sole liability under international law on the part of the EU in those cases. In this context, it should be highlighted that in most cases where a Member State has been brought to consultations it has been done alongside the EU. In fact, out of the 13 consultations brought against Member States, seven were also brought against the EU.

Against this backdrop, it could be argued that it is foremost the 'unity in the international representation'[43] of the Union in a dispute is enforced by the EU and its Member States by allowing the EU to speak on behalf of its Member States, but which

[41] WTO, Notification of Mutually Agreed Solution, *Ireland – Measures Affecting the Grant of Copyright*, WT/DS82/3 and *European Communities – Measures Affecting the Grant of Copyright and Neighbouring Rights*, WT/DS115/3, 13 September 2002.
[42] WTO, Request for Consultations, *Belgium – Administration of Measures Establishing Customs Duties for Rice*, WT/DS210/1, 19 October 2000.
[43] The importance of maintaining this unity within the WTO (and the mixed agreements it comprises for the EU) was already stressed by the Court of Justice in *Opinion 1/94* [1995] ECR I-05267, para 108.

does not imply that the EU should be exclusively responsible.[44] However, all these cases revolve in one way or another around issues concerning the implementation of EU law by the organs of the Member States, i.e. they entail situations which could be described as EU 'executive federalism'.[45] Therefore, the EU takes responsibility at the WTO based on its own understanding that Member States, when implementing EU law, are acting functionally as EU organs.[46] Otherwise put, the EU considers that it should be exclusively responsible for any breach that falls within the scope of EU Law. As the practice shows, the WTO dispute settlement organs and third parties, by having ultimately always accepted the responsibility of the EU in these cases, have acquiesced to this *modus operandi*.

The *LAN* dispute is a good example in this respect.[47] The US brought separate panels against EU, Ireland and the UK regarding the tariff treatment of Local Area Network (LAN) equipment and personal computers with multimedia capability ('PCs with multimedia capability').[48] In the end, a procedural agreement was reached between the US and the EU and its two Member States. The complaints lodged against the latter were merged into a single claim against the EU. Furthermore, the EU during the LAN case declared that it was 'ready to assume the entire international responsibility for all measures in the area of tariff concessions, whether the measure complained about has been taken at the [EU] level or at the level of Member States'.[49]

With this statement, contrary to what the International Law Commission (ILC) argues,[50] the EU was not acknowledging its responsibility as a way of attributing the conduct to itself. The EU was not arguing that it wanted to be held responsible

[44] G Luengo Hernández de Madrid, *Regulation of Subsidies and State Aids and EC Law: Conflicts in International Trade Law* (The Hague, Kluwer Law International, 2007), at 511.
[45] On the concept of executive federalism see R Schütze, 'From Rome to Lisbon: "Executive Federalism" in the (new) European Union' (2010) 47 *CML Rev* 1385.
[46] Kuijper, above n 19, at 214.
[47] WTO, Panel Report, *European Communities – Customs Classification Of Certain Computer Equipment,* WT/DS62/R, WT/DS67/R And WT/DS68/R, 22 June 1998, Modified By The Appellate Body WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R.
[48] WTO, Request for the Establishment of a Panel by the United States, *Ireland – Customs Classification Of Certain Computer Equipment*, WT/DS68/2, 10 March 1997; WTO, Request for the Establishment of a Panel by the United States, *United Kingdom – Customs Classification Of Certain Computer Equipment*, WT/DS68/3, 10 March 1997; WTO, Request for the Establishment of a Panel by the United States, *European Communities – Customs Classification Of Certain Computer Equipment*, WT/DS68/4, 13 February 1997.
[49] WTO, Oral pleading of the European Commission to the Panel "*European Communities - Customs Classification Of Certain Computer Equipment,"* 12 of June 1997, para 6; which also can be found in: *Giorgio Gaja, 'Second Report on Responsibility of International Organizations', in, International Law Commission, Fifty-fifth session* (United Nations, 2004), para 61.
[50] ILC, *Draft articles on the responsibility of international organizations, with commentaries* (Geneva, United Nations, 2011), at 29.

regardless of what the rules of attribution stated; indeed it argued that the rule of attribution in those cases involving organs of its Member States functionally acting as EU organs means that their conduct should be attributed to the EU and not to the Member States.[51] The fact that none of the Member States, panels or third parties in the relevant disputes ventured into such discussion, as well as the fact the EU in each case stepped up to the dispute and was accepted as the legitimate representative, confirm this more pragmatic approach.

