CHAPTER 9

The Responsibility of Member States of International Organizations

A Special Case for the European Union?

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1 Introduction

This paper addresses the question of the responsibility of a member State of an international organization in the particular setting of the European Union (“EU” or “the Union”) and queries whether the EU context constitutes a special case as compared to other international organizations. While the response to this question seems affirmative, it certainly requires some explanation why this is a special case in comparison to the situation of member States in other international organizations.

The special case of the EU is not solely confined to the question of the responsibility of its member States, but it also applies to the organization as such. It is most visible in the context of international treaty practice, even though not limited to it. The special case of the EU is connected to different things: the voluminous nature of the EU’s international treaty practice as such; the phenomenon of mixed agreements; and the modus operandi of the EU relating to the way in which international agreements are implemented within the EU framework. All of these different aspects contribute to the special way the member States feature in the context of the EU when issues of responsibility ultimately arise.

The paper will first differentiate between factual/behavioural aspects in the EU’s external action from the more distinctly legal aspects. It will then proceed to consider the notions of legal personality, competence and responsibility in relation to the EU. This is followed by consideration of the duty of communication as a complementary principle in the context of the so-called “mixed agreements” and joint responsibility as a default position. The conclusion will highlight the special case of the EU by pinpointing the key reasons contributing to it.

* The views expressed in this paper are personal and not necessarily reflecting the views of any of the EU institutions.
2 The European Union is a Special Case for Different Reasons

As a practical matter, issues of responsibility arise much more frequently in the case of the European Union than any other international organization. This is connected with the fact that the EU as an organization is engaged in such a large number of international treaty commitments. The EU’s comprehensive international treaty practice entails broad regulatory treaties such as the Law of the Sea Convention (‘UNCLOS’) or the membership in the World Trade Organization (‘WTO’), involving compulsory dispute settlement mechanisms. The fact that the EU participates in such treaties inevitably means that issues of responsibility arise at regular intervals. Today, the EU is party altogether to 258 multilateral agreements and 852 bilateral agreements.1

The potential for the issue of member State responsibility to arise is furthermore related to the phenomenon of ‘mixed agreements’.2 Indeed, the framework of mixed agreements — agreements in which both the EU and its member States participate — has become the predominant form of EU participation in major international treaties and conventions. This particular form of participation carries with it the potential that the issue of member State responsibility arises as a separate issue in the context of international disputes related to EU action. In so far as the ‘mixed’ participation in international treaties is a matter of choice — and this is notably so with regard to so-called ‘false mixity’ situations3 — the possibility of member State responsibility arising is in the end attributable to the way in which the EU and member States themselves choose to conduct their treaty relations. Evidently, the ‘mixed’ form of action in principle raises multiple questions of member State responsibility more often than would be the case if the organization alone participates in the agreements. However, this potential member State responsibility is not necessarily borne out in reality to the extent that one might assume at first sight. This is reflected at least in the trade field, as shown in the WTO dispute settlement practice. It is only exceptionally that individual EU member States have been targeted, despite the mixity of the WTO Agreement, and even then mostly alongside the EU; and it has been ultimately the EU that is normally responsible.4

1 As recorded by the Treaty Office of the EU’s External Action Service.
2 See generally Joni Heliskoski, Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States (Brill / Nijhoff, Leiden, 2001).
4 Interestingly, it has been pointed out that individual EU member States have been (initial) respondents only in 13 cases in WTO dispute settlement procedures, while the EU itself has