ΙΔΡΥΜΑ ΚΑΛΛΙΟΠΗΣ ΚΟΥΦΑ
ΓΙΑ ΤΗΝ ΠΡΟΑΓΩΓΗ ΤΟΥ ΔΙΕΘΝΟΥΣ ΔΙΚΑΙΟΥ ΚΑΙ
ΤΗΝ ΠΡΟΣΤΑΣΙΑ ΤΩΝ ΑΝΘΡΩΠΙΝΩΝ ΔΙΚΑΙΩΜΑΤΩΝ

KALLIOPI KOUFA FOUNDATION
FOR THE PROMOTION OF INTERNATIONAL
AND HUMAN RIGHTS LAW

Jean Monnet Project | EURIS

EU Responsibility in the International System

Training Manual No. 3

The Responsibility of the European Union under International Investment Law

Christos Zois

August 2022

With the support of the Erasmus+ Programme of the European Union

ΙΔΡΥΜΑ ΚΑΛΛΙΟΠΗΣ ΚΟΥΦΑ
ΓΙΑ ΤΗΝ ΠΡΟΑΓΩΓΗ ΤΟΥ ΔΙΕΘΝΟΥΣ ΔΙΚΑΙΟΥ ΚΑΙ
ΤΗΝ ΠΡΟΣΤΑΣΙΑ ΤΩΝ ΑΝΘΡΩΠΙΝΩΝ ΔΙΚΑΙΩΜΑΤΩΝ

KALLIOPI KOUFA FOUNDATION
FOR THE PROMOTION OF INTERNATIONAL
AND HUMAN RIGHTS LAW

JEAN MONNET PROJECT | EURIS

EU RESPONSIBILITY IN THE INTERNATIONAL SYSTEM

TRAINING MANUAL No. 3

The Responsibility of the European Union under International Investment Law

Kalliopi Koufa Foundation for the Promotion of International and Human Rights Law
Aristotelous 2, 54623, Thessaloniki

This project has been funded with support from the European Commission. This publication (communication) reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

Contents

1. Introduction

Pursuant to the entry into force of the Treaty of Lisbon, the European Union (EU/Union) was explicitly afforded legal personality under international law (Article 47 Treaty on the European Union (TEU)).[1] An immediate corollary of it, is the Union's capacity to engage into binding international agreements with third parties (States and/or other International Organisations (IOs)); **Article 216(1) Treaty on the Functioning of the European Union (TFEU)** expressly allows the conclusion of international agreements ***when this [competence] is provided by the Treaties.*** In the field of international economic law, up until 2009 the competence to conclude investment agreements resided with the Member States (MS); the Treaty of Lisbon, though, gave a new impetus to the Union's international presence as an investment regulator. More specifically, **Article 207 TFEU** explicitly included Foreign Direct Investments (FDI), and the ability to conclude relevant international agreements, in the ambit of the **Common Commercial Policy**, an exclusive EU competence pursuant to **Article 3(1)(c) TFEU**.[2]

As of today, the only international investment agreement (IIA) in force to which the EU -alongside (some of) its Member States-[3] is a party is the Energy Charter Treaty (ECT),[4] signed by the Union before the Treaty of Lisbon. In the post-Lisbon era, the EU has concluded IIAs with Canada (CETA),[5] Vietnam[6] and Singapore (EUSIPA),[7] whose entries into force are pending upon ratification by national parliaments, while it is currently negotiating new ones with Mexico,[8] Chile[9] and Angola.[10]

In the present manual we will examine the potential issues of EU's international responsibility that might arise in the instance of breaches of its IIAs, including the allocation of conduct and international responsibility between the EU and its Member States on international and Union law levels.

---

[1] Prior to the Treaty of Lisbon, Article 210 of the European Economic Community (EEC) Treaty more vaguely referred to the legal personality of the EEC. The Court of Justice of the European Union (CJEU) clarified rather early on that it implicitly referred to the EEC's international legal personality; see Case 22-70, *Commission of the European Communities v Council of the European Communities*, 31.3.1971, ECLI:EU:C:1971:32, §§13-14.

[2] Pursuant to the entry into force of the Treaty of Lisbon, the European Commission adopted in 2010 a Communication, which remains influential until today, setting out its goals for the new era of international investment negotiations and agreements. Among others, this Communication includes the creation of a common and coherent investor-state dispute settlement system (ISDS), which has manifested in the new-era investment agreements of the Union. See European Commission, Communication: 'Towards a comprehensive European international investment policy', 7 July 2010, COM(2010)343 final.

[3] Italy officially withdrew from the Energy Charter Treaty in 2019.

[4] Energy Charter Treaty (adopted 17.12.1994 entered into force 16.4.1998) 2080 UNTS 95.

[5] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ L 11, 14.1.2017, p. 23.

[6] Council Decision (EU) 2019/1096 of 25 June 2019 on the signing, on behalf of the Union, of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part, OJ L 175, 28.6.2019, p. 1–2

[7] Council Decision (EU) 2018/1047 of 16 July 2018 on the signing, on behalf of the Union, of the Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part, OJ L 189, 26.7.2018, p. 2–2

[8] European Union, In principle Agreement: 'Modernisation of the Trade Part of the EU-Mexico Global Agreement (Without Prejudice)' (2018), available: https://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156814.pdf, Section [X]: Resolution of Investment Disputes.

[9] European Commission, 'EU-Chile Free Trade Agreement. EU Textual Proposal. Investment and Trade in Services Title' (2018), available: https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156589.pdf.

[10] Additionally, the most recent negotiations on modernising its investment relations with third countries have been initiated between the EU and Angola in 2021; see European Commission, 'Recommendation for a Council Decision authorising the opening of negotiations with Angola for an agreement on investment facilitation', 23 March 2021, COM(2021) 138 final; European Commission, Press Release: 'EU and Republic of Angola launch negotiations for a first-ever Sustainable Investment Facilitation Agreement', 22 June 2021, available: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3096.

2. *Post-introduction:* Attribution of conduct to EU based on normative control or competence?

The tensed discussions in the International Law Commission (ILC) leading to the adoption of the Draft Articles on International Responsibility of International Organisations (DARIO) showcase the Union's dissatisfaction on the Commission's work regarding the rules of allocation of conduct/responsibility of Regional Economic Integration Organizations' (REIOs) MS. Against this background, two proposals for attribution models arose: **the normative control and the competence-based models**. Taking into consideration that these two models remain influential in the way the EU concludes its IIAs with third States, we will briefly present their main characteristics.

A. The 'normative control' model

ILC *European Commission Comments to DARIO Negotiations* (2011), p 167, para 1

European Union Member States have transferred competences (and therefore decision-making authority) on a range of subject matters to the European Union. … [These latter] are obliged to carry out binding decisions and policies adopted by the European Union according to the European Union's internal rules. This requires special rules of attribution and responsibility in cases where European Union Member States are in fact only implementing a binding rule of the international organization. In other words, the European Union exercises normative control of the Member States who then act as Union agents rather than on their own account when implementing Union law.

The above passage from the European Commission's comments during the DARIO negotiations encapsulates the core of the 'normative control' model; international responsibility is attributed to the EU for its MS conduct **when the latter was adopted in implementation of (an) EU act(s) which leave no margin of manoeuvre/appreciation to the MS**. Under this model, MS are practically equated with organs of the Union implementing the IO's decisions and for this reason the EU must be concerned as ***solely responsible.*** As it will be shown below, traces of this model can be found in all post-Lisbon IIAs concluded by the EU; however, even in the Commission's submissions the intensity of control necessary for a normative connection to be established is not specified and remains dependent on the interpretation of every single case.

B. Competence-based attribution of responsibility

The second model that has been proposed aims to bring the EU's internal structure to the international forefront. More specifically, **allocation of responsibility is premised on the internal distribution of competences pursuant to the EU Treaties**. In other words, responsibility is carried by the entity that has the capacity (whether it has exercised it yet or not according to a view or only when it has exercised it according to a second perception) to engage in international binding agreements with third parties (States and/or other IOs).[11] The most pertinent international treaty explicitly adopting this model is **the United Nations Convention on the Law of the Sea (UNCLOS)**,[12] which provides that each Party bears responsibility pursuant to their respective competences and even moves further into requiring REIOs to make this specification by submitting a declaration of competence.

[11] For an analysis of this model, see C Contartese, 'Competence-Based Approach, Normative Control, and the International Responsibility of the EU and Its Member States: What Does Recent Practice Add to the Debate?' (2019) 16 International Organizations Law Review 339, 342-3.

[12] United Nations Convention on the Law of the Sea (adopted 10.12.1982 entered into force 16.11.1994) 1833 UNTS 3.

UNCLOS, Annex IX, Article 5(1)-(2)

l. The instrument of formal confirmation or of accession of an international organization shall contain a declaration specifying the matters governed by this Convention in respect of which competence has been transferred to the organization by its member States which are Parties to this Convention.

2. A member State of an international organization shall, at the time it ratifies or accedes to this Convention or at the time when the organization deposits its instrument of formal confirmation or of accession, whichever is later, make a declaration specifying the matters governed by this Convention in respect of which it has transferred competence to the organization.

