Introduction

It is undisputed that international organizations may have legal personality. In the landmark Opinion of the International Court of Justice (ICJ) in the Reparation for Injuries, the ICJ concluded that the United Nations (UN) is an international person capable of possessing international rights and duties.\(^1\) Leaving aside the debate on the rationales underlying the ICJ’s conclusion and how it applies to different legal theories on international legal personality,\(^2\) Klabbers notes a presumptive approach which holds that as soon as an organization performs acts which can only be explained on the basis of international legal personality, it is presumed that it possesses international legal personality.\(^3\) The Union’s legal personality has been provided for in Article 210 of the European Economic Community (EEC) Treaty and is now found in Article 47 of the Treaty of Lisbon. While the drafters of the Union Treaties never expressly clarified whether that personality covers international legal personality, already in 1971 the Court of Justice of the European Union (the Court or CJEU) held that Article 210 of the EEC Treaty was supposed to also mean ‘international’ legal personality.\(^4\)

Stemming from this international legal personality is the capacity of organizations to assume international rights and obligations. Article 6 of the 1986 Vienna Convention on the Law of Treaties between states and international organizations or between international organizations establishes that their

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\(^2\) Two main theories can be noted – the will theory and the objective theory; see Jan Klabbers, An Introduction to International Organizations Law (Cambridge University Press 2015), 46–50.


capacity to conclude treaties is governed by the rules of that organization. Article 216(1) of the Treaty on the Functioning of the European Union (TFEU) sets express and implied powers of the European Union (EU) to conclude international agreements.\(^5\) The EU enjoys capacity to conclude international economic treaties which fall within its competence in the area of the common commercial policy.\(^6\) It has become a usual practice in the EU to conclude international agreements alongside its Member States when agreements also cover areas which fall outside the EU’s exclusive competence. The Court concluded in Opinion 2/15 that agreements which cover commitments that fall within a competence shared between the EU and the Member States cannot be concluded by the Union alone.\(^7\) Treaties to which both the EU and some or all of the Member States are party are called ‘mixed agreements’. Most of the EU’s major economic and environmental treaties are mixed, including the World Trade Organization Agreements (the WTO Agreements), the United Nations Convention on the Law of the Sea (UNCLOS), the Kyoto Protocol to the Climate Change Convention, the EU’s association agreements,\(^8\) free trade agreements\(^9\) (except the EU-UK Trade and Cooperation Agreement which is an EU-only treaty) and the European Economic Area Agreement (EEA Agreement).

The power to conclude international agreements comes with responsibility. An early principle of international law, formulated by the Permanent Court of International Justice in the famous Chorzów Factory case, is that a violation of international law entails responsibility and the obligation to make

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\(^5\) Art 216(1) of TFEU provides that ‘the Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope’. The implied powers stems from the ERTA doctrine; see Case 22–70 Commission of the European Communities v. Council of the European Communities [1977] ECR 273. The Court expanded the implied powers doctrine to include those areas where the EU has not yet legislated internally; see Opinion 1/76 Pursuant to Article 228 (1) of the EEC Treaty – ‘Draft Agreement establishing an European laying-up fund for inland waterway vessels’ [1977] ECR 754.

\(^6\) Art 3(1)(e) TEU.

\(^7\) Opinion 2/15 Free Trade Agreement with Singapore [2017] EU:C:2017:376, paras 243–244. However, note that the Court also noted that this conclusion is nothing more than acknowledgement of the fact that there was no possibility of the required majority being obtained within the Council for the Union to be able to exercise alone the external competence that it shares with the Member States in the area under consideration (non-direct foreign investment), see Case C-600/14 Federal Republic of Germany v. Council of the European Union [2017] EU:C:2017:935, para 67–68.

\(^8\) For example, the EU-Ukraine Association Agreement.

\(^9\) For example, CETA.
Nevertheless, the question of the international responsibility of organizations has puzzled legal scholars since the middle of the twentieth century. In his extensive work on international responsibility in the 1950s, Eagleton, for example, did not consider that international organizations may incur international responsibility. While the principle that organizations may be responsible for breach of their obligations is no longer seriously contested, the exact functioning of responsibility of international organizations remains a matter of great confusion. Alvarez rightly notes that it is not clear how the traditional doctrine of state responsibility, if it is relevant at all, ought to apply to organizations. The complexity of the question stems from the limited capacity enjoyed by international bodies – organizations may act only in those areas where they have been empowered to act by their founding members. A number of commentators have suggested that the 2011 International Law Commission’s (ILC) Articles on Responsibility of International Organizations (ARIO) are inadequate to address the different types and forms of international organizations. The root of this criticism lies in the fact that the ARIO rules are based on the 2001 Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), ignoring that states and organizations are essentially different subjects of international law.

