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ABSTRACT

The EU's newly acquired competence over foreign investment poses largely unprecedented legal challenges: the Union's unique structure and functioning are bound to raise questions about the traditional format of international investor-State arbitration. Anticipating these challenges, the European Commission has proposed a Regulation on managing the financial responsibility that arises out of such arbitrations; a

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revised version of this proposal was adopted by the European Parliament and the Council of the European Union. After outlining the contemporary international investment regime, as well as the relevant aspects of the EU legal system, this Article scrutinizes three problematic issues under international law that arise from the Regulation: respondent status in international arbitral proceedings, attribution of treatment, and compliance with the final award. This Article also discusses the means of recourse open to EU Member States dissatisfied with the EU's performance as respondent or its apportionment of financial responsibility.

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I. INTRODUCTION

In 2012, foreign direct investment (FDI) flow into the European Union (EU) amounted to nearly 260 billion U.S. dollars, representing close to a fifth of total investment flows globally.[1] In the same year, investment stock in the EU was 7.8 trillion U.S. dollars, accounting for over 34 percent of global investment.[2] In light of these numbers, it is of crucial—indeed even global—importance that the EU acquired *exclusive* competence over FDI—which previously rested with its Member States—through the entry into force of the Lisbon Treaty in 2009.[3]

As a result, international investment agreements (IIAs) protecting the rights of foreign investors in the EU—and EU investors abroad—will now be negotiated and concluded by the EU, on behalf of itself, as well as on behalf of its Member States. One such example is provided by the ongoing negotiations for a Transnational Trade and Investment Partnership (TTIP) between the EU and the U.S.—described as "the biggest bilateral trade deal ever negotiated."[4] Considering the profound impact of this transfer of competences, however, there is an alarming degree of uncertainty regarding its practical implications. Any given foreign investment in the EU will

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1. U.N. CONFERENCE ON TRADE & DEV. (UNCTAD), WORLD INVESTMENT REPORT 2013, at 213, U.N. Sales No. E.13.II.D.5 (2013), *available at* http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf [http://perma.cc/A4K2-GNYQ] (last visited Jan. 3, 2014) (archived Sept. 15, 2013).

2. *Id.* at 217.

3. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter *Lisbon Treaty*]. *Lisbon Treaty* art. 2(158) amended the Treaty establishing the European Community – renamed Treaty on the Functioning of the European Union [hereinafter TFEU] with *Lisbon Treaty* art. 2(1) – to place foreign direct investment under the common commercial policy, which is exclusive EU competence: TFEU art. 207, in conjunction with TFEU art. 3(1)(e). The consolidated versions of the Treaty on European Union [hereinafter TEU] and the TFEU are available at 2012 O.J. (C 326) 13 and 47, respectively. Unless otherwise indicated, references to the TEU and the TFEU are to these current versions of the treaties. It is also to be noted, however, that the precise contours of the EU's investment competence are still unclear, with some even raising the question of to what extent this competence is indeed exclusive. *See, e.g.*, Nikos Lavranos, *In Defence of Member States' BITs Gold Standard: The Regulation 1219/2012 Establishing a Transitional Regime for Existing Extra-EU BITs – A Member State's Perspective*, TRANSNAT'L DISP. MGMT., Mar. 2013, at 11.

4. Post Article Describing Trade Between EU Member States and the United States, EUROPEANCOMMISSION.COM, http://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states [http://perma.cc/LQT8-N2D2] (last visited Jan. 3, 2014) (archived Sept. 15, 2013).

necessarily be situated in the territory of an EU Member State (or in that of several),[5] subject to the authority of not only the EU, but also of that Member State. Therefore, if an investor's rights are breached, it may be difficult to determine who is responsible: the EU or the individual Member State. This is particularly so considering that in many—if not most—of the fields where regulatory conduct may affect the rights of investors, both the EU and its Member States have certain competences. In addition, even when a specific measure is adopted at the European level, Member States may have a considerable margin of discretion in the way they implement them.[6] Thus the interaction between the international rules on responsibility—attribution, in particular—and the EU system of "executive federalism," where almost all EU measures are carried out by Member States, may prove to be problematic. This interaction might lead to a situation where the Union may rarely be held responsible for any action on the international plane, since its rules are mostly carried out by Member State organs, which would imply that the Member States are held solely responsible, even though they may not have enacted the offensive rules. A solution would be to link responsibility to rule-making competence rather than to actual conduct—an approach currently put forward by the European Commission.

Anticipating difficulties in determining responsibility of the EU and/or its Member States, the EU Commission put forward a Regulation on managing financial responsibility arising out of investment arbitrations in 2012 (the Proposed Regulation).[7] After much discussion and several amendments, the European Parliament and the Council of the EU adopted the Regulation in 2014 (the Regulation), in accordance with the EU's ordinary legislative procedure.[8] This article scrutinizes the Regulation through the

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5. Unless otherwise indicated, references throughout the article to an EU Member State's role are understood to include the possibility of multiple Member States' involvement.

6. Although not all European measures leave a margin of discretion to member states, *see* TFEU, *supra* note 5, art. 288, most EU legislation is done in the form of directives, which do leave such a margin. As such, these are also the most likely to be problematic in potential investment arbitration cases, *see* Thomas Henquet, *International Investment and the European Union: An Uneasy Relationship*, *in* INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVES 375, 384 (Freya Baetens ed., 2013).

7. *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) 335 final (June 21, 2012) [hereinafter *Proposed Regulation*], http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149567.pdf [http://perma.cc/JNC-3LVZ] (last visited Jan. 3, 2014) (archived Sept. 15, 2013).

8. *See European Parliament legislative resolution of 16 April 2014 on the proposal for a regulation of the European Parliament and of the Council establishing a*

following structure: Part II outlines the contemporary international investment regime as well as the relevant aspects of the EU legal system; Part III analyzes the three problematic issues, namely respondent status in arbitral proceedings, attribution of treatment, and compliance with the final award; Part IV discusses the means of recourse open to EU Member States dissatisfied with either the EU's performance as respondent or with the EU's apportionment of financial responsibility.

II. THE EU AND THE IIA SYSTEM: SQUARE PEG, ROUND HOLE?

A. *The International System of Investment Protection*

The European Union and the current system of investment protection both trace back to the years following World War II. After the war, many areas of international law underwent major multilateral efforts of regulation, such as the 1947 General Agreement on Tariffs and Trade (GATT), which later formed the basis of the World Trade Organization (WTO).[9] Unlike in the field of trade, however, no major multilateral agreement was concluded to regulate investment: the only attempt to establish such an agreement was the 1948 Havana Charter, which included a brief provision on investment protection but never entered into force.[10] This was largely

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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 Ordinary legislative procedure: first reading (2012) (showing the original resolution); *Position of the European Parliament adopted at first reading on 16 April 2014 with a view to the adoption of Regulation (EU) No .../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*, Apr. 16, 2014, *available at* http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0419&language=EN&ring=A7-2013-0124 [http://perma.cc/7AUS-PRPF] (last visited June 11, 2014) (archived Sept. 15, 2013) (showing the preliminary position); 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, O.J. (L 257) 121–34 (Aug. 28, 2014) [hereinafter Regulation] (showing the final agreement). For more on the ordinary legislative procedure, see *infra* note 49 and accompanying text.

9. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 187 [hereinafter GATT] (including 24 Members as signatories); *see also* Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 3.

10. *See* Havana Charter for an International Trade Organization, Mar. 24, 1948, *U.N. Conference on Trade and Employment*, U.N. Doc. E/CONF.2/78 (Apr. 1948) (providing for investment protection); on the history of investment treaty law, see generally ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 1–73 (2009) (discussing the Havana Charter at 19–20). On the history and

due to the lack of support from the United States for the project. Given the isolationist tendencies prevailing at the time in the U.S. Senate, and in view of the political damage should it formally refuse to ratify, President Truman decided not to put the Havana Charter on the Senate agenda.[11]

Despite—or perhaps precisely because of—this lack of consensus about the necessity and the terms of such an all-encompassing multilateral agreement, developed states became increasingly concerned about the protection of their investors abroad. This was, in large part, due to developing countries' reiterated assertions of permanent sovereignty over natural resources and a concomitant wave of expropriations and nationalizations.[12] Consequently, instead of a multilateral framework, a system of predominantly *bilateral* agreements started developing from the 1960s and onward, with IIAs that either took the form of free-standing bilateral investment treaties (BITs), or of investment chapters within broader agreements. The latter are most commonly Free Trade Agreements (FTAs)—such as the North American Free Trade Agreement (NAFTA)—but may also include other types of treaties, such as the Energy Charter Treaty, which is a broad agreement regulating the energy sector in its various aspects.[13] In the 1990s, there was another attempt at creating an overarching regulatory framework, in the form of the so-called Multilateral Agreement on Investment, drafted under the auspices of the Organization for Economic Co-operation and Development and initially strongly backed by the United States[14] However, non-governmental organizations expressed concerns that the proposed agreement would unduly constrain the ability of host states to regulate matters such as labor conditions, so in the face of mounting public pressure, governments ultimately abandoned the project.[15] Meanwhile, the number of IIAs continued to grow over the

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basics of investment law, see generally RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2008); JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 1–3 (2010); M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (3d ed. 2012).

11. Daniel Drache, *The Short but Significant Life of the International Trade Organization: Lessons for Our Time*, 6–7 (CSGR Working Paper No. 62/00, Nov. 2000) (explaining that Truman withdrew support for political reasons).

12. *See, e.g.*, DOLZER & SCHREUER, *supra* note 12, at 14–15 (explaining why states wanted to protect investors); NEWCOMBE & PARADELL, *supra* note 12, at 18–19, 26–27 (emphasizing natural resource concessions).

13. *See* North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993); Energy Charter Treaty, Dec. 17, 1994, 2080 U.N.T.S. 95 (regulating energy investments, free trade in energy materials, freedom of energy transit, environmental impact, and dispute resolution).

14. *See, e.g.*, NEWCOMBE & PARADELL, *supra* note 12, at 55 (describing the Multilateral Agreement on Investment).

15. *See, e.g.*, CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 219 (2008); GUNTER METZGES, NGO-KAMPAGNEN UND IHR EINFLUSS AUF INTERNATIONAL

decades, particularly in the 1990s and 2000s, resulting in nearly 3,200 agreements that are currently in force, of which over 2,800 are BITs.[16]

IIAs are based on the rationale that the protection of investments will stimulate the flow of capital and technology, as well as the economic development of the contracting parties.[17] To this end, these treaties stipulate a number of substantive standards, notably full protection and security,[18] fair and equitable treatment,[19] the

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VERHANDLUNGEN: DAS MULTILATERAL AGREEMENT ON INVESTMENT (MAI) UND DIE 1997 OECD ANTI-BRIBERY CONVENTION IM VERGLEICH (2006); Jürgen Kurtz, *NGOs, the Internet and International Economic Policy Making: the Failure of the OECD Multilateral Agreement on Investment*, 3 MELB. J. INT'L L. 213, 225–26 (2002) (explaining the role NGOs played in the abandonment of the MAI); Mathias Albert & Stephan Hessler, *Das Multilateral Agreement on Investment (MAI): ein Beispiel für "failed governance"?*, *in* 2 INTERNATIONALE ORGANISATIONEN UND REGELUNGSBEREICHE 381 (Peter Nahamowitz & Rüdiger Voigt eds., 2002); Nii Lante Wallace-Bruce, *The Multilateral Agreement on Investment: An Indecent Proposal and Not Learning the Lessons of History*, 2 J. WORLD INVESTMENT 53 (2001) (describing the abandonment of the MAI); Andrew Walter, *Unravelling the Faustian Bargain: Non-State Actors and the Multilateral Agreement on Investment*, *in* NON-STATE ACTORS IN WORLD POLITICS 150–68 (Daphné Josselin & William Wallace eds., 2001).

16. UNCTAD, *supra* note 3, at 101.

17. *See, e.g.*, the preambles of the 2012 U.S. Model BIT, http://www.state.gov/documents/organization/188371.pdf [http://perma.cc/L5U7-V3AA] (archived Sept. 15, 2013) (recognizing that protecting investments stimulates economic development); 2004 Netherlands Model BIT, http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/convenanten/2004/08/27/ibo-modelovereenkomst/ibo-modelovereenkomst.pdf [http://perma.cc/M2Y7-6TBP] (archived Sept. 15, 2013) (recognizing agreement on the treatment of investments stimulates the flow of capital and technology); 2008 German Model BIT, http://www.italaw.com/sites/default/files/archive/ita1025.pdf [http://perma.cc/Z4Y8-7AK8] (archived Sept. 15, 2013) (recognizing that the encouragement and protection of investments increase prosperity); 2006 French Model BIT, http://italaw.com/documents/ModelTreatyFrance2006.pdf [http://perma.cc/9WG8-SCMT] (last visited Jan. 3, 2014) (archived Sept. 15, 2013) (reasoning that investments in transfers of capital and technology benefit economic development).

18. *E.g.*, U.S. Model BIT, *supra* note 19, art. 5 (describing the minimum standard of treatment); NAFTA, *supra* note 15, art. 1105 (establishing the minimum standard of treatment); German Model BIT, *supra* note 19, art. 2 (stipulating protections). On full protection and security, see generally, for example, DOLZER & SCHREUER, *supra* note 12, at 149–53 (emphasizing transparency); NEWCOMBE & PARADELL, *supra* note 12, at 307–14; Todd J. Grierson-Weiler & Ian A. Laird, *Standards of Treatment*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 259 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008) (noting how non-discrimination provisions are closely tied to minimum standard provisions).

19. *E.g.*, U.S. Model BIT, *supra* note 19, art. 5 (providing for fair and equitable treatment); NAFTA, *supra* note 15, art. 1105 (providing for non-discriminatory treatment); German Model BIT, *supra* note 19, art. 2 (providing for fair and equitable treatment). *See also*, DOLZER & SCHREUER, *supra* note 12, at 119–49 (describing fair and equitable treatment); Grierson-Weiler & Laird, *supra* note 18 (discussing fair and equitable treatment in relation to minimum standards); NEWCOMBE & PARADELL, *supra* note 12, at 255–98.

prohibition of expropriation without compensation,[20] as well as national[21] and most-favored-nation treatment.[22] Just as importantly, although these agreements are concluded *between states*, they usually provide for a procedurally novel arrangement whereby investors no longer have to rely on their home state to espouse their claim through diplomatic protection; investors instead have the possibility to initiate arbitral proceedings directly against the host state for alleged breaches of the IIA.[23] Accordingly, IIAs grant investors the right to make use of one or more sets of arbitral procedural rules.[24] The vast majority of IIAs refer disputes to the International Centre for Settlement of Investment Disputes (ICSID), whose proceedings are governed by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).[25] At the same time, the Arbitration Rules devised by the United Nations Commission on International Trade Law

20. *E.g.*, U.S. Model BIT, *supra* note 19, art. 6 (prohibiting expropriation without compensation); NAFTA, *supra* note 15, art. 1110 (requiring compensation at fair market value); German Model BIT, *supra* note 19, art. 4 (prohibiting expropriation without compensation). Expropriation may be direct or indirect; both forms are prohibited. *See, e.g.*, DOLZER & SCHREUER, *supra* note 12, at 89–118 (describing expropriation); NEWCOMBE & PARADELL, *supra* note 12, at 321–98; August Reinisch, *Expropriation*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 407, *supra* note 20.

21. National treatment entails "treatment no less favorable than that [the host state] accords, in like circumstances, to its own investors." *E.g.*, U.S. Model BIT, *supra* note 19, art. 3; NAFTA, *supra* note 15, art. 1102; German Model BIT art. 3, *supra* note 19 (providing for national treatment). *See also e.g.*, DOLZER & SCHREUER, *supra* note 12, at 178–86 (describing national treatment); NEWCOMBE & PARADELL, *supra* note 12, at 147–91.

22. Most favored nation treatment entails "treatment no less favorable than that [the host state] accords, in like circumstances, to investors of any non-Party [i.e. any third state]." *E.g.*, U.S. Model BIT, *supra* note 19, art. 4; NAFTA, *supra* note 15, art. 1103; German Model BIT, *supra* note 19, art. 3 (providing for most-favored-nation treatment); *see also, e.g.*, DOLZER & SCHREUER, *supra* note 12, at 186–91 (describing most-favored-nation treatment); NEWCOMBE & PARADELL, *supra* note 12, at 193–232; Pia Acconci, *Most-Favoured-Nation Treatment*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 363, *supra* note 20.

23. *E.g.*, U.S. Model BIT, *supra* note 19, Section B (outlining the process for the arbitration proceedings); NAFTA, *supra* note 15, Chapter Eleven, Section B, (establishing a mechanism for settling investment disputes); Netherlands Model BIT, *supra* note 19, art. 9 (requiring consent for contracting parties to submit to arbitration).

24. For an overview, see generally Freya Baetens, *Procedural Issues relating to Shared Responsibility in Arbitral Proceedings*, 4 J. INT'L DISP. SETTLEMENT 319 (2013) (describing six sets of procedural rules investors can use).