UNCLOS, Annex IX, Article 6

Parties which have competence under article 5 of this Annex shall have responsibility for failure to comply with obligations or for any other violation of this Convention.

In principle, the competence-based model constitutes the doctrinal basis of all post-Lisbon EU IIAs, since it is recited in every agreement's preamble as the basis of responsibility distribution; however, as it will be shown below, the operative parts of these agreements reveal a different reality of the subject matter at hand.

3. International Investment Agreements: Questioning the Union's exclusivity in favour of mixity

As shown in the 2010 Communication, the Union in the post-Lisbon era regarded the conclusion of all IIAs with third parties -including those moving beyond FDI and providing for an ISDS- as its exclusive competence, in the sense that individual Member State ratification was not required. However, in 2017 the Court of Justice of the European Union (CJEU) issued Opinion 2/15[13] regarding the EU-Singapore Free Trade Agreement (EUSFTA), whereupon it delved into the question on whom (EU or MS) the competence falls to conclude international agreements whose subject-matter falls under both exclusive and shared EU competences. In its Opinion, the CJEU concluded that the EUSFTA Investment Chapter (Section B, Chapter 9) establishing an ISDS resulted in competences being removed from MS without their consent; **for this reason, according to the Court, all IIAs including an ISDS *have to be obligatory mixed***.[14] On a practical level, pursuant to this Opinion the EU re-negotiated an IIA with Singapore and has been following the mixity paradigm in the conclusion of all its subsequent IIAs that include an ISDS.[15]

***Opinion 2/15* (2017) paras 290-293 and 276**

§290. Without prejudice to what is stated in paragraph 30 of this opinion, the Court has the task of ruling on the nature of the competence to establish such a dispute settlement regime. In that regard, whilst it is true that, as is clear from Article 9.17 thereof, the envisaged agreement does not rule out the possibility of a dispute between a Singapore investor and a Member State being brought before the courts of that Member State, the fact remains that that is merely a possibility in the discretion of the claimant investor.

[13] Opinion 2/15, 16 May 2017, ECLI:EU:C:2017:376.

[14] *Ibid*, paras 285-293. Even before Opinion 2/15 the main scholar view was that IIAs must be concluded as *mixed* in order to safeguard the internal distribution of competences in the EU; see, T Eilmansberger, 'Bilateral Investment Treaties and EU Law' (2009) 46 Common Market Law Review 383, 392.

[15] The Court's Opinion sparked also a really interesting debate on the continuation or not of the 'facultative mixity' theory established by Rosas regarding the conclusion of international agreements whose subject matter falls under the Union's shared competences. For the main doctrinal contours of this theory and the post-Opinion 2/15 debate, see J Heliskoski, 'The Exercise of Non-Exclusive Competence of the EU and the Conclusion of International Agreements' in K Lenaerts *et al.*, *An Ever-Changing Union?: Perspectives on the Future of EU Law in Honour of Allan Rosas* (Hart 2019) 293-310; L Ankersmit, 'Opinion 2/15 and the future of mixity and ISDS' (*European Law Blog*, 18 May 2017) available: https://europeanlawblog.eu/2017/05/18/opinion-215-and-the-future-of-mixity-and-isds/.

§291. The claimant investor may indeed decide, pursuant to Article 9.16 of the envisaged agreement, to submit the dispute to arbitration, without that Member State being able to oppose this, as its consent in this regard is deemed to be obtained under Article 9.16.2 of the agreement.

§292. Such a regime, which removes disputes from the jurisdiction of the courts of the Member States, cannot be of a purely ancillary nature within the meaning of the case-law recalled in paragraph 276 of this opinion and cannot, therefore, be established without the Member States' consent.

§293. It follows that approval of Section B of Chapter 9 of the envisaged agreement falls not within the exclusive competence of the European Union, but within a competence shared between the European Union and the Member States.

§276: The Court has already had occasion to point out that the competence of the European Union to enter into international commitments includes competence to couple those commitments with institutional provisions. Their presence in the agreement has no effect on the nature of the competence to conclude it. Those provisions are of an ancillary nature and therefore fall within the same competence as the substantive provisions which they accompany (see to that effect, inter alia, Opinion 1/76 (Agreement on the establishment of a European Laying-up Fund for Inland Waterway Vessels) of 26 April 1977, EU:C:1977:63, paragraph 5; Opinion 1/78 (International Agreement on Natural Rubber) of 4 October 1979, EU:C:1979:224, paragraph 56; and judgment of 22 October 2013, Commission v Council, C-137/12, EU:C:2013:675, paragraphs 70 and 71).

This mixity in the conclusion of the post-Lisbon IIAs is one of the most crucial elements in the discussion concerning the distribution of international responsibility between the EU and its MS, since they both remain full Parties to these Treaties and are bound in their entirety.[16] **More specifically, the perplexity of attributing international responsibility arises in case of breaches of investment obligations by Member States not on their own initiative but because they were called/obliged to implement an EU act -either fully or partially binding- such as a Regulation, Directive or in the field of investments a State-specific decision of the Commission.** In this regard, international investment tribunals might be eventually called to deal with the (substantive or procedural) question of distributing conduct and/or responsibility between the EU and MS.

C-316/91 *Parliament v Council* (1994) para 29

§29. The Convention was concluded, according to its preamble and Article 1, by the Community and its Member States of the one part and the ACP States of the other part. It established an essentially bilateral ACP-EEC cooperation. *In those circumstances, in the absence of derogations expressly laid down in the 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*.

4. EU-concluded IIAs and distribution of international responsibility: the role of the respondent determination mechanism

A common characteristic we can locate in both pre- and post-Lisbon era (mixed) IIAs is that they contain **no specific clause allocating the conduct and/or the responsibility between the Union and the MS** in the event of breaches of the agreements' obligations**.** On the contrary, we can detect a consistently repeated effort by the EU to **establish mechanisms which aim to internalise the determination of the Respondent Party (EU or the MS) in investor-initiated procedures**; while this mechanism does not explicitly refer to international responsibility we will examine

[16] Case C-316/91 *Parliament v Council*, 2 March 1994, ECLI:EU:C:1994:76, §29.

whether it can be used to deduce any rule regarding international responsibility distribution between the Union and its MS. In our analysis we will focus both on the ECT provisions and the very pertinent case-law on the issue of respondent determination therein, as well as on the new-era IIAs where this mechanism is included as a binding treaty provision.

A. The Energy Charter Treaty

A.1. Treaty provisions and relevant documents

As already mentioned, the ECT does not contain any specific provision or indication regarding the allocation of responsibility in the case of REIOs and their MS nor does it require the submission of *declarations of competences.* However, the Statement submitted by the Union pursuant to Article 26(3)(b)(ii) ECT aiming to specify the policies, practices and conditions in the case of investor-Parties disputes makes clear that according to the Union the international responsibility for (failing to) fulfilling the obligations under the ECT is distributed between the EU and its MS '***in accordance with their respective competences' as provided by the EU Treaties.***[17]

ECT, Article 26(3)(b)(ii)

For the sake of transparency, each Contracting Party that is listed in Annex ID [incl. the EU] *shall provide a written statement of its policies, practices and conditions* in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.

Additionally, the initial EU Statement submitted in 1997 (by the then European Communities) **introduced the concept of unilateral respondent determination by the EU**, which later found its way in all EU-led IIAs. More specifically, the 1997 Statement encouraged investors to seek the determination of the appropriate respondent by the Communities which would have to respond in 30 days (Article 3). The 2019 Statement by the EU, which replaced the initial 1997 Statement, explicitly refers to the text of Regulation 912/2014,[18] which specifies the procedure and sets the criteria for the determination of the appropriate respondent. However, as included in both Statements, ***the procedure introduced by the EU is not binding for the investors which can decide to initiate proceedings against the EU and/or its MS based on their own assessment***. Additionally, even if the procedure is followed and the EU makes the relevant determination, this is not binding for the tribunal -contrary to the post-Lisbon IIAs- which remains free to decide on the issue of determining the proper respondent.[19]

***European Communities Statement to ECT* (1997)**

The European Communities and their Member States have both concluded the Energy Charter Treaty and are thus internationally responsible for the fulfilment of the obligations contained therein, in accordance with their respective competences. The Communities and the Member States will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of another Contracting Party. In such case, upon

[17] Statement submitted to the Energy Charter Treaty (ECT) Secretariat pursuant to Article 26(3)(b)(ii) of the ECT replacing the statement made on 17 November 1997 on behalf of the European Communities, OJ L 115, 2.5.2019, p 1, §2.

[18] Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, OJ L 257, 28.8.2014, p 121–134.

[19] S Vezzani, 'The International Responsibility of the European Union and of Its Member States for Breaches of Obligations Arising from Investment Agreements: Lex Specialis or European Exceptionalism? In *M Andenas et al. (eds), EU External Action in International Economic Law: Recent Trends and Developments* (Springer 2020) 281, 297.

the request of the Investor, the Communities and the Member States concerned will make such determination within a period of 30 days.

