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The Participation of the EU in International Dispute Settlement

Lessons from EU Investment Agreements

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Foreword

The present study lies at the intersection between two fascinating and highly topical issues: the contribution of the European Union (EU) to the development of international law in the area of investment dispute settlement and the limitations imposed by the EU's internal 'constitutional' structure to its participation in international dispute settlement. As to the first issue, the EU is a new-comer in the field of investment arbitration. EU investment treaties containing the Investment Court System are still to enter into force. Yet, these treaties have become laboratories for designing a number of highly significant procedural novelties. Some of these novelties, such as the establishment of an appellate tribunal or the participation of non-disputing parties, have been introduced in order to improve the transparency and predictability of investment arbitration. Others, instead, are strictly related to the preservation of the EU's special features in international dispute settlement. Among the latter, the mechanism by which, if the investor intends to initiate arbitration proceedings, it is up to the EU to identify the respondent (i.e. the EU itself or a Member State) features prominently. The purpose of this mechanism is clear: by leaving to the EU the determination of the respondent, it aims to avoid the risk of external interference in the division of responsibility between the EU and Member States. This brings us to the other main issue addressed in this study, namely the challenges posed by the EU's internal structure to its action on the international stage. In particular, the focus is on the difficulty of reconciling the principle of autonomy, as interpreted in the case law of the European Court of Justice (ECJ), with the EU's or Member States' participation in international dispute settlement. The problem is certainly not new, but it has become particularly pressing in recent times, as highlighted by Opinion 2/2013 or, most recently, by the *Achmea* judgment. No doubt the autonomy of the European legal order and the role of the ECJ in preserving such autonomy are central features of the constitutional architecture of the EU. It is therefore inevitable that the need to defend such features plays an important role in shaping the EU's participation in international dispute settlement. However, the strict interpretation of these constitutional principles developed by the ECJ has the effect of rendering such participation extremely complex. This, in turn, has contributed to creating uncertainty

about the characteristics that an international dispute mechanism must present in order to the regarded as being compatible with the EU legal order.

In light of these developments, the identification and assessment of the special features characterising the new dispute settlement mechanism provided by EU investment treaties acquire particular relevance. The question is not simply whether this new mechanism is consistent with the principle of autonomy as developed by the ECJ. More broadly, it can be asked whether there is a case for suggesting that this mechanism should become a standard model to be applied, whenever possible, beyond the area of investment arbitration. This point is of central importance. Indeed, as the recent case law of the ECJ clearly indicates, there is a pressing need to identify procedural solutions that allow the EU to accommodate its special features when participating in international dispute settlement.

The questions just raised lie at the heart of this timely and valuable study by Luca Pantaleo. The answer the author gives to them are two resounding 'yesses': yes, a mechanism that leaves to the 'European bloc' the identification of the proper respondent in international litigations involving the EU is to be regarded as being consistent with the principle of autonomy as developed so far by the ECJ; and yes, this mechanism should become a standard model because it appears capable, more than any other mechanisms, of guaranteeing the participation of the EU in international disputes without risking the prejudicing of the autonomy of the EU legal order. Time will tell whether the 'internalisation model' introduced by EU investment agreements will indeed reflect a more general trend. What can already be said is that this study, for its careful examination of the procedural novelties introduced by the EU investment agreements, for its original systematisation of the different dispute settlement regimes to which the EU and the Member States are parties jointly, and for its systematic analysis of the requirements stemming from the principle of autonomy of the EU legal order, provides a relevant contribution to the literature on the participation of the EU in international dispute settlement.

Macerata, Italy
September 2018

Paolo Palchetti

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Finally, I would like to express my gratitude to those members of my family whose presence has been fundamental throughout my life. I am grateful to my parents, Fiore and Rosa, who, among many other things, have made it possible for me to access higher education despite having at times some trouble in making ends meet. To my grandfather, Antonio, to whom I owe my passion for the EU and the European integration process. I have grown up listening to the recollections of his experiences as an Italian migrant worker in Europe prior to the creation of the EU. His tales are for me a powerful reminder of how far we have come and how much

we have achieved in Europe in the last 60 years or so. Last but not least, the three most important and most valuable people have been my wife, Raquel, whose patience, dedication and support have made this book possible, as well as my son, Eduardo, and my daughter, Giovanna, who kept me going and constantly helped me to put things into the right perspective. I am immeasurably grateful to them.

The Hague, The Netherlands Luca Pantaleo

Contents

Abbreviations

AB	Appellate Body
ARIO	Articles on the Responsibility of International Organizations
ASR	Articles on Responsibility of States for Internationally Wrongful Acts
BIT	Bilateral Investment Treaty
CCP	Common Commercial Policy
CETA	Comprehensive Economic and Trade Agreement
CFSP	Common Foreign and Security Policy
CIP	Common Investment Policy
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EEA	European Economic Area
EFTA	European Free Trade Association
EU	European Union
FET	Fair and Equitable Treatment
FITR	Fork-in-the-Road
FTA	Free Trade Agreement
FTC	NAFTA Free Trade Commission
ICS	Investment Court System
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
ISDS	Investor-to-State Dispute Settlement
ITLOS	International Tribunal on the Law of the Sea
MIC	Multilateral Investment Court
NAFTA	North American Free Trade Agreement

NGO	Non-governmental Organisation
OSPAR	Convention for the Protection of the Marine Environment of the North-East Atlantic
PCA	Permanent Court of Arbitration
REIO	Regional Economic Integration Organisation
SCM	Agreement on Subsidies and Countervailing Measures
TAC	Total Allowable Catch
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

Chapter 1
Introduction

Contents

Abstract This chapter will introduce the topic of the book and the broader implications that it has on the understanding of some current issues of contemporary international and EU law.

Keywords settlement of disputes · EU autonomy · international organisations · international law · EU law

1.1 The Participation of a State-Like Subject of International Law to the Settlement of International Disputes

Owing to its broad treaty-making power and its far-reaching international agenda, the European Union (EU) has concluded a large number of international agreements, jointly with, or independently of, its Member States. Since its creation, the EU has been very active on the international plane. Inevitably, being a party to a vast array of international agreements with third parties entails the possibility that disputes arise. Hence, the ability to enter into international legal relationship should go hand in hand with the existence of a parallel ability to utilise the means offered by international law to settle disputes. For political rather than legal reasons, the Union's approach to international dispute settlement was initially characterised by "caution and restraint".[1] However, those times are long gone, and the EU is

[1] See Rosas 2017, p. 2.

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nowadays a party to a large number of agreements that feature a dispute settlement mechanism.

Yet, as this book will show, the involvement of the EU in the settlement of international disputes has not been a success story, so to speak. In a nutshell, the EU has faced the paradox of being a non-State subject, yet State-like actor, operating in a largely (still) State-centric international law. As far as the settlement of disputes is concerned, the problems connected with litigating against such State-like subject have emerged in particular in the context of agreements concluded by the EU and the Member States jointly (so-called mixed agreements). The main such challenge can be summarised as follows: when a mixed agreement is breached, what is the party that should be sued by the victim of the wrongful act? What is the entity against which a claim should be brought in order to settle a dispute? Is it the EU, the Member States or both?

In theory, there is a seemingly simple answer to these questions. Namely, a dispute should logically be initiated against the party that has committed the international wrong that is at its origins. That is to say, the party that is responsible as a matter of international law. After all, if a claim is brought against a party that does not bear responsibility, the claimant will certainly lose. That will occur either on the merits, or even at the preliminary stage of a dispute if an inadmissibility objection is raised. In the event that the dispute settlement mechanism seized of the dispute has the power to verify *ex officio* the admissibility of a claim—like, for example, the European Court of Human Rights (ECtHR)—an objection raised by the other party is not even necessary to declare the claim inadmissible. Hence, third parties claiming to be victims of a violation of an agreement concluded by the EU and the Member States should simply bring a dispute against the party that appears *prima facie* responsible. Therein, however, lies the rub.

As is well known, the responsibility of States and international organisations is among the most debated issues of international law, so much so that the rules of international law governing this matter have been studied by the International Law Commission (ILC) for more than 40 years.[2] The results of that study have recently been codified by the ILC.[3] However, there has been a lively debate concerning the suitability of such rules to a composite legal subject such as the EU.[4] Traditionally, the EU has advocated the adoption of special rules that would accommodate the special features of the Union and modulate the application of the general rules on responsibility. In particular, it has maintained that the allocation of responsibility between a regional economic international organisation (REIO)—which essentially

[2] See the summary provided by James Crawford in the entry 'State Responsibility' on the online Max Planck Encyclopedia of Public International Law, paras 3–5.

[3] See Articles on Responsibility of States for Internationally Wrongful Acts (ASR), and on the Responsibility of International Organizations (ARIO), of which the UN General Assembly has taken note. See, respectively, Resolution 56/83 adopted by the General Assembly on 12 December 2001, A/RES/56/83, and Resolution 66/100 adopted by the General Assembly on 9 December 2011, A/RES/66/100.

[4] This debate will be more thoroughly analysed below, see Sect. 5.2.

means the EU—and its Member States should take into account the internal rules of the organisation. According to this view, the allocation of responsibility should be strictly dependent on the division of competences between the organisation and the Member States: it should be the entity that is vested with the competence to adopt the act that eventually led to an international wrong that should be held responsible.[5] However, as will be seen more thoroughly in Chap. 5, the ILC has endorsed the existence of special rules only to a limited extent. As a result of a combined reading of the rules codified in ASR and ARIO, therefore, international responsibility for breaches of agreements to which both the EU and the Member States are a party may be apportioned independently of the internal rules of the Union.

As far as disputes are concerned this state of play has an inevitable consequence. An international court seized of a dispute based on a mixed agreement will have to determine who is the responsible party. From an EU law perspective, such determination entails an assessment concerning the division of powers and responsibilities between the EU and the Member States as fixed by the Treaties. In other words, determining what is the party that is responsible to discharge an international obligation stemming from a mixed agreement—which is a logically precedent step to apportioning responsibility and settling a dispute—amounts to a determination of who, whether the EU or the Member States, has the power to take action under EU law. A fictional scenario will help clarify this point. Suppose the EU and the Member States enter into a free trade agreement featuring an arbitral tribunal with State A. Suppose the EU adopts a directive imposing the Member States to prohibit the sale of goods containing a number of chemicals. Suppose Member State B adopts the necessary implementing legislation, as a result of which an exporter of State A gets its goods containing prohibited chemicals denied entrance into Member State B. Suppose State A believes that the agreement is being breached and brings proceedings against Member State B but not against the EU. What will the arbitral tribunal do in such (rather simplified) case?

Absent any rule in the agreement, the tribunal will be confronted with a number of options. First of all, it could apply Article 4 ASR and attribute the conduct that

[5] See, among others, UN doc. A/CN.4/556, where the views of the EU are expressed in full details. See, in particular, pp. 31–32, where the Commission gave the following example: "[t]he European Community is the bearer of many international obligations (especially because it has concluded many treaties). However, sometimes not only the behaviour of its own organs, but also organs of its member States, may breach such obligations. Such behaviour would therefore be *prima facie* attributable to those member States. This is an example of this situation: the European Community has contracted a certain tariff treatment with third States through an agreement or within the framework of WTO. The third States concerned find that this agreement is being breached, but by whom? Not by the European Community's organs, but by the member States' customs authorities that are charged with implementing Community law. Hence their natural reaction is to blame the member States concerned. In short, there is separation between responsibility and attribution: the responsibility trail leads to the European Community, but the attribution trail leads to one or more member States. This example illustrates why the European Commission feels that there is a need to address the special situation of the Community within the framework of the draft articles" (emphasis in the original).

led to the violation of the agreement (i.e. the approval of the implementing legislation) to Member State B. On this basis, it will assess whether the legislation constitutes a breach of the agreement and will hold Member State B responsible in case it will come to a positive determination. Alternatively, it could apply a normative control doctrine and exonerate Member State B from its responsibility.[6] In that case, State A would have to initiate another claim against a different respondent, namely the EU. State A could also sue the Union and Member State B at the same time. In such case, the tribunal could hold both parties jointly responsible, or again exonerate Member State B and attribute responsibility to the EU exclusively on the basis of a normative control analysis.

Be that as it may, this is clearly a case where Member State B will have no responsibility and no power to take action as a matter of EU law. It will be bound by an EU law obligation to comply with the directive. If the arbitral tribunal will order Member State B to bring its legislation in conformity with the agreement, Member State B will be legally unable to comply with this order without infringing EU law. Moreover, trade in goods is a matter falling within the exclusive competence of the EU pursuant to Article 207 of the Treaty on the Functioning of the European Union (TFEU). Technically speaking, on the international plane the EU is exclusively responsible of discharging the substantive obligations stemming from the agreement concerning the import of goods originating in State A, including goods containing chemical X whose access to Member State B has been denied. This means that by simply assuming respondent status in the dispute brought by State A, Member State B may be violating the EU exclusive competence under Article 207 TFEU.[7]

This point has repeatedly been emphasised by the European Court of Justice (ECJ)[8] in its case law concerning the participation of the EU and the Member States in international dispute settlement. As will be seen more comprehensively in Chap. 3, the Court has clearly stated that issues of international responsibility are closely yet inevitably interwoven with the internal division of competence. The ECJ has made this point in virtually all the relevant decisions that will be examined in this book. The paradigmatic example of this line of case law is probably para 230 of

[6] According to this doctrine, the Member States of the EU should not be held responsible as a matter of international law when they act under the normative control of the EU. While this doctrine has not been endorsed by the ILC, the existence—better: the emergence—of a special rule of international law concerning normative control has been maintained by Delgado Casteleiro in his leading study in the field. See Delgado Casteleiro 2016, as well as the considerations made in Chap. 5 of the present book.

[7] Needless to say, this is clearly a fictional scenario loosely based on a real WTO case brought by the US against the EU. See, in particular, European Communities—Certain Measures Affecting Poultry Meat and Poultry Meat Products from the United States (case suspended) WT/DS389. The WTO dispute settlement system will be comprehensively examined in Chap. 2.

[8] Throughout this book, the abbreviation CJEU, which stands for 'Court of Justice of the European Union', will not be used. Such abbreviation refers in fact to the whole institution consisting of both the Court of Justice (ECJ) and the General Court. Since reference is made exclusively to the ECJ's case law, the use of the acronym CJEU would be misleading.

Opinion 2/13 concerning the participation of the EU to the dispute settlement system put in place by the European Convention on Human Rights (ECHR). In particular, the Court stated that:

> A decision on the apportionment as between the EU and its Member States of responsibility for an act or omission constituting a violation of the ECHR established by the ECtHR is also one that is based on an assessment of the rules of EU law governing the division of powers between the EU and its Member States and the attributability of that act or omission.[9]

Given that a decision on the attribution of responsibility is inherent in any decisions taken by an international court to which the EU and the Member States may subscribe, one may wonder how it is possible to reconcile their participation in international dispute settlement with the need preserve the internal division of roles as fixed by the Treaties. A straightforward solution to this problem is to prevent the international dispute settlement to which the EU and the Member States are parties from apportioning responsibility between the EU and the Member States, thus avoiding any assessments concerning the internal division of competence and responsibilities under EU law. This is easier said than done though. How is it possible to settle a dispute involving the EU and the Member States without apportioning responsibility in a manner that is at variance with EU law?