25. *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159 (governing the ICSID). For more on the ICSID Convention, see generally CHRISTOPH H. SCHREUER WITH LORETTA MALINTOPPI, AUGUST REINISCH & ANTHONY SINCLAIR, THE ICSID CONVENTION: A COMMENTARY (2d ed., 2011). Some BITs refer to ICSID only. *E.g.*, Netherlands Model BIT, *supra* note 19, art. 9 (referring parties to the ICSID); French Model BIT, *supra* note 19, art. 7 (referring parties to the ICSID).

(UNCITRAL) are widely recognized as "the procedural benchmark for *ad hoc* (i.e. non-institutional) international arbitrations."[26] Although UNCITRAL arbitrations are *ad hoc*, arbitral institutions like the Permanent Court of Arbitration often *administer* them.[27] Furthermore, IIAs may refer investors to institutions originally established for commercial arbitration (i.e., arbitration between two private parties, as opposed to a private and a state party), but which now also conduct investor-state arbitrations under their respective rules. Examples of the latter are the Stockholm Chamber of Commerce (SCC)[28] and the International Chamber of Commerce (ICC).[29] Investment treaty arbitration has become a highly popular form of recourse in recent years, with the total number of known pending and concluded cases totaling more than 500 by now.[30] Generally, about two-thirds of investment disputes are brought before

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26. Baetens, *supra* note 26, at 320. The UNCITRAL Rules were originally developed in 1976 and revised in 2010. *See* U.N. GAOR, 31st Sess., Supp. No. 17, UN Doc. A/31/17 (1976), Chapter V, Section C, *reprinted in* 7 UNCITRAL Y.B. 22 (1976); U.N. GAOR, 65th Sess., Supp. No. 17, UN Doc. A/65/17 (2010), Annex I [hereinafter UNCITRAL Rules]. The General Assembly recommended the use of UNCITRAL Rules in G.A. Res. 31/98, UN Doc. A/RES/31/98 (Dec. 15, 1976), and G.A. Res. 65/22, UN Doc. A/RES/65/22 (Dec. 6, 2010). Arbitration under UNCITRAL rules is listed as an option by, for example, U.S. Model BIT, *supra* note 19, art. 24(3)(c); German Model BIT, *supra* note 19, art. 10(2)(3).

27. *See Recent Developments in Investor-State Dispute Settlement*, UNCTAD, May 2013 [hereinafter UNCTAD *Dispute Settlement*], at 3, *available at* http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf [http://perma.cc/6842-2FCN] (archived Sept. 15, 2013) (stating the majority of cases have been brought under the ICSID). The ICSID, SCC, and ICC also administer UNCITRAL arbitrations. *See The SCC Experience of Investment Arbitration under UNCITRAL Rules*, SCC, Oct. 2012, *available at* http://www.sccinstitute.com/filearchive/4/44668/UNCITRAL Disputes_The SCC Experience_AM.pdf [http://perma.cc/9UD3-JFWZ] (archived Sept. 15, 2013); ICC, *ICC to act as appointing authority*, *available at* http://www.iccwbo.org/products-and-services/arbitration-and-adr/appointing-authority [http://perma.cc/FTC8-A4TA] (archived Sept. 15, 2013) (allowing parties to use the ICC as an arbitral institution); *The ICSID Caseload – Statistics*, ICSID, Issue 2013-1, at 9, *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English41 [http://perma.cc/Y8VF-YSXT] (last visited Jan. 3, 2014) (archived Sept. 15, 2013) (showing that the ICSID provides administrative assistance for UNCITRAL arbitrations).

28. According to the SCC's own statistics, "64 countries are signatories to BITs that refer to the SCC in their dispute resolution clauses." SCC, *supra* note 29, at 4. Others list the SCC as an option. German Model BIT, *supra* note 19, art. 10(2)(4); and the Energy Charter Treaty, *supra* note 15, art. 26(4)(c).

29. *E.g.*, German Model BIT, *supra* note 19, art. 10(2)(4) (listing the ICC as an option).

30. UNCTAD *Dispute Settlement*, *supra* note 29, at 3. Since most arbitration fora do not maintain a public registry of claims, UNCTAD estimates that the total number of cases is likely to be higher.

the ICSID, which has currently more than 170 arbitrations on its docket.[31]

Developments since the end of World War II, therefore, have resulted in an established system of IIAs (mostly BITs) which has reached quite unprecedented levels of efficiency and which, because of this, is increasingly popular with global business.

B. *The European Union System*

World War II also provided the impetus for the economic integration of Europe. Principal was the desire to bring the coal and steel production of Germany and France—the basis of militarization—under common international control.[32] The call for an "ever closer union,"[33] resulted in the establishment of the European Coal and Steel Community, the European Atomic Energy Community, and the European Economic Community, together forming the European Communities, in the 1950s.[34] The latter, with the addition of cooperation in the fields of foreign and security policy, as well as justice and home affairs, eventually became the European Union in 1993.[35]

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31. *Id.* at 2–4. About a quarter of cases are brought before *ad hoc* tribunals under UNCITRAL rules, and the remainder before the SCC, ICC, and similar institutions. *See id.* For currently pending cases, see *List of Pending Cases*, ICSID, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&action Val=ListPending (last visited Jan. 3, 2014) [http://perma.cc/9TE4-XNW8] (archived Oct. 8, 2014).

32. *See, e.g.*, JOHN FAIRHURST, LAW OF THE EUROPEAN UNION 4–5 (9th ed. 2012).

33. Preamble to the Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11.

34. Treaty Between the Federal Republic of Germany, the Kingdom of Belgium, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands Instituting the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 143; Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 169; Treaty Establishing the European Economic Community, *supra* note 35. The Treaty establishing the European Economic Community was renamed "Treaty establishing the European Community" [hereinafter EC Treaty] in 1993, Treaty on European Union, art. G(A)(1), Feb. 7, 1992, 1757 U.N.T.S. 3, and renamed again to "Treaty on the Functioning of the European Union" in 2009, Lisbon Treaty, *supra* note 5, art. 2(1). The founding treaties—particularly the TEU and the TFEU—have been amended several times over the years; for the latest consolidated versions, *see supra* note 5. For more on the history of the European Union, see, for example, FAIRHURST, *supra* note 34, at 4–54. The predecessor organizations were originally established by six states, but there are now 28 Member States of the European Union (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxemburg, Malta, The Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom).

35. Treaty on European Union, *supra* note 36, art. A. The TEU established a "three-pillar system," where the European Communities, Justice and Home Affairs,

Over the years, the institutions at the European level acquired progressively more competences in the economic field and beyond, as the level of integration deepened and its objectives broadened to embrace social, environmental, and political goals.[36] The increasing depth of EU integration—at least in economic terms—is best illustrated through what are commonly known as the four levels of economic integration, where each level incorporates and supersedes the previous one. The four levels are (1) the free trade area, (2) the customs union, (3) the common market, and (4) the economic union.

The first level (the *free trade area*) is the level at which Member States have eliminated trade barriers among themselves, but each of them still sets its own customs rates for imports from outside the area. There are about a dozen multilateral free trade areas around the world—including the North American Free Trade Area between Canada, Mexico, and the United States, established by NAFTA—and hundreds more bilateral free trade agreements.[37] The agreements concluded under the auspices of the WTO also have the elimination of trade barriers as their aim.[38] At the second level (the *customs union*), members have set uniform customs standards for imports from outside the union—such as the East African Customs Union between Kenya, Tanzania, Uganda, Rwanda and Burundi.[39] The third level

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and Foreign and Security Policy each constituted a "pillar" of the EU, but the latter two functioned at the intergovernmental level. The Lisbon Treaty, *supra* note 5, art. 1(55), finally gave international legal personality to the European Union as such. TEU, *supra* note 5, art. 47.

36. *See, e.g.*, FAIRHURST, *supra* note 34, at 9–49.

37. NAFTA, *supra* note 15; *see also, e.g.*, Dom. Rep.–Central America–U.S. Free Trade Agreement, Aug. 5, 2004, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text [http://perma.cc/AL5J-E2PS] (archived Sept. 15, 2013); U.S.–Australia Free Trade Agreement, May 18, 2004, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text [http://perma.cc/H98K-BYE2] (archived Sept. 15, 2013); Free Trade Agreement Between the Republic of India and the Democratic Socialist Republic of Sri Lanka, Dec. 28, 1998, *available at* http://www.commerce.nic.in/trade/international_ta_indsl_1.asp [http://perma.cc/RS62-CM5H] (archived Sept. 15, 2013) (creating free trade agreements). For more examples, see *WTO Regional Trade Agreements Information System*, WTO.ORG, http://rtais.wto.org/UI/PublicAllRTAList.aspx (last visited Jan. 3, 2014).

38. *E.g.*, GATT, *supra* note 11 (aiming to reduce tariffs and other barriers to trade); General Agreement on Trade in Services, Apr. 15, 1994, 1869 U.N.T.S. 183 [hereinafter GATS] (desiring to liberalize trade services); WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS] (desiring to reduce blocks to trade); WTO Agreement on Trade-Related Investment Measures, Apr. 15, 1994, 1868 U.N.T.S. 186 (desiring to expand liberalization of trade). For more examples, see *WTO Documents*, WTO.ORG, http://www.wto.org/english/docs_e/docs_e.htm [http://perma.cc/7J2Q-RREY] (last visited Jan. 3, 2014) (archived Sept. 15, 2013).

39. East African Community Secretariat, Protocol on the Establishment of the East African Customs Union, Mar. 2, 2004, *available at* http://www.customs.eac.int/index.php?option=com_docman&task=doc_view&gid=1&tmpl=component&format=raw

(the *common market*) is the level at which the free movement of not only goods, but also production factors within the market, has been ensured. For example, the Southern Common Market (MERCOSUR) was established in 1991 by the Treaty of Asunción, which was later amended and updated by the 1994 Treaty of Ouro Preto.[40] MERCOSUR has five full members, namely Argentina, Brazil, Paraguay, Uruguay and Venezuela. Finally, the fourth level (the *economic union*) is the level that entails a harmonized fiscal and monetary policy, usually accompanied by a common currency (i.e., a monetary union).[41] The decision to build such an economic and monetary union in the framework of European integration was formalized in the early 1990s and has been (partially) implemented since 2002.[42] Currently eighteen out of the twenty-eight EU Member States are part of the "eurozone."[43] As a result of this deep

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&Itemid=164 [http://perma.cc/RH8H-CN8E] (archived Sept. 15, 2013) (setting customs standards); Treaty Establishing a Central African Economic and Customs Union, Dec. 8, 1964, 4 I.L.M. 699 (1965) (setting customs standards); Agreement on Cooperation and Customs Union between the European Economic Community and the Republic of San Marino, Dec. 16, 1991, 2002 O.J. (L 84) 43 (setting up a customs union). For more examples, see *WTO Regional Trade Agreements Information System*, *supra* note 39.

40. *See* Treaty for the Establishment of a Common Market between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, Mar. 26, 1991, 2140 U.N.T.S. 257 [hereinafter Treaty of Asunción]; Additional Protocol to the Asunción Treaty on the Institutional Structure of Mercosur, Dec. 17, 1994, 2145 U.N.T.S. 300 [hereinafter Ouro Preto Protocol] (providing for production factors and goods). *See also, e.g.*, the Treaty establishing the Common Market for Eastern and Southern Africa, Nov. 5, 1993, 33 I.L.M. 1072 (1994); Protocol on the Establishment of the East African Community Common Market, Nov. 20, 2009, *available at* http://www.eac.int/index.php?option=com_docman&task=doc_download&gid=362&Itemid=163 [http://perma.cc/7GP6-T9S9] (archived Sept. 15, 2013); Agreement Establishing the Common External Tariff for the Caribbean Common Market, July 4, 1973, 946 U.N.T.S. 76 (covering production factors and goods). For more examples, see *WTO Regional Trade Agreements Information System*, *supra* note 39.

41. In the case of the EU, see TEU art. 3(4), *supra* note 5 (establishing the euro); TFEU, *supra* note 5, arts. 119–44 (setting out the economic and monetary policy).

42. On the stages of the economic and monetary union, see, for example *Economic and Monetary Union (EMU)*, EUROPEANCENTRALBANK.COM, http://www.ecb.europa.eu/ecb/history/emu/html/index.en.html [http://perma.cc/M2VM-4EAN] (last visited Jan. 3, 2014) (archived Sept. 15, 2013) (showing the development of the EMU); *see also supra* note 43 (describing the development of the EU). On plans for an even more complete implementation, see European Council, *Towards a Genuine Economic and Monetary Union*, Dec. 5, 2012, http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/134069.pdf [http://perma.cc/G4RC-PD7U] (last visited Jan. 3, 2014) (archived Sept. 15, 2013). For more on the economic and monetary union in general, see, for example Francis Snyder, *EMU – Integration and Differentiation: Metaphor for European Union*, *in* THE EVOLUTION OF EU LAW 687 (Paul Craig & Gráinne de Búrca eds., 2d ed. 2011).

43. These 18 countries are Austria, Belgium, Cyprus, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Luxembourg, Malta, Portugal, Slovakia, Slovenia, Spain and The Netherlands. *See The Euro*, EUROPEANCENTRALBANK.COM,

integration and the extensive transfer of powers from the national to the European level, the EU is generally considered to form a *sui generis* category among international organizations, having distinct *supranational* characteristics.[44]

Nevertheless, no matter how unique the EU as a legal entity may be, one has to bear in mind that it is still an organization of enumerated powers, i.e., it can exercise only those powers which have been conferred upon it by its Member States.[45] In the case of foreign investment regulation, the Member States enacted this conferral through the Lisbon Treaty, which amended the Treaty on the Functioning of the European Union (TFEU)[46] to stipulate that under TFEU article 207(1), "[t]he common commercial policy shall be based on uniform principles, particularly with regard to . . . foreign direct investment," while TFEU Article 3(1)(e) states that "[t]he Union shall have exclusive competence in the [area of] common commercial policy." In accordance with the terms of TFEU Article 2(1), once an area has been designated as falling under exclusive EU competence, the Member States only have competence inasmuch as the EU transfers it *back* to them.[47]

In the areas within EU competence, legislation is usually proposed by the European Commission, then jointly decided upon by the Council and the European Parliament.[48] Within the institutional dynamics of the EU, the Commission tends to be seen as representing the interests of the Union, while the Council acts for the Member States, and the Parliament—the only directly elected EU organ—gives citizens the opportunity to influence decision-making.[49] In addition, the Commission is roughly the equivalent of the "executive

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http://www.ecb.europa.eu/euro/html/index.en.html [http://perma.cc/85NG-KYKU] (last visited Jan. 3, 2014) (archived Sept. 15, 2013).

44. *See, e.g.*, European Parliament Directorate-General for External Policies, *Responsibility in Investor-State Arbitration in the EU*, Dec. 2012 [hereinafter EP Study], at 9, http://www.europarl.europa.eu/committees/fr/studiesdownload.html ?languageDocument=EN&file=79450 [http://perma.cc/V5E6-L433] (archived Sept. 15, 2013) (distinguishing the EU from other international organizations); August Reinisch, *The EU on the Investment Path – Quo Vadis Europe? The Future of EU BITs and other Investment Agreements*, 34 (Mar. 20, 2013), *available at* http://ssrn.com/abstract=2236192 [http://perma.cc/XF9S-WF63] (last visited Jan. 3, 2014) (archived Sept. 15, 2013) (describing the EU as "a highly integrated supranational organization").

45. TEU, *supra* note 5, art. 5(2).

46. Formerly the EC Treaty. *See supra* note 36.

47. TFEU, *supra* note 5, art. 2(1); exclusive competences are listed in TFEU art. 3. There are also a number of so-called "shared competences," where the Member States may exercise their competence to the extent that the EU does not. *See* TFEU, *supra* note 5, arts. 2(2), 4.

48. This is the so-called "ordinary legislative procedure." *See* TEU, *supra* note 5, arts. 14(1), 16(1), 17(2) (setting out the legislative procedure); TFEU, *supra* note 5, arts. 289(1), 294 (setting out procedures).

49. See TEU, *supra* note 5, art. 17 on the Commission; art. 16 on the Council; and art. 14 on the Parliament. *See also, e.g.*, FAIRHURST, *supra* note 32, at 89–127.

branch" of a state, and is thus also the institution representing the EU in its external relations with non-Member States (third states.)[50]

Binding measures within the EU can take the form of regulations, directives, or decisions.[51] Regulations clearly set out the goal to be attained by all Member States, as well as the precise means through which such goal is to be reached.[52] Decisions bear essentially the same characteristics, except that they address a specific Member State, or group of Member States.[53] Most EU legislation, however, takes place through directives, which set out the objective to be achieved, but leave it up to the discretion of the Member States to decide through which means they will attain that objective.[54] In sum, even in areas falling under EU competence, Member States tend to have a considerable margin of discretion in implementing such policies.