***European Union Statement to ECT* (2019)**

§2. The European Union, Euratom and their Member States are internationally responsible for the fulfilment of the obligations contained within the Energy Charter Treaty, in accordance with their respective competences.

§3. On 23 July 2014 Regulation (EU) No 912/2014 of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-to-state-dispute settlement tribunals established by international agreements to which the European Union is party was adopted ('Regulation (EC) No 912/2014'). The Regulation applies to investor-to-state disputes initiated by a claimant from a third country under the Energy Charter Treaty. (…)

Besides linking distribution of responsibility to competences, the Statements do not elaborate thereon, and **they seem to draw no consequences from the determination of the respondent procedure alike (or equally the absence of relevant determination)**. This comes for example in clear contrast to the UNCLOS, which besides expressly linking responsibility to competence-sharing, provides that in the case the EU fails to make a determination pursuant to a disputing party's request, **the Union and its MS are regarded as *jointly and severally responsible on the international level* for UNCLOS violations**.

A.2. Relevant ECT case-law

Despite the vagueness of the treaty text, the case-law pertinent to the ECT can provide us with important information regarding both the distribution of responsibility between the EU and its MS in the field of international investment law and the criteria that can be used thereof, even though all proceedings up-to-date have been initiated *solely* against MS.

The first relevant case is ***Electrabel v Hungary***,[20] brought by a Belgian company pursuant to the revocation of a state contract which was deemed by a Commission decision as an unlawful state aid contrary to EU legislation. The ICSID Tribunal concluded that, considering the supranational nature of the EU, ***it would be 'absurd'* to hold Hungary liable for abiding with a binding Union decision which left no margin of manoeuvre to the state.**

***Electrabel S.A. v Republic of Hungary* (2012) para 6.72**

§6.72. Where Hungary *is required to act in compliance with a legally binding decision* of an EU institution, recognized as such under the ECT, it cannot (by itself) entail international responsibility for Hungary. Under international law, *Hungary can be responsible only for its own wrongful acts.* The Tribunal considers that it would be absurd if Hungary could be liable under the ECT for doing precisely that which it was ordered to do *by a supranational authority whose decisions the ECT itself recognises as legally binding on Hungary*.

The above-quoted passage showcases that **the Tribunal followed the 'normative control' theory** regarding distribution of responsibility between the EU and its MS by **focusing on the binding character** of the EU-issued act that the state had to follow.

However, further ECT-related case-law is the least inconsistent regarding the model of responsibility attribution between the EU and its MS. For example, in ***AES v Hungary***[21] and ***Micula v Romania***[22] both Tribunals refused to follow the respondent States' normative control line of defence (conduct dictated by European Commission acts on

[20] ICSID *Electrabel S.A. v. Republic of Hungary* (Decision on Jurisdiction, Applicable Law and Liability) (2012) ARB/07/19.
[21] ICSID *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary* (Award) (2010) ARB/07/22.
[22] ICSID *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I]* (Final Award) (2013) ARB/05/20.

state aids and EU-Romania Accession Treaty respectively) and attributed the conduct **and** the international responsibility exclusively to those states. More specifically, in *AES v Hungary* the Tribunal regarded Hungary's EU-based obligations only when the 'rationality' and 'reasonableness' of the measure taken was examined, **but not** as an exonerating of responsibility reason.

***AES Summit v Hungary*, paras 7.6.8 and 7.6.9**

§7.6.8. However, the Tribunal concludes that, properly understood, the dispute under analysis in the present arbitration is not about a conflict between the EC Treaty or Community competition law and the ECT.

§7.6.9. Rather, the dispute is about the conformity or non-conformity of Hungary's acts and measures with the ECT. Therefore, *it is the behaviour of the state* (the introduction b Hungary of the Price Decrees) which must be analyzed in light of the ECT, to determine whether the measures, or the manner in which they were introduced, violated the Treaty. *The question of whether Hungary was, may have been, or may have felt obliged under EC law to act as it did, is only an element to be considered by this Tribunal when determining the "rationality," "reasonableness," "arbitrariness" and "transparency"* of the reintroduction of administrative pricing and the Price Decrees.

B. The Post-Lisbon International Investment Agreements and allocation of responsibility

As already mentioned, in the past decade the EU has multiplied the conclusion of IIAs or Free Trade Agreements (FTAs), which include investment chapters in order to establish itself as a leader in international economic relations. The common feature of these IIAs is that they include ***no binding clause*** **regarding the allocation of conduct/responsibility between the EU and its MS** in case of a breach of investment obligations, or at least an operative provision which clarifies which system should be used for such attribution. The second feature is that they contain elaborative procedures for determining which Party should act as the Respondent in investor-initiated procedures. What is perplexing, though, is that the IIAs include ***no rule nor criteria*** to be followed in order to make this determination nor do they specify the results, if any, that this determination bears in terms of international responsibility, while it seems that the EU is *entirely entrusted with this procedure* **(proceduralisation).**

B.1. The procedure for determining the Respondent Party

The new procedure for determining the proper Respondent by the EU was included for the first time in **Article 8.21 CETA** and has been incorporated in every subsequent IIA negotiated or concluded by the Union. More specifically, after consultations between the investor and one of the Parties (the EU and/or its MS) fail, the investor **must notify the EU on its intention to initiate official proceedings**. This must be done in written form **(notice of intent)** where it **is obligatory for the investor to specify the *specific measures*** it considers as breaches of the IIA **and request** from the EU to determine which party will act as the Respondent.

After that, CETA provides that the EU has 50 days to make and communicate to the claimant the relevant determination (Article 8.21(4)), a time framework extended to 60 days in the subsequently concluded/negotiated IIAs and FTAs with investment Chapters **(Article 3.5(2) EU-Singapore IPA; Article 2.32(2) EU-Vietnam IIA; Section X, Article 5(3) EU-Mexico FTA)**. The IIAs stop short of enunciating the rules/criteria for the determination of the appropriate Respondent, thus giving rise to the impression that this willbe determined internally by the EU; in fact, as we will see below, Regulation 912/2014 regulates this determination and could be considered as a useful tool in order to extract internationally relevant rules on attribution of responsibility among others.

Relevant IIA provisions on the determination of Respondent by the EU			
International Agreement	**Date of Conclusion**	**Article on the determination of the Respondent**	**Text of the Article**
EU-Canada Comprehensive Economic and Trade Agreement (CETA)	2016	Article 8.21(1)-(3)	**1.** If the dispute cannot be settled within 90 days of the submission of the request for consultations, the request concerns an alleged breach of this Agreement by the European Union or a Member State of the European Union and the investor intends to submit a claim pursuant to Article 8.23, the investor shall deliver to the European Union a notice requesting a determination of the respondent. **2.** The notice under paragraph 1 shall identify the measures in respect of which the investor intends to submit a claim. **3.** The European Union shall, after having made a determination, inform the investor as to whether the European Union or a Member State of the European Union shall be the respondent.
EU-Singapore Investment Protection Agreement	2018	Article 3.5(1)-(2)	**1.** If the dispute cannot be settled within three months of the submission of the request for consultations, the claimant may deliver a notice of intent which shall specify in writing the claimant's intention to submit the claim to dispute settlement, and contain the following information: **(a)** the name and address of the claimant and, where such request is submitted on behalf of a locally established company, the name, address, and place of incorporation of the locally established company; **(b)** the provisions of Chapter Two (Investment Protection) alleged to have been breached; **(c)** the legal and factual basis for the dispute, including the treatment alleged to breach the provisions of Chapter Two (Investment Protection); and **(d)** the relief sought and the estimated loss or damage allegedly caused to the claimant or its locally established company by reason of that breach. The notice of intent shall be sent to the Union or to Singapore, as the case may be. **2.** Where a notice of intent has been sent to the Union, the Union shall make a determination of the respondent within two months from the date of receipt of the notice. The Union shall inform the claimant of this determination immediately, on the basis of which the claimant may submit a claim pursuant to Article 3.6 (Submission of Claim to

Relevant IIA provisions on the determination of Respondent by the EU			
International Agreement	**Date of Conclusion**	**Article on the determination of the Respondent**	**Text of the Article**
			Tribunal).
EU-Vietnam Investment Protection Agreement	2019	Article 3.32(1)-(2)	**1.** If the dispute cannot be settled within 90 days of the submission of the request for consultations, the claimant may deliver a notice of intent which shall specify, in writing, the claimant's intention to submit the claim to dispute settlement under this Section and contain the following information: **(a)** the name and address of the claimant and, where such request is submitted on behalf of a locally established company, the name, address and place of incorporation of the locally established company; **(b)** the provisions referred to in paragraph 1 of Article 3.27 (Scope) that are alleged to have been breached; **(c)** the legal and factual basis of the claim, including the measures that are alleged to breach the provisions referred to in paragraph 1 of Article 3.27 (Scope); and **(d)** the relief sought and the estimated amount of damages claimed. The notice of intent shall be sent to the Union or to Viet Nam, as the case may be. When a measure of a Member State of the Union is identified, it shall also be sent to the Member State concerned. **2.** When a notice of intent has been sent to the Union, the Union shall make a determination of the respondent and, after having made such a determination, it shall inform the claimant within 60 days of the receipt of the notice of intent as to whether the Union or a Member State of the Union shall be the respondent.
EU-Mexico Free Trade Agreement	2018 (Agreement in Principle)	Section X, Article 5(1)-(3)	**1.** If the dispute cannot be settled within 90 days of the submission of the request for consultations, the request concerns an alleged breach of this Agreement by the European Union or a Member State of the European Union and the claimant intends to submit a claim pursuant to Article 7 (Submission of a Claim to the Tribunal), the claimant shall deliver to the European Union a notice requesting a determination of the respondent. **2.** The notice under paragraph 1 shall identify the measures in respect of which the claimant intends to submit a claim. Where a measure of a Member State of the European Union is identified, the notice shall also be sent to the Member State