III. Exploring the 'odd couple': The special features of the WTO and of the EU as its member

The previous section highlighted the pragmatic approach of the EU and the WTO bodies as regards the responsibility of the former and identified two factors which favoured this approach to responsibility: The systemic design of the WTO and the constitutional principles governing the relations between the EU and its Member States This section will analyse these factors in a more detailed manner.

A. The special features of the WTO dispute settlement mechanism

It should be recalled that international responsibility is inextricably linked to the rules and design of dispute settlement mechanisms, which are entrusted with determining the existence of that very responsibility. WTO dispute settlement is no exception to that rule.[52] Thus, the principles and rules governing the resolution of disputes between the WTO contracting parties are of considerable influence for ascertaining which party bears responsibility for breaches of WTO obligations. What is rather exceptional though is the compulsory, quasi-judicial dispute settlement mechanism introduced with the conclusion of the Uruguay Round and codified in the Dispute Settlement Understanding (DSU), with ad its hallmarks an appellate system and reverse consensus in the Dispute Settlement Body.[53] As a result, here we find a sizeable body of practice and case law

[51] ILC, *Responsibility of international organizations. Comments and observations received from international organizations* (Geneva, United Nations, 2011), at 24.
[52] X Fernández Pons, *La Organización Mundial del Comercio y el Derecho Internacional: Un estudio sobre el sistema de solución de diferencias de la OMC y las normas secundarias de Derecho internacional general* (Madrid, Marcial Pons, 2006), at 265.
[53] see eg T Cottier, 'Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European Union' (1998) 35 *CML Rev* 325; J Jackson, 'The WTO dispute settlement system after ten years: the first decade's promises and challenges' in Y Tanigushi, A Yanovich and J Bohanes (eds), *The WTO in the Twenty-first Century: Dispute Settlement Negotiations, and Regionalism in Asia* (Cambridge, Cambridge University Press, 2007).

that can be utilized for the study of international responsibility in the area of international trade; a feature which is less present in other areas of international law.

With specific regard to the EU, an examination of its practice at the WTO yields the opposite picture to the one portrayed by the CJEU in *Parliament v Council*. As was shown earlier, generally the EU and its Member States do not appear side by side as bearers of joint and several responsibility under the WTO dispute settlement system. Instead, the EU Member States play a rather residual role in WTO dispute settlement,[54] while the EU bears virtually exclusive responsibility. Practice also revealed that the rules of attribution and responsibility are applied in such a way that vast majority of the wrongful acts committed within the territory of the EU are attributed to the EU and not to its Member States. That is due on one hand to the systemic design of the WTO and its rules on responsibility and dispute settlement and, on the other, to the special features of the EU as an actor within the WTO (especially the Union competence in the area, and the traditional role that the EU has played in the WTO). As far as the former is concerned, four salient features stand out: The emphasis on and prioritisation of mutually agreed solutions, the inclusiveness of the rules of standing, the interlinkages between the different WTO Agreements, and finally the enforcement mechanism through suspension of concession (and the way it is used against the EU).

As to the first feature, according to Article 3.2 DSU, the WTO dispute settlement mechanism has as its prime objective to preserve the rights and obligations of its Members under the WTO agreements. To this end, the DSU favours the solution of disputes through diplomatic means, more precisely through negotiations ('consultations' in WTO jargon). This is clearly established in Article 3.7 DSU, which provides that 'a solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.'[55] Only when consultations fail, a WTO Member may resort to solving the dispute through adjudicative means (i.e. a panel).[56] However, even if the adjudicative phase has already started, the parties to the dispute can continue to negotiate with a view to finding a mutually agreed solution. It should also be underlined that the panels have an obligation of giving the parties the adequate opportunity to develop such a mutually satisfactory solution.[57] A WTO Member thus

[54] see also Billiet, above n 24, at 197; and generally Eeckhout, above n 21.
[55] P Van Den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge, Cambridge University Press, 2008), at 173.
[56] Art 4.7 DSU.
[57] Art 11 DSU.

can continue to negotiate a mutually agreed solution with the other party after a panel has been established. This was the case, for instance, in *EC–Scallop*s. A panel was requested and established following a complaint brought by Chile and Peru against the EU (at the time the European Communities) concerning a French Government Order laying down the official name and trade description of scallops.[58] Eventually, however, the parties reached a mutually agreed solution.[59] In this regard, the possibility provided for in Article 12.12 DSU for suspending the panel proceedings for 12 months is often used to continue with the consultations after the panel has been established. The EU and New Zealand, for instance, availed themselves of this option in the *EC–Butter* dispute.[60]

Hence, the DSU provides enough procedural mechanisms that allow WTO members to resort to negotiations and consultations at any stage of the proceedings, which gives a high degree of flexibility to the parties to the dispute. As we have seen earlier, EU Member States have consistently preferred to let the Union reach mutually agreed solutions than to leave the dispute to be resolved through adjudication.