The aim of this book is precisely to solve this dilemma. The analysis that follows will show that the EU has employed a number of techniques in the different treaty regimes to which it is a party in order to make sure that potential disputes are brought against the respondent that, under EU law, is the one responsible of discharging the substantive obligation that has admittedly been breached. The analysis will cover (virtually) all regimes featuring a dispute settlement system to which the EU has subscribed. Yet, it will focus on the most recently created, namely the Investment Court System (ICS) established by EU investment agreements, due to its potential ability to constitute a possible paradigm for the settlement of disputes against the EU.

1.2 The Importance of the Topic

In 2002, in the context of its works concerning the responsibility of international organisations, the ILC's relevant Working Group took note of "the widely perceived need to improve methods for settling … disputes" concerning the responsibility of international organisations.[10] The concerns expressed by the ILC have recently materialised in the proposal made by Sir Michael Wood to include on its

[9] Court of Justice, *Draft Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Opinion of 18 December 2014, Opinion 2/13, ECLI:EU:C:2014:2454, para 230.

[10] See *Yearbook of the International Law Commission*, 2002, vol. II (Part Two), p. 96, para 486.

long-term programme the topic 'The settlement of international disputes to which international organizations are parties'.[11] This move is reflective of an ever expanding role of international organisations, which are nowadays involved in almost all fields of human cooperation.[12] The EU can certainly be considered the prime example of this growing prominence. While it is true that more and more international organisations are gradually gaining importance, the EU's unique position is still largely unquestionable. Yet, precisely because of the EU's sophisticated constitutional architecture that is at the very heart of its uniqueness, a generally accepted method to settle disputes involving the Union has proved particularly difficult to developed. As this book will show, the EU treaty practice on the matter is unsettled. The case law of the ECJ has added to the already existing difficulties. The need to develop a model dispute settlement capable of accommodating the special features of the EU, while at the same time being legally sound from an international law perspective, seems therefore to be of pivotal importance. After all, as rightly pointed out by Inge Govaere,

> It is hard to contest that if the EU wants to be a credible (and important) actor on the international scene then it should be able to play according to the international public law rules and obey international law principles too, if not especially so, in relation to dispute settlement. If the EU is to assume and enforce international rights and obligations effectively, it is imperative for it to be able to set up or adhere to international systems of dispute settlement which will be binding on both the [EU] and third countries alike.[13]

Ultimately, and consequently, the need to shed light on the participation of the EU and the Member States in the settlement of international disputes should be seen as a contribution to the general understanding of the role and the status of international organisations. As noted by August Reinisch,

> the ability to be sued may form the ultimate proof of the role of international organizations on the international level. As the old saying goes 'the proof of the pudding is in the eating'; it may well be that the proof of the status of international organizations lies in the fact that they are not only subject to international law and may incur responsibility for violating it, but also that such responsibility can be effectively invoked through dispute settlement.[14]

This study represents an attempt to systematise issues relating to dispute settlement in a coherent framework as far as the EU is concerned, and develop a possible model for the EU and the Member States so that their *responsibility can be effectively invoked*, to borrow from August Reinisch. It sets out to contribute to a debate that will only gain in importance in the years to come.

[11] See Wood 2016.

[12] See Brölmann 2007, p. 1.

[13] See Govaere 2010, p. 190.

[14] See Reinisch 2018, pp. 6–7.

1.3 Plan of This Book

This study will start off (Chap. 2) with providing an overview of the existing practice of the EU in international adjudication. More specifically, it will analyse the main treaty regimes that include a dispute settlement mechanism to which the EU has so far subscribed. These regimes will be categorised into different models based on their rules concerning the division of roles between the EU and the Member States in the disputes. It will start from an examination of the World Trade Organisation (WTO) regime, which is the one under which the EU has most frequently appeared as a disputing party. It will then move to the United Nations Convention on the Law of the Sea (UNCLOS) system, which has been used much less frequently than the WTO but that still provides some useful indications. Finally, a number of other agreements to which the EU is a party will also be analysed. These are agreements whose dispute settlement has never been activated in practice. Their practical relevance is, as a result, quite negligible.

The examination will continue (Chap. 3) with an appraisal of the case law of the ECJ concerning the establishment of an international dispute settlement system by an agreement concluded by the EU and the Member States. This chapter will analyse the main findings of the Court in some landmark decisions which have laid down a number of principles and conditions of EU law governing the participation of the EU in international dispute settlement. Special attention will be devoted to the principle of autonomy of the EU legal order, which the ECJ has used as a means to assess the compatibility with EU law of international dispute settlement to which the EU or the Member States have subscribed. This will conclude Part I of the book.

After providing an overview of existing regimes and of the ECJ's case law, Part II will focus on a dispute settlement mechanism that has yet to come into force. Namely, the already mentioned ICS featured in EU investment agreements that are awaiting ratification at the time of writing, such as the Comprehensive Economic and Trade Agreement (CETA),[15] the EU-Vietnam Free Trade Agreement (FTA),[16] and the EU-Singapore Agreement.[17] Chapter 4 will look at the main procedural innovations brought about by EU investment agreements, with a view to providing an account of how disputes will be conducted under them. In particular, the examination will illustrate the ground-breaking innovations brought forward by these agreements as opposed to more traditional investment dispute settlement systems such as *ad hoc* arbitral tribunals. It will include an examination of the non-confrontational mechanism available at the pre-litigation stage, an assessment of the structure and functioning of the ICS and of its internal articulation, as well as

[15] See the relevant webpage on the Commission's website: http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/ (accessed on 28 May 2018).

[16] See the relevant webpage on the Commission's website http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437 (accessed on 28 May 2018).

[17] See the relevant webpage on the Commission's website http://trade.ec.europa.eu/doclib/press/index.cfm?id=961 (accessed on 28 May 2018).

other procedural issues such as transparency. The inclusion of a chapter that is focused on procedural issues and that is, as such, partly non-aligned with the overall topic of the book is justified by the novelty of the ICS.

Chapter 5 will pick up on the analysis carried out in Part I concerning different models to settle disputes against the EU. It will do so by focusing on three main issues of EU investment agreements. Firstly, questions concerning the allocation of international responsibility and of financial liability between the EU and the Member States will be examined. Secondly, the analysis will turn to the partly related question concerning the representation of the EU and the Member States in investment disputes. Finally, the chapter will conclude with an assessment of the decisions of the ICS, focusing on their nature, enforcement and effects, and a number of important conclusions will be reached that will be further developed in Chap. 6 in order to assess the ability of EU investment agreements to serve as a general model (which will be called 'internalisation model') for the settlement of disputes against the EU. This will conclude Part II of this study.

Part III, consisting of only one chapter, will formulate general conclusions on the basis of the preceding analysis. In particular, Chap. 6 will assess the consistency of the ICS with the requirements set in the ECJ's case law concerning the principle of autonomy, with a view to examining whether the model designed in EU investment agreements can constitute a general paradigm for the settlement of disputes against the EU as far as EU law is concerned. This general paradigm will then be examined through the lens of international law, in particular in light of the body of secondary norms of general international law that the said paradigm is meant to replace. This will include an assessment of the possible obstacles posed by international law to a generalisation of the model dispute settlement designed by EU investment agreements (so-called internalization model) beyond the investment domain.

Finally, Chap. 7 will summarise the main findings of the book and wrap up the discussion while at the same time making some more general reflections on issues that extend beyond the settlement of disputes involving the EU and the Member States.

Before getting underway with the analysis, it bears noting that this monograph builds on research previously published in specialized journals (in particular European Papers and European Business Law Review) and edited volumes to which the Author has contributed.

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Part I

Chapter 2
The EU Practice in International Adjudication: An Appraisal of Existing Models

Contents

Abstract This chapter aims to provide an overview of the existing practice of the EU in international adjudication. It will address the main treaty regimes that include a dispute settlement mechanism to which the EU has so far subscribed, with a view to identify and systematise such practice into a coherent framework. To this end, it will attempt to categorise existing regimes into different models. The WTO regime will inevitably get the lion's share of the analysis and will be referred to as a model expressing a *de facto* unilateralism on the part of the EU when it comes to the participation in the disputes. The following system that will be analysed is the UNCLOS, which is labelled competence-based model, that is to say, a model in which the participation of the EU and the Member States to the settlement of disputes is, essentially, reflective of the internal division of competence as expressed in a declaration attached to the agreement. Finally, a number of other agreements to which the EU is a party will also be analysed. In particular, special attention will be devoted to what will be referred to as the joint responsibility

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model, the co-respondent mechanism, the State-to-State trade dispute model, and a final model that will be termed proceduralisation model. As it will be seen, the latter is reminiscent of the 'internalisation' model adopted under EU investment agreements, which will be thoroughly analysed in Chap. 5. The chapter will conclude that all these models are not entirely suitable to the specific characteristics of the EU for a variety of reasons.

Keywords WTO · UNCLOS · ECHR · dispute settlement · joint responsibility · proceduralisation

2.1 Introduction: The Need to Systematise the EU Existing Practice in International Adjudication

More than 15 years ago, Allan Rosas predicted that it was only logical and somewhat inevitable that the EU would be increasingly facing the challenge of international dispute settlement.[1] After all, the more a composite international subject enters into legal relationships with other subjects, the more likely those relationships are to result in a dispute. The involvement of the EU in international dispute settlement was quite scarce at that time. It was confined, in essence, to disputes litigated within the WTO. Perhaps surprisingly, things have not changed very much since then. In fact, instances in which the EU has appeared before an international dispute settlement as a party to a dispute are rare outside the WTO. The reasons for this infrequent participation of the EU in international disputes are manifold. Some of them have to do at least in part with the rather strict approach towards international dispute settlement taken by the EU institution whose longest-serving member is precisely (now Judge) Allan Rosas—namely, the ECJ.

The aim of this chapter, however, is not to examine the case law of the ECJ concerning the involvement of the EU in international dispute settlement. That will be done in Chap. 3. Rather, this chapter will provide an overview of the existing practice of the EU in international adjudication. It will address the main treaty regimes that include a dispute settlement mechanism to which the EU has so far subscribed, with a view to identify and systematise such practice into a coherent framework. To this end, this chapter will attempt to categorise existing regimes into different models. Unsurprisingly, the WTO regime will get the lion's share of the analysis (Sect. 2.2) and will be referred to as a model expressing a *de facto* unilateralism on the part of the EU when it comes to the participation in the disputes. The following section (Sect. 2.3) will be devoted to the UNCLOS system, which one could label competence-based model, that is to say a system in which the participation of the EU and the Member States to the settlement of disputes is, essentially, reflective of the internal division of competence as expressed in a

[1] Rosas 2002, pp. 50–51.

declaration attached to the agreement. Finally, a number of other agreements to which the EU is a party—or has attempted to be a party, as is the case of the ECHR—will be analysed in Sect. 2.4. In particular, special attention will be devoted to what will be referred to as the joint responsibility model, the co-respondent mechanism, the State-to-State trade dispute model, and a final model that will be termed proceduralisation model. As we shall see, the latter is reminiscent of the 'internalisation' model adopted under EU investment agreements, which will be thoroughly analysed in Chap. 5.

Before getting underway with this analysis, it is necessary to make a preliminary disclaimer. The examination of so-called non-compliance mechanisms included mostly in multilateral environmental agreements to which the EU is a party, such as the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, will deliberately be omitted. The reason for this is that non-compliance procedures, however interesting they might be, feature some specific characteristics that distinguish them from traditional arbitral or judicial means to settle disputes. While existing mechanisms of this kind certainly differ from each other to the point that it would be difficult to consider them together as a unitary model, they, however, share some basic common features.[2] These include the non-binding nature of their decisions and the predominance of political rather than legal elements.[3] They are probably best described as non-confrontational dispute avoidance procedures.[4] Therefore, they fall outside the scope of this book.

2.2 The WTO Model

The participation of the EU in disputes litigated under the WTO regime is abundant. Leaving aside cases where the EU was not a disputing party, figures published at the time of writing by the WTO show that the Union has appeared as a complainant in 99 cases, and as a respondent in 84 cases.[5] It is for this reason that the WTO is often considered the most successful example of the participation of the EU in international dispute settlement.[6] As we shall see in this chapter, it is also the *only* example of a *systematic* participation of the EU in international disputes. In this sense, it is perhaps striking that the institutions or the Member States have never sought the ECJ's assessment of what is certainly the most important dispute

[2] See Fodella 2009, p. 355.

[3] See, in relation to the Aarhus Convention, the considerations made by Jendrośka 2011.

[4] See the analysis carried out by Fitzmaurice and Redgwell 2001.

[5] See the overview of disputes by WTO member published here https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (accessed on 7 May 2018).

[6] See Hillion and Wessel 2017, pp. 8–9.

settlement system to which the EU is a party.[7] Contrary to what has happened in relation to other dispute settlements to which the EU has subscribed.[8]

The settlement of disputes in the WTO regime is governed by the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter: DSU). Even though the DSU does not employ classic expressions such as a 'court' or 'tribunal', there is little doubt that the system established by it can be considered a judicial settlement of disputes under international law.[9] The DSU consists of a Dispute Settlement Body (DSB) and an Appellate Body (AB), whose jurisdiction is not only mandatory and binding on the parties but it also contains an implementation and enforcement system.[10] Panels are set up by the DSB on an *ad hoc* basis. The DSU contains no rules concerning the division of roles between the EU and its Member States as far as the settlement of disputes is concerned, nor does it contain any indications concerning the division of competence as it is done under other regimes (see below, Sect. 2.3). However, the EU has always taken the lead in the settlement of disputes, with the Commission appearing on behalf of both the EU and the Member States. To a certain extent, it can be said that the EU has demonstrated the readiness to unilaterally assume the consequences resulting from a breach of a WTO Agreement, even when such breach is caused by a measure "adopted by a Member State without being firmly based in EU law".[11] As a result, it can be argued that the participation of the EU in the WTO dispute settlement is, in essence, based on a *de facto* unilateralism, in the sense that the EU unilaterally appears and responds on behalf of the whole European bloc and is ready to take up the consequences resulting from a WTO dispute.[12]

An examination of the practice reveals that this state of affairs has not gone completely unchallenged. Cases, where the EU is the complainant, are initiated by the Union alone, with the Commission acting as the representative of the European bloc in all cases.[13] However, it should be noted that 29 out of 84 complaints brought against the EU were at the same time brought against one or more Member States as co-respondent. In a vast majority of cases, the Union had conducted consultation or acted as the respondent alone on behalf of the whole European bloc even when a measure of one or more Member States was involved in practice. As has been rightly observed, there are possibly some practical considerations behind this tacit acceptance on the part of third countries—and of WTO Panels alike—that the EU is the only party intervening in disputes that involve measures taken by the

[7] In fact, in Opinion 1/94 the Court has only dealt with competence issues without touching upon the settlement of disputes. See Court of Justice, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*, Opinion of 15 November 1994, Opinion 1/94, ECLI:EU:C:1994:384.