Relevant IIA provisions on the determination of Respondent by the EU			
International Agreement	**Date of Conclusion**	**Article on the determination of the Respondent**	**Text of the Article**
			concerned. **3.** The European Union shall, after having made a determination, inform the claimant within 60 days of the receipt of the notices referred to in paragraph 2 as to whether the European Union or a Member State of the European Union shall be the respondent.
EU-Chile Free Trade Agreement	2018 (EU Proposal (Without Prejudice))	Article 2.23(1)-(3)	**1.** If the dispute cannot be settled within 90 days of the submission of the request for consultations, the request concerns an alleged breach of the Agreement by the European Union or a Member State of the European Union and the claimant intends to initiate proceedings pursuant to Article 2.24 (Submission of a Claim), the claimant shall deliver a notice to the European Union requesting a determination of the respondent. **2.** The notice shall identify the treatment in respect of which the claimant intends to initiate proceedings. Where treatment of a Member State of the European Union is identified, such notice shall also be sent to the Member State concerned. **3.** The European Union shall, after having made a determination, inform the claimant within 60 days of the receipt of the notice referred to in paragraph 1 as to whether the European Union or a Member State of the European Union shall be the respondent.

B.2. The default procedure in the case of non-determination

A really intriguing discussion has been stirred regarding the possibility -and the consequences thereof- of the EU failing to make and communicate the necessary determination of respondent within 50/60 days. The post-Lisbon IIAs have incorporated a **default procedure** for the determination of the respondent, which can also provide us with information on the model of attribution of international responsibility that lies on the foundations of these agreements. Contrary to UNCLOS, the IIAs' default procedure embraces **the 'either/or' model of responsibility, meaning that only the EU or the MS can be the respondent in a dispute** in case of failure of timely determination; additionally, no provision allows the establishment of *joint and several* responsibility for the EU and its MS.

More specifically, using **Article 3.5(3) of the EU-Singapore IPA** as an example, we can discern two criteria for the determination of the respondent party:

(a) in case the notice of intent *exclusively* identifies ***treatment taken by the Member State(s) in question*** then they will have to act as respondent(s), and

(b) in case the notice identifies ***treatment by an institution, body or agency of the Union***, then the Union will act as the respondent party.

Almost identical provisions on the matter can be found in CETA, the EU-Vietnam IIA and the EU-Mexico (in principle) FTA. The above provisions must be read in conjunction with the definition of the term 'measures' as provided by the IIAs/FTAs themselves; in this regard, in an expansive fashion, **'measures' can incorporate laws, regulations, rules, procedures, decisions, administrative actions, requirements, practices or any other form of measure by any of the Parties (Article 1.1. CETA; Article 1.2(k) EU-Vietnam IPA; Article 1.2(6) EU-Singapore IPA)**.

Provisions on the failure to determine the Respondent			
International Agreement	**Date of Conclusion**	**Relevant articles**	**Text of the Article**
EU-Canada Comprehensive Economic and Trade Agreement (CETA)	2016	Article 1.1.	(…) measure includes a law, regulation, rule, procedure, decision, administrative action, requirement, practice or any other form of measure by a Party;
		Article 8.21(4)	In the event that the investor has not been informed of the determination within 50 days of delivering its notice requesting such determination: **(a)** if the measures identified in the notice are exclusively measures of a Member State of the European Union, the Member State shall be the respondent; **(b)** if the measures identified in the notice include measures of the European Union, the European Union shall be the respondent.
EU-Singapore Investment Protection Agreement	2018	Article 1.2(6)	"measure" means any law, regulation, procedure, requirement or practice.
		Article 3.5(3)	Where no determination of the respondent has been made pursuant to paragraph 2, the following shall apply: **(a)** in the event that the notice of intent exclusively identifies treatment by a Member State of the Union, that Member State shall act as respondent; **(b)** in the event that the notice of intent identifies any treatment by an institution, body or agency of the Union, the Union shall act as respondent.
EU-Vietnam Investment Protection Agreement	2019	Article 1.2(k)	"measure" means any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action or any other form
		Article 3.32(3)	In case the claimant has not been informed of the determination of the respondent within 60 days of the receipt of the notice of intent: **(a)** if the measures identified in the notice are exclusively measures of a Member State of the Union, that Member State shall be the respondent; or **(b)** if the measures identified in the notice include measures of the Union, the Union shall be the respondent.

EU-Mexico Free Trade Agreement	2018 (Agreement in Principle)	Section X, Article 5(4)	In the event that the investor has not been informed of the determination within 60 days of delivering its notice requesting such determination: **(a)** if the measures identified in the notice are exclusively measures of a Member State of the European Union, the Member State shall be the respondent; **(b)** if the measures identified in the notice include measures of the European Union, the European Union shall be the respondent.

This default procedure, even though the Parties hope that it will never be activated, is not without problems itself. First, it does not resolve in a binding manner, whether the determination based on the measures the claimant indicated on the notice will be -in a similar fashion to EU's determinations- binding for every actor involved (claimant, tribunal) or whether the arbitration tribunal will retain its prerogative to determine which measures are purely state-initiated and which ones have been dictated by the EU. However, the provisions' textual reading, which link the determination of the respondent *solely* with the specific measures identified by the claimants, the broad definition of the term 'measures' and the lack of any specific reference on the intensity of the Union institutions' involvement in the decision-making process, can lead to the conclusion that **arbitral tribunals will not need to delve beyond the context of the notice of intent and examine the distribution of competences between the EU and its MS**, aligning with consistent CJEU case-law on the matter. Unfortunately, in Opinion 1/17[23] regarding the compatibility of CETA with EU law, the CJEU refrained from examining the matter, even though it constitutes a binding provision of CETA Chapter 8.

EU-Singapore IPA, Article 1.2(12)

"EU Party" means the Union or its Member States, or the Union and its Member States, within their respective areas of competence as derived from the Treaty on the European Union and the Treaty on the Functioning of the European Union.

EU-Vietnam IIA, Article 1.2(n)

"EU Party" means the Union or its Member States or the Union and its Member States within their respective areas of competence as derived from the Treaty on the European Union and the Treaty on the Functioning of the European Union.

A second consideration arises from the fact that the default mechanism **blurs the lines on whether the post-Lisbon IIAs adopt a 'competence-based' or 'normative control'** model of responsibility attribution, even though all IIAs in their 'Definitions' Article include an almost identical wording that the EU and its MS are bound by the IIAs' obligations **based on their respective competences (Article 1.2(n) EU-Vietnam IIA; Article 1.2(12) EU-Singapore IPA which refer to the 'EU Party' in general)**. However, this default mechanism moves away from such considerations, since **the determining factor is whether a measure has been or not afforded by the EU (or its institutions) regardless of its competence to do so**. The broadness of the definition of 'measures' and the fact that the IIAs do not specify whether these measures need be *binding upon the MS in question* has led to views that even

[23] Opinion 1/17 *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part*, 30 April 2019, ECLI:EU:C:2019:341.

non-binding EU acts could enact this provision.[24] However, such a reading, in case it is espoused by an arbitral tribunal in a potential future dispute, would not correspond either to the 'normative control' model where ***the contested measure must have been taken in implementation of a binding EU act that leaves no discretion to the MS.***

B.3. Further considerations regarding the post-Lisbon IIAs Respondent determination mechanism

The post-Lisbon IIA respondent determination system aligns *in principle* with the main concern of the Union regarding the conclusion of mixed agreements, namely **respect for the Union law's autonomy**. This concern was clearly expressed in Opinion 2/13 on the EU's accession to the European Convention on Human Rights where **the CJEU expressed its fear that an external adjudicatory body will be able to make *final and binding decisions* regarding the distribution of competences within the EU in terms of distribution of international responsibility**.[25] However, the new CETA-modelled IIAs conclude various guarantees against such risk:

a. The determination made by the EU on the matter of the appropriate respondent, which will or not be found internationally responsible, is binding on both the claimant and the arbitration tribunal **(Article 8.21(5) and (7) CETA; Article 3.32(4) and (6) EU-Vietnam IIA; Article 3.5(2) EU-Singapore IPA)**.

b. As already mentioned, the post-Lisbon IIAs concur to the 'either/or' respondent model, in the sense that it is impossible for the Union and its MS to be sued simultaneously, which could give an arbitral tribunal the chance to decide on division of competences and the subsequent allocation of international responsibility.

c. The possibility of an *Electrabel-alike* situations is also avoided since, unless the default procedure is enacted, the arbitral tribunal is not empowered to decide on the binding or not nature of an EU act upon its MSs or the margin of appreciation the act awards (or not) to them, since **domestic (including EU) law has to be regarded and evaluated as a matter of fact (Article 3.42(2) EU-Vietnam IIA; Article 3.13(2)(fn 1) EU-Singapore IPA; Article 8.31(2) CETA; Section X, Article 15(3) provisional EU-Mexico FTA)**.