The second feature, the rules on standing in WTO dispute settlement proceedings, can also be seen as a means of granting manoeuvring space and room for negotiation. The DSU is marked by flexibility as regards the set of parties involved in disputes. As the Appellate Body established in *EC–Bananas III*, there is broad discretion on whether to bring a case against another WTO member.[61] It does not matter whether the WTO member has a legal interest worth protecting under the WTO Agreements. As long as there is a potential interest, or a future opportunity to compete, the WTO Member has the right to start consultations under the DSU.[62] This broad understanding of the active responsibility to bring claims has not only helped the US to lodge claims against the EU in the Bananas dispute, even though the US did not export any bananas to the EU,[63] but

[58] WTO, Request for the Establishment of a Panel by Peru, *EC – Trade Description of Scallops*, WT/DS12/7, 22 September 1995; WTO, Request by Chile for the Establishment of a Panel, *EC – Trade Description of Scallops*, WT/DS12/6, 27 September 1995.
[59] WTO, Notification of Mutually Agreed Solution, *EC – Trade Description of Scallops*, G/L/94, G/TBT/D/9 WT/DS12/12, WT/DS14/11, 19 July 1996. The timeline of this dispute can be found at: <http://wto.org/english/tratop_e/dispu_e/cases_e/ds12_e.htm> Last consulted: 1 June 2012.
[60] WTO, Panel Report, *European Communities- Measures affecting Butter Products*, WT/DS72/R, 24 November 1999, para 12.
[61] WTO, Appellate Body Report, *EC –Bananas III*, WT/DS27/AB/R, 9 September 1997, para 132.
[62] see C López-Jurado Romero de la Cruz, 'La Solución de Diferencias en la OMC' in LM Hinojosa Martínez and J Roldán Barbero (eds), *Derecho internacional económico* (Madrid, Marcial Pons, 2010), at 192; Van Den Bossche, above n 55, at 185.
[63] WTO, Panel Report, *EC –Bananas III*, WT/DS27/R/USA, 22 May 1997, at 8.

has also allowed the EU to bring disputes on issues in which its competence on the issue was not altogether clear.[64]

Furthermore, Article 4.11 of the DSU allows third party interventions during consultations in similarly broad terms as the ones envisaged in Article 4.2 of the DSU as interpreted in *EC–Bananas III*.[65] Importantly, the broad construction of third party intervention is not restricted to the consultations phase. Accordingly, the EU can act as third party in any dispute brought against any of its Member States, and consequently influence the course of the ensuing proceedings.

Turning to the third feature, the WTO system is structured in such a way that most of the times an internationally wrongful act may constitute a breach of multiple WTO Agreements. For instance, the obligations enshrined in the GATT are so similar to those enshrined in GATS[66] that a breach of a provision of the former could lead to the breach of the same provision in the latter. Moreover, there are also sectoral agreements such as the Agreement on Agriculture, which develop in more detail the rules contained in GATT. The *EC – Bananas III* dispute is a good example of the interaction between this web of agreements. In this dispute, the US alleged that the bananas import regime established by the EU breached the GATT, the Agreement on Agriculture, as well as the GATS. The report of the Panel did not exclude this possibility. It acknowledged that a single measure can fall under scope of both the GATT and the GATS.[67]. These intersections between different WTO agreements makes a strict application of the ensuing legal obligations by the EU and its Member States according the division of competences in Union law virtually impossible as it is almost impossible to disentangle the different EU competences involved in a dispute concerning those agreements.