[8] See the analysis of the ECJ's case law carried out in Chap. 3.

[9] See Eckes 2013, p. 85.

[10] See Rosas 2003, pp. 292–293.

[11] See Hoffmeister 2012, p. 90.

[12] See Dimopoulos 2014, p. 1689.

[13] See Cottier 1998, p. 335.

Member States.[14] In particular, the structural features of the WTO dispute settlement itself seems to favour this solution. For there is an obvious comparative advantage for a third country in adopting retaliatory measures—or threatening to do so—that would affect the whole Union rather than, say, only Ireland or the Netherlands as the case may be. Given the absence of explicit rules, however, in some cases, the contrary might also be true. That is to say, in specific cases, it might be a more efficacious strategy to hold the EU and the Member States separately accountable as far as the settlement of a dispute is concerned. The United States, in particular, seems to have adopted a *divide et impera* strategy in a number of cases.[15] In such cases, the *de facto* unitary paradigm advanced by the EU has been expressly called into question.

In the so-called *LAN* case, the United States brought a claim against the EU, the United Kingdom and Ireland at the same time, challenging the allegedly erroneous tariff treatment applied to some computer equipment.[16] The claimant argued that there were three separate set of measures at stake in the dispute. Namely, measures of the EU, measures of the United Kingdom, and measures of Ireland. Although a procedural compromise resulting in the establishment of a single panel—as opposed to three different panels—had been reached on the request of the Commission, the United States emphasised that the United Kingdom and Ireland were WTO Members of their own right, and that "[n]othing in the text of the GATT 1994 or the DSU limited the scope of application of the provisions of these two agreements with respect to either Member as to its status in a dispute brought under these agreements".[17] Moreover, the claimant further pointed out that the internal allotment of responsibilities between the EU and the Member States was not an issue in the dispute, suggesting, implicitly, that it was purely an EU law internal matter. The Union strongly disagreed that "the transfer of sovereignty between EC member States and the EC was irrelevant on the external plane", stating that such transfer "had been recognized by Members" of the WTO. As a result, not only was the EU "ready to assume its international obligations", but it was also "not ready to allow an attack on its constitution in the WTO".[18]

The Panel circumvented the question concerning respondent status and responsibility in what appears to be a sophisticated exercise of careful legal drafting. As delightfully noted by Kuijpers,[19] the whole contention was silenced by the clever use of words made by the Panel. By stating that the dispute concerned "tariff treatment of LAN equipment and multimedia PCs by customs authorities *in*

[14] See Delgado Casteleiro 2016, p. 163.

[15] See Kuijper 2010, pp. 213–215.

[16] See European Communities—Customs Classification of Certain Computer Equipment (22 June 1998) WT/DS62, 67, and 68 (hereinafter: *LAN* Report).

[17] See *LAN* Report, para 4.13.

[18] See *LAN* Report, para 4.15.

[19] See Kuijper 2010, p. 214.

the European Communities" rather than afforded *by* it,[20] the Panel managed to find a—perhaps slightly ambiguous—solution that pleased all the parties involved. As to the request of the United States that the title of the dispute be changed to "European Communities, Ireland and the United Kingdom—Increases in Tariffs on Certain Computer Equipment" to make clear that these two Member States were also a party to the dispute—even though represented by the Commission—the Panel rejected it on procedural grounds. However, the Panel noted, "the title of a particular dispute is given for the sake of convenience in reference and in no way, affects the substantive rights and obligations of the parties to the dispute".[21] In practice, however, this meant that the Panel *de facto* accepted the unilateral assumption of all the consequences stemming from the dispute made by the EU. Accordingly, the Report's conclusions are addressed to the Union only.[22]

The following case that deserves to be examined is the *Selected Customs Matters* case,[23] where the United States brought a complaint against the EU concerning some customs treatment that was allegedly not in conformity with the WTO. This time the claimant did not seek the involvement of the Member States in the disputes. It directed its claim against the Union only. However, it was the panel itself that questioned the internal division of competence between the EU and the Member States. The dispute concerned a field that clearly comes under the Union's exclusive competence under (current) Article 207 TFEU. Customs matters can, in fact, be considered the quintessential element of the Common Commercial Policy (CCP). However, as is well known, things are in practice fully in the hands of Member States' customs authorities given the lack of an EU centralised customs administration. In order to assess the legality of the relevant customs treatments, the Panel sought clarifications from the EU as to who was responsible, as a matter of Union law, for discharging the relevant WTO obligations.[24] The Commission replied by making a distinction between internal and external competence. It said, in essence, that the Union was responsible as a matter of international law, but that the Member States were responsible as a matter of EU law for the parts falling within their respective sphere of competence.[25] From an EU law perspective, this is rather obvious. While the EU might conclude an international agreement on the basis of a given external competence, such as the CCP, it is clear that the internal implementation of that same agreement will be carried out through one or more internal competences that might be shared with the Member States. As far as an FTA is concerned, it is typically the case that internal shared competence will come into play.

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[20] See *LAN* Report, para 8.16, emphasis added.

[21] See *LAN* Report, para 8.17.

[22] See *LAN* Report, paras 9.1 and 9.2.

[23] See European Communities—Selected Customs Matters (16 June 2006) WT/DS315 (hereinafter: *Selected Customs Matters* Report).

[24] See *Selected Customs Matters* Report, Annex A, Q41.

[25] Ibid.

The Panel in this case eventually accepted the EU's submission that the Member States' authorities were acting as organs of the Union. None the less, it also considered that "the administration of EC customs law is primarily the responsibility of the EC member States".[26] As observed by Delgado Casteleiro, this shows that "the Panel might not have understood the differentiation made between internal and external competence".[27] To our purpose, *Selected Customs Matters* suggests that the absence of explicit rules concerning the participation of the EU and the Member States to the settlement of disputes provides no guarantee that the WTO dispute settlement bodies will not make assessments concerning the internal division of powers as fixed by the EU Treaties, even where the other disputing party seems not to be bothered by this matter—as it was, conversely, in the *LAN* case. In light of the ECJ's case law that will be analysed in Chap. 3, it is doubtful that this state of affairs would be consistent with the Court's well-established position that the dispute settlement to which the EU subscribes cannot interfere with the internal division of competence.

The final case that will be examined in this section is the *Airbus* case.[28] This is the first—and so far only—time in which a WTO Panel has established joint responsibility between the EU and the Member States. The dispute was brought by the United States and revolved around subsidies granted to Airbus by the EU itself, as well as by a number of Member States, namely Germany, Spain, France and the United Kingdom. The claimant argued that the aid in question was illegal under the Agreement on Subsidies and Countervailing Measures (SCM), which comes under the exclusive competence of the Union in accordance with the ECJ's findings in Opinion 1/94 (now expanded by Opinion 2/15).[29] The United States brought the claim against the EU as well as the Member States concerned "in their own right as Members of the WTO" but conceded that the EU represented "their interests in the dispute".[30] The EU responded that it was not true that it merely 'represented' the Member States and that, on the contrary, it was ready to take "full responsibility in these proceedings for the actions of its member States".[31] Furthermore, just like the United States did in the *LAN* case, the Union submitted to the Panel a request to change the title of the dispute by removing the reference to the Member States in order to reflect that the EU was the only respondent party.[32]

The Panel noted that the Union had made all submissions and communications, and that although representatives of the Member States concerned did appear before

[26] *Selected Customs Matters* Report, Annex B, Q146.

[27] See Delgado Casteleiro 2016, p. 183.

[28] See European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft (30 June 2010) WT/DS316 (hereinafter: *Airbus* Report).

[29] See Court of Justice, *Opinion 1/94*, para 44.

[30] See *Airbus* Report, para 7.171.

[31] Ibid.

[32] See *Airbus* Report, para 7.172.

it in two meetings, they "did not speak or make any submissions".[33] Eventually, the EU requested the Panel to resolve the outstanding issue of who was the proper respondent party in the dispute. The conclusion of the Panel on this point deserves to be cited in full:

> Fundamentally, in our view, there is no issue to be resolved. The United States requested consultations and the establishment of this Panel asserting claims concerning, inter alia, alleged subsidies provided by the European Communities and by the governments of each of four EC member States, France, Germany, Spain, and the United Kingdom, which subsidies allegedly cause adverse effects to the interests of the United States. Each of these five is, in its own right, a Member of the WTO, with all the rights and obligations pertaining to such membership, including the obligation to respond to claims made against it by another WTO Member. […] The fact that four of those Members are member States of the European Communities, which is itself a Member of the WTO, does not affect their individual status as Members of the WTO against whom another Member, the United States, has brought claims of violation of various provisions of the WTO Agreements. Whether these four WTO Members choose to appear and actively defend their interests before the Panel separate from the actions of the European Communities is a matter entirely within their discretion, subject to the obligations of their status as member States of the European Communities. However, those obligations do not affect their status in this dispute.[34]

As a logical consequence of this conclusion, the Panel analysed each subsidy challenged by the United States separately, finding that a number of them were in contravention of the WTO Agreements.[35] It, therefore, found that "to the extent that the European Communities, France, Germany, Spain and the United Kingdom have acted inconsistently with the SCM Agreement, they have nullified or impaired benefits accruing to the United States under that Agreement".[36]

As pointed out by Delgado, the "Airbus dispute can be considered a marginal example if put in context with other disputes brought against the EU".[37] To our purpose, however, it provides another illustration of how the lack of rules concerning the role of the EU and the Member States in international disputes to which they may both be parties may affect the internal relations between them, and in particular the division of powers under the Treaties. As we shall see in Chap. 3, this state of affairs is potentially at variance with the principle of autonomy as interpreted by the ECJ. It is worth mentioning that after the adoption of the *Airbus* Report, in four more cases a WTO Member has requested consultations simultaneously to the EU and to at least one Member State.[38] Although all these disputes

[33] See *Airbus* Report, para 7.173.

[34] See *Airbus* Report, para 7.174, footnotes omitted.

[35] See *Airbus* Report, paras 8.1 and 8.2.

[36] See *Airbus* Report, para 8.5.

[37] See Delgado Casteleiro 2016, p. 193.

[38] See European Union and a Member State—Seizure of Generic Drugs in Transit WT/DS408/8, in which India has requested consultations to the EU and the Netherlands; European Union and a Member State—Seizure of Generic Drugs in Transit WT/DS408/9, in which Brazil has requested consultations to the EU and the Netherlands; European Union and a Member State—Certain

seem to be currently suspended, they might be indicative of a growing trend in the WTO towards joint responsibility and co-respondency of the Union and the Member States. As rightly observed by Castellarin, "*[o]n pourrait s'étonner que cette pratique se généralise à l'heure où la nouvelle repartition des compétences du traité de Lisbonne étend les domains de competence exclusive de l'Union*".[39] However ironic, this is certainly a situation that may lead to potential conflicts with the principle of autonomy.

In light of the examination carried out above, it is possible to summaries the main characteristics of the WTO model briefly. Under this regime, the participation of the EU in the settlement of disputes is based on a lack of clear rules concerning the division of roles between the EU and the Member States. This situation has favoured a *de facto* imposition of the EU as the only legal subject acting on behalf of the whole European bloc. Based on this practice, however, it is unclear whether in the eyes of third countries and WTO organs alike the EU appears in a mere representative capacity or, as the Commission would maintain, as the bearer of the (international) legal relationship arising out of a violation of the WTO Agreements. According to Delgado Casteleiro, the practice developed within the WTO confirms the acceptance, on the part of the WTO organs, that responsibility is attributed on the basis of the normative control paradigm.[40] On the contrary, Castellarin has argued that the above practice has led to the spontaneous creation of a general rule based on which responsibility for violations of the WTO Agreements is always attributed to the EU, including where Member States measures are at stake.[41] This, in Castellarin's view, is without prejudice to the possibility to attribute responsibility to the Member States simultaneously, and have them acting as respondents in their own right as parties to the WTO.[42]

Be that as it may, the WTO model seems to display several limits. If only because it makes the panels the ultimate arbiter of questions concerning responsibility and respondency. It is true that, so far, only in one occasion has a panel challenged the ability of the EU to appear as the one and only respondent to a dispute. However, it is perhaps unwarranted to affirm that the practice developed so far can suffice to exclude that complaints in the WTO cannot be brought against both the EU and the Member States irrespective of their (internal) roles as organised by the EU Treaties. This, as we shall see in Chap. 3, is largely unsatisfactory from an EU law perspective.

Measures Concerning the Importation of Biodiesels WT/DS443/5, in which Argentina has requested consultations to the EU and Spain; as well as European Union and certain Member States—Certain Measures Affecting the Renewable Energy Generation Sector WT/DS452/5, in which China has requested consultations to the EU, Italy and Greece.

[39] See Castellarin 2017, p. 468.

[40] See Delgado Casteleiro 2016, pp. 178–193.

[41] See the thoughtful analysis carried out by Castellarin 2017, pp. 498–501.

[42] See Castellarin 2017, pp. 474–475.

2.3 The Competence-Based Model: The Involvement of the EU in the Settlement of Disputes Under UNCLOS

Contrary to the WTO, the participation of the EU in disputes litigated under the UNCLOS regime has been infrequent so far. As we shall see below in greater detail, only two disputes were brought against the EU and its Member States. They were both settled before a decision on the merits could be reached by the tribunals seized. In addition, the position of the EU has been indirectly affected by a recent Advisory Opinion of the International Tribunal on the Law of the Sea (ITLOS), which is a non-binding procedure. Hence, the practice developed under this regime seems to be of negligible importance. Despite this, the UNCLOS rules governing the participation of the EU to the settlement of disputes remain worthy of being analysed in this book, in light of the importance of such a major multilateral international agreement and of its ability to constitute yet another legal model for the settlement of disputes against the EU. Similar to the WTO, an assessment of the consistency of UNCLOS with the EU Treaties has never been sought. Therefore, the ECJ has never pronounced itself on this matter.