International Agreement	Date of Conclusion	Relevant articles	Text of the Article
EU-Canada Comprehensive Economic and Trade Agreement (CETA)	2016	Article 8.21(5) and (7)	**§5:** The investor may submit a claim pursuant to Article 8.23 on the basis of the determination made pursuant to paragraph 3, and, if no such determination has been communicated to the investor, on the basis of the application of paragraph 4. **§7:** The Tribunal shall be bound by the determination made pursuant to paragraph 3 and, if no such determination has been communicated to the investor, the application of paragraph 4.
		Article 8.31(2)	The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the disputing Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as

[24] Vezzani (n 19) 305.

[25] Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 18 December 2014, ECLI:EU:C:2014:2454, §221.

			appropriate, the domestic law of the disputing Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party
EU-Singapore Investment Protection Agreement	2018	Article 3.5(2)	The Union shall inform the claimant of this determination immediately, on the basis of which the claimant may submit a claim pursuant to Article 3.6 (Submission of Claim to Tribunal).
		Article 3.13(2)(fn 1)	Subject to paragraph 3, the Tribunal shall apply this Agreement interpreted in accordance with the Vienna Convention on the Law of Treaties and other rules and principles of international law applicable between the Parties. (fn 1): For greater certainty, the domestic law of the Parties shall not be part of the applicable law. Where the Tribunal is required to ascertain the meaning of a provision of the domestic law of one of the Parties as a matter of fact, it shall follow the prevailing interpretation of that provision made by the courts or authorities of that Party, and any meaning given to the relevant domestic law made by the Tribunal shall not be binding upon the courts or the authorities of either Party. The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the disputing Party.
EU-Vietnam Investment Protection Agreement	2019	Article 3.32(4) and (6)	**§4:** The claimant may submit a claim pursuant to Article 3.33 (Submission of a Claim) on the basis of the determination referred to in paragraph 2, or, if no such determination has been communicated to the claimant within the timeframe provided for in paragraph 2, in accordance with paragraph 3. **§6:** The Tribunal and the Appeal Tribunal shall be bound by the determination made pursuant to paragraph 2.
		Article 3.42(2)	When rendering its decisions, the Tribunal and the Appeal Tribunal shall apply the provisions of Chapter 2 (Investment Protection) and other provisions of this Agreement, as applicable, as well as other rules or principles of international law applicable between the Parties, and take into consideration, as matter of fact, any relevant domestic law of the disputing Party.
EU-Mexico Free Trade Agreement	2018 (Agreement in Principle)	Section X, Article 15(3)	For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal shall consider, when relevant, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.

The question of the compatibility of the unilateral respondent determination as part of a new ISDS with the EU legal system was resolved **in Opinion 1/17**. The Luxembourg Court concluded that the CETA ISDS does not infringe the autonomy of EU's legal order since the Respondent is determined by the Commission and not any CETA tribunal, **which means that as an internal act, this determination remains under the final and decisive scrutiny of the CJEU (Opinion 1/17, paras 74, 132 and 140)**. However, this pronouncement of the Court was surprising considering that even a literal reading of the CETA provisions -and all subsequent IIAs- provides a rather different story. **More specifically, this unilateral determination of the respondent party is not present in the Chapters regarding inter-State/Party dispute settlement.** Therefore, in the case of arbitration procedures initiated between (State) Parties, there is no safeguard that tribunals will not be called to make a pronouncement on the internal distribution of competences and its impact on the issue of responsibility allocation. However, this possibility *is undoubtedly non-consistent* with Opinion 2/13 and the conclusions in Opinion 1/17.

Opinion 1/17 **(2019) paras 74, 132 and 140**

§74. In addition, by virtue of the mechanism referred to in Article 8.21 of the CETA, that Tribunal cannot take notice of the division of powers between the European Union and its Member States. The difficulty identified by the Court in paragraphs 33 to 36 of Opinion 1/91 (EEA Agreement — I) of 14 December 1991 (EU:C:1991:490), and in paragraphs 224 and 225 of Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014 (EU:C:2014:2454), therefore does not arise in this case.

§132. The fact that there is no jurisdiction to interpret the rules of EU law other than the provisions of the CETA is also reflected in Article 8.21 of that agreement, which confers not on the CETA Tribunal, but on the Union, the power to determine, when a Canadian investor seeks to challenge measures adopted by a Member State and/or by the Union, whether the dispute is, in the light of the rules on the division of powers between the Union and its Member States, to be brought against that Member State or against the Union. The exclusive jurisdiction of the Court to give rulings on the division of powers between the Union and its Member States is thereby preserved, and Section F of Chapter Eight of the CETA must be distinguished in that regard from the draft agreement that was the subject of Opinion 2/13 (Accession of the Union to the ECHR) of 18 December 2014, (EU:C:2014:2454, paragraphs 224 to 231).

§140. It must be noted, second, that, notwithstanding Article 8.21 of the CETA, which confers on the Union the power to determine whether, if a claim is lodged before the CETA Tribunal by a Canadian investor, the Union will itself be the respondent or whether it will leave that position to the investment host Member State, the Union will not be able to object, when the contested measure was adopted by it, to that measure being examined by that Tribunal. It follows from the rules of procedure laid down in the CETA, and in particular Article 8.25.1 of that agreement, that the respondent, whether that is the investment host Member State or the Union itself, is required to consent to the settlement of that dispute by that Tribunal.

5. Internal distribution of responsibility and determination of respondent mechanism: Regulation (EU) 912/2014

The abovementioned effort of the Union to internalise the procedure for determining the appropriate Respondent has been characterised by a constructive vagueness at the international level; however, the internal procedure of the Union, based on Regulation 912/2014, is considerably more structured and can provide important elements on the discussion regarding the rules of distribution of responsibility between the EU and its MS in international investment law.

A. Determination of the respondent party

A.1. The in-principle rules on determination of the Respondent Party

The first important observation is that the Regulation contemplates the Union's efforts to implement the **'either/or' respondent determination procedure in the standard of investor-state investment arbitration**; therefore, in the Regulation we find no reference -implicit or explicit- on the possibility of *joint and several responsibility* between the EU and its MS. Additionally, the Regulation's *ratione materiae* field of application (Article 1 and 2(a)), which incorporates all investment agreements with ISDS in place, thus including the ECT, is indicative of the fact that the EU strives to create a common and consistent model of respondent determination across all international procedures which might create a danger for its financial interests and which cannot be left unregulated .[26]

Secondly, the Regulation's provisions are **premised on the idea that the EU will be the primary Respondent in the majority of investor-initiated proceedings which include *any measure (understood in the most extensive way possible)* afforded by the EU (Article 4(1) Regulation).** On the other hand, MS act as Respondents only when the dispute arises **when a specific measure was (directly) afforded by its organs (Article 5 Regulation)** unless exceptions **(Article 9 Regulation)** apply.

Regulation 912/2014, Articles 4(1) and 5

Article 4(1): The Union shall act as the respondent where the dispute concerns treatment *afforded by the institutions, bodies, offices or agencies of the Union*.

Article 5: This Section shall apply in disputes concerning, fully or partially, treatment afforded by a Member State.

A.2. The exceptions to the main rule on the determination of the respondent (Article 9 Regulation)

According to **Article 9(1)(b) Regulation**, a MS **can decline its respondent status** when it wishes to **rely on the Commission's expertise on the matter.** Most important, though, the Regulation provides for specific rules under which the EU can voluntarily act as Respondent. More specifically **the EU can act as the Respondent** when:

(a) ***the national measure was required by EU law***

(b) the ***measures under questions included treatment by the EU institutions as well*** and

(c) there are pending WTO proceedings on a similar subject-matter and the Commission wishes to **ensure the consistent application of defensive strategy**.[27]

All these exceptions provide the Commission with an immense discretion regarding the determination of the respondent party, since, for example, the term 'treatment afforded by the [EU] institutions' can be considered as broad as to incorporate any measure taken by the EU.[28] This broad perception became evident from the initial negotiations

[26] C Brown, I Naglis, 'Dispute Settlement in Future EU Investment Agreements' in M Bungenberg, A Reinisch and C Tietje (eds), *EU and Investment Agreements. Open Questions and Remaining Challenges* (Hart 2013) 15, 25.

[27] On the latter exception and its importance, *cf.* A Reinisch, 'The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Dispute Settlement Outcomes' (2004) 3 The Law & Practice of International Courts and Tribunals 37, 61ff, who focuses on the importance of consistent defence regarding the issues of *lis pendens and res judicata* in international investment law.