C. *EU Meets Investment Law*

For most of the European Union's existence, it did not have competence over FDI.[55] Member States each concluded their own investment treaties, amounting altogether to approximately 1,200 BITs with third states by the time the Lisbon Treaty entered into force in 2009.[56] At the time, the only international treaty in this field

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50. See *TEU, supra* note 5, arts. 17(1), 18 (giving the Commission executive powers). The 2009 Lisbon Treaty established a "double hatted" High Representative of the Union for Foreign Affairs and Security Policy, charged with the twofold mission to conduct the Common Foreign and Security Policy and ensure the consistency of the Union's external action. Furthermore, a European External Action Service (EEAS) was created to act as the European diplomatic corps assisting the High Representative in fulfilling his mandate. See TEU, supra note 5, art. 27(3). The EEAS was formally established by Decision 2010/427/EU of the Council of Ministers establishing the organization and functioning of the European External Action Service on July 26, 2010 (OJ 201/30 of Aug. 3, 2011). The EEAS was formally launched on January 1, 2011. *See, e.g.*, Chiara Cellerino, *The New European External Action Service and the Lisbon Call for Coherence of European External Action: Issues of Accountability and Scope*, 17 COLUM. J. EUR. L. ONLINE 22 (2011) (discussing the role that the EEAS plays in dealing with the EU's external policies).

51. TFEU, *supra* note 5, art. 288. EU institutions can also adopt recommendations and opinions, but these have no binding force.

52. *Id.* para. 2.

53. *Id.* para. 4.

54. *Id.* para. 3.

55. Arguably, since the entry into force of the Treaty of Nice Amending the Treaty on European Union, and the Treaties Establishing the European Communities and Certain Related Acts, Feb. 26, 2001, 2001 O.J. (C 80) 1, the EU has been competent in the field of investment in services because of the third GATS mode of transboundary services trade (commercial presence). *See* GATS, *supra* note 40, art. I(2)(c). This was one of the reasons why in subsequent negotiations it was argued that it was logical to also cover investment in goods manufacturing.

56. *See, e.g., EU Takes Key Step to Provide Legal Certainty for Investors Outside Europe*, EUROPEAN COMMISSION DIRECTORATE-GENERAL FOR TRADE (Dec. 12,

that included the EU as a party was the Energy Charter Treaty between the EU, its Member States and some fifteen third states.[57]

The fate of agreements concluded by Member States with third states is addressed in Regulation No. 1219/2012, which entered into force on January 9, 2013, and laid the groundwork for the new division of competences.[58] This Regulation divides BITs between EU members and third states into three groups based on their date of conclusion or entry into force.

The first group contains agreements signed before December 1, 2009. These BITs remain in force, although Member States have a duty to notify the Commission of their existence, so as to allow the Commission to assess "whether one or more of their provisions constitute a serious obstacle to the negotiation or conclusion by the Union of bilateral investment agreements with third countries."[59] If that is the case, consultations are opened between the Commission and the Member State to agree upon amendments to the treaty provision, which are then to be renegotiated by the Member State and the third state.[60] Furthermore, if no agreement is reached between the Commission and the Member State after the end of the consultations, "the Commission may . . . indicate the appropriate measures to be taken by the Member State concerned in order to remove the obstacles."[61] Such a lack of agreement has not occurred as of yet, so it is still unknown how the Commission will apply this provision in practice. Under one possible reading of the Regulation, the phrase "may indicate the appropriate measures to be taken" could imply that the Commission has the right to choose whether or not to indicate measures, but once it has done so, the Member State has no

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2012), http://trade.ec.europa.eu/doclib/press/index.cfm?id=854 [http://perma.cc/6HJG-CMZ8] (archived Sept. 15, 2014). For a list of such BITs, see 2013 O.J. (C 131) 2.

57. *See* The Energy Charter Treaty, *supra* note 15. For more on investment under this treaty, see THOMAS ROE & MATTHEW HAPPOLD, SETTLEMENT OF INVESTMENT DISPUTES UNDER THE ENERGY CHARTER TREATY, 100–03, 171–85 (2011).

58. Regulation (EU) No. 1219/2012 of the European Parliament and of the Council of 12 December 2012, 2012 O.J. (L 351) 40 [hereinafter Regulation No. 1219/2012] (establishing transitional arrangements for bilateral investment agreements between Member States and third countries).

59. *Id.* art. 5. *See also id.* arts. 2–3.

60. *Id.* art. 6(2).

61. *Id.* art. 6(3). Whether and to what extent such an indication by the Commission is binding is not entirely clear, however. *See, e.g.*, Lavranos, *supra* note 5, at 9 ("[A] consultation procedure has been put in place in Article 6, which enables the European Commission to discuss with the Member State concerned its problems with a particular BIT and indicate which steps the Member State should take in order to resolve the issue."). The use of "should" (rather than "must" or "shall") suggests that the indication is not necessarily binding. *See id.* ("Of course, if no satisfactory solution is achieved[,] the European Commission has the power to start in accordance with Article 258 TFEU an infringement procedure against the Member State before the [Court of Justice of the European Union]."). The Court's case law on the matter is not quite consistent, though. *See id.* at 5.

choice but to comply. This would give the Commission considerable leverage in any round of consultations.

The second group encompasses agreements signed between December 1, 2009 and January 9, 2013. As with the previous group of BITs, the Commission needs to be notified of the existence of these treaties so as to allow for an assessment of their compatibility with EU law.[62] In addition, for this second group, the Commission has to give its express authorization to maintain these BITs, or to let them enter into force. Furthermore, it is interesting to note that—in a move ostensibly designed to ensure greater consistency already in the transitional phase—a Member State shall "inform the Commission without undue delay of any representations made to it that a particular measure is inconsistent with the agreement."[63] Moreover, the Member State has to immediately inform the Commission of any dispute settlement request lodged under the auspices of the BIT as soon as it becomes aware of such a request, so as to allow "[t]he Member State and the Commission [to] fully cooperate and take all necessary measures to ensure an effective defence which may include, where appropriate, the participation in the procedure by the Commission."[64]

In June 2013, the Commission was given a mandate by the Council to enter into formal negotiations with the United States as to reach an agreement concerning the comprehensive EU-U.S. TTIP, for which the first round of talks took place in July 2013.[65] The EU also has ongoing negotiations on bilateral FTAs with an investment chapter with Canada, India, Japan, Morocco, Malaysia, Thailand, and Vietnam.[66] In October 2013, the Council of the European Union

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62. Regulation No. 1219/2012, *supra* note 60, art. 12.

63. *Id.* art. 13(b).

64. *Id.*

65. Press Release, European Commission, Member States Endorse EU-US Trade and Investment Negotiations (June 14, 2013), *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=918 [http://perma.cc/37LN-8KM5] (archived Sept. 15, 2014); Press Release, European Commission, EU and US Conclude First Round of TTIP Negotiations in Washington (July 12, 2013), *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=941 [http://perma.cc/4BNH-67ST] (archived Sept. 15, 2014).

66. *See, e.g.*, Memorandum from the European Commission, The EU's Bilateral Trade and Investment Agreements – Where are We? (Oct. 18, 2013), *available at* http://europa.eu/rapid/press-release_MEMO-13-915_en.htm [http://perma.cc/V7MX-Y7J3] (archived Sept. 15, 2014). In fact, the terms of the agreement with Canada are largely finalized. A "technical summary" of its main points was made public by the Canadian authorities in late October 2013. *See* Technical Summary of Final Negotiated Outcomes: Canada-European Union Comprehensive Economic and Trade Agreement, Canada's Economic Action Plan, http://www.actionplan.gc.ca/sites/default/files/pdfs/ceta-technicalsummary.pdf (last visited Sept. 15, 2014) [http://perma.cc/G7TQ-J59E] (archived Oct. 25, 2014). The consolidated text of the Canada-EU Comprehensive Economic and Trade Agreement (CETA) was made public on September 26, 2014. *See* Consolidated CETA Text, http://trade.ec.europa.eu/doclib/docs/2014/september/

approved the opening of negotiations by the Commission on an investment agreement with China.[67] However, because all such negotiations will take a considerable amount of time, the Commission will have to prioritize, meaning that some third states will not be offered an opportunity to conclude a BIT with the EU in the near future. To avoid a gap in investment protection, individual EU Member States can still agree on new BITs if authorized by the Commission, and the Commission may also participate in the negotiations.[68] The EU-third state BITs authorized by the Commission, concluded after January 9, 2013, accordingly form the third group of IIAs covered by Regulation No. 1219/2012.

When disputes arise under the new EU-third state IIAs, they could give rise to certain legal problems. Foreign investments will necessarily be located in the territory of one or more Member States—and they will thus be subject to treatment not only by the EU itself but also by the Member States. The Member States in some cases may be acting on their own authority (possibly even contrary to EU law), while in other instances may be acting on the instructions of the EU. As a result, it may be unclear who is responsible for any alleged violation of the IIA. Therefore, investors will have to determine against whom to initiate arbitral proceedings: against the EU or against the Member State? One can imagine that in order to avoid the risk of choosing the "wrong" respondent, investors would generally opt for bringing a claim against both. That, however, leads to the next problem: how is it to be decided who exactly acted in breach of the IIA? In other words, to whom is the conduct in question attributable: to the EU, to the Member State, or even to both? Finally, if both the EU and the Member State are found to have acted in breach of the IIA and compensation is awarded to the investor, how is it to be divided between the EU and the Member State? This entails the ancillary problem that under international law, there is no principle of joint and several responsibility.[69] A tribunal will always

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tradoc_152806.pdf (last visited Oct. 22, 2014) [http://perma.cc/AJ44-PAJE] (archived Oct. 25, 2014); or Consolidated CETA Text, Ch. X, Investment, http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/10.aspx?lang=eng (last visited Oct. 22, 2014) [http://perma.cc/YE3B-Y9QQ] (archived Oct. 25, 2014).

67. Press Release, Council of the European Union, Council Approves Launch of Investment Talks with China (Oct. 18, 2013), *available at* http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/139055.pdf. *See China*, EUROPEAN COMMISSION, http://ec.europa.eu/trade/policy/countries-and-regions/countries/china [http://perma.cc/QHQ9-LZ24] (archived Sept. 15, 2014); *infra* note 8.

68. Regulation No. 1219/2012, *supra* note 60, arts. 7–11.

69. Rep. of the Int'l Law Comm'n, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, 317, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10. (2001) [hereinafter ARSIWA]. *But see* JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 328–32 (2013) (noting that private law concepts like joint and several liability have not been

have to divide responsibility and hence compensatory duties. The Commission put forth the Proposed Regulation on June 21, 2012 to address the issues relating 'managing financial responsibility' arising from arbitration under EU-third state IIAs. The European Parliament adopted an amended form of the Regulation on April 16, 2014, and the Council of the EU adopted it on July 23, 2014.[70] Following its publication in the Official Journal of the EU on August 28, 2014, the Regulation entered into force on September 17, 2014. After a preliminary note on the legal status of such a Regulation under international law, the following section will examine, more closely in the light of the proposal, the questions of: respondent status, attribution of breach, and compliance.

III. PROBLEMATIC ISSUES ARISING FROM THE REGULATION

Before delving into the issues raised by the Regulation, one major caveat must be made: the impact of such Regulation on the arbitral proceedings and the resulting award is conditional upon its integral incorporation in the IIA.[71] In other words, the Regulation only has legal force *within the EU,* it cannot be relied upon as a binding source of law in the EU's relations with third states or investors residing in third states.[72] Arbitrations are initiated on the basis of a so-called "arbitration clause" in the applicable IIA whereby both contracting states agree to submit any future disputes under the treaty to arbitration. The state parties thereby waive their right to immunity from jurisdiction and most often grant private foreign investors (who are themselves not parties to the treaty) the right to private standing, i.e., a right to launch such arbitral proceedings directly against the state hosting the investment. The jurisdictional limits of any arbitral tribunal are set by the arbitration clause, within which tribunals are considered competent to decide on all matters

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adopted into international law, and thus they can only play a subsidiary role in international law).

70. *See generally* Proposed Regulation, *supra* note 9; Regulation, *supra* note 10.

71. *See* EP Study, *supra* note 46, at 22–23; Jan Kleinheisterkamp, *Financial Responsibility in the European International Investment Policy* (LSE Law, Society and Economy Working Papers 15/2013), 8, 16, *available at* http://www.lse.ac.uk/collections/law/wps/WPS2013-15_Kleinheisterkamp.pdf [http://perma.cc/ZPR7-6QTT] (archived Oct. 8, 2014).

72. A similar situation exists, for example, where a state displays a certain conduct which is entirely lawful under its own domestic rules, but unlawful under international law. When the responsibility of that State is subsequently invoked before an international court, it cannot justify its conduct by reference to its lawfulness under domestic law. *See* ARSIWA, *supra* note 69, art. 3, at 74 ("The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.").

related to their own jurisdiction (this is known as *la compétence de la compétence* or *Kompetenz-Kompetenz*).[73] As a result, the text of the Regulation should be incorporated in the IIA. Otherwise, the IIA must make direct recourse to the Regulation, and explicitly subject all future arbitral proceedings under the IIA to the rules set out in the Regulation insofar as jurisdiction is concerned.[74] That being said, future EU IIAs will most likely include provisions giving effect to the Regulation at the international level,[75] therefore the rest of the analysis in this article will proceed on this assumption.

A. *Respondent Status: Whom to Sue?*

The first question faced by any investor wishing to initiate arbitral proceedings is: against whom should the claim be brought? In other words, who is the appropriate respondent? As noted above, the investor will most likely prefer to start proceedings against both the EU and the Member State involved, in order to avoid wasting time and funds suing the "wrong" respondent. Yet, having a case with a multitude of respondents is exactly what the Regulation seeks to avoid. This section first examines whether EU-third state IIAs are so-called "mixed agreements," i.e., agreements whereby the EU and all its Member States are contracting parties, or whether the EU could conclude such agreements on its own. Subsequently, the precise terms of the European Commission's proposal regarding respondent status are discussed, followed by an elaboration on the problems with this proposal.

1. Investment Agreements: Mixed or EU-only?

Since arbitrations are initiated on the basis of the IIA's arbitration clause, arguably, claims could only be brought against a

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73. *See, e.g.*, Nottebohm Case (Liechtenstein v. Guatemala), 1953 I.C.J. 111, 117 (Nov. 18); Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 18 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); *see also* Kleinheisterkamp, *supra* note 73, at 15–16.

74. Stipulating in one treaty that in case of conflict, the provisions of another treaty prevail is not uncommon in international law. *See, e.g.*, Energy Charter Treaty, *supra* note 15, art. 4 (stating that in case of conflict between the Energy Charter Treaty provisions and those of the GATT, the latter prevail).

75. *See* Kleinheisterkamp, *supra* note 73, at 16. ("It can . . . be assumed that the Commission has the intention to include such clarification in every future EU investment agreement, since otherwise the solution in the present draft Regulation would [be] wholly ineffective and moot."); *see also* the Consolidated CETA Text, *supra* note 68, art. X.20, setting up a procedure for "Determination of the respondent for disputes with the European Union or its Member States" and stipulating that "[t]he tribunal shall be bound by the determination made pursuant to" this procedure.

contracting party to the treaty. The preliminary question is thus whether only the EU will become party to these agreements, or both the EU and its Member States?

a. EU Competence under EU Law

The answer to this preliminary question is at least partially found in EU law, which divides the EU's competence to regulate into three categories: exclusive, shared, and supporting. This division applies to internal (or, within the Member State itself) as well as external (or, international) rulemaking. Firstly, matters that are part of the exclusive competence of the EU, like the conclusion of treaties and representation in dispute settlement cases, are dealt with solely by the EU institutions (mostly the Commission).[76] For example, this is the case with regard to the common commercial policy and ensuing cases before the WTO Dispute Settlement Body.[77] Secondly, topics for which competence is shared between the EU and its Member States[78] are subject to the conclusion of so-called mixed agreements. In addition to the third state(s), the EU, as well as its Member States, are parties to such agreements. An illustration of a mixed agreement can be found in international environmental law: the EU and its members are all parties to the UN Framework Convention on Climate Change and its Kyoto Protocol.[79] Thirdly, for issues falling under supporting competence, the EU is not a party to any of the relevant international agreements; at most it coordinates or

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76. TFEU, *supra* note 5, art. 2(1) (stating that in these matters, only the EU is able to legislate and adopt binding acts, and thus the Member States' role is limited to applying these acts, unless the Union authorizes them to adopt certain acts themselves).

77. Other areas falling under the exclusive competence of the EU are customs union; the establishing of the competition rules necessary for the functioning of the internal market; monetary policy for the Member States whose currency is the euro; the conservation of marine biological resources under the common fisheries policy; and the conclusion of international agreements when the agreement's conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as the agreement's conclusion may affect common rules or alter their scope. TFEU, *supra* note 5, arts. 3(1)–(2)).

78. TFEU, *supra* note 5, art. 4 (stating that in these fields, the EU and its Member States are authorized to adopt binding acts, but Member States may exercise their competence only in so far as the EU has not exercised, or has decided not to exercise, its own competence).

79. United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107; Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 148. Other areas of shared competence include internal market; social policy; economic, social and territorial cohesion; agriculture and fisheries, excluding the conservation of marine biological resources; consumer protection; transport; trans-European networks; energy; area of freedom, security and justice; common safety concerns in public health matters. TFEU, *supra* note 5, art. 4(2)).

complements the Member States' actions.[80] This applies, for example, to industry, culture, or tourism-related agreements.[81]

b. Exclusive or Shared Competence on Foreign Investment?