The rules concerning the participation of the EU in the settlement of disputes are laid down in Annex IX. In short, participation in disputes and attribution of responsibility are expressly and directly linked to the internal division of competence. In particular, Article 6(1) of Annex IX explicitly states that the "Parties which have competence under Article 5 of this Annex shall have responsibility for failure to comply with obligations or for any other violation of this Convention". Article 5(1), in turn, affirms that "a declaration specifying the matters governed by this Convention in respect of which competence has been transferred to the organization by its member States which are Parties to this Convention" must be deposited along with the instrument of ratification of UNCLOS. Article 5(3) clarifies that matters in respect of which a transfer of competence in favour of an organisation has not been communicated are presumed to fall within the Member States competence. This set of rules is completed by the provision of Article 5(4), which states that any change concerning the distribution of competence has to be promptly notified, as well as by Article 6(2), which stipulates that any "State Party may request an international organization or its member States which are State Parties for information as to who has responsibility in respect of any specific matter". If such information is not provided within a reasonable time, the organisation and its Member States are presumed to be jointly liable.

In summary, the attribution of responsibility and, as a consequence, the participation in disputes under UNCLOS follows the internal division of competence as enshrined in the declaration referred to in Article 5(1). This is so because if an action is brought against the entity that eventually turns out not to be responsible for the alleged violation of UNCLOS, such action would be rejected either at the stage of preliminary objections—if an inadmissibility objection is raised—or at the stage of the merits. Furthermore, Article 6(2) gives the opportunity—without imposing

an obligation, as clearly confirmed by the use of the conditional mood 'may'—to third countries to seek further clarification on top of what has been already indicated in the declaration of competence by issuing an *ad hoc* request on a specific question. As has been rightly noted by Heliskoski, this is a sort of integration of the declaration of competence that could be a useful way to deal with the inherently dynamic and evolving nature of EU competences.[43]

No indications on how ITLOS would deal with the EU declaration of competence can be drawn from the first dispute brought against the EU under UNCLOS by Chile in the so-called *Swordfish* case.[44] In brief, the case revolved around the adoption of unilateral measures by the Chilean government aimed at enhancing the conservation of swordfish. Chile's legislation applied to fishing activities carried out in the Chilean Exclusive Economic Zone (EEZ) and was later extended to the high seas. Non-compliance with these measures by vessels flying the flag of a third country would entail the denial of access to Chilean ports to such vessels. As a result of this legislation, Spanish vessels catching swordfish in the relevant zones, not in conformity with the said measures were denied access to Chile's ports. This resulted in the commencement of a double, parallel dispute. On the one hand, the EU challenged the Chilean unilateral measures within the WTO. On the other hand, Chile launched an action under Article 15 of the ITLOS Statute, claiming the infringement on the part of the EU of a number of UNCLOS provisions, such as, for example, the obligation to cooperate for the preservation of highly migratory species like the swordfish pursuant to Article 64 UNCLOS.[45]

As already mentioned, the dispute was settled and withdrawn in 2009 as a result of the diplomatic solution reached between the parties.[46] Therefore, the ITLOS' Special Chamber did not have the chance to make any decision concerning the assumption of respondent status. The only useful indication that we can draw from this case is that Chile decided to bring the dispute only against the EU, for failure to comply with its obligations under UNCLOS in relation to fishing activities carried out by vessels flying the flag of its Member States.[47] However, based on the documents available it is impossible to assess how Chile concluded that the EU was the only proper respondent to the dispute. The most plausible explanation, as noted by Delgado Casteleiro, is that the choice was presumably based on the declaration of competence issued by the EU, according to which the latter was exclusively

[43] See Heliskoski 2001, p. 164, but also Delgado Casteleiro 2016, p. 134.

[44] See Case no. 7, *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union)*.

[45] A more thorough summary of the dispute is provided by Delgado Casteleiro 2016, pp. 139–146.

[46] See *Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Union), Order of 16 December 2009, ITLOS Reports 2008–2010, p. 13*, Order of 16 December 2009.

[47] See *Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Community), Order of 20 December 2000, ITLOS Reports 2000, p. 148*, Order of 20 December 2000.

competent in relation to matters concerning the conservation and management of living marine resources.[48]

To our purpose, it is important to emphasise that had the dispute been continued, it would have been unlikely that the EU would have challenged the admissibility of the action based on the argument that it was brought against the wrong respondent. In other words, it seems safe to assume that the EU would have taken the same stance seen above in the context of the WTO. Namely, it would have accepted to respond on behalf of the whole European bloc by virtue of its exclusive competence covering the matters relevant to the dispute. This, in turn, suggests that the ITLOS would have most probably accepted this state of affairs and would have settled the dispute between the claimant and the respondent as identified in Chile's claim. In fact, as it will be further examined in Chap. 5,[49] it can generally be affirmed that an international tribunal must be satisfied that the respondent to a dispute is *prima facie* responsible for the actions challenged by the claimant. This assessment is usually made at the preliminary stage of a procedure. However, as it will be seen, it is unlikely that a tribunal will make such assessment *motu proprio*, that is without an explicit objection on the part of one of the two parties.[50] In other words, absent an objection of inadmissibility made by one of the parties to the dispute, it is logical that an international dispute settlement mechanism will entertain the case without questioning whether the respondent brought before it is the right or the wrong one. It will content itself with the latter's acceptance of its status. Therefore, even if the dispute would have continued to a later stage, it is safe to presume that the Union's participation as the sole respondent would not have been called into question at the preliminary stage of the procedure.

However, as demonstrated by the WTO *Selected Customs Matters* case examined above, it cannot be excluded, as a matter of principle, that ITLOS would not have sought a clarification from the EU as to the internal division of competence concerning the discharge of the obligations stemming from UNCLOS, at least at the stage of the merits. In other words, it is reasonable to believe that in case of doubt, ITLOS could have raised issues of competence, and made its own assessment of such issues. As will be seen in Chap. 3, from an EU law perspective, it is in principle problematic that an international dispute settlement mechanism makes its own assessments concerning the internal division of powers between the EU and the Member States. This would hardly be reconcilable with the ECJ's case law concerning the principle of autonomy.

The second relevant UNCLOS case was brought against the EU by Denmark in respect of the Faroe Islands in the context of what is widely known as the 'Mackerel

[48] See Delgado Casteleiro 2016, pp. 144–146.

[49] See, in particular, Sect. 5.2.

[50] A famous exception to this state of affairs is the ECtHR, which uses heavily its power to check the admissibility of claims *ex officio*. See Admissibility of an Application, CourTalks, available at https://www.echr.coe.int/Documents/COURtalks_Inad_Talk_ENG.PDF (accessed on 14 June 2018) p. 1, where it is reported that the ECtHR rejects around 90% of received applications as inadmissible.

War'. In short, the dispute revolved around a fishing quotas disagreement between the EU and the Faroe Islands in relation to two associated species, namely mackerel and a type of herring known as the Atlanto-Scandian variety. As the two parties were unable to reach an agreement on a so-called total allowable catch (TAC), the Faroe Islands more than trebled its fishing quotas with a unilateral decision. On 16 August 2013, Denmark brought arbitral proceedings against the EU before the Permanent Court of Arbitration (PCA) on behalf of the Faroe Islands alleging a violation of Article 63(1) UNCLOS.[51] In response, the EU adopted trade measures against the Faroe Islands a few days later as it considered the quota announced by this country to be unsustainable.[52] The Mackerel War, however, was terminated with an agreement reached between the Parties only a few months later, and the PCA arbitration was officially discontinued on 23 September 2014.[53]

To begin with, it is unclear whether this would be a case falling within the scope of Article 344 TFEU, according to which the Member States are prevented from submitting a dispute concerning the application and interpretation of EU law to any means of dispute settlement other than the ECJ.[54] Scholars have expressed different views on this point.[55] For the purpose of this book, a number of useful indications can be drawn from the *Atlanto-Scandian Herring* case. Firstly, the dispute revolved around a provision—Article 63(1) UNCLOS—concerning a matter that falls within the EU exclusive competence over the conservation of marine biological resources.[56] Secondly, only EU measures were at stake in the *Atlanto-Scandian Herring* case. In fact, even though the sanctions imposed by the EU were enacted after the commencement of the dispute, it was clear from the outset that the Member States were in no way involved. Thirdly, the Faroe Islands—as well as Denmark—were familiar enough with the division of competence at EU level and were well aware that fishing agreements are concluded exclusively by the EU as a rule.[57]

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[51] An overview of the (brief) procedural history of this case is provided on the website of the PCA at the following address: https://www.pcacases.com/web/view/25 (accessed 10 July 2018).

[52] See Commission Implementing Regulation (EU) No 793/2013 of 20 August 2013 establishing measures in respect of the Faeroe Islands to ensure the conservation of the Atlanto-Scandian herring stock, OJ L 223, 21.8.2013, pp. 1–7.

[53] See PCA, *In the Matter of the Atlanto-Scandian Herring Arbitration (The Kingdom of Denmark in respect of the Faroe Islands v. The European Union)*, Termination Order of 23 September 2014, PCA Case No 2013-30.

[54] This provision will be thoroughly analysed in Sect. 3.4.

[55] In particular, it has been argued that Denmark violated Article 344 TFEU at least from a formal perspective, as it could have found itself bound by an international arbitral award conflicting with its EU law obligations. See Wackernagel 2013, pp. 8–9. A different argument has been made by Vatsov 2014, pp. 877–878, according to whom Denmark has not violated its EU law obligations as it merely acted on behalf of a subnational entity that is not part of the EU territory.

[56] See Article 3(1)(d) TFEU.

[57] It should be noted that the Faroe Islands themselves had concluded fishing agreements with the EU before the *Atlanto-Scandian Herring* dispute arose. See, in particular, The Framework Agreement between the European Economic Community, of the one part, and the Government of

If anything, the *Atlanto-Scandian Herring* case confirms the practice already developed in the *Swordfish* case. Needless to say, the fact that the dispute was discontinued prevented the PCA arbitral tribunal from making its own assessment on the matter. Differently from the *Swordfish* case, however, the *Atlanto-Scandian Herring* dispute seems to be more straightforwardly a case where the EU was the only plausible respondent. In all likelihood, had the case been continued, no discussion on the division of competence would have taken place. Hence, the fact that the dispute was brought exclusively against the EU appears as a confirmation that third countries—in this case, an autonomous subnational entity of a EU Member State—use the declaration of competence issued in the context of UNCLOS as a reference base to identify the respondent party in a dispute.

The third UNCLOS case that is—only indirectly—relevant to this study is the Advisory Opinion requested by the Sub-Regional Fisheries Commission (hereinafter: *SRFC Advisory Opinion*).[58] Of the four questions put to the ITLOS, only the third one is relevant to our purpose. It was phrased as follows:

> Where a fishing license is issued to a vessel within the framework of an international agreement with the flag State or with an international agency, shall the State or the international agency be held liable for the violation of the fisheries legislation of the coastal State by the vessel in question?[59]

Although formulated in general terms, the question primarily concerned the EU and its Member States as readily acknowledged by the ITLOS.[60] The Tribunal further noted that in accordance with Annex IX UNCLOS, issues of responsibility of an international organisation are linked with competence. More specifically, it stated that "an international organization which in a matter of its competence undertakes an obligation, in respect of which compliance depends on the conduct of its member States, may be held liable if a member State fails to comply with such obligation".[61] However, strictly speaking, the question revolved around the violation of fisheries agreements and not of UNCLOS itself. For this reason, and unsurprisingly, the ITLOS declared that issues of liability for conducts undertaken by private vessels depended "on whether the relevant agreement contains specific provisions regarding liability for such violation. [Whereas] [i]n the absence of such provisions in the agreement, the general rules of international law apply".[62] Furthermore, it should be noted that the fisheries agreements in question were, like

Denmark and the Home Government of the Faroe Islands, of the other part, adopted by Council Regulation (EEC) 2211/80 of 27 June 1980, OJ L 226 of 29 August 1980, p. 11.

[58] See *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015,* ITLOS Reports 2015, p. 4.

[59] See *SRFC Advisory Opinion*, para 151.

[60] See *SRFC Advisory Opinion*, para 158.

[61] See *SRFC Advisory Opinion*, para 168.

[62] See *SRFC Advisory Opinion*, para 170.

the one at stake in the *Atlanto-Scandian Herring* case, agreements concluded by the Union only. The EU emphasised this aspect in its submissions to the Tribunal.[63] For this reason, the ITLOS further observed that the "international organization, as the *only* contracting party to the fisheries access agreement with the SRFC Member State, must […] ensure that vessels flying the flag of a member State comply with the fisheries laws and regulations of the SRFC Member State".[64] Since the Member States were not Parties to these agreements, they had no binding obligations stemming from such agreements as a matter of international law. As a logical consequence of this, the ITLOS concluded that "only the international organization may be held liable for any breach of its obligations arising from the fisheries access agreement, and not its member States".[65]

As already mentioned above, this case is only indirectly relevant to the analysis carried out in this book. First of all, the advisory nature of the procedure means that there was, strictly speaking, no dispute at stake. Therefore, there was no need to identify the proper respondent as there could be no respondent whatsoever. Secondly, the ITLOS' decision in question only tells us that within UNCLOS, the dispute settlement mechanism established under such an agreement seems to be willing to use the declaration of competence made by the EU as the starting point of its analysis concerning responsibility and respondent status. However, it does not tell us, what would happen if the division of competence as enshrined in the declaration issued by the EU in accordance with Annex IX is incomplete or unclear. Who would be the final assessor of the division of powers and responsibilities between the EU and the Member States under the EU Treaties? Like the *Atlanto-Scandian Herring* case, the *SRFC Advisory Opinion* revolved around a relatively straightforward scenario. As we have seen, in the case in point only an EU exclusive competence was at stake. Furthermore, only acts of the EU undertaken as a result of the exercise of such exclusive competence—namely, the Union-only fisheries agreements with SRFC countries—came under the scrutiny of the Tribunal. But who, under UNCLOS, would be the ultimate arbiter of competence issues in a scenario that is more complex than this one?

As is well known, and despite being a widespread practice,[66] declarations of competence display several limits that often undermine the purpose of their adoption. Amongst the criticisms formulated to such declarations, legal scholars have pointed out that they are seldom accurately drafted because of the inherent difficulty in doing so, that they do not reflect the dynamic nature of the division of competences, and that they are usually not updated.[67] In light of their "imprecise,

[63] See Written statement by the European Commission on behalf of the European Union, para 84.

[64] See *SRFC Advisory Opinion*, para 172, emphasis added.

[65] See *SRFC Advisory Opinion*, para 173.

[66] For a list of agreements with a declaration of competence, see the EU Treaties Office Database, available at http://ec.europa.eu/world/agreements/viewCollection.do?fileID=76198.

[67] See Delgado Casteleiro 2012, p. 498; Heliskoski 2013, p. 200.

incomplete and open-ended" nature,[68] much room for interpretation would be left to the international court or tribunal charged with applying them.[69] Not to mention cases where the EU and the Member States themselves disagree as to the allocation of competence.