Lastly, should negotiations fail and a panel report conclude that WTO obligations have been breached by a member, which are subsequently not removed within a so-called 'reasonable period of time' (Art. 22.1 DSU) the DSU provides for decentralized

[64] eg WTO, Request for consultations, *China – Measures affecting Financial Information Services and Foreign Financial Information Supplier*, WT/DS372/1, 5 March 2008; WTO, Request for consultations, *United States - Measure Affecting Government Procurement*, WT/DS88/1, 26 June 1997. Both disputes concern issues falling within shared competence of the Union (the General Agreement on Trade in Services (GATS) and the Agreement on Government Procurement (GPA)). Nevertheless, it is the EU which requested consultations. See also Billiet, above n 24, at 209; also J Heliskoski, 'Joint competence of the European Community and its Member States and the Dispute Settlement practice of the World Trade Organization' (1999-2000) 2 *Cambridge Yearbook of European Legal Studies* 61, at 80.

[65] WTO, Appellate Body Report, *EC –Bananas III*, WT/DS27/AB/R, 9 September 1997, para 132

[66] Van Den Bossche, above n 55, at 336.

[67] WTO, Panel Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas.* WT/DS27/R/USA, 22 May 1997, para 7.283.

but supervised enforcement. This operates through compensation and the suspension of concessions equivalent to the nullification and impairment of benefits guaranteed by WTO law caused by the inconsistent measures (Art. 22.4 DSU). According to Article 22.2 DSU, in case the parties fail to agree on compensation, 'any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.' These suspensions do not have to concern the same sector in which the violation took place only, but can also be applied to other sectors or even other agreements if this is deemed 'practicable or effective' (Art. 22.3 DSU). Should a dispute arise about the level or nature of the suspension, this will be solved through arbitration (Article 22.6 DSU).

From the examples provided earlier, we can see that the issue of responsibility for breaches of obligations under the WTO, also on the part of the EU, is far from a theoretical matter. In comparison to other international organisations and dispute settlement mechanisms, it is indeed rather highly regulated and judicialised. Cases of violations can be brought to adjudication without the consent of the party against which a complaint has been brought. Moreover, via the suspension of concessions scheme, the level of the damage (in terms of impairment of benefits) is determined and can be used against the culprit to induce compliance. When recourse was made to such measures by WTO members against the EU, it has always been targeted as a whole. This is possible given the particular position that the EU assumes within he EU framework, a point to which we shall return in the next section.

It should be stressed though that these suspensions differ from reparations as known in traditional international responsibility. The former do not constitute a means of redress, but merely serve as a temporary means to induce actual compliance. As the DSU puts it, 'neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements' (Article 21.1 DSU). In this way, they are more akin to, and represent a further development and sophistication of, termination or suspension of the operation of a treaty following a material breach under the Law of Treaties (Article 60 VCLT and Art. 60 VCLTIO).

B. The special features of the EU within the WTO structure

In order to grasp the operation of international responsibility of the EU in the area of trade, one has to consider, next to the specific setup of the WTO, also the special position of the EU therein. This position is characterised both by the historically grown succession of the EU into most of the competences of its Member States, as well as by the continuing dual existence of the Union and its Members as full WTO members and the ensuing necessity of cooperation and coordination.

At the outset, the European Economic Community (EEC) of 1957 was founded in the shadow of the pre-existing 1948 GATT. In many ways, the Rome Treaty resembled a mini-GATT at the regional level in Europe.[68] This raised first of all the question of compatibility of the envisaged customs union with GATT rules. This, however, has remained a rather theoretical issue, as compatibility of the EU with Article XXIV GATT on customs unions was never ascertained either through dispute settlement or by the Committee on Regional Trade Agreements.[69] More important in practical terms and for present purposes is the development by which the Community succeeded the Member States within GATT due to its competence in the area of trade. This was acknowledged by the CJEU in the famous *International Fruit* decision.[70]

Henceforth, a modus operandi has developed between the Community (and later the EU) and its Member States by which the Commission represents the Community in trade negotiations, while the Member States remain in the background, acting first and foremost within the Council and the Trade Committee (the former 'Article 133 Committee') to grant mandates to the Commission and oversee its actions.