In the Commission's view, "the Union has exclusive competence to conclude agreements covering all matters relating to foreign investment, that is both foreign direct investment and portfolio investment."[82] However, Article 207 of the TFEU refers only to foreign direct investment, while the question of whether portfolio investments (which are covered by the protected investment definition of most IIAs)[83] also fall under exclusive EU competence is contentious. Thus, the scope of EU competence with regard to the

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80. TFEU, *supra* note 5, art. 6. Article 6 states that in these areas, the EU can only intervene to support, coordinate or complement the action of Member States. Consequently, it has no legislative power in these fields and may not interfere in the exercise of these competences reserved for Member States. *Id.*

81. Other areas falling under the supportive competence of the EU include protection and improvement of human health; education, vocational training, youth and sport; civil protection; administrative cooperation. *Id.* art. 6.

82. Proposed Regulation, *supra* note 9, at 3. The Commission bases it position on TFEU Article 63 on the free movement of capital, in combination with TFEU Article 3(2). *See id.* ("In the Commission's view, the Union must have exclusive competence also over matters of portfolio investment since the rules being envisaged, which would apply indistinctly to portfolio investment, may affect the common rules on capital movement set down in Article 63 of the Treaty."). Of course, even if this is indeed found to be the case, the EU may still allow Member States to become party to the agreements, although it is under no obligation to do so. *See, e.g.*, Allan Rosas, *Mixed Union – Mixed Agreements, in* INTERNATIONAL LAW ASPECTS OF THE EUROPEAN UNION 125, 130–31 (Martti Koskenniemi ed., 1998).

83. *See, e.g.*, INTERNATIONAL MONETARY FUND, BALANCE OF PAYMENTS AND INTERNATIONAL INVESTMENT POSITION MANUAL ¶ 6.54, at 110 (6th ed. 2009), *available at* http://www.imf.org/external/pubs/ft/bop/2007/pdf/bpm6.pdf ("Portfolio investment is defined as crossborder transactions and positions involving debt or equity securities, other than those included in direct investment or reserve assets."). Modern IIAs generally cover not only FDI, but also portfolio investments. For example, the U.S. Model BIT defines investment as:

> [E]very asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include: (a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans; (d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; (f) intellectual property rights; (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.

U.S. Model BIT, *supra* note 19, art. 1. *See also, e.g.*, Reinisch, *supra* note 46, at 21.

IIAs' subject matter remains unsettled.[84] The Regulation itself also suggests that such competence may be limited to foreign direct investment.[85] Furthermore, even if portfolio agreements are eventually found to be within exclusive EU competence, the treaties to be concluded by the EU are likely to be agreements covering a broad range of topics, with the consequence that they will almost inevitably cover areas that do not fall under such exclusive competence such as transport, energy, or safety concerns in public health matters.[86] As a result, extra-EU investment agreements are likely to be mixed agreements to which both the EU and its Member States will become parties.[87] This is also supported by the EU's

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84. *See, e.g.*, Henquet, *supra* note 8, at 381–82 (noting that Article 207 of TFEU, when read literally, only covers direct investments and does not include indirect investments, and consequently, only direct investments are part of the exclusive competence of the EU and that indirect investments remain part of the competence of the EU member states); Reinisch, *supra* note 46, at 2–5, 20–25; Friedl Weiss & Silke Steiner, *The Investment Regime Under Article 207 of the TFEU – A Legal Conundrum: The Scope of "Foreign Direct Investment" and the Future of Intra-EU BITs*, *in* INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVES 355, 355–67 (detailing the history of the treatment of FDI, as well as the various interpretations of the term "FDI" (Foreign Direct Investment)).

85. Regulation, *supra* note 10, art.1(1).

86. For a list of FTAs concluded and under negotiations, see *Free Trade Agreements*, EUROPEAN COMMISSION, http://ec.europa.eu/enterprise/policies/international/facilitating-trade/free-trade/index_en.htm [http://perma.cc/HRW4-CNTV] (archived Sept. 15, 2014). The negotiations with Canada, India, and Singapore are all for the purpose of FTAs with investment sections, but there are plans that the EU "will also develop self standing investment agreements with selected partners." *Investment*, EUROPEAN COMMISSION, http://ec.europa.eu/trade/policy/accessing-markets/investment [http://perma.cc/3WMB-X89V] (archived Sept. 15, 2014). For example, the planned agreement with China is to be "the EU's first ever stand-alone investment agreement since foreign direct investment became the exclusive competence of the EU under the Lisbon Treaty." Memorandum, European Commission, EU investment negotiations with China and ASEAN (Oct. 18, 2013), http://trade.ec.europa.eu/doclib/press/index.cfm?id=975 [http://perma.cc/CB8H-8SKK] (archived Sept. 15, 2014).

87. Marc Bungenberg, *The Division of Competences Between the EU and Its Member States in the Area of Investment Politics*, *in* EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW 2011: INTERNATIONAL INVESTMENT LAW AND EU LAW 29, at 40–42 (Marc Bungenberg, Jörn Griebel & Steffen Hindelang eds., 2011) (pointing out specifically that "EU investment agreements comparable with US investment agreements in their scope of application and quality can only be concluded as 'mixed agreements'."); *see* Kleinheisterkamp, *supra* note 73, at 7 (noting that the agreements are likely to be mixed); Ralph Alexander Lorz, *Trying to Change the Rules for Responding to Arbitration Unilaterally: The Proposed New Framework for Investor-State Dispute Settlement for the EU*, 87 COLUMBIA FDI PERSPECTIVES, Jan. 22, 2013, http://www.vcc.columbia.edu/files/vale/print/No_87_-_Lorz_-_FINAL.pdf. For more on which cases require mixity of agreements, for example, Rosas, *supra* note 84, at 131–33. Even when the scope of competences covered under the agreement does not strictly require it, EU Member States can still become parties to such agreements (with the permission of the EU): these are so-called "false mixed agreements." *See* Rosas, *supra* note 84, at 131.

current practice, such as in the case of the EU-Korea FTA concluded in 2010, which was signed by both the EU and its Member States.[88]

c. Preliminary Conclusion on Exclusive versus Mixed IIAs

The Regulation does not rule out the possibility that the EU IIAs will be mixed agreements, in spite of the strong position of the Commission that all foreign investment matters now fall under exclusive EU competence. In view of several Member States' opposition to the Commission's expansive interpretation of its newly acquired competences,[89] the most likely—and politically most feasible—scenario is that the EU-third state IIAs will be mixed agreements, in which case there would be prima facie no impediment to the foreign investor to initiate arbitral procedures against the EU as well as against its Member States. The Regulation, however, explicitly seeks to delimit investors' options in choosing its respondent(s) when launching arbitral procedures under the EU-third state IIAs. This proposal is discussed in the following section, under the assumption that the EU-third state IIAs will be concluded as mixed agreements.

2. The Commission's Proposal

The Regulation aims to eliminate the possibility of bringing a claim simultaneously against *both* the EU and a Member State.[90] Instead, the Regulation adopts an "either/or" determination of respondent status, whereby the Commission reserves the right to act as sole respondent in three categories of cases.

The distinguishing factor determining the first category is the involvement of the EU in the treatment allegedly violating the IIA. Where the case exclusively concerns "treatment afforded by the institutions, . . . offices or agencies of the Union," the EU will act as the sole respondent.[91] Where the dispute concerns treatment

88. Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, Sept. 16, 2010, 2011 O.J. (L 127) 6. The FTA has been provisionally in force since July 1, 2011. *See Agreement Details*, COUNCIL OF THE EUROPEAN UNION, http://www.consilium.europa.eu/policies/agreements/search-the-agreements-database?command=details&id=&lang=en&aid=2010036&doclang=EN [http://perma.cc/7PL9-FSQP] (archived Sept. 15, 2014).

89. See the records of various extensive debates in the European Parliament, available in the Register of Documents (http://www.europarl.europa.eu/RegistreWeb/search/simpleSearchHome.htm, last visited Jan. 3, 2014).

90. *See* Proposed Regulation, *supra* note 9, at 7. See also *supra* note 77 on the incorporation of this concept into the CETA.

91. *Id.* art. 4(1).

accorded at least partially by the Member State and partially by the EU, the Member State may act as respondent, but even then, the Commission enjoys broad discretion and primacy in deciding whether it nevertheless wishes to act as the respondent. Where the treatment was afforded entirely by the Member State, but required by EU law (resulting in financial liability for the EU),[92] the Commission also has priority in deciding whether it wishes to act as respondent.[93] Both of these scenarios are based on the—quite understandable—rationale of EU involvement, either through the EU partially carrying out or requiring certain conduct. However, it seems disproportionate to grant the Commission priority to *entirely* replace the Member State as respondent, however small the EU's role or financial liability may be.[94]

The second category contains cases in which the treatment was afforded entirely by the Member State with no involvement whatsoever by the EU (possibly even in breach of EU law), but where the Commission still has primacy in deciding whether to act as respondent. According to Article 9(3) of the Regulation:

> The Commission may decide by means of implementing acts, based on a full and balanced factual analysis and legal reasoning provided to the Member States . . . that the Union is to act as the respondent where similar treatment is being challenged in a related claim against the Union in the WTO, where a panel has been established and the claim concerns the same specific legal issue, and where it is necessary to ensure a consistent argumentation in the WTO case.

This provision is much more carefully circumscribed than its earlier versions in the legislative process, which simply made general reference to the likelihood of similar investment claims at the time of the case or even in the future—thereby giving the Commission unduly broad discretion.[95] In contrast, the Regulation refers to trade disputes with an already established panel at the WTO. If something is simultaneously a trade issue *and* an investment issue, it is likely to affect the EU as a whole, rather than just the particular Member State. Given the Commission's undisputed role as the representative of the EU in trade disputes at the WTO, there is indeed a strong argument to be made for consistency.

The third category of cases in which the Commission will act as respondent are cases in which the Member State declines to act as

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92. *See id.* art. 8(2). For more on compensation, see *infra* Section III.C.

93. *See id.* art. 8(2)(q).

94. *See id.* arts. 9(2)(a)–(b) (stating that the EU can decide to act as the respondent when "the Union would bear all or *at least part of* the potential financial responsibility" or "the dispute *also* concerns treatment afforded by the institutions, bodies or agencies of the Union" (emphasis added)); *see also* EP Study, *supra* note 46, at 24.

95. *See* Proposed Regulation, *supra* note 9, arts. 8(2)(c)–(d).

respondent.[96] On the one hand, this residuary power of the Commission is, in all likelihood, based on the debatable grounds of exclusive EU competence for *all* investment matters[97] and is therefore questionable—but for the investor and for the sake of procedural efficiency, it offers at least a clear and predictable picture. On the other hand, this arrangement also enables the Member State to deliberately decline respondent status, thereby hoping to avoid responsibility.[98] However, the Member State would do so at its own peril, as it would then have only limited influence on the defense mounted by the Commission, and if financial liability is established, it would have to reimburse the EU in accordance with the terms of the Regulation.[99]

3. Problematic Issues

Two problems with regard to respondent status may arise under the Regulation: (1) disagreement between the Commission and the Member State involved on the appropriate defense strategy and (2) violation of the fair trial rights of the EU and/or its Member State. Whereas the first issue may effectively undermine a consistent line of defense, the second raises direct concerns about the proper administration of justice.

a. Disagreement on the Defense Strategy

Situations could arise in which the conduct of a Member State would have to be defended by the EU—more precisely, the Commission. In these situations, the terms of the Regulation require that the Commission "take all necessary measures to defend and protect the interests of the Member State concerned[,]" stipulating that "the Commission and the Member State concerned shall prepare the defence in close co-operation with each other[.]"[100] Indeed, the Commission is under an obligation to share documents with the Member State, and consult with the latter when the Member State so requests. Furthermore, the Member State's representatives form part of the delegation by default.[101] However, it remains an open question whether, and to what extent, the Member State's wishes regarding the defense strategy will effectively be taken into account. At the very

96. *See* Regulation, *supra* note 10, art. 9(1)(b).
97. *See supra* note 84 and accompanying text.
98. *See* EP Study, *supra* note 46, at 25.
99. *See id.*; *see also infra* Section III.C.
100. Regulation, *supra* note 10, art. 11(1)(a), (d).
101. *Id.* art. 11(1)(c), (e).

least, the version adopted by the European Parliament already shows greater sensitivity regarding the Member State's interests than the original draft proposed by the Commission. A new article has been added on cooperation and consultations between the Commission and the Member State;[102] and amendments specifically state that "[i]n acting pursuant to this Article [i.e. Article 9], the Commission shall ensure that the Union's defence protects the financial interests of the Member State concerned"[103] and that:

> When the Union acts as the respondent in accordance with paragraphs 2 and 5, the Commission shall consult the Member State concerned on any pleading or observation prior to the finalisation and submission thereof. Representatives of the Member State concerned shall, at the Member State's request and at its expense, form part of the Union's delegation to any hearing and the Commission shall take due account of the Member State's interest.[104]

On the question of cooperation, one may look to the experience of the EU and its Member States with WTO dispute settlement for an indication of what to expect. Although sources generally speak of a "[p]ositive experience of the practice in WTO dispute settlement,"[105] there appears to be little direct involvement of Member States, who instead exercise their influence indirectly through EU institutions.[106] Cooperation in concrete cases seems to function more on an *ad hoc* basis, than in a pre-established framework.[107] Arguably, this

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102. *Id.* art. 6.

103. *Id.* art. 9(4).

104. *Id.* art. 9(6).

105. EP Study, *supra* note 46, at 21–22; *see also* Michael Hahn & Livia Danielli, *You'll Never Walk Alone: The European Union and Its Member States in the WTO*, *in* EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW: COMMON COMMERCIAL POLICY AFTER LISBON 49, 58 (Marc Bungenberg & Christoph Herrmann eds., 2013) (stating "the practice works, by and large, well"); Pieter Jan Kuijper, *International Responsibility for EU Mixed Agreements*, *in* MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD 208, at 224 (Christophe Hillion & Panos Koutrakos eds., 2010) (speaking of "intense cooperation" in the context of "the 'Airbus/Boeing' litigation"); Allan Rosas, *International Dispute Settlement: EU Practices and Procedures*, 46 GERMAN Y.B. INT'L L. 284, 299 (2003) ("[T]he handling of WTO disputes . . . has proceeded on a pragmatic basis, with a central role for the Commission, and can by and large be counted among the EU success stories.") (footnotes omitted).

106. *See* ASJA SERDAREVIC, THE EUROPEAN UNION AS A COLLECTIVE ACTOR IN THE WORLD TRADE ORGANIZATION 198–99 (2013); Thomas Cottier, *Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European Union*, 35 COMMON MKT. L. REV. 325, 353 (1998) (remarking on the EU's participation in WTO dispute settlement both in areas of shared and exclusive EU competence); *see also* Hahn & Danielli, *supra* note 107, at 51(discussing more generally on "the Union's policy within the WTO").

107. Cottier, *supra* note 108, at 355–56; *see* JONI HELISKOSKI, MIXED AGREEMENTS AS A TECHNIQUE FOR ORGANIZING THE INTERNATIONAL RELATIONS OF THE EUROPEAN COMMUNITY AND ITS MEMBER STATES 111 (Martti Koskenniemi ed. 2001) (suggesting that proceeding on an *ad hoc* basis might actually ease cooperation). For a

"positive experience" is influenced by the fact that the EU's exclusive competence—at least for trade in goods—has been well-established for decades, unlike its competences concerning investment matters. Member States may well feel more protective with regard to their investment policies that they have carefully developed since the conclusion of the first BITs in the 1960s—and hence less willing to grant the Commission a free rein in setting out a defense strategy in investment arbitration procedures. Furthermore, the "worst" outcome in a WTO case is that a certain measure, which is found in breach of the WTO covered agreements, would have to be withdrawn or amended. Investment arbitration, on the other hand, additionally carries the substantial risk that a significant amount of compensation is awarded to a successful claimant which would then have to be paid (at least partially) by the Member State found in breach—again a sound reason for a Member State to reject handing over full control to the Commission. Thus, the usefulness of examining the EU's practices before the WTO Dispute Settlement Body in order to predict future investment arbitration practices is limited because, as one study notes, "investment arbitration is conducted differently from the more diplomatic dispute resolution in the WTO context."[108] Moreover, the claimant party (e.g., the investor) in an arbitral proceeding is not a party to the treaty that lies at the basis of the dispute (e.g., the IIA), so the claimant's interests influencing the treaty's interpretation may well be different from those of the Contracting Parties (e.g., the States) who designed the IIA. Investment arbitration could also be seen as a more adversarial "litigatory" process than the more compromise-oriented WTO Dispute Settlement Body. This is in spite of the confidentiality usually attached to pending investment cases, which takes away the pressure of the public eye, and which often allows for successful settlement negotiations after a claim has already been brought. These significant differences in character, between investment and WTO proceedings, imply one should proceed with caution when making analogies about the EU's conduct as a litigant.

In any event, if the Member State considers that its rights have been not been well-represented, it could potentially initiate proceedings against the Commission before the Court of Justice of the European Union (CJEU).[109]

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brief discussion of attempts at such a pre-established framework, see Rosas, *supra* note 107, at 298; *Heliskoski*, *supra* note 109, at 117.