In summary, and much like the WTO model, the competence-based model displays several limits. First and foremost, some of these limits have to do with the inherent inadequacy of declarations of competence to serve as a useful instrument. As said above, it is doubtful that they can successfully guide a dispute settlement mechanism in making determinations concerning responsibility and respondent status. Secondly, and most importantly to the purpose of this book, the competence-based models necessarily and inevitably entails that the relevant dispute settlement body is vested with the power to decide, in case of doubt, where the competence divide lies in a given case. This circumstance, put differently, renders the dispute settlement mechanism in question the ultimate reviewer of issues relating to the division of competence between the EU and the Member States.

2.4 The Involvement of the EU in International Disputes Under Other Agreements: Joint Responsibility, Co-respondency, the State-to-State Trade Dispute Model, and Proceduralisation

Despite the already mentioned fact that the EU, in practice, has seldom been involved in international disputes outside the WTO framework, it has concluded numerous agreements that include a dispute settlement mechanism. Such mechanisms have never been activated in practice. However, this section will none the less provide a brief overview of their functioning and structure, with a view to further categorising possible models for the settlement of international disputes against the EU. The agreements in question will be divided into four models: the joint responsibility model, the co-respondency model, the State-to-State trade dispute model, and the proceduralisation model.[70] As we shall see, this last model can be considered a sort of logical predecessor of the so-called internalisation model, which is the one adopted by EU investment agreements that will be examined thoroughly in Chap. 5. In other words, the internalisation model used in EU investment agreements can be regarded as a logical evolution of the proceduralisation model.

[68] Heliskoski 2013, p. 202.

[69] See the considerations made by Contartese and Pantaleo (forthcoming).

[70] Sections 2.4.1, 2.4.2, and 2.4.4 are based on the analysis carried out in Contartese and Pantaleo (forthcoming).

2.4.1 The Joint Responsibility Model

A technique that has been used under some mixed agreements and that may appear appropriate for indirectly governing the participation of the EU and the Member States to the settlement of disputes is the rule on joint responsibility. As is well known, the principle of joint responsibility means that, "when the EU and one or more Member States commit an internationally wrongful act that results in a single injury, both are responsible for the injury caused, not individually, or for separable parts of the injury, but jointly, for the same, undivided injury".[71] For the purpose of the present work, the existence of a rule on joint responsibility in an international agreement would suggest to an applicant party that the correct respondents are, by default, both the EU and its Member States. Where such a rule is included, the international dispute settlement mechanism would have to settle the dispute with a double-respondent and allocate responsibility to both of them without neither investigating EU law nor apportioning responsibility between them in accordance with the rules of general international law.[72]

Amongst the agreements to which the EU and its Member States are parties, the ones that expressly foresee joint responsibility, as a rule, are quite rare.[73] Nevertheless, these agreements have received some attention in the academic debate, especially as a result of the *European Parliament v Council* judgment, which seemed to suggest that the Union and the Member States are collectively responsible for their obligations under mixed agreements unless a declaration of competence is provided.[74] In reality, this case specifically refers to a mixed bilateral agreement where the EU and the Member States were one, undivided contracting party to the treaty. A number of arguments have been put forward against the automatic application of joint responsibility to mixed agreements. First of all, it has

[71] See Nollkaemper 2012, p. 310.

[72] These rules will be thoroughly discussed in Sect. 5.2.

[73] If one excludes the Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997, in force 16 February 2005), the only notable examples seem to be the Galileo/GPS Agreement—Agreement on the promotion, provision, and use of Galileo and GPS Satellite-based Navigation Systems and related applications, done at Dromoland Castle, Co. Clare (Ireland), 26 June 2004. In particular, this is established under Article 19 'Responsibility and Liability' as a fall-back option. For a comment, see Olson 2010, p. 332, who observed that "the United States and EU were able in Galileo/GPS to agree that uncertain cases would result in joint and several liability unless the European side provided a timely statement definitively assigning responsibility. Despite initial reservations, the EU eventually accepted this provision. Neither side was happy with this result, however, nor is it clear that either would be prepared to accept a similar solution in other cases". It should be noted, however, that this agreement does not include a legal means to settle disputes. The only available option is a diplomatic one, namely consultations. The other example would be the already mentioned UNCLOS, which establishes joint responsibility in case the EU and the Member States fail to provide a reaction to a request issued by a third country in accordance with Article 6(2) of Annex IX.

[74] See European Court of Justice, *European Parliament v Council of the European Union*, Judgment of 2 March 1994, Case C-316/91, ECLI:EU:C:1994:76, paras 24–35.

been pointed out that in some circumstances, default joint responsibility would lead to unacceptable results. This would be the case where wrongful acts are committed *ultra vires*,[75] as well as in relation to the so-called facultative mixed agreements, that is agreements where mixity is not legally mandatory.[76]

From an EU law perspective, the only—yet indubitable—advantage of such a model is that neither the applicant party nor the international jurisdiction would be required to investigate the relevant EU norms at stake and make determinations concerning the internal relations between the EU and the Member States. In this sense, as we shall see in Chaps. 5 and 6, the joint responsibility model seems to share the main advantage of the internalisation model, which is also that of sealing off the internal rules governing the distribution of powers and responsibilities under the EU Treaties by removing it from the jurisdiction of the relevant dispute settlement mechanism. However, the main difference would be that while under the internalisation model there is only one actor in the dispute representing the European bloc as a unitary entity, a rule on default joint responsibility leads to the opposite result: namely, the EU and the Member States would be always and automatically joint parties to a dispute. Even, for example, where the dispute concerns matters falling within the exclusive competence of the Union. From an EU law perspective, it is clear that this state of affairs would be problematic. Not to mention the problems that joint responsibility between an international organisation and its Member States raises as a matter of international law.[77]

2.4.2 *The Co-respondent Mechanism Established by the Draft Accession Agreement to the ECHR*

As is well known, under the Draft Accession Agreement to the ECHR,[78] two innovative mechanisms were introduced in order to accommodate the specific characteristics of the EU legal order, namely the co-respondent mechanism and the prior involvement of the ECJ in proceedings before the ECtHR. Under the first procedure, both the European Union and its Member States were allowed, under certain circumstances, to become parties to proceedings instituted against only one of them,[79] while the prior involvement procedure enabled the ECJ to assess the compatibility with the rights enshrined in the ECHR of the provision of EU law

[75] See Björklund 2001, p. 387.

[76] See Kuijper and Paasivirta 2013, pp. 44–45.

[77] For a critical view see Nollkaemper 2012, p. 346.

[78] See Draft Agreement on the Accession of the EU to the European Convention on Human Rights, available at https://www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/CDDH-UE_MeetingReports/CDDH_2011_009_en.pdf (accessed on 27 April 2018).

[79] See Article 3 of the Draft Accession Agreement.

concerned, if it had not yet done so in its case law.[80] The two mechanisms were intertwined to a large extent, given that the prior involvement procedure could be triggered in disputes where the Union was involved as co-respondent.

The rationale behind the co-respondent mechanism was twofold. From a human rights perspective, it was deemed to help avoid the "gaps in participation, accountability and enforceability in the Convention system",[81] in light of the specific nature of the EU as a non-State entity which implied that "there could arise the unique situation in the Convention system in which a legal act is enacted by one High Contracting Party and implemented by another".[82] From an EU law perspective, it provided "the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate", in accordance with the requirements of Article 1(b) of Protocol No 8 to the EU Treaties. As for applicant parties, this mechanism was deemed to be adequately protective of their rights. In fact, private parties were allowed to make submissions before a decision on adding a co-respondent was taken, and the admissibility of their applications was to be "assessed without regard to the participation of the co-respondent in the proceedings".[83]

The co-respondent mechanism was certainly a quite sophisticated instrument. The rules governing its functioning were contained in Article 3 of the Draft Accession Agreement. Accordingly, the Union could obtain the status of co-respondent to the proceedings if it appeared that an alleged infringement by one or more Member States called into question the compatibility between the ECHR and a provision of (primary or secondary) EU law.[84] It was also possible for one or more Member States to become a co-respondent. This was the case if the application was directed against the Union and it appeared "that [the alleged infringement] call[ed] into question the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of a provision of [primary law] or any other provision having the same legal value pursuant to those instruments, notably where that [infringement] could have been avoided only by disregarding an obligation under those instruments".[85] Where both the EU and its Member States were respondents in the case, the status of either could be changed to that of a co-respondent.[86]

The rationale behind these rules, as indicated in the Draft explanatory report, was to bring the correct party or parties before the ECtHR. This meant, in practice, that the respondent was to be understood as the party to which the contested act,

[80] See Article 3, para 6, of the Draft Accession Agreement.

[81] See Draft explanatory report, para 39.

[82] See Draft explanatory report, para 38.

[83] See Draft Explanatory Report, para 40.

[84] See Article 3(2) Draft Accession Agreement.

[85] See Article 3(3) Draft Accession Agreement.

[86] Article 3(4) Draft Accession Agreement.

measure or omission was to be attributed, while the co-respondent was to be regarded as the party that had the power to amend the provisions of EU law relating to that act, measure or omission. In the case of EU secondary law, this would be the EU itself, while in the case of EU primary law, it would be one or more of its Member States.[87] The Draft Accession Agreement conferred the power to decide on the status of co-respondent to the ECtHR. More specifically, the latter could either invite a party to become a co-respondent or accept a party's request to that effect. In both circumstances, the Court of Strasbourg was under an obligation to seek the views of all parties to the proceedings in order to assess whether the conditions for triggering the co-respondent mechanism were met.[88] The proper functioning of the co-respondent mechanism was based on the assumption that the potential co-respondent would not refuse to play such a role. For this reason, the Union was meant to add a declaration stating that "it will request to become a co-respondent to the proceedings before the European Court of Human Rights or accept an invitation by the Court to that effect, where the conditions set out in Article 3, para 2, of the Accession Agreement are met".[89]

It is indisputable that the co-respondent mechanism had some clear advantages, especially regarding its ability to avoid gaps under the system laid down by the ECHR. However, it also displayed a number of limits and ambiguities from both an EU law and an ECHR system perspective. As is well known, and contrary to the WTO and the UNCLOS regimes analysed above, an assessment of the compatibility of the Draft Accession Agreement with EU law has been sought. Moreover, as is also widely known, the verdict of the ECJ was not a favourable one. For the purpose of this book, two main problematic aspects of the co-respondent mechanism as interpreted by the ECJ in Opinion 2/13 will be examined.[90] First, we will address the issue of who had the power to decide on the triggering of such a mechanism. Secondly, the analysis will turn to the effects of the co-respondent mechanism on the allocation of responsibility and the division of competence.

As for the triggering of the co-respondent mechanism, the Draft Accession Agreement provided two options. First, it made provision for an invitation of the co-respondent by the ECtHR itself. Second, it provided that a party could request to be involved as co-respondent. In Opinion 2/13, the ECJ did not find that the ECtHR's competence to invite the Union or its Member States to become a co-respondent was problematic. The Court explained that the non-binding nature of the invitation issued by the ECtHR allowed the EU and the Member States to

[87] Draft Explanatory Report, para 56. For a critical view on the ability of the EU and its Member States to amend the EU law at the origins of the ECHR violation, see Delgado Casteleiro 2014, pp. 111–115.

[88] See Article 3(5) Draft Accession Agreement.

[89] See Appendix II—Draft declaration by the European Union to be made at the time of signature of the Accession Agreement.

[90] See Court of Justice, *Draft Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Opinion of 18 December 2014, Opinion 2/13, ECLI:EU:C:2014:2454.

"remain free to assess whether the material conditions for applying the co-respondent mechanism are met".[91] By contrast, the ECJ noted that a request by a contracting party to become co-respondent did not guarantee that the autonomy of the EU legal order was adequately safeguarded. Since ECtHR was called to decide on the plausibility of the reasons provided by the Union or its Member States to that end, the Court found that given that "[the material conditions for applying the co-respondent mechanism] result, in essence, from the rules of EU law concerning the division of powers between the EU and its Member States and the criteria governing the attributability of an act or omission that may constitute a [breach] of the ECHR, the decision as to whether those conditions are met in a particular case necessarily presupposes an assessment of EU law".[92] The ECJ, therefore, concluded that "such review would be liable to interfere with the division of powers between the EU and its Member States".[93]

As far as the allocation of international responsibility was concerned, the Draft Accession Agreement contained a rule at Article 3(7) that was reminiscent of the (default) joint responsibility model analysed above, albeit nuanced by a possible exception:

> If the violation in respect of which a High Contracting Party is a co-respondent to the proceedings is established, the respondent and the co-respondent shall be jointly responsible for that violation, unless the Court, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible.

As noted by some observers, the rationale behind this rule was to prevent the ECtHR from giving a ruling on the allocation of responsibility between the Union and the Member States and, as a consequence, deciding on the relevant EU rules on the division of competence.[94] Nevertheless, the ECJ was not satisfied with the text of this provision. The Court recalled that "a decision on the apportionment as between the EU and its Member States of responsibility for an act or omission constituting a violation of the ECHR established by the ECtHR is also one that is based on an assessment of the rules of EU law governing the division of powers between the EU and its Member States and the attributability of that act or omission".[95] The ECJ, therefore, concluded that "to permit the ECtHR to adopt such a decision would […] risk adversely affecting the division of powers between the EU

[91] See Court of Justice, *Draft Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, para 220.

[92] See Court of Justice, *Draft Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, para 221.

[93] See Court of Justice, *Draft Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, para 225.

[94] See, in particular, Jacqué 2011, p. 995; De Schutter 2010, p. 555; Kuijper and Paasivirta 2013, p. 65.

[95] See Court of Justice, *Draft Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, para 230.

and its Member States".[96] The Court continued that "even [if] it is assumed that a request for the apportionment of responsibility is based on an agreement between the co-respondent and the respondent, that in itself would not be sufficient to rule out any adverse effect on the autonomy of EU law".[97] Recalling that the question of the apportionment of responsibility must be "resolved solely in accordance with the relevant rules of EU law",[98] the ECJ concluded that "to permit the ECtHR to confirm any agreement that may exist between the EU and its Member States on the sharing of responsibility would be tantamount to allowing it to take the place of the Court of Justice in order to settle a question that falls within the latter's exclusive jurisdiction".[99] The conclusions reached by the Court in this matter seem to suggest that both the identification of the correct respondent and the allocation of (international) responsibility between the EU and its Member States must remain an internal EU law issue.

2.4.3 The State-to-State Trade Dispute Model

As is well known, the EU has concluded a number of FTAs with a variety of third countries.[100] Before the entry into force of the Lisbon Treaty, some components of EU FTAs came within shared competence. For this reason, all these FTAs have been concluded in the form of mixed agreements.[101] Such FTAs all include a dispute settlement mechanism. Although minor differences exist, such mechanisms are all built around a similar structure and have similar features. The common traits that they share allow us to consider them cumulatively as yet another model that the EU has adopted in its treaty practice. Since this model is contained in bilateral trade agreements concluded by the EU and the Member States with a third country and is only applicable to State-to-State disputes, it will be referred to as the State-to-State trade dispute model.