It should be underlined that from the beginning, Community competence in trade, as it concerned only goods at the time before the WTO agreements, was of exclusive nature.[71] This means the Member States did not retain any competence of their own, but as founding members of the GATT they continued to be, at least formally, contracting

[68] G de Búrca and J Scott, 'The Impact of the WTO on EU Decision-making' in G de Búrca and J Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (Oxford, Hart Publishing, 2001), at 2; P Eeckhout, *EU External Relations Law*, 2nd edn (Oxford, Oxford University Press, 2011), at 11.
[69] P Mavroidis, 'Do not Ask Too Many Questions: The Institutional Arrangements for Accommodating Regional Integration within the WTO' in E Kwan Choi and JC Hartigan (eds), *Handbook of International Trade* (Oxford, Blackwell, 2005).
[70] CJEU, Joined Cases 21 to 24-72 *International Fruit* [1972] ECR-01219, para 18; in detail on CCP competence see Eeckhout, above n 68, at 11-69.
[71] see in particular CJEU, *Opinion 1/75* [1975] ECR 1355.

parties in their own right.[72] This way of working with the Commission as the protagonist and the Member States in the background already fostered the impression of the EU as a fairly unified and singular entity.

However, the advent of the WTO and the expansion of the areas covered beyond goods to include services (GATS) and intellectual property (TRIPS) raised the question of whether the scope of the Common Commercial Policy (CCP) then also went beyond trade in goods. In *Opinion 1/94*, the Court acknowledged that now there existed areas of the WTO that fell outside of the scope of the 'classic' CCP and represented a competence shared between the Union and the Member States.[73] The border between exclusive EU competence and competence shared with the Member States remained a moving and elusive target, despite attempts to codify the state of affairs in the Amsterdam and Nice Treaties.[74] In any event, the emergence of areas in the WTO framework that were not of exclusive EU competence brought the Member States closer to the fore again, also as visible bearers of responsibility, at least until the entry into force of the Lisbon Treaty.[75]

By virtue of the Lisbon Treaty, in force since 1 December 2009, the entire area of the WTO framework has come under CCP's exclusive competence, including trade in goods, services, intellectual property and even investment aspects.[76] According to the competence catalogue now contained in the Treaties, in areas of exclusive competence such as the CCP, 'only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.'[77] Thus, EU Member States do no longer retain competences in this field, but only exert influence through the internal mechanisms of the EU institutional structure. The Council still maintains oversight over the Commission as the Union's trade negotiator through a special committee, now called

[72] CJEU, Case 22-24/72 *International Fruit Company* [1972] ECR 1219, para 18; see also R Holdgard, *External Relations Law of the European Community: Legal Reasoning and Legal Discourses* (Alphen aan den Rijn, Wolters Kluwer, 2008), at 198; J Klabbers, *The European Union in International Law* (Paris, Pedone, 2012), at 74.
[73] CJEU, *Opinion 1/94* [1995] ECR I-05267.
[74] cf Art. 133 TEC in the Amsterdam and Nice versions.
[75] see in particular CJEU, *Opinion 1/08* [2009] ECR I-11129, paras 117–174; see also A Alemanno, 'Opinion 1/08, Community Competence to Conclude with Certain Members of the World Trade Organization Agreements Modifying the Schedules of Specific Commitments of the Community and Its Member States Under the General Agreement on Trade in Services' (2010) 104 *Am J Intl L* 467.
[76] Arts 3(1)(e) TFEU and 201(1) TFEU; see also F Hoffmeister, 'The European Union's Common Commercial Policy a year after Lisbon - sea change or business as usual?' in P Koutrakos (ed), *The European Union's External Relations a year after Lisbon*, CLEER Working Paper 2011/3, at 83-87; Eeckhout, above n 68, at 59.
[77] Art 2(1) TFEU.

the 'Trade Policy Committee' (known pre-Lisbon as the 'Article 133 Committee').[78] Additionally, the Lisbon reform brought an important institutional innovation, i.e. the requirement of consent by the European Parliament also for trade agreements, which was previously lacking.[79] Still, the Member States continue to be contracting parties of the WTO, even though the EU has taken over comprehensive competence in the area of trade.[80] Using the terminology introduced by Schermers, the WTO agreements come very close to being 'false' mixed agreements' from the point of view of the EU.[81]

This coexistence between Union (and its predecessors) and the Member States has from the beginning necessitated coordination and cooperation.. This was clearly stated by the CJEU in *Opinion 1/94* which highlighted the importance for the EU and its Member States of speaking with a single voice at the WTO.[82] There is no doubt, as the Court acknowledged, that the duty of cooperation[83] plays a very important role in the relations between the EU and its Member States in the daily management of the WTO framework, both in trade negotiations and dispute settlement.