108. EP Study, *supra* note 46, at 22.

109. *See infra* Section IV.

b. Violation of Fair Trial Rights

Even more fundamentally, the question arises whether, under international law, an arbitral tribunal can even render a decision on the responsibility of the Member State involved if the Commission acts as the sole respondent. If the Member State concerned is not party to the proceedings, while the vital issue to be settled concerns a pronouncement of the tribunal on the responsibility of that state, this could raise the application of the *Monetary Gold* principle set out by the International Court of Justice. The *Monetary Gold* principle states that a third state's responsibility cannot be adjudicated without that state's consent.[110] A state, like an individual, has a right to a fair trial, which includes the right to a fair hearing as well as a right to being offered an opportunity to defend itself. Arguably, this right would be denied to EU Member States, which would have to watch their rights being assessed without being able to represent themselves and put forward their own defense in the proceedings. The *Monetary Gold* principle does not apply if the third state's responsibility is merely ancillary to the case,[111] but in the present context, the conduct of the Member State would most likely be at the very center of the claim.

Considering that, in IIAs, consent is given in advance through the arbitration clause, application of the *Monetary Gold* principle may not necessarily be considered a bar to the proceedings, as the tribunal would, in any event, have jurisdiction over claims lodged under the same IIA against the Member State as well.[112] However, it would seem possible—without a clear incorporation of the Regulation's terms into the IIA, for example—that the tribunal would refuse to decide on a certain claim. This may happen unless (1) the Member State is party to the proceedings, or (2) in a case where it is

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110. "Where, as in the present case, the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it." Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K., N. Ir. and U.S.), 1954 I.C.J. 19, 33 (June 15). For an example of considering the Monetary Gold principle in the investment context, see Third Interim Award on Jurisdiction and Admissibility, Chevron Corp. v. Republic of Ecuador, No. 2009–23 (Perm. Ct. Arb. 2012), ¶¶ 4.60–4.71, *available at* http://www.italaw.com/sites/default/files/case-documents/ita0175.pdf [http://perma.cc/9UMC-AHYR] (archived Sept. 14, 2014).

111. *See infra* note 118 and accompanying text.

112. *Cf.* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia), 1996 I.C.J. 595 (July 11), at 613–14, ¶ 26, (alteration in original) (referring to "the principle according to which it should not penalize a defect in a procedural act which the applicant could easily remedy [by initiating a new application]."). *See, e.g.*, TSA Spectrum de Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/05/5, Award, ¶ 112 (Dec. 19, 2008) (refusing to reject the case on the ground of failure to observe the formalities in Article 10(3) of the BIT).

represented by the Commission, the Member State has explicitly waived its right thereto and confirmed full consent to its responsibility under the treaty being assessed.

Looking at the *Monetary Gold* principle from the EU's perspective, the question is whether the responsibility *of the EU* could even be determined if the Member State is not a party to the dispute. As stated, application of the *Monetary Gold* principle depends on whether the Member State's "legal interests . . . would form the very subject-matter of the decision."[113] Unless determining the responsibility of the Member State is "a prerequisite for the determination of the responsibility of"[114] the EU (which is not a very likely scenario), *Monetary Gold* does not preclude adjudication of the EU's responsibility. The reverse situation may also arise if, for instance, an investor challenges a Member State's measure that implements an EU directive and the investor does not initiate proceedings against the EU. The question then is whether determining the EU's responsibility is "a prerequisite for the determination of the responsibility of" the Member State, which may well be the case.[115] The advance consent to arbitration clause of IIAs solves many of these problems, but the tribunal could still find itself caught between the Commission's determination of the appropriate respondent, on the one hand, and the *Monetary Gold* principle, on the other hand. In the end, this may be more of a theoretical problem than a practical one: the above examples show that it will probably only arise if the Commission declines the opportunity to act as respondent, which is not very likely. In the scenario outlined above, for example, when a Member State allegedly wrongly implements an EU directive, the Commission is almost certain to step in based on Article 9(2)(a) of the Regulation.

4. Preliminary Conclusion on Respondent Status

The most—and perhaps too—simple answer would be that, by transferring competence over foreign investment to the EU level, Member States have implicitly also agreed in advance to the representation of their interests by the Commission, much like sub-federal entities (say, the states within the United States) are represented by the federal level. Alternatively, it could be argued that respondent status should be seen entirely as a matter of

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113. *See* Monetary Gold, *supra* note 112, at 32; *see also* Certain Phosphate Lands in Nauru (Nauru v. Austl.), 1992 I.C.J. 240, ¶¶ 49–55 (June 26); East Timor (Port. v. Austl.), 1995 I.C.J. 90, ¶¶ 23–35 (June 30).

114. Nauru, *supra* note 115, at 261.

115. *Id.*

representation, and thus detached from responsibility. In other words, the issue at hand would still be the responsibility of the Member State, except the Member State would not represent itself but let itself be represented by a delegation from the Commission.[116] Although such a view may be tenable throughout the proceedings, it can cause problems if, and when, it comes to remedies—particularly remedies other than compensation. Arbitration rules stipulate that awards are final and binding on the parties to the dispute.[117] Therefore, the payment of compensation or the performance of any other remedial measure would have to be carried out by the European Union; the Member State would not be bound by the award vis-à-vis the investor. Since investment tribunals rarely, if ever, order anything other than compensation,[118] this problem could simply be avoided through the EU honoring the award and reclaiming the amount internally from the Member State, in accordance with the rules laid down in the Regulation.[119] But in the, admittedly unlikely, event that the award requires specific measures to be taken by the Member State (e.g., change of legislation), the EU could not practically enforce these over the objections of the Member State concerned.[120]

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116. Compare HELISKOSKI, *supra* note 109, at 194–97, in the context of joint proceedings, distinguishing joint proceedings from joint responsibility: "[r]ather than an indication prejudging the question of responsibility, the mode of joint proceedings should properly be conceived as a procedural strategy." His argument is different from the one put forward here, as in such a case "[t]he materially competent respondent . . . would however always be involved." *Id.* at 197.

117. *See* 2010 UNCITRAL Rules, *supra* note 28, art. 34(2); SCC Rules of Arbitration art. 40, *available at* http://www.sccinstitute.com/filearchive/3/35894/K4_Skiljedomsregler%20eng%20ARB%20TRYCK_1_100927.pdf [http://perma.cc/G7EU-CFR2] (archived Sept. 14, 2014); ICC Rules of Arbitration art. 34(6), *available at* http://www.iccwbo.org/WorkArea/DownloadAsset.aspx?id=2147489109 (last visited Sept. 14, 2014) [http://perma.cc/TX22-5HJH] (archived Sept. 14, 2014).

118. *See* Kleinheisterkamp, *supra* note 73, at 18; *see also* Anne van Aaken, *Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 721, 734–35 (Stephan W. Schill ed., 2010).

119. For more on compensation and financial liability, *see infra* Section III.C.

120. TFEU, *supra* note 5, art. 207(6) ("The exercise of the competences conferred by this Article in the field of the common commercial policy . . . shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonization."); *see* EP Study, *supra* note 46, at 17. According to the technical summary of the Canada–EU FTA, an investment tribunal "cannot order the repeal of the host state's measure," although it "may order an award, separately or in combination, for damages or restitution of property, as well as costs." Technical Summary, *supra* note 66, at 15. This is confirmed in the Consolidated CETA Text, *supra* note 68, art. X.36. Then again, the Regulation defines "settlement" as "any agreement between the Union or a Member State, or both, of the one part, and a claimant, of the other, whereby the claimant agrees not to pursue its claims in exchange for the payment of a sum of money *or action other than the payment of money*." Regulation, *supra* note 10, art. 2(h) (emphasis added).

Finally, even if the Regulation's arrangements are incorporated into the IIA, the investor could still have the possibility to bring two separate cases—one against the EU, one against the Member State—and ask for a joinder of these cases. It would then be up to the Commission and the Member State to argue that this is not in conformity with—at least the spirit of—the arbitration clause. A similar problem would arise if an investor would bring a case against the EU, lose that case, and then try to bring the same complaint against the Member State (or vice versa). It seems, however, that the EU might have anticipated at least some of these issues. A summary of the largely finalized Canada-EU FTA's terms provides that "[t]o pursue [a] claim, an investor must file a waiver abandoning any other parallel claim it may have seeking damages related to the same measure(s)" and that "future claims are also prohibited when the . . . claim is dismissed on its merits."[121] Since in some cases it may be highly unclear who has extended a certain treatment, investors may be relieved to know that "if the . . . claim is dismissed in its early stages, such as on procedural or jurisdictional grounds, then an investor may pursue its claim elsewhere."[122]

B. *Determining Who is Responsible: Attribution of Conduct*

The second problem created by the Regulation relates to the determination of who is responsible. Under the international rules on responsibility of states and international organizations, an internationally wrongful act consists of a certain conduct (act or omission) which forms a breach of international law (here, the IIA) and which can be attributed to an actor who was under such obligation.[123] The latter element (attribution) may give rise to legal difficulties in the present context. In the case of mixed agreements, both the EU and its Member States would be under the obligation to comply with the IIA, but this does not imply that the conduct of either could automatically be extended to the other. In its explanatory

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121. *Technical Summary*, *supra* note 68, at 14; confirmed, albeit not literally, in the Consolidated CETA Text, *supra* note 68, art. X.21(1)(f)(g) and (5).

122. *Technical Summary*, *supra* note 68, at 14; confirmed in the Consolidated CETA Text, *supra* note 68, art. X.21(5).

123. *See* ARSIWA, *supra* note 71, art. 2; *Report of the International Law Commission, U.N. General Assembly*, U.N. Doc. A/66/10, GAOR 66th Sess., Supp. No. 10, at 53, (2011) [hereinafter ARIO] ("The characterization of an act of an international organization as internationally wrongful is governed by international law."). These Articles were adopted by the UN General Assembly in 2011 (Res. 66/100 of 9 December 2011) and although they have not been incorporated in any treaty, they are nevertheless largely (albeit not entirely) considered to be a codification of international customary rules on this topic. JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 182 (8th ed. 2013).

memorandum to the Proposed Regulation, the Commission put forward that attribution should not be determined by the author of the act but on the basis of the competence for the subject matter.[124] In simple terms, like parents can be held legally responsible for the acts of their children, the EU would be responsible for the conduct of its Member States, if such conduct would concern a subject matter which falls under EU competence. The problem with determining attribution based on competence is that it departs from the usual international legal approach and, more importantly, that it differs from the manner in which respondent status as well as the identity of the bearer of the duty to compensate is determined. The section below first deals with the legal value of the Commission's explanatory memorandum, followed by an examination of the general international rules on attribution as applicable in the present context.

1. Legal Value of the Explanatory Memorandum

Unlike the arrangements on respondent status, the Regulation itself does not contain any provisions on how responsibility should be determined, nor did the Proposed Regulation; the Commission's views in this respect are only outlined in the so-called "explanatory memorandum" accompanying the Proposed Regulation. Therefore, even if the IIA's arbitration clause incorporates the Regulation, it will still not cover the issue of determination of responsibility—unless the contents of the explanatory memorandum of the Proposed Regulation were also to be incorporated in to the IIA, for example as an annex.

According to the explanatory memorandum of the Proposed Regulation, responsibility should be based on competence—and not the identity of the entity that actually extended the allegedly wrongful treatment:[125]

> Should it be the case that both the European Union and the Member States are parties to an agreement and it needs to be decided who is responsible as a matter of international law for any particular action, the Commission takes the view that *this has to be decided not by the author of the act, but on the basis of the competence for the subject matter* of the international rules in question, as set down in the Treaty.[126]

This is contrary to the organizing principle in the Proposed (as well as the ultimately adopted) Regulation to determine both

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124. *Infra* note 131 and accompanying text.

125. Compare the use of the term "treatment" in Proposed Regulation, *supra* note 9, at 4, with "conduct" as seen in ARIO, *supra* note 125. Although there are some differences between the two terms, they essentially rest on the same concept.

126. Proposed Regulation, *supra* note 9, at 4.

respondent status and compensation (though with some adjustments). To support its view, the Commission relies on Opinion 1/91 of the CJEU, which stated in the context of the Agreement on the European Economic Area (EEA) that:

> The expression 'Contracting Parties' is defined in Article 2(c) of the [EEA] agreement. As far as the Community and its Member States are concerned, it covers the Community and the Member States, or the Community, or the Member States, depending on the case. *Which of the three possibilities is to be chosen is to be deduced in each case from the relevant provisions of the agreement and from the respective competences of the Community and the Member States* as they follow from the EEC Treaty and the ECSC Treaty.[127]

However, on plain reading, it appears that the CJEU opinion—unlike the Commission proposal—links respondent status with responsibility, and discusses "Contracting Parties" either in the "respondent" sense or in both the "respondent" and "responsibility" sense.

Setting aside the persuasiveness or otherwise of the Commission's arguments, it remains an open question to what extent the contents of the explanatory memorandum would be taken into account by an arbitral tribunal. While, strictly speaking, it cannot qualify as *travaux préparatoires*, since it was not created during the preparation of an IIA, it would most likely be taken into account—if at all—as a supplementary means of interpretation.[128] In accordance with Article 32 of the 1986 VCLT,

> Recourse may be had to supplementary means of interpretation ... in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.[129]

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127. Opinion 1/91, Community v. Countries of the European Free Trade Association, 1991 E.C.R. I–06099, ¶ 33 (emphasis added) (delivering the Opinion pursuant to the second subparagraph of Article 228(1) of the Treaty–Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area).

128. *See* Yves le Bouthillier, *Article 32 (1986), in* 1 THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY 864, at 865, ¶ 4 (Olivier Corten & Pierre Klein eds., 2011).

129. Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations, Mar. 20, 1986, 25 I.L.M. 543. Although the Convention is not in force, this provision arguably reflects customary international law, since, as noted by the ILC commentary to the draft convention, "articles 31, 32 and 33 . . . reproduce unchanged articles 31, 32 and 33 of the [1969] Vienna Convention." *See Report of the International Law Commission to the*

But if there is no provision at all on determination of responsibility, it seems quite a stretch of the imagination to conclude that any one of the three scenarios outlined above—confirmation, ambiguous meaning, or manifestly absurd result—could be reached by an arbitral tribunal. It is more likely that in the absence of *lex specialis* laid down in the agreement, the tribunal would simply look to the general rules on the responsibility of international organizations.

2. Applying General Rules to a Specific Context

Interestingly enough, there is some doubt as to what exactly the general rules on the responsibility of international organizations entail. Different international adjudicatory institutions and the International Law Commission (ILC) have displayed different approaches to determining the responsibility of the EU and/or its Member States. As the case will ultimately turn on which approach an arbitral tribunal finds more convincing: the conduct-based, or the competence-based determination of responsibility. A brief overview of each is given below.

a. The Conduct-based Approach

The responsibility of the EU and/or its Member States can arise with conduct that may be categorized as follows: (1) conduct of EU organs themselves, (2) conduct of Member States acting pursuant to an EU measure, and (3) conduct of Member States acting on their own accord.[130] The first scenario is quite clear (the EU is responsible for the conduct of its own organs), and will therefore not be further discussed,[131] while the third scenario is only of concern when the Member State's conduct has an impact in an area falling under EU competence. The analysis below will thus focus on the second scenario.

Following in the footsteps of the ILC's Articles on State Responsibility, the ILC's Draft Articles on the Responsibility of International Organizations define an internationally wrongful act as "conduct consisting of an action or omission [which] (a) is attributable to that organization under international law and (b) constitutes a breach of an international obligation of that organization."[132]

General Assembly, 37 U.N. GAOR Supp. (No. 10), UN Doc. A/37/10, *reprinted in* [1982] 2(2) Y.B. Int'l L. Comm'n 17, at 41, UN Doc. A/CN.4/SER.A/1982/Add.l (Part 2) (providing commentary on the articles of the Vienna Convention); *see also* le Bouthillier, *supra* note 130, at 864–65.

130. For a somewhat similar categorization, see Eva Steinberger, *The WTO Treaty as a Mixed Agreement: Problems with the EC's and the EC Member States' Membership of the WTO*, 17 EUR. J. INT'L L. 837, 850 (2006).

131. *See* Proposed Regulation, *supra* note 9, art. 4.

132. ARIO, *supra* note 125, art. 4.

The following conduct is attributable to the international organization in question: acts or omissions of its organs or agents (Article 6), that of organs or agents of other states/organizations placed at its disposal (Article 7), and conduct acknowledged and adopted by it (Article 9).[133] While this may seem fairly straightforward at first sight, it is complicated by the fact that different bodies—most notably the ECtHR and various WTO panels—have taken different views as to whether certain types of conduct are attributable to the EU or to one of its Member States when a certain EU measure is carried out or implemented by the Member States.

i. Human Rights Cases

In general, the ECtHR has shown a greater tendency to attribute such conduct to the Member State. In *Cantoni*, it held that the fact that a piece of French legislation "is based almost word for word on Community Directive 65/65 . . . does not remove it from the ambit of . . . the Convention."[134] Similarly, in the *Matthews* case, the Court decided that "[t]he Convention does not exclude the transfer of competences to international organizations provided that Convention rights continue to be 'secured'. Member States' responsibility therefore continues even after such a transfer."[135] Even where there was no margin of appreciation or discretion for the Member State—as in *Bosphorus*,[136] which concerned an Irish measure taken pursuant to an EU sanctions regulation—the Court still held that "a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations."[137]

In sum, the ECtHR has been more inclined to attribute implementing conduct to the Member States. It is a commonly held

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133. *Id.* at 12 (addressing attribution under certain circumstances which are not relevant for this article's analysis).