Before getting underway with the analysis, however, it is necessary to make two clarifications. First of all, in this subsection, the expression FTA is used in a non-technical manner so as to include not only FTAs proper but also other

[96] See Court of Justice, *Draft Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, para 231.

[97] See Court of Justice, *Draft Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, para 234.

[98] See Court of Justice, *Draft Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, para 234.

[99] See Court of Justice, *Draft Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, para 234.

[100] A non-comprehensive list of countries with which the EU has concluded an agreement includes but extends beyond Chile, Mexico, Moldova, Morocco, South Africa, and South Korea.

[101] This may change, however, as a result of Opinion 2/15. See the considerations made below in Sect. 5.3.

agreements variously denominated that contain a trade component, such as the EU-Chile and EU-Moldova Association Agreements. Secondly, a similar mechanism is also included in the new, post-Lisbon FTAs that the EU is currently concluding or negotiating, such as CETA and the EU-Singapore Agreement. As we shall comprehensively see in Chaps. 5 and 6, this means that under these agreements, State-to-State disputes and disputes involving individuals in the field of investment will follow an entirely different set of rules.

For the purpose of this analysis, the EU-South Korea FTA will be used as an example in order to identify the main characteristics of this model. Chapter 14 Section A of the EU-South Korea FTA governs the settlement of disputes under this agreement. It is established that disputes should be resolved through consultations at first. If consultations fail, a party may request the establishment of an arbitration panel. Neither the provisions concerning consultations nor those relating to arbitration contain any rule concerning the identification of the party against which a dispute should be brought. In particular, Article 14.4(2) states as follows:

> The request for the establishment of an arbitration panel shall be made in writing to *the Party complained against* and the Trade Committee. The complaining Party shall identify in its request the specific measure at issue, and it shall explain how such measure constitutes a breach of the provisions referred to in Article 14.2.[102]

Absent any rule in the chapter concerning the settlement of disputes, one has to turn the general definition of what constitutes a 'party' under the EU-South Korea FTA. Article 1.2 provides the following definition:

> the Parties mean, on the one hand, the European Union or its Member States or the European Union and its Member States within their respective areas of competence as derived from the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as the 'EU Party'), and on the other hand, Korea.

Based on this provision, it would seem that the EU and the Member States should be considered one and the same party, which is collectively referred to as the EU Party. The reference to competence matters, however, suggests that the EU Party should be broken down, where appropriate, in accordance with the division of competence as fixed by the Treaties. No declaration of competence is, however, attached to the FTA. For the purpose of settling a dispute, this means that South Korea should at first identify one or more specific measures that it considers to be in violation of the FTA. Secondly, it should attribute the measure in question to a EU Party based on its own assessment of who has the competence to adopt that measure in question under EU law. This could be the EU, the Member States or both in case of shared competence. This last circumstance entails that joint responsibility is forcefully admitted under these FTAs. If an arbitration panel is established under Article 14.5, such a panel will necessarily have to verify, at least *prima facie*, that the respondent brought before it is the one responsible under international law. This

[102] Emphasis added.

will admittedly be done in accordance with the rules of general international law concerning responsibility that will be thoroughly discussed in Sect. 5.2.

In summary, the State-to-State trade dispute model seems to be the least regulated one. Contrary to all other models analysed in this chapter—save, perhaps, the WTO model—it is the only model that contains almost no indication as to how to identify the respondent or to attribute responsibility. It only includes a general reference to the division of competence under EU Treaties, based on which the third country concerned is supposed to attribute the power to adopt the measure that it considers to be in violation of the relevant FTA, and as a consequence identify a respondent party in a dispute. Unlike UNCLOS, a reference to competence is not complemented by a declaration aimed at clarifying to the third party involved what is the division of roles under EU law. As a result, the State-to-State trade dispute model leaves these issues entirely in the hands of the other party to a dispute and the dispute settlement body established under these agreements. They will, as a result, apply their own understanding of EU law in conjunction with the general international law. As we shall see more thoroughly in Chap. 3, this model seems to be the most ill-suited to the EU and the requirements of autonomy.

2.4.4 *The Proceduralisation Model: A Precursor of Internalisation?*

The final technique devised in some international agreements that include a dispute settlement to which the EU is a party can be described as the proceduralisation model.[103] Historically, the first examples of this kind are the so-called Rhine Conventions, which are agreements concluded between four Member States (namely France, Germany, Luxembourg and the Netherlands), the EU and Switzerland. These agreements lay down a procedure which allows the Union and its Member States to identify the correct respondent. More specifically, the applicant party to a dispute is required to transmit a request seeking the determination of the respondent simultaneously to a Member State as well as to the Union, which will have to jointly notify the party of the correct respondent within two months. Should that time limit not be observed, both the Union and the Member State concerned will be regarded as constituting one and the same party to the dispute. A good example of this rules of proceduralisation is Section 7(2) of the Annex to the Convention on the Protection of the Rhine, which is worth to be cited in full.

> In the case of a dispute between two Contracting Parties, only one of which is a Member State of the European Community, which is itself a Contracting Party, the other Party shall simultaneously transmit its request to that Member State and to the Community, which shall jointly notify the party within two months following receipt of the request whether the

[103] On the rules of proceduralisation under international agreements concluded by the EU, see Heliskoski 2001, pp. 157–208; as well as Rosas 2003, pp. 299–303.

> Member State, the Community or the Member State and the Community together are parties to the dispute. If such notification is not given within the appointed time, both the Member State and the Community shall be regarded as constituting one and the same party to the dispute for the purposes of applying this Annex. The same shall obtain when the Member State and the Community are jointly a party to the dispute.

An identical article is also foreseen under some of the Council of Europe's treaties, namely the Additional Protocol of 10 May 1979 to the European Convention for the Protection of Animals during International Transport,[104] the Convention on the Conservation of the European Wildlife and Natural Habitats,[105] and the Convention on Transfrontier Television of 5 May 1989.[106] These mechanisms as well have never been used in practice.

A similar solution was devised by the Energy Charter Treaty (the ECT). Under this agreement, the procedural rule was inserted in the Union's declaration to a treaty provision, rather than in the text of the ECT itself.[107] The wording of such a declaration appears, however, to contain an important difference with respect to the provisions mentioned above, as the determination of the respondent by the Union and its Member States made under the ECT is not binding on the other party to the dispute. It only takes place at the request of the investor. In other words, the investor is free not to avail itself of the possibility to issue the request in question. For a number of reasons, investors have so far preferred to sue only the Member States without seeking a clarification as to the correct respondent in accordance with the declaration attached to the ECT.[108]

It is worth emphasising that for a rule of proceduralisation to be effective, it should display some basic features. The most appropriate solution seems to be a provision that makes the determination of the respondent binding on both the applicant party and on the body, that will settle the dispute—as opposed to an optional mechanism that the applicant may, or may not, decide to trigger to its liking. This would avoid not only a fall-back on the rules of general international law concerning responsibility, but it would also make sure that the respondent party

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[104] See Article 47, para 2 of the Convention (ETS n. 65) as amended by the additional protocol (ETS n. 103).

[105] See Article 18, para 3 of the Convention on the Conservation of the European Wildlife and Natural Habitats (1979).

[106] Annex on arbitration, para 2 of the Convention on Transfrontier Television of 5 May 1989 (ETS N. 132). The EU is not a Contracting Party.

[107] Statement submitted by the European Communities to the Secretariat of the Energy Charter Treaty pursuant to Article 26, para 3, b, ii, of the Energy Charter Treaty (OJ 1994 L 336/115): "The Communities and the Member States will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of another Contracting Party. In such case, upon the request of the Investor, the Communities and the Member States concerned will make such determination within a period of 30 days". The footnote to the declaration specifies that the determination made by the EU and its Member States "is without prejudice to the right of the investor to initiate proceedings against both the Communities and their member states". See Roe and Happold 2011, pp. 89–103.

[108] See the considerations made by Roe and Happold 2011, p. 185.

will not raise an inadmissibility objection before the international court or tribunal that has to settle the dispute.[109] Also, it would make sure that the applicant does not have the freedom to choose the respondent it considers the appropriate one and the mechanism before which the dispute is brought to attribute international responsibility. The proceduralisation model seems to be an appropriate instrument to protect the autonomy of the EU legal order insofar as it prevents the dispute settlement mechanism from making determinations that may affect the internal relations between the EU and the Member States, and in particular issues relating to the division of competence. It also seems to offer a satisfactory solution to the other party to the dispute, who will always have the guarantee that the respondent appearing in the dispute is the one that is willing to assume the consequences of the international wrongful act challenged by it. These features of the proceduralisation model are reminiscent of the internalisation model that will be presented in Chap. 5. In addition, it seems safe to affirm that rules of proceduralisation are also to be preferred to a treaty system that includes no rule whatsoever on the participation of the EU and the Member States to the dispute settlement, as is clearly demonstrated by the challenges made to the *de facto* WTO arrangement seen above.

For these reasons, it is perhaps surprising that the proceduralisation model has been less frequently used than other models, in particular, the competence-based model—and despite having been invented, so to speak, before any other model. From a quantitative point of view, agreements featuring a declaration of competence are in fact much more numerous than those making use of rules of proceduralisation. This trend, however, is set to be changed by EU investment agreements that will be examined in Chap. 5.

2.5 Conclusions

The analysis carried out above has focused on the practice of the EU in international adjudication. By examining the rules and the structure of the dispute settlement mechanisms to which the EU has so far subscribed, this chapter has attempted to offer a systematisation of such practice. Existing systems have been divided among six models. The advantages and the disadvantages of each model have been highlighted. A preliminary assessment of their suitability to the so-called EU exceptionalism has also been provided, although a clearer picture of this will only emerge after the examination of the case law of the ECJ concerning the participation of the EU to international dispute settlement that will be carried out in Chap. 3.

The first model analysed above is that of the WTO, which is also the most widely used—both as an applicant and as a defendant—by the EU. Such a model does not contain any explicit rule governing the participation of the EU and the

[109] See more in detail the considerations made in Sect. 5.2.

Member States to the dispute settlement system. Their participation, as seen above, seems to be based on a *de facto* unilateral assumption of all the consequences flowing from a dispute made by the EU, which is in turn admittedly *de facto* accepted by third parties and WTO bodies alike. We have also seen that this factual arrangement may have crystallised in a special rule applicable only within the WTO system, as suggested by Castellarin's position. In both scenarios, the possibility of litigating against the Member States separately from, or conjunctively with, the Union cannot be ruled out. It is true that the number of challenges to the exclusive role of the EU might appear marginal from a quantitative perspective if compared to the cases in which it has remained unchallenged. However, the considerations made above confirm that the WTO model is not entirely suitable to fully accommodate the specific characteristics of the EU as defined in the case law of the ECJ. In particular, it does not guarantee that the dispute settlement bodies do not make determinations concerning the internal division of competence between the EU and the Member States.

A similar conclusion has been reached in relation to the second model analysed above, that is to say, the competence-based model. As an illustration thereof, the rules on the settlement of disputes under UNCLOS have been examined. This section revealed that a dispute settlement where the participation of the EU and the Member States is expressly and directly linked to competence has several limits and ambiguities. First of all, the proper functioning of the whole systems is based on an instrument, namely declarations of competence, whose proper functioning is almost impossible to achieve. This is partly due to the ever-changing nature and scope of EU competence and partly caused by the objectively and inevitably fluid nature of any competence issues. In addition, and this is a major drawback that is shared with the WTO model, a competence-based model such as UNCLOS does not prevent, by definition, the international dispute settlement body from making determinations on the internal allocation of powers between the EU and the Member States. To a certain extent, its proper functioning depends precisely on the ability of the dispute settlement body to make such determinations.

The remaining four models examined above are the (default) joint responsibility model, the co-respondent mechanism, the State-to-State trade dispute model, and the proceduralisation model. The first is based on a rule that attributes joint responsibility to the EU and the Member States automatically, thus obliging the applicant to any dispute to bring an action against both the EU and the Member States. While this model has the advantage of preventing the dispute settlement body from assessing the internal relations between the EU and the Member States, it can none the less lead to unacceptable results. Most importantly, it can result in the attribution of responsibility to both entities involved even in a case where only EU exclusive competence is at stake, and vice versa. The co-respondent mechanism, on its part, was clearly a very sophisticated instrument aimed at governing the participation of the EU and the Member States to a complex dispute settlement regime as the ECHR. However, it failed on the most important points, namely on its ability to prevent the ECtHR from making assessments that fall within the exclusive remit of the ECJ. Thirdly, the State-to-State trade dispute model is based, essentially, on

the absence of any rule whatsoever concerning the division of roles between the EU and the Member States. While reference to competence is included in the definition of what constitutes a party to the relevant FTAs, this is not accompanied by an *ex ante* clarification made by the EU by means, for example, of a declaration of competence. This model—albeit never used in practice—seems to be the most problematic from an EU law perspective, as it would leave the definition of roles and the division of competence fully in the hands of non-EU parties. Finally, we have examined the proceduralisation model, that is agreements laying down procedural rules that allow the EU and the Member States to designate the respondent party to a dispute in accordance with the EU's own internal rules. We will see in Chap. 5 that these systems come very close to the model chosen by EU investment agreements. The proceduralisation model can be considered, to a certain extent, a precursor of the model followed by EU investment agreements, which we have labelled the internalisation model. All the procedural rules analysed in this chapter, however, contain one or more defective features. For example, most of them establish joint responsibility as a fall-back option, or, even worse from an EU law perspective, are not binding on the other party to the dispute, thus resulting in an automatic fall-back on the general international law. This led us to conclude that even though the proceduralisation model seems more suitable to the specific characteristics of the EU than the models previously analysed, additional legal safeguards may be required to make sure that the participation of the EU and the Member States to the settlement of disputes is in harmony with EU law, and in particular with the principle of autonomy.

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Chapter 3
The Participation of the EU in International Dispute Settlement: General Principles and Conditions Set by the Court of Justice

Contents

Abstract This chapter aims to examine the case law of the ECJ concerning the participation of the EU in international dispute settlement. By analysing the main findings of the Court in some landmark decisions, it will provide an appraisal of the principles and conditions of EU law governing the participation of the EU in international dispute settlement as set out by the Court of Justice. Special attention will be devoted to the so-called principle of autonomy of the EU legal order, which will be presented as a sort of umbrella concept encompassing what the Court considers 'the specific characteristics of the EU', and which has served as a means to assess the compatibility with EU law of international dispute settlement to which the EU or the Member States have subscribed.