[28] A Steinbach, *EU Liability and International Economic Law* (Hart 2017) 154.

for the adoption of the Regulation[29] but was eventually not accepted by the MS in the Council, and the more restrictive phrasing of Regulation 912/2014 was eventually adopted

B. The issue of allocation of financial responsibility

Regarding the ***internal allocation of financial responsibility***, the Regulation follows the exact same logic as the determination of the Respondent Party since *the actor of the contested measure* is the primary actor for financial responsibility **(Article 3 Regulation)**. Even in that field, though, the exceptions can be more telling than the rule itself. In case the MS conduct ***was required by the EU law*** the financial responsibility can rest with the EU **(Article 3(1)(c) Regulation)**. The definition of the term 'required' shows that according to the Regulation ***it is mandatory that there is no discretion left to the MS regarding the EU act implementation*** **(Article 2(1)(l) Regulation)**. Therefore, in case the MS retains some *discretion in the implementation of EU acts* the financial responsibility lies primarily with it.

Regulation 912/2014, Articles 2(1)(l) and 3(1)

Article 2(1): 'required by Union law' refers to treatment where the Member State concerned could only have avoided the alleged breach of the agreement by disregarding an obligation under Union law such as where it has no discretion or margin of appreciation as to the result to be achieved.

Article 3(1): Financial responsibility arising from a dispute under an agreement shall be apportioned in accordance with the following criteria:

(a) the Union shall bear the financial responsibility arising from treatment afforded by the institutions, bodies, offices or agencies of the Union;

(b) the Member State concerned shall bear the financial responsibility arising from treatment afforded by that Member State;

(c) by way of exception to point (b), the Union shall bear the financial responsibility arising from treatment afforded by a Member State where such treatment was required by Union law.

Notwithstanding point (c) of the first subparagraph, where the Member State concerned is required to act pursuant to Union law in order to remedy the inconsistency with Union law of a prior act, that Member State shall be financially responsible unless such prior act was required by Union law.

C. The role of the Regulation in the attribution of responsibility between the EU and its MS

Before delving into the discussion of the Regulation's normative power in terms of international responsibility determination/distribution, it is crucial to mention that the Regulation is ***an internal instrument of EU law*** which aims to regulate the financial responsibility distribution **(Regulation, Preamble, Recital 5)**. Nevertheless, the Regulation can be regarded as an indicator of the Union's perspective concerning the rules which must be followed on the issue of responsibility attribution in investment and, in general, in international economic law. More specifically, Recital 3 of the Regulation's Preamble takes clear stance in favour of the competence-based model.[30]

[29] See, European Commission, ' Proposal for a Regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party ' (Communication) COM (2012) 335 final, Art 8(2)(b) and (d) respectively; European Parliament, 'Draft Legislative Resolution on the proposal for a regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party (COM(2012)0335 – C7-0155/2012 – 2012/0163(COD)), 16 (Amendment 19).

[30] *Cf.* European Commission, 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. Towards a Comprehensive European International Investment Policy', COM (2010) 343 final, 10.

Regulation 912/2014, Preamble, Recital 3

International responsibility for treatment subject to dispute settlement follows the division of competences between the Union and the Member States. As a consequence, the Union will in principle be responsible for defending any claims alleging a violation of rules included in an agreement which fall within the Union's exclusive competence, irrespective of whether the treatment at issue is afforded by the Union itself or by a Member State.

However, our previous analysis shows that the operative part of the Regulation does not follow the same direction as its Preamble. In the implementation phase, the Union prefers to follow the normative control model, since both respondent status and financial responsibility can be allocated to the Union when *it requires its MS to abide by specific legislation* (*cf.* the term 'required' as explained above).[31]

6. The post-Lisbon IIAs and determination of the appropriate Respondent: a new attribution of international responsibility emerging for the Union?

A. The determination of the Respondent as recognition of MS conduct by the Union (Article 9 DARIO)

The inclusion of the mechanism for the unilateral determination of the Respondent in investor-initiated disputes arising under the new-era IIAs has sparked the discussion of whether it can be considered as an implicit or explicit recognition of the MS conduct by the Union. Article 9 DARIO -following Article 8 of the Articles on State Responsibility- *allocates the responsibility to the IO for the conduct of its MS* ***in case and to the extent the latter recognises and adopts said conduct as its own.***

DARIO, Article 9

Conduct which is not attributable to an international organization under articles 6 to 8 shall nevertheless be considered an act of that organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own.

ASR, Article 8

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

In this regard, the respondent determination mechanism has given rise to **two theoretical readings**:

a) The **first** reading, adopted by the majority of the commentators, **regards this determination as, at least, an implicit recognition of the MS conduct by the EU**, at least in the specific context of each separate case. This reading is also consistent with some **WTO jurisprudence**, where either the EU argued[32] or the panels concluded[33] that the Union assumed responsibility for tariff measures taken both at Union and MS level.

[31] See on that matter, C Contartese, 'Competence-Based Approach, Normative Control and the International Responsibility of the EU and its Member States: What Does the Recent Practice Add to the Debate? (2019) 16 International Organizations Law Review 1, 37.

[32] WTO *EC-Customs Classification of Certain Computer Equipment* (European Commission Oral Pleadings) (1997) WT/DS62/R, WT/DS67/R, WT/DS68/R, §6 cited in DARIO, Commentary to Article 9, §3.

[33] WTO *EC-Measures Affecting the Approval and Marketing of Biotech Products* (Panel Report) (2006) WT/DS 291/R; WT/DS292/R; WT/DS293/R, §7.101.

WTO *EC-Classification of Certain Computer Equipment*, EC Oral Pleadings

§6: [The Union is] 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 [European Community] level or at the level of Member States.

WTO *EC-Biotech*, Panel Report, para 7.101

§7.101. (…) The European Communities never contested that, for the purposes of this dispute, the challenged member State measures are attributable to it under international law and hence can be considered EC measures. Indeed, it was the European Communities – and it alone – that defended the contested member State safeguard measures before the Panel.

b) The **second** reading[34] regards the determination of the respondent as a ***mere procedural step*** which bears no indication on the determination of the responsible party. In other words, the EU and/or its MS **act only as *representatives in proceedings*, without explicitly or implicitly assuming any responsibility for the other's actions**. For example, in the case of parallel WTO proceedings, the Regulation clearly justifies the Union assuming the Respondent status on the need for consistency in defence strategies, without any mention to the issue of international responsibility. However, it cannot be overlooked that the **exceptions provided in Articles 3 and 9 of the Regulation** link distribution of financial responsibility and determination of respondent status with the possibility of the Union ***having a determining role in the measures taken by the MS***, which violate the IIA.

Nevertheless, the use of the Regulation for the extraction of a general rule on distribution of international responsibility might give rise to two concerns. First, as already mentioned, EU law is regarded as internal law by all concluded IIAs, **which bears minimal significance in international law and can be regarded only as a relevant indication**.[35] Secondly, the **differentiation between the responsible party and the actual entity that is charged with fulfilling the financial obligation of reparation** is not something uncommon. On the contrary, this is the established rule in most **federal systems**, where according to international law the State is the internationally responsible entity even for unlawful conduct of its constituents, which are later called to bear the financial burden, in light of the **principle of *unity of States***. According to our view, such a consideration could be *mutatis mutandis* applied in the case of the EU, where the respective constituents are the MS which are called to implement its legislation/acts, which might subsequently give rise to disputes on international responsibility. As shown, both readings bear significant scholar importance and can be convincingly supported in scholar work; however, the issue in international law will be most possibly resolved if/when post-Lisbon IIA arbitration tribunals start pronouncing on the matter.

B. Does this new respondent mechanism spark the rise of an EU-specific *lex specialis* regarding allocation of responsibility in international investment law (Article 64 DARIO)?

DARIO, Article 64

These draft articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or of

[34] See, F Baetens *et al.*, 'Determining International Responsibility Under the New Extra-EU Investment Agreements: What Foreign Investors in the EU Should Know' (2014) 47 Vanderbilt Journal of Transnational Law 1203, 1232; Vezzani (n 23) 311.
[35] *Cf.* Article 27 Vienna Convention on the Law of the Treaties on the use of domestic law as means to avoid/circumvent international obligations.

a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.

The adoption of the post-Lisbon IIAs gave rise to an academic debate on the possibility of them establishing a special rule regarding the distribution of conduct/responsibility tailored for the EU and other REIOs, as the Union had been advocating for years. As shown above, **Article 64 DARIO empowers the creation of *lex specialis* which would allow IOs to operate outside the main framework for international responsibility**; more specifically, the Commentary to Article 64 refers to the specificities of the Union and makes reference to the ***possibility of establishing a rule where MS implementing EU binding acts could -exceptionally- be equated with EU organs***.[36]

However, the main questions remain: how is this rule created and how binding is this special rule against third parties? First, although the determination of the respondent procedure is included in all post-Lisbon IIAs, **the exact modalities and rules for this determination, have been conveniently omitted,** as we already showed. Even though all new-era IIAs were concluded after the adoption of Regulation 912/2014, the Union seemed hesitant to carve in hard rock specific determination rules and most importantly any consideration on the allocation of international responsibility based on this mechanism. Secondly, necessary elements for the rise and crystallisation of *lex specialis* are the **consistent application and acceptance of the rule by the counterparts in the disputes.** However, neither the post-Lisbon IIAs nor Regulation 912/2014 can be regarded as consistent enough since they do not definitively reach a conclusion in favour of the 'competence-based' or 'normative control' models, and they include no *a priori identifiable rules* for any necessary determination which is made on a case-by-case basis.