The duty of cooperation between the EU and its Member States seems to work smoothly in negotiations within the WTO framework.[84] For instance, during the negotiations of GATS schedules of specific commitments, EU Member States had no problem in letting Commission act as the sole negotiator and voice during the negotiations, even though, in theory, there was room for independent Member State action in that area.[85] However, the fact that Member States cooperate with the Commission and allow it to be the sole negotiator does not mean that they are giving up part of their competences in favour of the EU. As *Opinion 1/08* shows, while Member States are willing to accept the Commission as the sole negotiator on issues not covered

[78] Art 207(3) third indent TFEU.
[79] Arts 207(3) TFEU and 218 TFEU; see also D Kleimann, 'Taking Stock: EU Common Commercial Policy in the Lisbon' (2011) 66 *Aussenwirtschaft* 211, at 216-222.
[80] But note Art 207(6) TFEU, which essentially imposes a safeguard against the use of CCP powers for harmonisation where this is excluded otherwise by the Treaties. Cf further A Dashwood. 'Mixity in the era of the Lisbon Treaty' in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited* (Oxford, Hart Publishing, 2010), at 357; and Hoffmeister above n 76, at 86-87.
[81] HG Schermers, 'A Typology of Mixed Agreements' in D O'Keeffe and HG Schermers (eds), *Mixed Agreements* (Deventer, Kluwer Law and Taxation, 1983), at 27.
[82] CJEU, *Opinion 1/94* [1994] ECR I-05267, paras 106-109.
[83] Art 4 (3) TEU (formerly Art 10 TEC).
[84] Council Conclusions of July 26, 2006, Council doc. 12019/06.
[85] P Eeckhout, 'External Relations of the EU and the Member States Competence, Mixed Agreements, International Responsibility, and Effects of International Law', in *FIDE 2006* (2006), at 9.

by exclusive Union competence, they still want to sign the outcome of those negotiations.[86]

In dispute settlement proceedings, cooperation and coordination between the EU and its Member States also play a crucial role. As it has been shown earlier, EU Member States play a minimal role in dispute settlement proceedings in the WTO. They have never lodged a complaint, but still this does not mean that Member States do not have a say in the disputes brought by the Commission. The Trade Policy Committee oversees the actions of the Commission also in that regard.[87] A good example of how such cooperation takes place is the *PolyGram* dispute.[88] The EU brought a complaint against Canada on the refusal of the latter to allow the distribution of films by PolyGram (a Dutch company). The EU argued through the Commission that the refusal amounted to a breach of the GATS. At the time of the dispute, GATS fell within shared competence under EU law, and PolyGram was a Dutch Company. Thus, in theory the Netherlands could have brought the dispute on its own motion. However, the Trade Policy Committee (at that time still called the '133 Committee') decided that the Commission should bring the claim and not the Member State in question.[89] There were two reasons for allowing the Commission to lodge the complaint. First, the Committee followed the Commission view that if the Netherlands were to lodge the complaint individually, that would amount to a breach of the duty of cooperation.[90] Secondly, the Netherlands lacked the expertise in WTO issues so it preferred to let the Commission take the lead.[91]

Similarly, in defensive cases the significance of cooperation and coordination should not be underestimated, especially in cases brought against the EU and its Member States. For instance, in the *Airbus* dispute,[92] when the US targeted not only the EU but also the four Member States involved in the Airbus venture, the EU and its Member States were represented by the Commission. Nevertheless, France, Germany, Spain and the United Kingdom closely collaborated with the Commission in the preparation of the

[86] CJEU, *Opinion 1/08* [2009] ECR I-11129; see also M Cremona, 'Balancing Union and Member State interests: Opinion 1/2008, choice of legal base and the common commercial policy under the Treaty of Lisbon' (2010) 35 *EL Rev* 679.
[87] R Torrent, *Derecho y Práctica de las Relaciones Económicas Exteriores en la Unión Europea* (Barcelona, Cedecs, 1998), at 166.
[88] WTO, Request for consultations, *Canada - Measures affecting film distribution services*, WT/DS117/1, 22 January 1998.
[89] Heliskoski, above n 64, at 81.
[90] *ibid*,
[91] R Torrent, above n 87, at 163.
[92] WTO, Request for consultations, *European Communities and Certain Member States – Measures affecting Trade in Large Civil Aircrafts*, WT/DS316/1, 12 October 2004.

defence.[93] Moreover, the Commission argued that the EU was exclusively responsible for those actions for which the US argued a breach of WTO Law.[94]

Overall the practice in the WTO shows how the duty of cooperation has allowed the EU to speak with one voice rather unproblematically, with that voice being the Commission. Furthermore, given the new competences involved in the WTO agreements as well as the recent case law on the duty of cooperation established by the CJEU,[95] it is difficult to envisage situations in which EU Member States could deviate from a concerted Union strategy in the WTO, or even to act without consulting the European Commission in advance.