Keywords principle of autonomy · EEA Court · Patent Court · Article 344 TFEU · ECJ's exclusive jurisdiction · Achmea ruling

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3.1 Introduction: The Court of Justice and Its Troubled Relationship with International Dispute Settlement

As has been rightfully pointed out, the participation of the EU to international dispute settlement can be rooted in the foundational principles governing the Union's external action as enshrined in the Treaties.[1] In particular, Article 3(5) of the Treaty on the European Union (TEU) and Article 21(1) and (2) TEU seem to encourage and promote the involvement of the EU in international dispute settlement as a means to foster the "multilateral solutions to common problems" (Article 21(1)), as well as to "consolidate and support democracy, the rule of law, human rights and the principles of international law" (Article 21(2)). In addition, the power to subscribe to international dispute settlement can be seen as inherent in the EU treaty-making power, as repeatedly recognised by the ECJ's case law that will be analysed below. Despite these points of principle, it is a fact that some decisions of the ECJ concerning the participation of the EU in international dispute settlement have been particularly restrictive. In a very meaningfully titled essay, Bruno de Witte pointed out that the Court has repeatedly made clear "its diffidence towards other international courts".[2] The essay in question was written before the ECJ famously struck down the Draft Accession Agreement to the ECHR in its Opinion 2/13. In light of that Opinion, the statement that concluded the essay in question sounds nowadays somewhat prophetic. In fact, Bruno de Witte concluded that the ECJ "has occasionally been a little selfish, showing more concern for its own role than for the advancement of the broader agenda of promoting the international rule of law",[3] which the provisions of the Treaties mentioned above would seem to strongly encourage. This appears even more true in light Opinion 2/13.

The aim of this chapter is precisely to examine the case law of the ECJ concerning the participation of the EU in international dispute settlement. In particular, by analysing the main findings of the Court in some landmark decisions,[4] it will attempt to provide an appraisal of the principles and conditions of EU law governing the participation of the EU in international dispute settlement as set out by

[1] See Hillion and Wessel 2017, p. 24. As well as Larik 2016, pp. 100–107.

[2] See de Witte 2014, p. 33.

[3] See de Witte 2014, p. 46.

[4] These decisions are, in chronological order: Court of Justice, *Draft Agreement establishing a European laying-up fund for inland waterway vessels*, Opinion of 26 April 1977, Opinion 1/76, ECLI:EU:C:1977:63; Court of Justice, *Draft Agreement relating to the creation of the European Economic Area*, Opinion of 14 December 1991, Opinion 1/91, ECLI:EU:C:1991:490; Court of Justice, *Commission of the European Communities v Ireland*, Judgment of 30 May 2006, Case C-459/03, ECLI:EU:C:2006:345; Court of Justice, *Draft Agreement on the Creation of a unified patent litigation system*, Opinion of 8 March 2011, Opinion 1/09, ECLI:EU:C:2011:123; Court of Justice, *Draft Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Opinion of 18 December 2014, Opinion 2/13, ECLI:EU:C:2014:2454; Court of Justice, *Slowakische Republik v Achmea BV*, Judgment of 6 March 2018, Case C-284/16, ECLI:EU:C:2018:158.

the judges sitting in Luxembourg. Special attention will be devoted to the so-called principle of autonomy of the EU legal order. To this end, it is necessary to flag a general caveat. The principle of autonomy of EU law is an extremely complex subject that could itself be the topic of a monographic work.[5] The Court of Justice has resorted to this concept in a variety of cases and for a variety of purposes, some of which are unrelated to the settlement of international disputes.[6] It is beyond the scope of this book to provide a comprehensive analysis of the constitutive elements of the principle of autonomy. Therefore, this chapter will only analyse the case law in which the notion of autonomy has been used as a sort of umbrella concept encompassing what the Court refers to as 'the specific characteristics of the EU', and which has served as a means to assess the compatibility with EU law of international dispute settlement to which the EU or the Member States have subscribed.

The relevant ECJ's decisions will not be analysed one by one and in chronological order. Rather, this chapter will provide an examination of the principles and conditions that can be derived from them. The analysis will, therefore, proceed from one principle to another rather than from one decision to another. Accordingly, Sect. 3.2 will address the issue concerning the existence of an organic link between the ECJ and the international dispute settlement established by the EU as affirmed in Opinion 1/76 and Opinion 1/91. Section 3.3 will deal with what can be considered a common *leitmotiv* of virtually all ECJ's decisions in question, namely the need to avoid that the international dispute settlement issues binding interpretations of EU law, and more specifically of the division of competence between the EU and the Member States. Section 3.4 will be focused on Article 344 TFEU, which sets a general prohibition for the Member States to submit to an international dispute settlement any dispute concerning the interpretation and application of EU law, as clarified in the *Mox Plant* ruling, Opinion 2/13 and the *Achmea* judgment. Section 3.5 will examine the question concerning the role of an international dispute settlement in relation to EU acts that are generally excluded from the jurisdiction of the Court, as affirmed in Opinion 2/13. Finally, Sect. 3.6 will present some conclusions and attempt to reconstruct and summarise the case law in a coherent framework.

[5] In fact, the author is aware of at least one colleague who is currently working on the idea of a monographic study concerning the principle of autonomy, namely Cristina Contartese. This would be most welcome, as the scholarship has so far taken a piecemeal approach to the topic. Much light still needs to be shed on the principle of autonomy and its broader implications. A comprehensive study of it would, therefore, fill an important gap in the literature.

[6] This is the case, for example, of the *Kadi* judgment, in which the autonomy of the EU legal order was called into question not by the participation of the EU in international dispute settlement, but by the alleged exclusion from judicial review of EU regulations implementing UN sanctions. See the considerations made by Contartese 2017, pp. 1643–1646, as well as by de Witte 2010, pp. 142–143.

3.2 No Double-Hatting Allowed: Protecting the ECJ's Integrity or Paying Excessive Attention to Details?

Opinion 1/76 is famous for its great contribution to the development of the ground-breaking notion of implicit competences in the field of EU external relations law.[7] However, it is also the ECJ's decision in which, for the first time, the concept of the autonomy of the EU legal order has been used externally rather than internally.[8] That is to say, *vis-à-vis* the international legal order as opposed to the legal order of the Member States.

Opinion 1/76 was a rather small international agreement in that it included the membership of only one-third country, namely Switzerland. The agreement sought to establish a 'laying up fund' for vessels navigating in the Rhine basin and featured an internal governance structure consisting of a number of treaty bodies, including a sort of mini-court named Fund Tribunal. In its decision, the ECJ seemed to show its understanding for the need to put in place a system of "judicial remedies and legal procedures which will guarantee the observance of the law in the activities of the Fund to an equal extent for all individuals".[9] However, the Court had reservations concerning the structure of the Fund Tribunal, and in particular the circumstance that its own judges would also serve as Members of the Fund Tribunal. The ECJ found that

> [A] difficulty would arise […] because the six members of the Court required to sit on the Fund Tribunal might be prejudicing their position as regards questions which might come before the Court of Justice of the Community after being brought before the Fund Tribunal and *vice versa*. The arrangement suggested might conflict with the obligation on the judges to give a completely impartial ruling on contentious questions when they come before the Court.[10]

The ECJ, therefore, came to the conclusion that the Tribunal could be established upon condition that its own judges were not required to wear two hats.

The Court came to a similar conclusion in Opinion 1/91, concerning the creation of a European Economic Area (EEA) between the EU and its Member States of the one part, and the European Free Trade Association (EFTA) countries of the other part. In its original version, the EEA Agreement included an EEA Court with the following main characteristics. The EEA Court was a two-instance body consisting of a Court of First Instance and an EEA Court endowed with the power to settle disputes between the Contracting Parties arising out of the application of the EEA Agreement. Article 6 of the EEA Agreement created a systemic link between EU

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[7] See Van Vooren and Wessel 2014, pp. 74–96.

[8] For an overview of the differences between internal and external autonomy, see Contartese 2017, pp. 1632–1633, as well as the considerations made in Sect. 6.3 of this book.

[9] See Court of Justice, *Draft Agreement establishing a European laying-up fund for inland waterway vessels*, para 21.

[10] See Court of Justice, *Draft Agreement establishing a European laying-up fund for inland waterway vessels*, para 22, emphasis in the original.

law and the case law of the ECJ, on the one hand, and EEA law and the case law of the EEA Court, on the other hand. It stated that the provisions of the EEA Agreement were meant to be interpreted in conformity with the rulings of the ECJ on the corresponding provisions of the EU Treaties. Furthermore, there was an organic link between the EEA Court and the ECJ in accordance with Article 95 of the EEA Agreement. Both the EEA Court and the EEA Court of First Instance were supposed to include judges of the ECJ and the (then) Court of First Instance of the European Communities next to the EEA Court own judges. These provisions were deemed necessary to secure uniformity between the EEA regime and the EU legal order, given that the former was essentially an extension of the rules of the latter to EFTA countries, and the provisions of the EEA Agreement were textually identical to the corresponding provisions of the EU Treaties.[11] It was against this background that the ECJ was asked to assess "whether the proposed system of courts may undermine the autonomy" of the EU legal order.[12]

The EEA Agreement created two parallel legal orders that were closely intertwined with each other. The existence of correspondence in the law and the case law of the two legal orders created a systemic relationship on the normative level, which was further completed by the existence of an organic link between the EU courts and the EEA courts. We will deal with the systemic linkage in Sect. 3.3. As regards the organic link between the courts, the ECJ was unsurprisingly unhappy about it for the same reasons seen in Opinion 1/76. In essence, the Court reiterated its concerns relating to the impartiality of double-hatted judges, stating that "it would be very difficult, if not impossible, for those judges […] to tackle questions with completely open minds" when they switched from one judicial system to another.[13]

None of the Opinions examined in this section provided a clear explanation of why the existence of an organic link between the ECJ and the international dispute settlement at stake would endanger the independence and impartiality of judges serving in both courts. The threat to the integrity of the ECJ—and hence to the autonomy of the EU legal order—was somewhat asserted without really being substantiated. In principle, it is not unreasonable to argue that double-hatting could be regarded as a useful instrument capable of conferring on the Court of Justice a relatively high degree of control over the international dispute settlement established by an agreement concluded by the EU. Therefore, it is probably correct to see the Court's position on this matter as expressing an exaggerated attention to detail.[14] At the same time, it is perhaps surprising that the framers of the EEA Agreement insisted on the creation of an organic link between courts after the—

[11] See Court of Justice, *Draft Agreement relating to the creation of the European Economic Area*, paras 1–29.

[12] See Court of Justice, *Draft Agreement relating to the creation of the European Economic Area*, *supra* note 4, para 30.

[13] See Court of Justice, *Draft Agreement relating to the creation of the European Economic Area*, *supra* note 4, para 52.

[14] See de Witte 2014, p. 36.

certainly debatable, but rather clear—findings of Opinion 1/76. Be that as it may, the main takeaway of this case law is that the ECJ demonstrated that it is more willing to accept an international dispute settlement that is entirely external with respect to the EU legal order, rather than hybrid courts such as those scrutinised in Opinion 1/76 and Opinion 1/91.

3.3 No Binding Interpretations of EU Law and No Rulings on the Internal Division of Competence

A common finding that has characterised virtually all ECJ's decisions concerning the autonomy of the EU legal order and international courts established by the EU is the need to make sure that the latter does not issue binding interpretations of EU law, particularly in relation to the internal division of competence between the EU and the Member States. The two requirements can be somewhat considered the two sides of the same coin. Namely, two equally unacceptable threats to the ECJ's exclusive jurisdiction to interpret and apply EU law.

The very first decision in which the Court was confronted with this problem is the aforementioned Opinion 1/91. On top of the existence of an organic link between courts as seen above, the ECJ saw two additional features of the EEA Court as particularly problematic for the autonomy of the EU legal order. The first critical issue detected by the Court had to do, in essence, with the division of competence between the EU and the Member States. More specifically, the Court emphasised that the power of the EEA Court to interpret the expression 'Contracting Party' in order to determine whether it meant "the Community, the Community and the Member States, or simply the Member States" for the purpose of settling a dispute entailed that the EEA Court had "to rule on the respective competences of the Community and the Member States as regards matters governed" by the EEA Agreement.[15] This circumstance was "likely adversely to affect the allocation of responsibilities defined in the Treaties and, *hence*, the autonomy of the Community legal order, respect for which must be assured by the Court of Justice".[16] This, in turn, caused a violation of the ECJ's exclusive jurisdiction in determining these matters.

The Court went on to identify another critical feature of the EEA Court. It started by explaining that the problem was not one of principle. In fact, with a statement that will come up quite frequently in later decisions, the ECJ declared that "[t]he Community's competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the

[15] See Court of Justice, *Draft Agreement relating to the creation of the European Economic Area*, para 34.

[16] See Court of Justice, *Draft Agreement relating to the creation of the European Economic Area*, para 35, emphasis added.

decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions".[17] However, the problem lied with the peculiar nature of the EEA Agreement and the system of courts set up by it. In particular, the ECJ further observed that the problem lied with the juxtaposition, next to EU law, of a corpus of identically worded rules. This circumstance would entail that the interpretation of the EEA Agreement made by the EEA Court would also have an impact on the determination of the corresponding rules of EU law.[18] In other words, the ECJ was concerned about possible contamination of the EU legal order as a result of the development of a parallel EEA case law on a body of law that was essentially a replica of EU law. In this manner, the interpretations of EEA law issued by the EEA Court would become, or risk to become, binding interpretations of EU law in violation of the ECJ's exclusive competence on the matter.

Opinion 1/91 initially caused dismay, but the parties soon resumed negotiations and came to a compromise that incorporated the ECJ's indications. Under the reformed agreement, both the systemic relation between the EEA system and the EU law system, as well as the organic relation between the EEA Court and the ECJ, were removed. Membership to the EEA Agreement was limited to the EFTA countries, and the interconnection between the two systems of courts was replaced.[19] This arrangement was later endorsed by the Court of Justice in Opinion 1/92,[20] and so it was a similar dispute settlement mechanism limited to the field of air transport.[21]

To our purpose, Opinion 1/91 represents a veritable turning point in the ECJ's case law concerning the participation of the EU in international dispute settlement. In this decision, the two interrelated principles that the Court has further elaborated in subsequent rulings are clearly delineated. In summary, these principles are: (a) an international court cannot have the power to rule on the division of competence between the EU and the Member States, in respect of which the sole possible arbiter is the ECJ; (b) neither can it issue interpretations of EU law that are directly or indirectly binding for the EU. The rationale behind these two conditions is, as seen above, the need to preserve the exclusive jurisdiction of the ECJ to interpret and apply EU law and hence guarantee its uniformity. Here it should be noted that the interpretations given by the EEA Court were only indirectly binding on the EU, and only as a consequence of the said deep interconnection between legal orders created

[17] See Court of Justice, *Draft Agreement relating to the creation of the European Economic Area*, para 40.

[18] See Court of Justice, *Draft Agreement relating to the creation of the European Economic Area*, para 45.