Lastly, considering that no IIA is currently fully in force since national ratification is still pending (pursuant to the pronouncements of Opinions 2/15 and 1/17), the issues discussed in this manual have predominantly a theoretical interest; nonetheless, considering that the EU keeps repeating the same pattern of internalisation/proceduralisation in all its concluded/negotiated IIAs it is quite possible that at some point an international tribunal might be called to adjudicate on a relevant dispute. Besides, the ECT still remains in force and can generate new disputes which might be the most fertile ground for examining the evolution of the distribution of responsibility in the international economic legal order.

EU International Investment Agreements with third parties

Country	Date of conclusion/negotiation	IIA/FTA Chapters	Status
Canada	2016	FTA Chapters	Member States' Ratification
Singapore	2018	IIA (investment protection)	Member States' Ratification
Vietnam	2019	IIA (investment protection)	Member States' Ratification
Mexico	2018	FTA Chapters	Agreement in principle
Chile	2018	FTA Chapters	Text Proposal by the EU
Angola	2021 (negotiations started)	IIA only	Negotiation

[36] 'Draft Articles on the Responsibility of International Organizations' [2011] ILCYb, vol. II/2, 102-103, Commentary to Article 64, §§2 and 4.

7. Further reading – Bibliography

Ankersmit L, 'The Compatibility of Investment Arbitration in EU Trade Agreements with the EU Judicial System' (2016) 13 Journal for European Environmental and Planning Law 46-63.

Ankersmit L, 'Opinion 2/15 and the future of mixity and ISDS' (*European Law Blog*, 18 May 2017) available: https://europeanlawblog.eu/2017/05/18/opinion-215-and-the-future-of-mixity-and-isds/.

Baetens F *et al.*, 'Determining International Responsibility Under the New Extra-EU Investment Agreements: What Foreign Investors in the EU Should Know' (2014) 47 Vanderbilt Journal of Transnational Law 1203-1260.

Bekkedal T, 'Autonomy or Unity? Investment Protection (ISDS) and the Principle of Equality before the Law' (2021) 6 European Papers 713-739.

Brauch MD, 'Should the European Union Fix, Leave or Kill the Energy Charter Treaty?' (2021) available: https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/190/.

Brown C, Naglis I, 'Dispute Settlement in Future EU Investment Agreements' in M Bungenberg, A Reinisch and C Tietje (eds), *EU and Investment Agreements. Open Questions and Remaining Challenges* (Hart 2013) 15-36.

Burgstaller M, 'European Law Challenges to Investment Arbitration' in M Waibel *et al.* (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer 2010) 455-482.

Bungenberg M, 'The Division of Competences between the EU and Its Member States in the Area of Investment Politics' in Bungenberg M, Griebel M, Hindelang S (eds), *International Investment Law and EU Law* (Springer 2011) 29-42.

Burgstaller M, 'The Energy Charter Treaty as Mixed Agreement: A Model for Future European Investment Treaties?' in Coop G (ed), *Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty* (JurisNet 2011) 125–153.

Cafari Panico R, Di Benedetto F, (2016) Recent Developments in the Most Controversial Aspects of EU International Investment Agreements: Portfolio Investments and Investor-State Dispute Settlement (*Transnational Dispute Management*, 2016) available: https://www.transnational-dispute-management.com/article.asp?key=2317 .

Cannizzaro E, 'Beyond the Either/Or: Dual Attribution to the European Union and to the Member States for Breach of the ECHR' in Evans M, Koutrakos P (eds), *The International Responsibility of the European Union. European and International Perspectives* (Hart 2013) 295-312.

Cappiello B, 'Il Regolamento europeo n. 912/2014 e la ripartizione della responsabilità tra Unione Europea e Stati membri nel caso di violazione di accordi internazionali di investimento' (2016) 16 Il Diritto dell'Unione Europea 71-103.

Chamon M, 'Mixity in the EU's post-Lisbon Free Trade Agreements' in Bosse-Platière I, Rapoport C, *The Conclusion and Implementation of EU Free Trade Agreements: Constitutional Challenges* (Elgar 2020) 39-57.

Contartese C, 'Competence-Based Approach, Normative Control, and the International Responsibility of the EU and Its Member States: What Does Recent Practice Add to the Debate?' (2019) 16 International Organizations Law Review 339-377.

Contartese C, Andenas M, 'Opinion 1/17 and Its Themes: An Overview' (2021) 6 European Papers 621-630.

Contartese C, Pantaleo L 'Division of Competence, Autonomy and the Determination of the Respondent Party: Proceduralization as a Possible Way-Out?' in Neframi E, Gatti M (eds) *Constitutional Issues of EU External Relations* (Nomos 2018) 409-445.

Cremona M, 'The Opinion Procedure under Article 218(11) TFEU: Reflections in the light of Opinion 1/17' (2020) 4 Europe and the World: A Law Review. Available https://doi.org/10.14324/111.444.ewlj.2020.22.

De Luca A, 'New Developments on the Scope of the EU Common Commercial Policy under the Lisbon Treaty: Investment Liberalization vs. Investment Protection?' in Sauvant K P (ed) *Yearbook of International Investment Law & Policy (2010/2011)* (OUP 2012) 165-215.

De Mestral A, 'The Lisbon Treaty and the Expansion of EU Competence over Foreign Direct Investment and the Implications for Investor-State Arbitration' in Sauvant KP (ed), *Yearbook on International Investment Law and Policy 2009–2010* (OUP 2010) 365–339.

Delgado Casteleiro A, 'The International Responsibility of the European Union – The EU Perspective: Between Pragmatism and Proceduralization' (2013) 15 Cambridge Yearbook of European Legal Studies 563-586.

Delgado Casteleiro A, *The International Responsibility of the European Union. From Competence to Normative Control* (CUP 2016).

Delgado Casteleiro A, Contartese C, 'International Responsibility of the EU and/or its Member States for International Agreements: From Joint Participation to "Participation"' in Levrat N *et al.* (eds), *The EU and its Member States' Joint Participation in International Agreements* (Hart 2022) 171-186.

Delgado Casteleiro A, Larik J, 'The "Odd Couple": The Responsibility of the EU at the WTO' in Evans M D, Koutrakos P (eds), *The International Responsibility of the European Union* (Hart 2013) 233–255.

Delile JF, 'L'avis 1/17 ou le retour en grâce des juridictions internationales auprès de la Cour de justice de l'Union européenne' (2019) Revue des Affaires européennes 2019/2, 347-370.

Denza E, 'Responsibility of the European Union in the Context of Investment' in Evans M, Koutrakos P (eds), *The International Responsibility of the European Union* (Hart 2013) 215–232.

Dimopoulos A, *EU Foreign Investment Law* (OUP 2011).

Dimopoulos A, 'The Involvement of the EU in Investor-State Dispute Settlement: A Question of Responsibilities' (2014) 51 Common Market Law Review 1671–1720.

Dionysiou K, *CETA's Investment Chapter: A Rule of Law Perspective* (Springer 2021).

Eilmansberger T, 'Bilateral Investment Treaties and EU Law' (2009) 46 Common Market Law Review 383–429.

Fanou M, 'The CETA ICS and the Autonomy of the EU Legal Order in Opinion 1/17 – A Compass for the Future' (2020) 22 Cambridge Yearbook of European Legal Studies 106-132.

Fanou M, 'The independence and impartiality of the hybrid CETA Investment Court System: Reflections in the aftermath of Opinion 1/17' (2020) 4 Europe and the World: A Law Review https://doi.org/10.14324/111.444.ewlj.2020.26.

Fernández-Pons X, Polanco R, Torrent R, 'CETA on Investment: The Definitive Surrender of EU Law to GATS and NAFTA/BITS' (2017) 54 Common Market Law Review 1319-1358.

Florou A, 'The UK Supreme Court Judgment in Micula v. Romania: A Landmark Judgment for the Relationship between EU Law and International Investment Law?' (2021) 36 ICSID Review 295-303.

Franckx E *et al* 'Annex IX' in Proelss A *et al* (eds), *United Nations Convention on the Law of the Sea: A Commentary* (Beck 2017) 2512–2552.

Gasbarri L, 'The Dual Legality of the Rules of International Organizations' (2017) 14 International Organizations Law Review 87–119.

Gáspár-Szilágyi S, 'A Standing Investment Court under TTIP from the Perspective of the Court of Justice of the European Union' (2016) 17 Journal of World Investment & Trade 701-742.

Gáspár-Szilágyi S, 'Binding Committee Interpretations in the EU's New Free Trade and Investment Agreements' (2017) 2 European Investment Law and Arbitration Review Online 90-133.