134. Cantoni v. France, 1996-V Eur. Ct. H.R. 1614, 1628, ¶ 32; *see also* ECtHR, *Factsheet: Case-law concerning the EU* [hereinafter *Factsheet*] http://www.echr.coe.int/Documents/FS_European_Union_ENG.pdf (last visited Sept. 14, 2014) [http://perma.cc/5W3N-UPKY] (archived Sept. 14, 2014) (referring to the decision in Cantoni v. France).

135. Matthews v. The United Kingdom, 1999–I Eur. Ct. H.R. 251, 265, ¶ 32; Convention for the Protection of Human Rights and Fundamental Freedoms, art. I, Nov. 4, 1950, 213 U.N.T.S. 221 (referring to 'securing': "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in . . . this Convention.")

136. Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, 2005-VI Eur. Ct. H.R. 107, ¶ 153. *See also* ECtHR, *Factsheet*, *supra* note 136, at 3 (noting that "[f]or the first time [the Court] agreed to examine on the merits a complaint concerning measures taken to give effect to Community law where the State had no margin of appreciation").

137. Bosphorus, *supra* note 138, at 157, ¶ 153.

view that this approach is mainly due to the ECtHR's lack of jurisdiction so far over the EU[138] and "driven by the mission of the Court to provide effective human rights protection."[139] In other words, if the ECtHR had not held the Member States responsible, the violation of the victims' rights would have gone unpunished as the EU was not a party to the European Convention on Human Rights, hence not bound by its terms and could not be sued before the Court.

However, it is interesting to note that according to the recently finalized EU accession agreement to the European Convention on Human Rights, "an act, measure or omission of organs of a Member State of the European Union or of persons acting on its behalf shall be attributed to that State, even if such act, measure, or omission occurs when the State implements the law of the European Union."[140] At the same time, this does not exclude the participation of the EU in a case alongside the Member State, through the so-called co-respondent mechanism.[141] In other words, although the EU will no longer fall outside the ECtHR's jurisdiction, the same approach is maintained as before—the only difference being that the EU can be "added" to the proceedings, *in addition to* the Member State. A possible explanation for this approach could be that EU rules most often do not directly provide treatment for individuals and hence cannot directly breach their rights. The risk of breaching human rights law is greater in the case of Member States implementing EU rules. Furthermore, the goal of stipulating that the EU should be added as a respondent in addition to the Member State might serve to avoid a situation in which valuable time is lost by suing the wrong respondent; drafters might have desired to prevent a situation in

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138. *See, e.g.*, Frank Hoffmeister, *Litigating against the European Union and Its Member States–Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?*, 21 EUR. J. INT'L L. 723, 735, 738–39 (2010) ("Whereas attribution of Member States' conduct to the Union would lead to the undesired result that the case would have to be declared inadmissible, attribution to the Member State affirms the jurisdiction of the Court."); Kuijper, *supra* note 107, at 211.

139. Hoffmeister, *supra* note 140, at 735.

140. Draft Revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, *Fifth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, Final Report to the CDDH*, June 10, 2013, Appendix I, art. 1(4), *available at* http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008rev2_EN.pdf (last visited Sept. 14, 2014) [http://perma.cc/S23A-43SY] (archived Sept. 14, 2014).

141. *Id.*; *see, e.g.*, Jean Paul Jacqué, *The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms*, 48 COMMON MKT. L. REV. 995, 1007, 1012–16 (2011) (discussing the co-respondent based on early drafts of the accession agreement); Tobias Lock, *Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order*, 48 COMMON MKT. L. REV. 1025, 1038–45 (2011).

which individuals seeking redress for human rights violations would be forced to exhaust multiple local remedies systems.

ii. Economic Law Cases

Unlike the ECtHR, WTO panels have been receptive to the idea that Member States can act as organs of the EU. The EU has long been involved in GATT, and became—together with its Member States—an original member of the WTO when the latter was established in 1995.[142] The new WTO agreements, covering not only trade in goods, but also trade in services and intellectual property rights,[143] extended into areas which—the CJEU determined—did not fall under exclusive EU competence, but rather shared competence between the EU and its Member States.[144] Subsequent amendments to the EU founding treaties ensured that EU exclusive competence now covers all WTO agreements.[145] The mixed treaty problem in the context of foreign investment hence does not play, or at least does not play strongly, in the trade context. In sharp contrast to the ECtHR, the EU not only participates, but also plays a prominent role in the WTO dispute settlement system. Although some states—particularly the United States—have tried to sue Member States and the EU separately, no single EU Member State has defended itself on its own since the inception of the WTO.[146] On the contrary, the EU *always*

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142. *See* GATT, *supra* note 11; WTO Agreement, *supra* note 11, art. XI(1) (listing the EU (then EC) as an original member in WTO Agreement art. XI(1)).

143. Annexes 1A, 1B and 1C to the WTO Agreement are respectively the multilateral agreements on trade in goods, services and intellectual property. *See* WTO Agreement, *supra* note 11; GATS, *supra* note 40; TRIPS, *supra* note 40; General Agreement on Tariffs and Trade, Apr. 15, 1994, 33 I.L.M. 1154.

144. *See* Opinion 1/94, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property–Article 228(6) of the EC Treaty, 1994 E.C.R. I–5389 (holding the Community and its Member States are jointly competent to conclude GATS and TRIPs); *see also* Steinberger, *supra* note 132, at 844–55; Hahn & Danielli, *supra* note 107, at 53.

145. *See, e.g.*, Hahn & Danielli, *supra* note 107, at 50, 61.

146. *Id.* at 59. Even cases where EU Member States have been respondents *alongside the EU* are rare. There are only two such cases which led to a Panel (and Appellate Body) report: the *LAN* case, and *European Communities—Measures Affecting Trade in Large Civil Aircraft*. *See* Panel Report, *European Communities—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316 (June 30, 2010); Panel Report, *European Communities—Customs Classification of Certain Computer Equipment*, WT/DS62/R, WT/DS67/R, WT/DS68/R (Feb. 5, 1998). Then again, the possibility is not excluded. *See* Panel Report, *European Communities—Tariff Treatment of Certain Information Technology Products*, ¶ 7.86, WT/DS375/R, WT/DS376/R, WT/DS377/R (Aug. 16, 2010). Finally, it is worth noting that EU Member States have also not been complainants in their own right before WTO panels. *See* Piet Eeckhout, *The EU and its Member States in the WTO–Issues of Responsibility*, *in* REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 449, 453 (Lorand Bartels & Federico Ortino eds., 2006).

acts as respondent in WTO cases, whether on its own or together with Member States.

EU measures enacted through Member States have been challenged a number of times before the WTO, raising issues of attribution and responsibility. A notable instance was the *EC – Computer Equipment* (LAN) case, which the United States initiated against not only the European Community, but also the UK and Ireland, regarding tariff treatment of certain computer equipment by their customs authorities.[147] The WTO panel report focused its examination "on whether customs authorities in the European Communities, *including those located in* Ireland and the United Kingdom, have or have not deviated from the obligations assumed," but the conclusions and the recommendations were addressed solely to the EU.[148] In the subsequent *EC – Trademarks and Geographical Indications* case, the panel went even a step further, accepting the EU's submission "that Community laws are generally not executed through authorities at Community level but rather through recourse to the authorities of its Member States which, in such a situation, 'act *de facto* as organs of the Community, for which the Community would be responsible under WTO law and international law in general'."[149] Similarly, in *EC – Selected Customs Matters*, the panel concluded that "the authorities in the Member States . . . act as organs of the European Communities when they review and correct administrative action taken pursuant to EC customs law."[150] In the latter two cases, however, the responsibility of the Member States themselves was actually not at issue, only whether the conduct of their organs could be attributed to the EU. This might explain why the panel reverted to the reasoning of the *LAN* case in the most recent *EC – IT Products* case, brought by the United States, Japan, and Taiwan against not only the EC, but all its Member States.[151] Accordingly, it did "not consider it necessary to determine *at the outset* whether to rule on the

147. Panel Report, *European Communities—Customs Classification of Certain Computer Equipment*, ¶¶ 4.9–4.15, 8.15–8.17, WT/DS62/R, WT/DS67/R, WT/DS68/R (Feb. 5, 1998) (discussing the status of defending parties in the LAN case).

148. *Id.* ¶ 8.16 (emphasis added); *see also* Kuijper, *supra* note 107, at 214 n.32 (asserting that the Appellate Body Report did not touch upon this issue "in an authoritative manner").

149. Panel Report, *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, ¶ 7.98, WT/DS174/R (Mar. 15, 2005) (footnote omitted).

150. Panel Report, *European Communities—Selected Customs Matters*, ¶ 7.553, WT/DS315/R (June 16, 2006). That said, in this case, the responsibility of Member States was not at issue, only that of the EU. *See id.* ¶ 7.548.

151. *See generally* Panel Report, *European Communities and its Member States—Tariff Treatment of Certain Information Technology Products*, ¶¶ 6.10–6.12, 7.80–7.90, 8.2, WT/DS375/R, WT/DS376/R, WT/DS377/R (Aug. 16, 2010) (providing general comments of the complainant, European Communities and the panel, the status of the parties and the panel's findings).

claims directed against EC Member States,"[152] and came eventually to the following conclusion:

> [I]f one or more EC member States were found to have applied WTO inconsistent measures, be they enacted by the States themselves or by the European Communities, it could be appropriate to find that the member States have acted inconsistently with their WTO obligations. However, we note that the complainants have framed their claims as challenging the European Communities measures 'as such' and have confirmed to the Panel that they are not making claims with respect to specific applications of those measures by national customs authorities of any member States. Under the circumstances, the Panel considers that it is not required to make, and does not make, findings with respect to member States' application of the European Communities' measures that were challenged 'as such' in this dispute.[153]

Thus, the panel ultimately sidestepped the question of Member States' responsibility by focusing on the nature of the claim.

All in all, WTO panels have shown a good deal of pragmatism on the issue of attributing Member States' conduct to the EU. They have been receptive to the idea of Member State authorities acting as *de facto* organs of the EU, but at the same time they also did not exclude the possibility of joint responsibility, even if they have not applied it in the cases at hand.

b. The Competence-based Approach

The tying of responsibility to competence rather than treatment or conduct arguably results in a much more straightforward delineation of responsibility. In areas where the EU has exclusive competence (such as over foreign direct investment), only the EU can be found responsible—regardless of what the Member State does. In areas of shared competence (portfolio investments might ultimately fall into this category), the determination is similarly free of complications. Where the EU has shared competence with the Member States, the latter may only "exercise their competence to the extent that the Union has not exercised its competence."[154] Therefore, *by definition*, the issuing of a regulation, directive, or decision (which is what might violate the IIA and thus trigger dispute settlement mechanisms) is exactly what determines in such cases that something falls under EU competence. In neither of these scenarios does the arbitral tribunal need to examine whether the Member State acted on its own accord or pursuant to an EU measure. The arbitral tribunal

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152. *Id.* ¶ 7.89.

153. *Id.* ¶ 8.2; *see also id.* at ¶ 7.106 (noting that the DSU does not distinguish between challenging measures "as such" and "as applied").

154. TFEU, *supra* note 5, art. 2(2).

furthermore need not consider how a Member State implemented that measure, or whether the implementation was even in conformity with EU law.[155]

That said, relying solely on competence to determine responsibility may also lead to awkward results, as illustrated in the following hypothetical: let us assume that the EU issues a directive, which does not breach the IIA. One of the Member States implements it in a way that does violate the IIA, while it could have been implemented in a non-violating way. For example, its aim could have been reached through other means. The EU will be found responsible by virtue of its competence, even though it had no influence whatsoever on the implementation and *itself* did not breach the IIA. At most the EU could be blamed for not having prevented this through an infringement procedure—but this would be a violation through omission, which is not the same as having committed the breach oneself. Also, such an infringement procedure against a Member State can only be brought *post-factum*, after the Member State has already committed a violation. In other words, while there is a breach of the IIA, this would not be attributable to the EU under a conduct-based approach. But since in this scenario, competence replaces conduct as the test for attribution, the violation will be "attributable" to the EU. Steinberger refers to this as a question of simple "risk allocation": the EU must bear the necessary risk accompanying the competence.[156]

While most actual cases involving the EU seem to focus on the attribution of conduct, there is also support for a competence-based approach in international jurisprudence. Interestingly enough, these cases provide evidence not so much through the pronouncements of the judicial decisions themselves, but rather through the choice of respondents by the claimants. In a number of cases, applicants brought complaints against the EU with regard to Member States' conduct when such conduct was *not* taken pursuant to EU law. In these cases, the EU did not object to the role of respondent, nor did the respective adjudicatory bodies overrule the applicants' choice.

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155. In addition to judicial economy, this has the added benefit of not interfering with the autonomy of the EU legal order (and the CJEU's exclusive power to adjudicate on such matters, in order to protect that autonomy), which is a concern occasionally raised in discussions on investor-state dispute settlement in extra-EU IIAs. *See, e.g.*, Reinisch, *supra* note 46, at 34–38. To preserve that autonomy, TFEU Article 344 mandates that EU "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein." TFEU, *supra* note 5, art. 344; *see also* Opinion 1/91, *supra* note 129; *see* Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶¶ 4.151–166 (Nov. 30, 2012) (proclaiming that this obligation, however, is only placed on EU Member States, with no corresponding obligation on *investors*).

156. *See* Steinberger, *supra* note 132, at 854.

Perhaps the most notable example is the *EC–Asbestos* case brought before a WTO panel, which concerned a French ban on asbestos, an entirely domestic measure that nonetheless affected international trade.[157] As trade in goods falls under exclusive EU competence, the measure was defended by the EU acting as respondent—France did not even have a role as co-respondent.[158] Similarly, in *EC–Biotech*, the EU acted as the sole respondent defending a range of restrictions on the import of genetically modified products, while only some of these measures originated from the EU itself and the complainants had brought their claim against several individual Member States in addition to the EU.[159] Examples are also not limited to WTO case law: the *Swordfish* case was initiated by Chile under the UN Convention on the Law of the Sea against the EU for the conduct of Spanish fishing vessels, as the EU has exclusive competence over "the conservation of maritime resources."[160]

3. Preliminary Conclusion on Attribution

Why did the EU choose to defend these measures instead of letting the Member State produce its own defense? The answer lies as much in the internal power struggles of the EU as in the "external" issue of responsibility under international law. As pointed out in the WTO context, "the [EU] is eager to take up responsibility," and while this may appear counterintuitive, the "main reason for the [EU]'s

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157. *See* Panel Report, *European Communities–Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/R (Sept. 18, 2000) [Hereinafter EC–*Asbestos*] (reporting on a measure between Canada and European Communities regarding France's ban on asbestos); Appellate Body Report, *European Communities–Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R (Mar. 12, 2001) (reporting on Canada's appeal of certain issues in the Panel Report in *European Communities—Measures Affecting Asbestos and Products Containing Asbestos*).

158. *See* Hoffmeister, *supra* note 140, at 737; EC–*Asbestos*, *supra* note 159, ¶ 1.1.

159. *See* Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R (Sept. 29, 2006) (noting that complainants were the US, Canada and Argentina; respondents were (in addition to the EU) Austria, Germany, France, Italy, Greece and Luxembourg).

160. *See* Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. Eur. Community), Case No. 7, Order of Dec. 20, 2000, ITLOS, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_7/Ord.2000.3.E.pdf [http://perma.cc/KLL5-W77E] (archived Sept. 14, 2014) (noting the Order of the case); Hoffmeister, *supra* note 140, at 738. The case never came to a judgment, as it was ultimately settled. *See* Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. E.U.), Case No. 7, Order of Dec. 16, 2009, ITLOS, http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_7/Ord.2009.1-16.12.09.E.pdf [http://perma.cc/EQ2F-2J3Z] (archived Sept. 14, 2014) (explaining settlement of case).

eagerness may well be the European Commission's quest for integration and for international confirmation and acceptance of the [EU] as such."[161] The same (or similar) dynamics can be detected in the case of investment, as well. With regard to trade, "[t]he Commission vigorously battled to have the [European] Court of Justice say that the [EU] had sole competence in WTO matters,"[162] and now the same kind of approach can be seen in the Commission's explanatory memorandum to the Proposed Regulation, in which it claims exclusive competence over all investment-related matters.

There is a major difference, however, between trade and investment law. As described in the WTO Dispute Settlement Understanding:

> The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. . . . In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement.[163]

In contrast, the goal of investment arbitration is first and foremost to secure compensation for the individual investor when the host state violates the terms of an IIA. The financial implications are significant, to say the least (awards often reach tens or even hundreds of millions of dollars), which is exactly what motivated the Commission in proposing the draft Regulation.[164] In other words, the Commission may be eager to act as respondent. However, the Commission may also be equally eager to recover (at least part of) the award from the Member State, where the treatment in question was (at least partly) accorded by the Member State.