The question of the international responsibility of the EU is particularly complex. On the one hand, unlike other organizations it is a supranational body with extensive, state-like powers. On the other hand, the EU’s multilevel implementation system has its origins in the limited resources that its Member States put at its disposal necessary to exercise its competences. To overcome this imbalance between power and means the EU has adopted the so-called system of executive federalism, whereas authorities of the Member States implement Union policies. In this system decisions which will often bind Member States can be taken by majority vote, and so, as Klabbers rightly notes, it is entirely possible that a Member State will have to adopt a certain course of

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10 Factory at Chorzów (Germany v. Poland), Jurisdiction [1927] PCIJ Series A – No. 8, para 55. The PCIJ held that ‘it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form’.
12 José E Alvarez, International Organizations as Law-Makers (Oxford University Press 2010), 129.
How then do we determine international responsibility for violations of joint obligations in such multi-layered governance structure? By the term ‘joint obligations’ I primarily mean obligations held by both the EU and its Member States under mixed agreements.

The European Union proposes its answers. The central idea is that the EU is a *sui generis* entity and so subject to a special regime of international responsibility. The applicable *lex specialis*, according to the European Commission, must be based on the internal division of competences between the EU and its Member States. The competence-based approach to international responsibility holds that the EU is responsible for violations of obligations in its areas of competence, irrespective of who carried out the conduct in question. Gaja, Special Rapporteur for the ARIO project, seemed to agree with the European Commission on what he referred to as a ‘problem’ of determining responsibility in the EU by addressing the following example:

> Member State customs authorities follow a policy of tariff classification which is alleged to be contrary to the trade provisions of an agreement that has been concluded by the EC and its member States together. The question of apportionment of the obligation and of responsibility would have to be decided in favour of the EC, since trade policy is an exclusive competence of the EC which has been wholly transferred by the member States to it. It would seem to be impossible in such a situation to say that the action by member States’ customs authorities should nonetheless lead to the attribution of the conduct to the member States, since they are not the carriers of the obligation any longer.

Gaja suggested that the articles ‘should probably make room for the internal rules of the organization’ as an element that is important not only to the question of the attribution of conduct but also – and perhaps foremost – for the question of the apportionment of responsibility.

Opinions which have emerged during the debate can be broadly divided into two groups. A first group of legal scholars suggests that the responsibility of the EU cannot be regulated solely on the basis of the rules of the organization because they are internal rules. While the need to accommodate the special

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16 Klabbers 2015, 26.
17 Comments and Observations Received from Governments and International Organizations, A/CN.4/556 (ILC 2005), 31.
18 Comments A/CN.4/556, 32.
19 Comments and Observations Received from International Organizations, A/CN.4/545 (ILC 2004), 26.
nature of the EU legal order is acknowledged, the argument is that rules of responsibility must sit comfortably within international law. A second group of authors stress the *sui generis* nature of the EU, a one-of-a-kind supranational organization. They suggest that law of international responsibility should provide space for the rules of the organization which governs the division of competences between the EU and Member States. To use the phrase of Kuijper and Paasivirta, this is the ‘inside looking out’ approach.

While determining international responsibility on the basis of internal rules conveniently accommodates the special nature of the Union, there is nothing in international dispute-settlement practice which would indicate that courts and tribunals support or apply the competence-based responsibility of the EU. To the best of my knowledge there has been no international economic dispute where responsibility was allocated to the EU or its Member States solely on the basis of competence. International adjudicators do not engage in the complex task of untangling the internal institutional functioning of the EU. Rather, as will be argued in this book, the EU and its

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22 Kuijper and Paasivirta 2013.
Member States remain independently responsible for violations of their joint obligations, irrespective of the internal transfer of powers. The question then is what governs the distribution of international responsibility between the EU and its Member States in, as is more specifically asked in this book, international economic law?