Lastly, we should return to the enforcement mechanism provided by the DSU through which suspensions of concessions can be authorised against WTO members found to have violated their obligations under the WTO agreements. The combined result of this particular enforcement mechanism and the position the EU has assumed in the WTO is that the Union can be targeted as a whole, and not the individual Member States in which the violation was committed. This makes sense, since the Union is the bigger target providing a wider selection of vulnerable sectors and companies to single out in the quest for inducing compliance. This is confirmed by practice, as there is no instance thus far in which a WTO member has requested suspension of concessions against a single EU Member State. As shown earlier, in the cases where Member States have been targeted either individually or alongside the EU for complaints, in most cases a mutually agreed solution was reached by the EU. At the same time, suspensions have been applied have been applied against the EU in its entirety. Prominent examples include suspensions by the United States in the course of the bananas and hormones disputes. These targeted a range of products from various Member States, with specific

[93] *ibid*. See also European Communities – Measures Affecting Trade in Large Civil Aircraft (DS316), Oral Statement of the European Communities to the First meeting of the Panel, para 4, available at: <http://trade.ec.europa.eu/doclib/docs/2007/march/tradoc_133827.pdf> Last consulted 1 June 2012.

[94] see European Communities – Measures Affecting Trade in Large Civil Aircraft (DS316), First Written Submission by the European Communities, para 155, available at: <http://trade.ec.europa.eu/doclib/docs/2007/april/tradoc_134551.pdf > Last consulted 1 June 2012.

[95] These cases concern various policy fields, such as environmental policy, CJEU, *Case C-246/07 Commission v Sweden (PFOS*) [2010] ECR I-03317; maritime safety, CJEU, *Case C - 45/07, Commission v Greece (IMO)* [2009] ECR I-00701; or inland waterway transport, CJEU, Case *C-433/03 Commission v Germany (Inland Waterways)* [2005] ECR I-06985; CJEU, *Case C-266/03 Commission v Luxembourg (Inland Waterways)* [2005] ECR I-04805. In all these cases, the Court concluded that the Member States should have refrained from committing certain acts. See also A Delgado Casteleiro and J Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?' (2011) 36 *EL Rev* 524. Note also the controversy over acts of certain Member States in the framework of the Convention on Trade and Endangered Species (CITES), which were at odds with a common position agreed at EU level. The acts were were withdrawn following the threat by the Commission to commence an infringement procedure for breach of the duty of cooperation. See Hoffmeister, above n 76, at 94-95.

targets such as Italian pecorino cheese in the former case,[96] and French Roquefort cheese in the latter.[97]

The EU is thus treated as a single unit when it comes to the application of the suspension of concessions in the WTO framework. This is confirmed further when we consider their legal fallout within the EU. As we have seen, companies from Member States, even if these states have not contributed to the violations apart from the fact of being members of the EU, can suffer adverse consequences for their business if such suspensions target them. Some of the targeted companies subsequently lodged claims for damages with the EU courts, culminating in the famous *FIAMM & Fedon* decision, in which the CJEU refused to grant such damages.[98] This illustrates that this united stand of the Union has indeed significant repercussions 'behind the veil', which may effectively amount to intra-EU redistribution.[99] In this particular case, upholding the controversial – and WTO law inconsistent – banana trade regime of the EU came at the price of harming others, such as the FIAMM and Fedon companies and their employees.