In sum, it appears difficult to distil a uniform approach or general rule concerning the basis of determination of responsibility of international organizations from the case law. Unless arbitral tribunals decide to develop their own approach, there is a fair chance that the WTO case law will be seen as more instructive than ECtHR jurisprudence, if only because the types of cases are generally more similar as they relate to economic matters. Even so, it remains to be

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161. *See* Eeckhout, *supra* note 148, at 456 (noting the EU's eagerness to take responsibility and conclusions derived from this initiative).

162. *Id.*

163. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 (quoting the rules and procedures on settlement of disputes).

164. *See* Proposed Regulation, *supra* note 9 (highlighting the title and explanatory memorandum of the Proposed Regulation).

seen to what extent the WTO's pragmatism could translate into the different system of investment arbitration.

C. *Compliance with the Arbitral Award*

The third and final problem that had been raised by the Regulation relates to the final stage of dispute settlement, namely compliance with the arbitral award. Such award could either entail the tribunal's "stamp of approval" on a settlement reached by the parties, or it could be a decision holding the respondent responsible for breach of the IIA. In the latter case, two possible remedies could be prescribed: the payment of compensation or a specific performance (withdrawal of a measure or execution of a contract, for example). All of this could be straightforwardly implemented in case the respondent was the Member State which extended the violatory treatment. However, under the Proposed Regulation, as well as the ultimately adopted Regulation, the Commission would most likely be the sole respondent in the majority of cases, while implementation would have to be executed (at least partly) by the Member States. Under such circumstances, smooth implementation is likely to be much less self-evident than the Proposed Regulation seemed to assume. Furthermore, the situation had to be addressed in which an arbitral award was not voluntarily complied with and the investor had to resort to judicial enforcement. Some of these questions have been tackled under the Regulation, which was formulated following the "trilogue" among the Commission, the Council, and the Parliament.

1. Settlement by the Parties

In international law, as in national law, it is possible that the parties in dispute reach a mutually acceptable agreement mid-dispute. In such cases, it often does not make sense to continue with the litigation, so the terms of agreement are set in writing and the adjudicatory body (in the present case, the arbitral tribunal) may be asked to rubber-stamp them so that they obtain the legal validity of a final award.

When it comes to reaching a settlement, the Proposed Regulation distinguished between two situations: "settlement of disputes concerning treatment afforded exclusively by the Union" and that extended (fully or in part) by a Member State.[165] Whereas the

165. *See* Proposed Regulation, *supra* note 9, arts. 12–13 (distinguishing between dispute settlement "concerning treatment afforded by the Union" and those "concerning treatment afforded by the Member State).

provisions regarding the former case remained practically intact under the Regulation, provisions with regard to the settlement of disputes concerning treatment afforded by a Member State have been radically amended. These provisions circumscribe the Commission's powers and elaborating on the grounds of financial responsibility incurred.

In case of settlement of disputes concerning treatment afforded by the Union, the Commission has the discretion to decide whether such settlement "would be in the interests of the Union," in which case it may adopt an implementing act to this extent in accordance with the examination procedure of Regulation 182/2011.[166] This seems logical: when the EU has breached its obligations, the EU can accept a settlement. However, problems may arise in practice if such settlement would involve "action other than the payment of a monetary sum."[167] In such cases, cooperation of the Member State(s) can be required who may not have agreed with the decision to settle.[168]

Even more questions might arise with respect to the second situation, i.e., in case of settlement of disputes concerning treatment afforded (in full or in part) by a Member State. Here the Regulation provides that:

> Where the Union is the respondent in a dispute concerning treatment afforded, whether fully or in part, by a Member State, and the Commission considers that the settlement of the dispute would be in the financial interests of the Union, the Commission shall first consult with the Member State concerned pursuant to Article 6. The Member State may also initiate such consultations with the Commission.[169]

Hence, although the Commission must consult with the Member State, it does not have to follow the opinion of the Member State in account when deciding upon the settlement. If the Commission and the Member State concerned agree to settle the dispute (in accordance with the terms negotiated by the Commission), the Member State has to "endeavour to enter into an arrangement with the Commission setting out the necessary elements for the negotiation and implementation of the settlement."[170] In other words, the burden falls upon the Member State to get agreement from the

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166. *See* Regulation, *supra* note 10, art. 13(1) (discussing discretion given to the Commission when settlement of a dispute is exclusively afforded by the Union).

167. *Id.* art. 13(2) (quoting the Final Regulation).

168. This situation will be examined further below, in the section on implementation of remedies. *See infra* notes 190–203 and accompanying text.

169. Regulation, *supra* note 10, art. 14(1) (referring to the "financial interests" of the EU). *But see* Proposed Regulation, *supra* note 9, art. 13(1) (referring merely to the "interests of the Union").

170. Regulation, *supra* note 10, art. 14(2) (quoting the Final Regulation).

Commission, even though the ultimate financial consequences of the settlement might have to be shouldered by the State.

In the same vein, if the Member State has confirmed to the Commission its intention not to act as a respondent, the Commission may opt for the settlement of the dispute, following consultations with the Member State concerned. Such a course of action rests on the provision that "the settlement is in the financial interests" of the EU which is to be indicated by "a full and balanced factual analysis and legal reasoning."[171]

The major amendment under the Regulation has been deleting the provision according to which "[i]n the event that the Member State does not consent to settle the dispute, the Commission may settle the dispute where *overriding* interests of the Union so require."[172] This is a welcome development, especially in light of the fact that the original draft of the Proposed Regulation had no definition of what these "overriding interests" could entail.[173] Thus, the Proposed Regulation gave the Commission a significant margin of appreciation on whether to settle or not, and under which conditions. However, it must be noted that this was mitigated to an extent by the so-called examination procedure that needed to be followed in order for the Commission's decision to settle to be approved.[174]

In contrast, according to the Regulation, the decision on the settlement of disputes concerning treatment afforded (in full or in part) by a Member State is largely dependent on the subject that would incur the financial responsibility. More specifically, the following scenarios may come into play:

(i) if a Member State alone would bear financial responsibility, only that Member State may settle the dispute;[175]

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171. *Id.* art. 14(4) (quoting the Final Regulation).

172. Proposed Regulation, *supra* note 9, art. 13(3) (emphasis added) (quoting provision deleted from the Final Regulation).

173. This was later rectified through an amendment by the European Parliament defining overriding interests. *See Amendments Adopted by the European Parliament on 23 May 2013 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*, amend. 19, COM (2012) 0335 final (May 23, 2013), *available at* http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-219 [http://perma.cc/TQ4J-EV5] (archived Sept. 14, 2014) (defining 'overriding interests' in Amendment 19).

174. *See* Proposed Regulation, *supra* note 9, art. 13(4) ("[T]he terms of the settlement agreed shall be approved in accordance with the examination procedure referred to in Article 20(3).").

175. *See* Regulation, *supra* note 10, art. 14(3) (emphasizing that the party bearing financial responsibility holds settlement authority).

(ii) if the Commission has taken the decision that the EU is to act as a respondent pursuant to Article 9(2) and the financial responsibility is exclusively to be borne by the EU, the Commission may decide to settle the dispute;[176]

(iii) if the Commission has taken the decision that the EU is to act as respondent pursuant to Article 9(2) and the financial responsibility is to be borne by both the EU and a Member State, "the Commission may not settle the dispute without the agreement of the Member State concerned" while the latter "may submit a full analysis of the impact of the proposed settlement on its financial interests."[177] In case the Member State opposes the settlement, "the Commission may nonetheless decide to settle provided that such settlement does not have any financial or budgetary implications for the Member State concerned on the basis of a full and balanced factual analysis and legal reasoning, taking account of the Member State analysis and demonstrating the financial interests of the Union and of the Member State concerned."[178] In essence, this means that the Commission may choose to settle the dispute without the Member State's agreement if it assumes the burden of the *entire* settlement amount.

Importantly, the Regulation provides that the terms of settlement under Article 14(4)-(6) shall *not* include actions by the "Member State concerned other than the payment of a monetary sum" (namely, a specific performance such as withdrawal of a measure or execution of a contract).[179]

Finally, the decision to settle (taken either by the Commission or the Member State concerned) is subject to approval by means of an implementing act in accordance with the examination procedure, which implies that a committee composed of Member State representatives is established to deliver a binding opinion by weighed majority.[180] This ensures that all Member States (not merely those involved in the dispute) have a say in a settlement. The fact that this opinion is delivered by weighed majority also implies that the opinion of large Member States may prevail over that of smaller ones, even where only the latter are affected by the settlement.

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176. *See id.* art. 14(5) (highlighting other scenarios of settlement authority).

177. See *id.* art. 14(6) (highlighting other scenarios of settlement authority).

178. *Id.*

179. *See id.* art. 14(7) (limiting actions to payment of monetary sums).

180. *See id.* art. 14(8) (referring to art. 22(3), which in turn refers to the examination procedure as detailed in Regulation (EU) No. 182/2011 of the European Parliament and of the Council of 16 February 2011 Laying Down the Rules and General Principles Concerning Mechanisms for Control by Member States of the Commission's Exercise of Implementing Powers, 2011 O.J. (L 55) 13, art. 5).

A welcome move is the removal of the Proposed Regulation's provision that permitted settlement of the dispute by the Commission on the basis of the EU's ambiguous "overriding interests" in the case of non-consenting Member States. The retention of this provision would have afforded the Commission far-reaching discretion. Rather, making the decision to settle dependent on the subject that would bear the financial responsibility strikes a fair balance, taking into account the sovereign rights and the right of defense of the Member States concerned. Moreover, the need to avoid undue interference with the Members States' powers has been addressed through rendering as a condition the cooperation between the Commission and the Member States, as well as the provision of sufficient and rational justification for any decision made by the Commission.

In cases where the Union is the respondent and a Member State wishes to settle, the Regulation distinguishes between disputes regarding treatment afforded *exclusively* by the Member State and those regarding treatment afforded *in part* by the Member State. This is different from the Proposed Regulation, which only provided the Member State with the possibility to settle when the treatment was exclusively afforded by that Member State.[181]

When it comes to a dispute concerning treatment exclusively afforded by a Member State, that Member State may settle the dispute subject to the following conditions:

> (a) [it] accepts any potential financial responsibility arising from the settlement;
>
> (b) any settlement arrangement is enforceable only against the Member State; and
>
> (c) the terms of the settlement are compatible with the law of the Union.[182]

Even in the event of such a Member State-induced settlement, however, the Commission remains in control, since the Member State must submit to the Commission any draft settlement arrangement for approval.[183] But if the draft settlement is approved, "the Commission

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181. *See* Proposed Regulation, *supra* note 9, art. 14(1) (highlighting changed language from Proposed Regulation).

182. Regulation, *supra* note 10, art. 15(1) (quoting the Final Regulation on conditions of settlement); *see also* Proposed Regulation, supra note 9, art. 14(1)(d) (making any such settlement conditional on there being "no overriding interest of the Union against the settlement"). *But see* Regulation, *supra* note 10; Proposed Regulation, *supra* note 9; *supra* text accompanying note 175 (illustrating removal of references to "overriding interests"); *supra* text accompanying notes 173–75.

183. *See* Regulation, *supra* note 10, art. 15(3) ("[T]he Member State shall notify the Commission of the draft settlement arrangement"); *see also supra* text accompanying notes 173–75.

shall take all necessary steps to make the settlement arrangements effective."[184]

In the case of disputes arising from treatment afforded in part by a Member State, if the Member State considers that the settlement would be in its financial interest, it shall consult with the Commission first.[185] "If the Commission and the Member State concerned agree to settle the dispute" (in accordance with the terms negotiated by the Member State), the Member State has to "endeavour to enter into an arrangement with the Commission setting out the necessary elements for the negotiation and implementation of the settlement."[186] On the contrary, when the Commission opposes the settlement, it may decide to refuse to settle on the grounds of "a full and balanced factual analysis and legal reasoning" provided to Member States by means of an implementing act in accordance with the examination procedure of Regulation 182/2011.[187]

2. Implementation of Remedies

Two main remedies exist in international law, as applied in the context of investor-state arbitration: payment of compensation and mandatory performance. The latter, although long put forward as the preferred remedy under international law as it is intended to recreate the situation which would have existed had the wrongful act not taken place,[188] is rarely prescribed by arbitral tribunals. The most

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184. Regulation, *supra* note 10, art. 15(3).

185. *See id.* art. 16(1) (noting that the Member State must consult the Commission first if the Member State believes the settlement would be in its financial interest).

186. *Id.* art. 16(2).

187. *See id.* art. 16(3) (denoting the steps the Commission must take in refusing to consent to the settlement).

188. See Factory at Chorzów (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13), which contains the following seminal passage on restitution in international law:

> The essential principle contained in the notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

See generally ARSIWA, *supra* note 71, arts. 34–35 (discussing State's responsibility of reparation and restitution).

common remedy—and hence the one to be expected in investor-EU arbitrations—is compensation. The sections below deal with compensation and performance both in case of settlement as well as fully-litigated disputes, *where the EU acted as respondent.*

a. Payment of Compensation

i. (External) Payment to the Investor

From the investor's perspective, the payment of compensation—at least as a matter of law—is clear-cut. In case there is disagreement between the Union and the Member State regarding the allocation of financial responsibility, the investor entitled to compensation will be paid by the Commission from the budget of the Union. In the words of the Regulation:

> The Commission should consult closely with the Member State concerned in order to reach agreement on the apportionment of financial responsibility. Where the Commission determines that a Member State is responsible, and the Member State does not accept that determination, the Commission should pay the award, but should also address a decision to the Member State requesting it to provide the amounts concerned to the budget of the Union, together with applicable interest. The interest payable should be that set down pursuant to Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council.[189]

This pragmatism is also reflected in the Regulation's relevant provisions on the payment procedure, which are remarkably straightforward. In cases where the EU has acted as respondent, the investor may simply "present a request to the Commission for payment" and the latter will settle the bill—unless the Member State already accepted full financial responsibility at an earlier stage, in which case the Member State will pay.[190]

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189. Regulation, *supra* note 10, ¶ 20 (quoting language from the Final Regulation). The softer language of the text here ('should' rather than 'shall') is explained by the fact that the quote is from one of the recitals of the Regulation, and not the articles themselves.

190. *See* Regulation, *supra* note 10, art. 17 (discussing final payments of dispute where Union acts as respondent). The Member State always has the possibility of accepting "any potential financial responsibility arising from the arbitration" in cases where the EU acts as respondent. The Member State may then enter into arrangements with the Commission "dealing with, inter alia, (a) mechanisms for the periodic payment of costs arising from the arbitration; (b) mechanisms for the payment of any award made against the Union." *Id.* art. 12. It is not explicitly addressed in the regulation what happens if the Member State decides not to honor its previous commitment accepting financial liability. However, in that case, it is likely that the procedure outlined in Article 19 of the Regulation would apply by analogy. In other words, the Commission would pay the award to the investor, and it would adopt a

ii. Internal Allocation of Costs

While outwardly, the Commission—if it has acted as respondent—will almost always be the one paying the compensation, the same is not true internally. The Regulation lays down the following apportionment criteria in Article 3(1) for the internal allocation of costs arising from dispute settlement:

> (a) the Union shall bear the financial responsibility arising from treatment afforded by the institutions, bodies 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 the law of the Union in order to remedy the inconsistency with the law of the Union of a prior act, that Member State shall be financially responsible unless the adoption of such prior act was required by Union law.[191]

The Regulation explains the rationale behind this apportionment as follows:

> Where the Union, as an entity having legal personality, has international responsibility for the treatment afforded, it will be expected, as a matter of international law, to pay any adverse award and bear the costs of any dispute. However, an adverse award may potentially flow either from treatment afforded by the Union itself or from treatment afforded by a Member State. It would as a consequence be inequitable if awards and the costs of arbitration were to be paid from the budget of the Union where the treatment was afforded by a Member State, unless the treatment in question is required by Union law. It is therefore necessary that financial responsibility be allocated, as a matter of Union law, between the Union itself and the Member State responsible for the treatment afforded on the basis of criteria established by this Regulation.[192]

In other words, where the wrongful treatment exclusively originates in a Member State, the Member State in question has to pay the costs flowing from dispute settlement. Similarly, where the treatment originates in the EU institutions (including where the measure in question was adopted by a Member State as required by EU law), financial responsibility will be borne by the Union. All this is logical, except for one detail: the Member State has to take on the burden *in all cases* where it acts to "remedy [an] inconsistency with the law of

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decision addressed to the Member State requiring the latter to pay the full amount into the EU budget.

191. Regulation, *supra* note 10, art. 3(1) (quoting language from the Regulation regarding apportionment of financial responsibility).

192. *Id.* ¶ 5 (quoting language from Final Regulation on rationale behind apportionment of financial responsibility).

the Union of a prior act," where EU law did not require that prior act. Such a need to remedy an inconsistency can occur either with change originating in a Member State or with change originating at the EU level. An example of the former can be the passing of new legislation by an existing Member State or the accession of a new Member State, which has to bring its laws into conformity with the EU's *acquis communautaire*.[193] The latter can happen when the EU gains new competences and adopts legislation in an area that it has not previously regulated. In both cases, it is indeed the responsibility of the Member States to ensure conformity of their laws with the existing *acquis* at any given time.[194] But while it is reasonable to expect the Member State to assume financial responsibility for remedying inconsistencies resulting from its own actions, it does not seem fair to put the financial burden on the individual Member State where it has acted pursuant to new *EU-wide* legislation.