Gáspár-Szilágyi S, 'Between Fiction and Reality: The External Autonomy of EU Law as a "Shapeshifter" after Opinion 1/17' (2021) 6 European Papers 675-692.

Heliskoski J, 'The Exercise of Non-Exclusive Competence of the EU and the Conclusion of International Agreements' in K Lenaerts *et al.*, *An Ever-Changing Union?: Perspectives on the Future of EU Law in Honour of Allan Rosas* (Hart 2019) 293-310.

Hervé A, 'Défendre l'ordre juridique de l'Union en exportant s1es valeurs et instruments fondarnentaux: Commentaire sous l'avis 1/17 de la Cour de justice de l'Union européenne' (2020) RTD eur. 1, 107-125.

Hillion C, Wessel RA, 'The European Union and International Dispute Settlement: Mapping Principles and Conditions' in Cremona M, Thies A, Wessel RA (eds), *The European Union and International Dispute Settlement* (Hart 2017) 7-30.

Hindelang S, Hagemeyer T M, 'In Pursuit of an International Investment Court. Recently Negotiated Investment Chapters in EU Comprehensive Free Trade Agreements in Comparative Perspective' (July 2017) Doc. EP/EXPO/B/INTA/2017/02 available: http://www.europarl.europa.eu/RegData/etudes/STUD/2017/603844/EXPO_STU(2017)603844_EN.pdf.

Hoffmeister F, 'Litigating against the European Union and its Member States: Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?' (2010) 21 European Journal of International Law 723–747.

Kassoti E, Odermatt J, 'The Principle of Autonomy and International Investment Arbitration: Reflections on *Opinion 1/17*' (2020) 73 Questions of International Law 5-20.

Kleinheisterkamp J, 'Financial Responsibility in European Investment Law and Policy' (2014) 63 International and Comparative Law Quarterly 449–476.

Koutrakos P, 'The Autonomy of EU Law and International Investment Arbitration' (2019) 88 Nordic Journal of International Law 41-64.

Kübek G, 'Autonomy and international investment agreements after Opinion 1/17' (2020) 4 Europe and the World: A law review, available: https://doi.org/10.14324/111.444.ewlj.2020.27.

Kuijper PJ, 'Attribution-Responsibility-Remedy: Some Comments on the EU in Different International Regimes' (2013) 47 Revue belge de droit international 55–77.

Kuijper PJ, Paasivirta E, 'Does One Size Fit All? The European Community and the "Codification" of the Responsibility of International Organizations' (2005) 36 Netherlands Yearbook of International Law 169–226.

Lenk H, 'An Investment Court System for the New Generation of EU Trade and Investment Agreements: A Discussion of the Free Trade Agreement with Vietnam and the Comprehensive Economic Trade Agreement with Canada' (2016) 1 European Papers 665–677.

Lenk H, 'Issues of Attribution: Responsibility of the EU in Investment Disputes under CETA' (2016) 13 TDM 1–23, available: www.transnational-dispute-management.com.

Marín Duran G, 'Untangling the International Responsibility of the European Union and Its Member States in the World Trade Organization Post-Lisbon: A Competence/Remedy Model' (2017) 28 European Journal of International Law 697–729.

Maubernard C, 'L'avis 1/17 ou les contours de l' autonomie procédurale et substantielle de l'ordre juridique de l'Union' (2019) RUE nº 632, 573-580.

Melikyan A, 'The Legacy of Opinion 1/17: To What Extent is the Autonomous EU Legal Order Open to New Generation ISDS?' (2021) 6 European Papers 645-673.

Metaxas A, 'Opinion 1/17: Autonomy of EU Legal Order and the Conflicting Context of International Investment Arbitration' (2021) 6 European Papers 631-644.

Miglio A, 'Autonomia dell'ordinamento dell'Unione europea e meccanismi internazionali di risoluzione delle controversie in materia di investimenti' in Spagnolo A, Saluzzo S (eds), *La responsabilità degli Stati e delle organizzazioni internazionali: nuove fattispecie e problemi di attribuzione e di accertamento* (LEDI 2018) 303–336.

Neframi E, 'International Responsibility of the European Community and of Member States under Mixed Agreements' in Cannizzaro E (ed), *The European Union as an Actor in International Relations* (Kluwer 2002) 193–205.

Neframi E, 'Permanent Investment Courts and the EU Legal Order' in Ünüvar G *et al.* (eds), *Permanent Investment Courts: The European Experiment* (Springer 2020) 27-51.

Palchetti P, 'The Allocation of International Responsibility in the Context of Investor-State Dispute Settlement Mechanisms Established by EU International Agreements' (2017) 28 European Business Law Review 185–195.

Pantaleo L, 'Respondent Status and Allocation of International Responsibility Under EU Investment Agreements' (2016) 1 European Papers 847–860.

Pantaleo L, *The Participation of the EU in International Dispute Settlement: Lessons from EU Investment Agreements* (T.M.C. Asser Press 2019).

Pantaleo L, 'The Future of Investment Arbitration in the light of Opinion 1/17' (2020) 73 Questions of International Law – Zoom Out 21-31.

Peers S, '"We *aren't* the World": the CJEU Reconciles EU Law with International (Investment) Law' (*EU Law Analysis*, 2 May 2019) available: http://eulawanalysis.blogspot.com/2019/ 05/we-arent-world-cjeu-reconciles-eu-law.html.

Rapoport C, 'Balancing on a Tightrope: Opinion 1/17 and the ECJ's Narrow and Tortuous Path for Compatibility of the EU's Investment Court System (ICS)' (2020) 57 Common Market Law Review 1725-1772.

Ratz P, *International and European Law Problems of Investment Arbitration Involving the EU* (Nomos 2017).

Reinisch A, 'The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Dispute Settlement Outcomes' (2004) 3 The Law & Practice of International Courts and Tribunals 37-77.

Riffel C, 'The CETA Opinion of the European Court of Justice and its Implications—Not that Selfish After All' (2019) 22 Journal of International Economic Law 503-521.

Rizzo A, 'Legal Foundations of the Competence of the European Union on Foreign Direct Investments' (2014) 23 Italian Yearbook of International Law 131–146.

Roberts A, 'The Shifting Landscape of Investor-State Arbitration: Loyalists, Reformists, Revolutionaries and Undecided' (*EJIL:Talk!*, 15 June 2017) available: https://www.ejiltalk.org/the-shifting-landscape-of-investor-state-arbitration-loyalists-reformists-revolutionaries-and-undecideds/.

Roe T, Happold M, *Settlement of Investment Disputes under the Energy Charter Treaty* (CUP 2011).

Schaefer S, Odermatt J, '*Nomen est Omen?* The Relevance of "EU Party" in International Law' in Levrat N *et al.* (eds), *The EU and its Member States' Joint Participation in International Agreements* (Hart 2022) 131-150.

Silvereke S, 'Withdrawal from the EU and Bilateral Free Trade Agreements: Being Divorced is Worse?' (2018) 15 International Organizations Law Review 321-340.

Soloch B, Mbengue MM, 'Conformity of International Dispute Settlement Mechanisms with EU Law: Does the EU's Participation Really Matter?' in Levrat N *et al.* (eds), *The EU and its Member States' Joint Participation in International Agreements* (Hart 2022) 151-170.

Stegmann PT, *Responsibility of the EU and the Member States under EU International Investment Protection Agreement. Between Traditional Rules, Proceduralisation and Federalisation* (Springer 2019).

Steinbach A, *EU Liability and International Economic Law* (Hart 2017).

Strantzali A, 'Competence *Ratione Personae* of Investment Tribunals: Claims Arising out of Measures under the European Banking Union Framework' (2021) ICSID Review 1-26, available: 10.1093/icsidreview/siaa039.

Titi C, 'International Investment Law and the European Union: Towards a New Generation of International Investment Agreements' (2015) 26 European Journal of International Law 639–661.

Titi C, 'Aspects of the EU's Responsibility in International Investment Disputes' in Cremona M, Thies A, Wessel RA (eds), *The EU and International Dispute Settlement* (Hart 2017) 83–98.

Uwera G, 'Investor-State Dispute Settlement (ISDS) in Future EU Investment-Related Agreements: Is the Autonomy of the EU Legal Order an Obstacle?' (2016) 15 Law and Practice of International Courts and Tribunals 102–151.

Vezzani S, 'The EU and Its Member States before the Strasbourg Court: A Critical Appraisal of the Co-respondent Mechanism' in Repetto G (ed), *The Constitutional Relevance of the ECHR in Domestic and European Law: An Italian Perspective* (Intersentia 2013) 221–235.

Vezzani S, L'autonomia dell'ordinamento giuridico dell'Unione Europea. Riflessioni all'indomani del parere 2/13 della Corte di giustizia (2016) 99 Rivista di diritto internazionale 68–116.

Vezzani S, 'The International Responsibility of the European Union and of Its Member States for Breaches of Obligations Arising from Investment Agreements: *Lex Specialis* or European Exceptionalism? In M Andenas *et al.* (eds), *EU External Action in International Economic Law: Recent Trends and Developments* (Springer 2020) 281-321.