IV. Conclusion: A 'responsible' power

The aim of this contribution was to show that the special features of the WTO as well as those of the position of the EU therein reveal a particular approach to international responsibility, which is marked by both pragmatism and assertiveness of the EU. Generally, both the EU and the WTO are amongst the most sophisticated international organisations to be found (to the extent that the EU can still be considered as an IO, that is). They remain an 'odd couple' until the present day, due to their emphasis on being 'rules-based', including compulsory dispute settlement. Nevertheless, the WTO remains also to a large extent 'member-driven'. Among these members, we continue to find, nominally, both the EU and its Member States. However, the competences to act in the WTO have shifted over time towards the EU, culminating in the Lisbon Treaty, which both expanded the CCP and made it an entirely exclusive competence. Moreover, while WTO dispute settlement is entirely geared towards finding negotiated outcomes and

[96] see WTO, Recourse by the United States to Article 22.2 of the DSU, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* WT/DS27/43, 14 January 1999, at 3.
[97] WTO, Recourse by the United States to Article 22.2 of the DSU, *EC—Measures Concerning Meat and meat Products (Hormones)*, WT/DS26/19, 18 May 1999, at 3. See further above n 2 on 'carousel sanctions'.
[98] CJEU, Joined Cases C-120/06 P and C-121/06 P *FIAMM & Fedon* [2008] ECR I-06513.
[99] see P Mavroidis, 'It's alright ma, I'm only bleeding' in A Epiney, M Haag and A Heinemann (eds), *Challenging boundaries: Essays in honour of Roland Bieber* (Baden-Baden, Nomos, 2007).

adjudication is only seen as a last resort, in the EU strict and enforceable loyalty obligations apply.

The combination of these factors frames the way in which the Union and its Members assume responsibility for their acts in dispute settlement concerning trade matters. We have seen that in practice, other WTO members have at times tried to target individual Member States for consultations and panel requests, on their own or alongside the Union. However, the EU consistently came forward while the Member States stepped back, either to negotiate a mutually agreed solution or to plead the case and face, if necessary, the consequences en bloc. This was so in instances where a matter may be considering coming within the widely defined scope of EU law, but where the competence of the Union was not a self-evident issue. Despite these attempts, third parties always accepted the Union taking over, and also WTO panels and the Appellate Body refrained from questioning this approach. This acceptance stems from pragmatic and strategic approaches fostered by the design of the WTO dispute settlement system. Undoubtedly, the possibility of adopting countermeasures against the EU in its entirety is more attractive than applying those same countermeasures to Ireland or Luxembourg, or any single Member State for that matter. While we may continue to argue about whether the EU is still a 'political dwarf', it is obvious that third countries prefer to take aim at the 'economic giant'[100] as the easier target.

This leads us to conclude that in the particular area of trade within the framework of WTO dispute settlement, the question is less about the veil of the organisation and other rather abstract debates that preoccupy international law scholars. Rather, the model we find in the EU of 'executive federalism' and consistent representation of the Union and its Member States on the international scene necessitates different notions to deal with responsibility. Here, the EU is clearly more than a veil draped over the Member States. It exercises visible and tangible control over and on behalf of its Members. Nowhere does that become more evident than at the WTO in Geneva.

Overall, the responsibility of the EU in the WTO can be seen as an example of international actorness of the Union. First, the concerns on the lack of responsibility of international organisations[101] are nowhere to be seen in the case of the EU at the WTO.

[100] To use the famous expression by Belgian Foreign Minister Mark Eyskens in 1991, quoted in S Marsh and H Mackenstein, *The International Relations of the European Union* (New York, Pearson/Longman, 2005), at 248.

[101] see HG Schermers and N Blokker, *International Institutional Law. Unity within Diversity* , 5th edn (Leiden, Martinus Nijhooff, 2011), at 1009-1020.

The Member States are not hiding behind the EU as to avoid their responsibilities. Neither does the EU use its internal division of competences to evade its responsibility. Instead, in the WTO we witness an eagerness of the EU to be held responsible in lieu of its Member States.[102] Indeed, it could be argued that the responsibility of the EU at the WTO is a success story. On the one hand, third countries can prevail themselves fully of the remedies offered by the WTO to urge the EU to stay faithful to 'free and fair trade' and the 'strict compliance' with its international obligations.[103] On the other, despite the adverse consequences that may follow from accepting responsibility, it nonetheless serves as a way for the Union to assert itself on the global stage. While not always compliant with WTO law, at the very least it is a 'responsible' power in international trade.

Nonetheless, in closing, it should be underlined once more that this is possible above all by the also rather unique framework of the WTO, which allows for the emergence of dispute settlement practice diverging from the norm. The extent to which this approach to responsibility could be transferred to other policy areas in which the EU is also active is a different question. It may, eventually, remain a feature reserved only to this 'odd couple'.

[102] see also Eeckhout, above n 21, at 543.
[103] To use the aims the Union has set itself in the post-Lisbon EU Treaties, Art 3(5) TEU.