If the Commission, having acted as respondent, thinks the Member State should shoulder at least part of the financial responsibility, the two must start consultations on the matter.[195] They have three months to reach an agreement, otherwise the Commission will decide the amount to be paid by the Member State unilaterally.[196] The latter then has to pay into the EU budget within six months (with interest, where applicable), or it has two months to object.[197] If the Member State objects, "and the Commission disagrees with the . . . objection," it will adopt another decision within six months, requiring the Member State to reimburse the EU budget (with interest).[198] The Regulation only covers the possibility of an

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193. The *acquis communautaire* is, in the words of FAIRHURST, *supra* note 34, at 761, "the total body of Union law accumulated so far." New Member States generally have to achieve most of this conformity *before* accession, but they are often granted moratoria on certain issues, with the understanding that they have to achieve conformity within a few years after accession. With regard to legislation by an existing Member State, it is also possible that an old law of a Member State is not in conformity with the *acquis*, but this inconformity has not come to light before; in such a case, the same rules would apply as with new legislation.

194. *See generally* TEU, *supra* note 5 (emphasizing the general duty of cooperation laid out in the treaty).

195. *See* Regulation, *supra* note 10, art. 19(2) (noting that, if necessary, the Member State and Union should immediately engage in consultations to determine financial responsibility).

196. *See id.* art. 19(3) (outlining time limitations and other steps in reaching agreement on financial responsibility).

197. *See id.* art. 19(4) (outlining time limitations and other steps in reaching agreement on financial responsibility).

198. *See id.* art. 19(5) (outlining time limitations and other steps in reaching agreement on financial responsibility). It is not entirely clear from the Regulation whether the Commission may take more than six months to decide if it indeed disagrees with the objection.

objection lodged with the Commission itself, but the Member State may also have further—judicial—options to challenge the decision, as discussed below in Section IV.

Nonetheless, all of this is of fairly little relevance to the foreign investor who will be paid within the agreed time from the EU budget. The further apportionment of the compensation amount is a matter of internal law, which could be subject to further discussion and even litigation at the EU level. The situation is different, however, in cases where an arbitral tribunal would not (only) prescribe the payment of compensation but (also) a certain act of performance.

b. Specific Performance

In theory, the general rule under international law regarding remedies is that, in the first place, the wrongdoing state or international organization must try to "re-establish the situation as it existed before the wrongful act was committed."[199] Only to the extent that damage is not made good by restitution does an international obligation arise for the state or international organization responsible to compensate for the damage caused by the internationally wrongful act.[200]

In practice, however, international courts and tribunals only rarely resort to prescribing a specific performance—even less so in investor-state arbitration.[201] Should an investor-state tribunal nonetheless decide to prescribe a specific performance, such as the issuance or extension of a license, the provision of protection, or the execution of a contract, this may prove to be problematic for the investor. What works so simply and elegantly in the case of compensation (the EU pays and is later reimbursed by the Member State) does not provide a feasible solution when it comes to specific performance. Depending on the measure required, it may well be the

199. *See* ARSIWA, *supra* note 71, art. 35 (noting when a State is under obligation to make restitution); ARIO, *supra* note 125, art. 35 (noting when an international organization is under obligation to make restitution). Both sets of articles stipulate that states/international organizations are obliged to make restitution "provided and to the extent that restitution: (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation." *See also* Chorzów Factory, *supra* note 190, at 48.

200. *See* ARSIWA, *supra* note 71, art. 36(1) (noting when the need for compensation arises on the part of a state); ARIO, *supra* note 125, art. 36(1) (noting when the need for compensation arises on the part of an international organization).

201. *See generally* BORZU SABAHI, COMPENSATION AND RESTITUTION IN INVESTOR-STATE ARBITRATION: PRINCIPLES AND PRACTICE (2011). As noted above, according to the technical summary of the Canada-EU FTA, an investment tribunal "cannot order the repeal of the host state's measure," although it "may order an award, separately or in combination, for damages or restitution of property, as well as costs." *Technical Summary*, *supra* note 68, at 15. This is confirmed in the Consolidated CETA Text, supra note 68, art. X.36.

case that only the Member State is able to comply with the award. But if the Member State did not willingly let itself be represented by the Commission acting as respondent, if it did not consent to a settlement, or if it did not agree with the defense strategy adopted by the Commission—it could well refuse such compliance. In that case, the investor would have to resort to recognition and judicial enforcement procedures before domestic courts.

3. Recognition, Enforcement, and Execution

Where a Member State has acted as respondent, the general rules on recognition and enforcement as stipulated in the ICSID Convention, the New York Convention, or the UNCITRAL Model Law on International Commercial Arbitration apply.[202] In effect, this means that insofar as recognition and enforcement are concerned,[203] arbitral awards have to be dealt with by domestic courts as final and binding decisions of the highest court of the land.[204] However, the

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202. *See* ICSID Convention, *supra* note 27 (noting that provisions of the "Convention on the Settlement of Investment Disputes Between States and Nationals of Other States - International Centre for Settlement of Investment Disputes" will apply); New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38 (noting that the provisions of the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" will apply); *see also* Freya Baetens, *Enforcement of Arbitral Awards: "to ICSID or not to ICSID" is Not the Question*, 5 INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW 211 (2011). *See generally* UNCITRAL Model Law on International Commercial Arbitration, with Amendments as Adopted in 2006, GAOR 40th Sess., Supp. No. 17, UN Doc. A/40/17 (1985), *amended by* U.N. GAOR 61st Sess., Supp. No. 17, UN Doc. A/61/17 (2006), consolidated version *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

203. As a general rule, one should distinguish between the recognition and enforcement of an arbitral award on the one hand, and its execution on the other. Although domestic practice may vary to a certain degree, the first step of "recognition" is the formal acknowledgement of an arbitral award as a final and binding disposition of contested claims. Its primary purpose is to certify the *res judicata* effect of an award as applying in the domestic context so that the award becomes enforceable. The third (and last) step in the process of a contested arbitral award is "execution," i.e. the prevailing party's actual collection of compensation or the achievement of other relief granted by the award. The second step of "enforcement" is less precise. In many domestic legal systems it will mean formally declaring in an order that an arbitral award is in fact enforceable within the domestic sphere. In such systems, the first and second step will generally be subsumed under a single proceeding termed "exequatur" proceeding – exequatur literally meaning "this has to be enforced." In other legal systems, enforcement may more loosely refer to the creditor's legal rights to execute the award as set out above. *See* LUCY REED, JAN PAULSSON & NIGEL BLACKABY, GUIDE TO ICSID ARBITRATION 179–90 (2d ed. 2011) (elaborating on recognition and enforcement of arbitral awards in the ICSID context).

204. *See* ICSID Convention, *supra* note 27, art. 54(1) (mandating that each contracting state shall recognize an award rendered pursuant to the ICSID Convention). Although the New York Convention does not contain a corresponding

execution phase of an arbitral award will not be shielded from domestic laws, even if the award is treaty-based. Thus, the domestically applicable doctrines of (relative or absolute) immunity from execution will have to be complied with—and may adversely affect an investor's chances of actually collecting compensation. A clear example of this practice is provided by Articles 54(3) and 55 of the ICSID Convention, stipulating that:

> Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.
>
> Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.

With respect to execution, the most favorable situation for an investor is if the domestic courts apply the doctrine of relative immunity, in which case commercial assets of a state may be executed (unlike assets of a state destined for public service).[205]

An investor may also face difficulties relating to execution in cases where the EU (by means of the Commission) has acted as respondent. In the territory of the EU, the Protocol on the Privileges and Immunities of the EU applies, according to which "[t]he property and assets of the Union shall not be the subject of any administrative or legal measure of constraint without the authorisation of the Court of Justice [of the European Union]."[206] Execution against Union assets would therefore require the investor to bring its request before the CJEU. In such a case, the Commission considers that:

> [T]he Court of Justice would apply the standard approach on sovereign immunity to such situations, with the result that the situation within the Union would be comparable to the situation in other countries, including the Member States of the European Union, where the international principle of sovereign immunity from execution would come into play.[207]

In other words, even in cases where the EU has waived its immunity to jurisdiction in advance to all disputes arising under its IIAs, it may

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provision, in practice it operates much the same way. *See* Baetens, *supra* note 202, at 216 *et seq.*

205. The doctrine of relative immunity is not yet accepted by all States, but certain trends in this direction are discernible. *See, e.g.*, Convention on Jurisdictional Immunities of States, *opened for signature* Jan. 17, 2005, 44 I.L.M. 803 (2005) (not yet in force) (exempting "property . . . specifically in use or intended for use by the State for other than government non-commercial purposes"). *A contrario*, property that is used by the State for commercial purposes is not covered by State immunity from execution.

206. Protocol on the Privileges and Immunities of the European Union, art. 1, 2012 O.J. (C 326) 266 (quoting regulations on the property and assets of the Union); *see also* TFEU, *supra* note 5, art. 343 (noting that the Union shall enjoy the privileges and immunities in Member States as necessary for performance of Union's tasks).

207. Explanatory memorandum to the Proposed Regulation, *supra* note 9, at 8 (quoting language on the application of sovereign immunity).

maintain immunity with respect to enforcement actions. As a result, an investor would not be able to execute the award against EU assets if the CJEU favors the doctrine of absolute immunity. A less strict approach would entail that EU assets could be seized as long as they are not needed by the Union to exercise its essential functions. But even in this case, enforcement could be difficult because, unlike states, the EU does not have many such "superfluous" assets either within or outside of the EU territory, due to the conferred nature of the EU's competences and corresponding budgets.[208] That said, "there are no recorded cases of the Union or of its Member States refusing to respect an award,"[209] and there is no element making such refusals likely to occur in the future.

IV. RECOURSE FOR MEMBER STATES DISSATISFIED WITH THE EU AS RESPONDENT

Finally, this Article briefly addresses the means of recourse offered to Member States affected by the award[210] but does not agree with the Commission's defense strategy decisions or its apportionment of financial responsibility in the particular case.

If the Member State deems that its rights have not been well represented—because the Commission, acting as respondent, did not adequately represent the Member State's interests—it could potentially initiate proceedings against the Commission before the

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208. *See, e.g.*, TEU, *supra* note 5, art. 5, at 269 (limiting powers to those provided in the treaties, and providing for the EU to be financed only from own resources received from Member States). In other words, the EU receives specific funds from Member States to undertake specific activities, leaving residual powers and the linked possibility to build up financial surpluses, which can be used for commercial activities in the hands of Member States.

209. Explanatory memorandum to the Proposed Regulation, *supra* note 9, at 8 ("While there are no recorded cases of the Union or of its Member States refusing to respect an award, if an investor were to consider it necessary to seek recognition or enforcement of an award, it would need to seek such recognition or enforcement via the courts of the Member States.").

210. In all cases where the Commission acts as respondent, one or more Member State(s) will necessarily be affected by the award. If a Member State has to pay (part of) the compensation or carry out certain specific performance, then that state will be affected; if the EU has to pay (part of) the compensation or carry out certain specific performance, then all Member States will (indirectly) be affected. If compensation has to be paid from the EU budget, this affects all Member States, as they contribute to the budget; that said, the amount of compensation would have to be high enough (even as divided between individual Member States) to make it worth incurring the costs of litigation before the CJEU. In view of these circumstances, this section focuses on the scenario where the Member State which could have been (or indeed was) respondent itself is affected.

CJEU.[211] These proceedings, in which other Member States could possibly intervene, would have to be aimed against an act of the Commission, such as an agreement to settle or the apportionment of financial responsibility arising from the award. The CJEU could then potentially annul the Commission's decision. The chance of success remains doubtful, however, as it would seem difficult for a Member State to prove that its own defense strategy would have secured a better result, by means of a (more) favorable award or settlement.[212] In any case, even if the CJEU were to render a judgment in favor of the complaining Member State, this is merely an internal matter and would not annul the award (or affect the investor).

The Member State may also decide to contest the apportionment of the compensation, rather than the defense strategy. However, the Member State in that case will have to claim misapplication of the criteria or even challenge the Regulation itself.[213] If the Member State is successful, the CJEU may re-apportion the costs, assigning a greater share to the EU budget. In the absence of a legislative amendment to the Regulation, this may rectify the problem, highlighted above, of pushing financial responsibility on the Member States when they act pursuant to new EU-wide legislation due to the expansion of EU competences.

V. CONCLUSION

The EU's newly acquired competence over foreign investment poses largely unprecedented legal challenges: the Union's unique structure and functioning are bound to raise questions about the traditional format of international investor-state arbitration. Anticipating these challenges, the European Commission put forward a Proposed Regulation on managing financial responsibility arising out of such arbitrations, which was adopted after amendment by the European Parliament and the Council of the EU in 2014.

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211. *See* TFEU, *supra* note 5, art. 263 (noting that the CJEU has jurisdiction on cases brought by Member States "on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers").

212. However, if there is proof of a settlement offer, turned down by the Commission, from the investor with better conditions (e.g., a lesser amount of compensation) than the final award, this would offer an easy way to monetize strategy decisions. The question then becomes if and to what extent the CJEU would be receptive to the idea of "penalizing" the Commission for a bad defense strategy by making it pay the difference.

213. Since this would be an *internal* EU law case before the CJEU, in such a case the Regulation will be applicable pursuant to EU law – the problems highlighted above regarding its non-inclusion in the IIA do not apply.

The stakes are high, and the Regulation, acknowledged to be "one of the key elements in the creation of an EU investment policy,"[214] reflects policy choices in all its major aspects. It places a high value on investor-friendliness, which helps explain why the Regulation aims to determine who is to be the *single* respondent in a given case (sparing the investor the dilemma of choosing) and why the Commission is willing to pay the full compensation awarded when it acts as respondent, only reclaiming (part of) it later from the Member State. Time—and an inevitable stream of cases—will tell whether all of these policy choices were justified. Excluding the option of joint responsibility, for example, may have the unintended consequence of complicating, rather than simplifying, the proceedings.

In any event, whatever good intentions the Commission may have had towards investors, the policy choices made in its proposal are explained in no small part by the internal EU dynamics at play. With the EU having gained exclusive competence over foreign direct investment, the Commission is eager to solidify its position as the EU's representative, much like it has been the case with trade. But while there is an undeniable similarity with trade, there is a remarkable difference between the respective dispute settlement mechanisms. The implications of a trade case can also easily reach millions or even billions of dollars, but a lost case usually results "only" in an obligation to modify certain measures, and not the direct payment of compensation. These two factors—the Commission's need to solidify its role regarding a newly acquired competence, and the possibility of having to pay compensation—may help explain why the Commission is not willing to leave the proceedings up to the more informal and *ad hoc* mechanisms which have worked relatively well in WTO cases.

The first draft of the Proposed Regulation, put forward by the Commission, bears the signs of these ambitions. It claimed exclusive competence over all aspects of foreign investment, including the more contentious issue of portfolio investments. It ensured a far-reaching role for the Commission in the conduct of dispute settlement, from discretion in choosing to be respondent, through the choice of strategy (including decisions to settle), to the apportionment of financial responsibility. These are understandable choices from the perspective

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214. Press Release, Council of the European Union, 3266th Council Meeting: Foreign Affairs – Trade Items, 10 (Oct. 18, 2013), *available at* http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/EN/foraff/139062.pdf [http://perma.cc/TL7L-LRVD] (archived Sept. 14, 2014) (provisional version; last visited Jan. 3, 2014) (noting the importance of the Proposed Regulation on managing financial responsibility in EU arbitrations).

of developing a common EU investment policy. However, considering that it will often be the Member State who has to bear (at least part of) the financial responsibility of a case in which it could not defend itself, some of the proposal's provisions were too far-reaching. As such, it is little surprise that many of them have been softened through amendments included in the Regulation.

The contours of the proposed framework are nonetheless clear. Most notably, while it sets the origin of the treatment complained of as the basis for both respondent status and apportionment of compensation, it chooses the criterion of competence for deciding responsibility. This "mismatch" of treatment and competence in different aspects of the case may result in a situation where the respondent is not the actor whose responsibility is in question. This, while posing an interesting procedural issue, may cause problems when it comes to implementing remedies other than compensation (such as restitution of property). Furthermore, competence as the basis of responsibility is far from established in international law. Case law involving the EU shows a mixed picture, but—in the absence of a provision in the IIA's arbitration clause on how to determine responsibility—it is likely that the WTO's pragmatism and its receptiveness to the "executive federalism" argument will prove instructive for tribunals. Finally, the internal apportionment criteria are based on sound logic, except for placing the financial burden on the individual Member State when the latter is complying with new EU-wide legislation pursuant to new competences. This is no small matter, considering that the EU gains new competences with virtually every new treaty between the Member States. That said, the Member State can always seek revision of the apportionment at the EU's Court of Justice.

The swift adoption of the Regulation by the European Parliament and the Council of the EU is certainly to be welcomed as the first EU investment agreements are in the process of being finalized, and it has become increasingly pressing to have a framework in place. With the conclusion of these new agreements, and the subsequent flow of arbitrations, it will be intriguing to see how the system developed by the Regulation works in practice. The EU is a global player, and major deals ahead—such as those with the United States, China, or India—are likely to influence the settlement of investor-State (and investor-EU) disputes for many years to come.