The relevance of the topic stems from the steady expansion of the Union’s role in the global economy. While the EU has been a player in international trade since its inception in the form of the European Coal and Steel Community in 1951, a significant impetus for its common commercial action was given in 2009 with the adoption of the Treaty of Lisbon. Among other things, competence in the field of foreign direct investment was transferred from Member States to the Union. Having acquired these new powers, the EU commenced the development of a European international investment policy by adopting a Communication titled ‘Towards a comprehensive European international investment policy’ of 7 July 2010 (Communication). The European Commission set out two major goals for the new investment policy and is currently working along two parallel lines to achieve them. First, the EU is seeking to ensure that EU investors abroad enjoy a level playing field, which assures both uniform and optimal conditions for investment through the progressive abolition of restrictions and protection of investors’ rights. To this end the Union announced in the Communication that the EU would gradually replace bilateral investment treaties (BITs) concluded by its Member States and third countries with those of its own. The second goal indicated in the Communication is the enforcement of investment commitments. It is stated in Part 3(d) of the Communication that future EU trade and investment protection agreements should include a new investor-state dispute-settlement mechanism.

To achieve its goals the European Commission is currently negotiating a number of free trade agreements (FTAs) with third countries. From 2016 to 2018 it has finalized negotiations with several partners, including the EU-Canada Comprehensive Economic and Trade Agreement (CETA), the European Commission, ‘Communication: Towards a Comprehensive European International Investment Policy, COM 345’. In this book, I will refer to earlier bilateral investment treaties concluded by the Member States as first-generation treaties.


CETA was signed on 30 October 2016. It entered into force provisionally on 21 September 2017. National/regional parliaments will have to approve CETA before it can take full effect. Canadian side ratified the treaty on 16 May 2017.
EU-Singapore Free Trade Agreement (EUSFTA), the EU-South Korea Free Trade Agreement and the EU-Japan Economic Partnership Agreement (EPA). The following analysis refers to these treaties as ‘new-generation’ FTAs, a term also employed by the European Commission. The new agreements, inter alia, cover trade liberalization and investment protection. They also establish dispute-settlement mechanisms to deal with trade and investment claims.

The expansion of the EU’s external action in the global economy demands accountability. The issues of responsibility have not (yet) given rise to serious contention. That is so because, rather than looking for routes to escape responsibility, the EU has proved to be a willing respondent in international economic disputes. That does not make the question of this book moot. On the contrary, it calls for an investigation into the EU’s approach to international responsibility and how this approach fits within international law.

This book presents a concept of functional international responsibility of the EU for violation of international economic obligations. Reference to the word ‘functional’ is not, however, made to present a connection with the general theory of functionalism in international institutional law. This term is used to argue that responsibility in a multilayered structure like the EU is distributed based on the adjudicative function which is defined by the treaty regime in question. At the same time, this study does not reject that there may be, at a deeper level, a connection with the broader concept of functionalism in the law of international organizations.

1.1 SCOPE OF RESEARCH

This book explores the allocation of international responsibility for violations of joint economic obligations in the context of a multilayered structure where sovereignty is shared among different subjects of international law. By

26 The EU and Singapore completed the negotiations for a comprehensive FTA on 17 October 2014, text available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=961, last visited 2 August 2018. The treaty needs now to be formally approved by the European Commission and then agreed upon by the Council of Ministers and ratified by the European Parliament.

27 The negotiations were finalized on 8 December 2017. After the legal verification and translation processes, the European Commission can then submit the agreement for the approval of the European Parliament and EU Member States.


reference to ‘shared sovereignty’ I mean a common governance arrangement, whereas the EU policies are implemented through authorities of Member States, a feature stemming from its limited resources. Analysis is primarily focused on the EU and its Member States, but the normative findings of the present research are relevant to the institutional law of international organizations and law of international responsibility more broadly.

The book aims to answer three main questions: what, how and why.

First, the book aims is to identify what legal basis governs the allocation of international responsibility between the EU and its Member States. It searches for the underlying rationales which guide international dispute-settlement bodies when faced with violation(s) of economic obligations held jointly by the EU and its Member States.

Second, the book seeks to extrapolate how international courts and tribunals apply this legal basis in practice. Does the reasoning of international courts and tribunals differ depending on the treaty regime in question? How do these differences correlate with the patterns of distribution of shared responsibility between the EU and its Member States?

Third, the book aims to explain why the distribution of shared responsibility differs across treaty regimes. How can we explain the factors that shape the role of the EU and its Member States in international dispute-settlement practice?

It must be emphasized that this book explores the question of the international responsibility of the EU in international economic law only. To specify further, it explores the question in the context of joint economic obligations of the EU and its Member States, primarily under mixed agreements. I have chosen to explore the question of responsibility primarily in the context of two major economic frameworks, namely the Energy Charter Treaty (ECT) and the WTO Agreements. Both the ECT and the WTO Agreements are mixed, that is they bind both the EU and its Member States, and their dispute-settlement bodies provide a great case study to explore allocation of international responsibility in a multilayered body.

Under EU law, international economic obligations fall under the category of Common Commercial Policy (CCP) which is an exclusive competence of the EU (Article 3 of the TFEU). That is, the right of decision-making in the area of CCP belongs to the EU, while Member States are prevented from taking action unless mandated by the Union. One may question to what extent the normative findings of this book are applicable in the context of other EU competences or whether they are limited to the narrow case of the EU’s exclusive competence in trade.
This work does not address international responsibility for violations of obligations in areas other than CCP. Accordingly, it does not expressly answer whether and how the normative findings of this research are applicable in fields that do not fall under the category of exclusive competences of the EU, such as shared competences in the field of environment, development cooperation or immigration, and ancillary competence in, for example, public health. However, this book addresses CCP not because my intention was to focus exclusively on trade matters but simply because the EU’s action in trade offers valuable case law under the ECT and the WTO dispute-settlement mechanisms which is not present, at least to the same extent, in other fields.

Here I should like to note one important point. Functional international responsibility, which is presented in this book, may or may not apply to other areas of EU action. While this book does make any specific conclusions in this regard, the central claim presented herein implicitly suggests that the categorization of competence is largely irrelevant to the question of allocation of international responsibility between the EU and its Member States. The (in)applicability of functional international responsibility to other areas of EU action will depend not on the type of competence (i.e. shared or exclusive) but on the nature of an international obligation in question.

First, this book suggests that the type of competence is not always relevant—as it is not relevant in the area of CCP—for the allocation of international responsibility between the EU and its Member States. For the purposes of international responsibility, the nature of competence is not instructive of who is bound by an international obligation. This is a question of mixity, that is, whether Member States are parties to an international treaty in addition to the EU (and, in some cases, the question of obligations erga omnes). Member States may be bound by international obligations in the areas of exclusive EU competence if they are parties to an international treaty alongside the EU. This may, and does, happen when a treaty covers both areas of exclusive and shared competences. Whether a mixed treaty contains trade or environmental obligations is, in this respect, irrelevant—the very purpose of mixity is to avoid categorizing obligations as belonging to the sphere of Member States versus the EU. In this sense, there is no difference between international obligations under mixed agreements in the area of CCP and obligations under mixed agreements in areas of shared competence—it will be argued in Chapter 3 that in both cases Member States are independently responsible for all obligations under a given mixed agreement, irrespective of whether that obligation falls under a shared or
exclusive competence. The typology of a given competence is largely irrelevant from an international law perspective. The only relevance that the category of a specific competence plays in the context of international responsibility is that it informs of who is likely to be bound by an international obligation in the context of that competence – the EU, its Member States or both. In the context of shared competences, mixed agreements are a dominant form of treaty-making precisely because there has been no full transfer of powers to the EU. Given that both the EU and its Member States are bound by treaties which contain obligations in the fields of shared competence (e.g. environmental treaties such as the Paris Agreement adopted under the United Nations Framework Convention on Climate Change), the question of allocation of international responsibility may be particularly relevant in the context of shared competences.

Second, whether functional international responsibility is applicable in areas other than CCP depends not on the type of competence but on the nature of the obligation in question. This book argues that it is the obligation, rather than the internal categorization of competences, which dictates the underlying rationale for the allocation of international responsibility. The nature of an obligation and the typology of competences are related but independent concepts: that a specific obligation falls under a certain competence (shared or exclusive) is not determinative of its nature. By ‘nature’ I mean the inherent features of the commitment. As it will be argued in this book, international economic obligations differ essentially from other types of international obligations because of their consensual nature and the restorative, rather than retributive, function of remedies that protect them. It will be suggested that in international economic law, attribution of conduct is irrelevant for the allocation of responsibility in a multilayered structure where sovereignty is shared between different subjects of international law. What international courts and tribunals ask is not who is responsible for a breach but rather who is best placed to bear responsibility. The answer to this question depends on the nature of the obligation in question.

It may thus be that the functional approach to international responsibility will not apply in case of obligations which are essentially different from international economic law. While it is not possible, at least within the scope of the present book, to differentiate various international obligations according to their characteristics, a brief reference to one example illustrates the point. It is unlikely that attribution of conduct will be irrelevant in

30 An in-depth analysis of the principle of independent responsibility of the EU and its Member States is provided in Chapter 3.