[19] This is the so-called homogeneity objective, which the EFTA Court has actively tried to pursue. See, among others, Baudenbacher 2005.

[20] The saga of the EEA Court is commented in great detail by Brandtner 1992.

[21] See Court of Justice, *Draft Agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area*, Opinion of 18 April 2002, Opinion 1/00, ECLI:EU:C:2002:231.

by the EEA Agreement. This is different, for example, from the situation that the Court has faced in Opinion 1/09.

Opinion 1/09 concerned the conclusion of an agreement between the EU, its Member States and third countries which were parties to the European Patent Convention (hereinafter: PC Agreement). The PC Agreement aimed to establish a two-instance judicial body tasked with the power to hear cases related to European and Community patents (hereinafter: the Patent Court). One specific feature of the PC Agreement was that according to Article 14a, the relevant sectoral secondary EU legislation was listed as applicable law to the disputes that the Patent Court was meant to settle. Here lies the main difference between the EEA Court and the Patent Court. While the former would interpret and apply EEA law and only indirectly EU law, the latter would have had jurisdiction *ratione materiae* to hear disputes concerning EU patent law. Since this would have been clearly at variance with the ECJ's exclusive jurisdiction, the framers of the PC Agreement included a provision enabling the Patent Court to request a preliminary ruling to the ECJ. Article 48 of the PC Agreement stated as follows:

> When a question of interpretation of the [EC Treaty] or the validity and interpretation of acts of the institutions of the European Community is raised before the Court of First Instance, it may, if it considers this necessary to enable it to give a decision, request the Court of Justice … to decide on the question. Where such question is raised before the Court of Appeal, it shall request the Court of Justice … to decide on the question.

The provision in question, in essence, made provision for the prior involvement of the ECJ in any case pending before the Patent Court that would require the application and interpretation of EU law.[22] The framers must have thought that this mechanism was enough to ensure the compatibility of the Patent Court with EU law. Essentially, it reproduced the preliminary ruling mechanism applicable to domestic courts of the Member States. The ECJ, however, disagreed.

The Court started off by stating that the EU Treaties are not just ordinary international agreements. Referring to its settled case law, the ECJ recalled that the Treaties created a new legal order, whose essential characteristics are the primacy of EU law over the law of the Member States, and the direct effects of EU law provisions.[23] The EU courts, as well as the domestic courts of the Member States, are entrusted with the duty to interpret and apply EU law.[24] Conversely, the Patent Court was placed "outside the institutional and judicial framework of the European Union".[25] The ECJ went on recalling that as a matter of principle, the EU

[22] For a thoughtful analysis of cases concerning a direct referral from an international tribunal to the ECJ see Contartese 2016.

[23] See Court of Justice, *Draft Agreement on the Creation of a unified patent litigation system*, para 65.

[24] See Court of Justice, *Draft Agreement on the Creation of a unified patent litigation system*, para 69.

[25] See Court of Justice, *Draft Agreement on the Creation of a unified patent litigation system*, para 71.

competence in the field of external relations necessarily entails the power to submit itself to the decisions of a court created by an agreement to which the Union is a party.[26] The Court further recalled its case law, in particular, Opinion 1/92 and 1/00, where the creation of such a court had been considered consistent with the autonomy of the EU legal order.[27] However, the ECJ found that "the judicial systems under consideration in the above-mentioned Opinions were designed, in essence, to resolve disputes on the interpretation or application of the actual provisions of the international agreements concerned".[28] This was in stark contrast with the jurisdiction of the Patent Court, which was "called upon to interpret and apply not only the provisions of that agreement but also the future regulation on the Community patent and other instruments of European Union law", as well as other provisions of EU law such as fundamental rights and general principles.[29] Even though the PC Agreement enabled the Patent Court to make a preliminary reference, the unavailability of the infringement procedure—which is essential to correct an infringement of EU law committed by a national court—against decisions of the Patent Court would make it impossible to remove an erroneous interpretation of EU law made by this court. This, the ECJ concluded, would "alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law".[30]

Opinion 1/09 is certainly a landmark decision with important systemic implications. Its great constitutional significance goes beyond the scope of the present analysis.[31] To our purpose, suffice it to say that the decisive factor that led the ECJ to reject the compatibility of the Patent Court with the EU legal order seems to be that such an organ would directly apply a significant body of sectoral EU law, without the guarantee—offered by the infringement procedure—that the ECJ would be the ultimate arbiter in interpreting and applying this law. The Court's reference to Opinion 1/92 and 1/00 seemed to be a sign that the ECJ was willing to give the green light to a dispute settlement body that was only entrusted with the power to interpret and apply the provisions of its constitutive international agreement. This *dictum* seems to be of particular relevance to the topic of this book. In particular, Opinion 1/09 seemed to contain a clear indication that insofar as an international dispute settlement applies and interprets only the rules of the international

[26] See Court of Justice, *Draft Agreement on the Creation of a unified patent litigation system*, para 74.

[27] See Court of Justice, *Draft Agreement on the Creation of a unified patent litigation system*, para 76.

[28] See Court of Justice, *Draft Agreement on the Creation of a unified patent litigation system*, para 77.

[29] See Court of Justice, *Draft Agreement on the Creation of a unified patent litigation system*, para 78.

[30] See Court of Justice, *Draft Agreement on the Creation of a unified patent litigation system*, para 89.

[31] For a more detailed appraisal, see Lock 2011.

agreement on the basis of which it has been established, questions concerning the interpretation of EU law simply do not arise.

This is not to say that Opinion 1/09 was immune from criticism. The rationale behind the Court's main finding, in fact, eventually came down to a somewhat parochial argument. As delightfully noted by de Witte, the message emerging from this decision was that

> the national courts of the Member States can be disciplined more effectively […] by the threat of 'punishment' if they do not perform their duties […] whereas there is no such judicial sanction [that is, the infringement procedure] for 'disobedience' by an international court! The strange logic of that argument is that national courts can (only) be trusted to be faithful actors of the EU legal order because they must fear sanctions if they do not perform their duties.[32]

For the purpose of this book, however, Opinion 1/09 is an important confirmation that, for good and bad, in the eyes of the ECJ an international dispute settlement that is somehow connected with the internal EU legal order is more threatening than one that is entirely extraneous to it. The existence of a link between an international court and EU law is particularly problematic when it results in the ability of such a court to issue interpretations of EU law that have—directly or even indirectly—legal implications internally, especially regarding the division of competence between the EU and the Member States. The ECJ has strongly imposed itself as the only possible arbiter of such issues as is required by the Treaties.

The final contribution to this line of case law came out in December 2014 when the Court handed down the much-awaited Opinion 2/13 on the accession of the EU to the ECHR. In this decision, the tension between the EU aspiration to be involved in international disputes and the limits set by the principle of autonomy reached its apogee. The background of the dispute is well known. The Treaty of Lisbon introduced an explicit legal basis laying down an obligation to accede to the ECHR.[33] On this basis, negotiations started in 2010 and were successfully concluded in April 2013, when a Draft Accession Agreement was finalised. The agreed solution provided that the EU would initially accede to the ECHR, as well as to Protocol no. 1 and Protocol no. 6, leaving the door open for the EU to accede to other Protocols at a later stage.[34] Upon request of the European Commission, the ECJ was asked to deliver an opinion on the comparability of the (entire) Draft Accession Agreement with the EU Treaties. As is well known, the Court ruled that the agreement in question was inconsistent with EU law for several reasons.

Needless to say, this is not the right venue to provide a comprehensive assessment of the ECJ's decision and its broader implications on the accession process. Opinion 2/13 has caused a veritable deluge of reactions from the scholarship, and

[32] See de Witte 2014, p. 43.

[33] See Article 6(2) TEU.

[34] The process of accession is summarised in the Opinion. See Court of Justice, *Draft Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, paras 46–57.

the reader is therefore referred to the existing literature commenting on the decision.[35] To our purpose, it is sufficient to briefly recall the reasons that led the ECJ to declare that the participation of the EU in the dispute settlement under the ECHR system was at odds with EU law. In short, the Luxembourg Court has found that the Draft Accession Agreement was inconsistent with EU law on four main grounds. First of all, it was found to be at variance with some substantive principles of EU law, such as the principle of mutual trust.[36] This ground is unrelated to the settlement of disputes and therefore falls beyond the scope of this book. Secondly, the possibility to bring inter-State cases under Article 33 of the ECHR was deemed incompatible with Article 344 TFEU. This question will be examined in Sect. 3.4. Thirdly, the co-respondent mechanism envisaged in the Draft Accession Agreement was found to be susceptible of affecting the division of powers between the EU and the Member States. Fourthly and finally, the fact that the ECHR would have been able to review the legality of Common Foreign and Security Policy (CFSP) acts that are generally exempted from the jurisdiction of the ECJ itself was considered yet another breach of the autonomy of EU law.[37] We will focus on this aspect in Sect. 3.5. As a result, the analysis that follows will address exclusively the third ground, which can be seen as a direct evolution of the previous case law commented in this section.

In brief, the Court found that the so-called co-respondent mechanism laid down in Article 3 of the Accession Agreement was inconsistent with EU law.[38] This mechanism has been already commented on in-depth in Chap. 2, hence the considerations made in that context will not be repeated here. Suffice it to say that the main reason why the Draft Accession Agreement was rejected was that it would empower the ECtHR to make determinations in relation to "the rules of EU law concerning the division of powers between the EU and its Member States and the criteria governing the attributability of an act or omission that may constitute a violation of the ECHR", which "necessarily presuppose[d] an assessment of EU

[35] Among many others, see the thoughtful examination carried out by Eeckhout 2015; Spaventa 2015, as well as the other scholarly writings referenced throughout this chapter that deal with Opinion 2/13.

[36] As is well known, this principle is an essential component of the Area of Freedom, Security and Justice (AFSJ), according to which the Member States have to blindly recognise national judicial decisions in criminal matters without, in principle, questioning their validity. The automaticity of mutual recognition is based on the presumption that fundamental rights as guaranteed in the EU legal order are respected in all Member States. Since under the Accession Agreement the EU and the Member States were conceived of as Contracting Parties not only in their relations with third countries but also in their relations with each other, the principle of mutual trust on which the entire AFSJ is based was directly called into question by the Draft Accession Agreement. On the constitutional significance of mutual trust and mutual recognition, see Mitsilegas 2006.

[37] As is well-known, the judicial review carried out by the ECJ of CFSP acts acts is very limited, in accordance with Article 24(1) TEU.

[38] More comprehensively on the co-respondent mechanism, see Gaja 2014.

law".[39] The Court found that this power resulted in an interference with the division of powers between the EU and the Member States as it entailed an assessment on the apportionment of responsibility between the EU and the Member States in instances where the internal division of competence was at stake.[40]

Opinion 2/13 can be seen as an integration of the previous case law. In fact, it made clear that the problem concerning the division of competence—in relation to which the ECJ's exclusive jurisdiction had already been abundantly affirmed—is directly related to the issue of apportioning international responsibility for violation of an international agreement. The indirect—yet inevitable—consequence of this decision is that issues of (international) responsibility come within the exclusive remit of the ECJ. In other words, by claiming exclusive jurisdiction over issues concerning the competence divide between the EU and the Member States, the Court of Justice has affirmed in Opinion 2/13 that the allocation of international responsibility for violation of an international agreement must remain an internal EU law matter subject to the Court's sole assessment. In fact, it is not easy to see how, on the basis of this decision, an international court could make decisions concerning the international responsibility of the EU and the Member States without making determinations concerning what is the party to the agreement to which a violation can be attributed, and therefore rule—although indirectly—on the internal division of competence. This point will be further examined and elaborated in Chap. 6. At this stage, it is sufficient to emphasise that, as a result of the above case law, the ECJ's exclusive jurisdiction seems to have a clear external dimension, which results in an impact over the (competing) jurisdiction of an international dispute settlement to which the EU and the Member States have subscribed.

3.4 The ECJ's Jurisdiction over Intra-EU Disputes

A problem that is partly related to the one examined in Sect. 3.3 is the prohibition for the Member States to submit any dispute concerning EU law to a means of settlement other than the ECJ pursuant to Article 344 TFEU. The provision in question reads as follows

> 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.

As has been observed, Article 344 TFEU belongs to a small group of Treaty provisions that have remained largely unapplied and relatively unknown for

[39] See Court of Justice, *Draft Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, para 221.

[40] See Court of Justice, *Draft Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, para 230.

decades.[41] While the ECJ briefly mentioned it for the first time in Opinion 1/91,[42] it was not until the *MOX Plant* case that this provision was interpreted at length by it.[43] It then re-took centre stage in Opinion 2/13 and in the *Achmea* ruling. In order to fully understand this case law, it seems appropriate to take a step backwards and briefly recall the events that led to *MOX Plant*.

The first two decisions in which Article 344 TFEU came—directly or indirectly—into play are not decisions of the ECJ as one would possibly expect. In fact, this provision made its way into two international arbitral awards handed down before the Court's *MOX Plant* judgment. In chronological order, the first one is an award rendered by an arbitral tribunal within the context of the *MOX Plant* dispute. Without going into too much detail,[44] the dispute in question concerned the opening of a mixed dioxide plant by the UK in Sellafield, which is located on the Irish Sea coast of Cumbria, north-west England. Because of the envisaged radioactive waste generated by the plant, Ireland lodged two parallel complaints against the UK under two different international agreements. On the one hand, it brought an action under Article 9 of the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR), claiming that the UK had failed to provide Ireland with all the necessary information on the plant as required by the said provision. On the other hand, it seized UNCLOS arbitral tribunal, claiming that the UK had breached a number of obligations under UNCLOS as well. In both disputes, it was clear that EU legislation was also at stake. Moreover, in both cases, the two parties disagreed as to the consequences that the pieces of EU law at stake would have on the international dispute. While the UK asserted the lack of jurisdiction or inadmissibility of the claims, Ireland took the opposite view.

In the OSPAR arbitration, the UK's objection was only marginally based on Article 344 TFEU. Rather, it was centred on what can be seen as a systemic interpretation of the relevant provisions of OSPAR in light of Directive 90/313. According to such an interpretation, which was supposedly confirmed by the *travaux préparatoires* of the OSPAR, the right of access to information enshrined in Article 9 OSPAR had to be interpreted as giving rise to an obligation for the Parties to conform with the Article 3(1) of the Directive in question, which also concerned the right of access to information on environmental matters. This meant, in essence, that the dispute was governed by EU law rather than by the OSPAR. The indirect logical consequence of the UK's slightly convoluted argument was that Ireland lacked a cause of action under the OSPAR and should have, instead, activated the

[41] See Lavranos 2006b, p. 291, who rightly observes that the dearth of disputes between the EU Member States can likely be explained by the long-lasting friendly relations existing between them and the reciprocal willingness to avoid the diplomatic repercussions that would result from bringing each other before an international court.

[42] See Court of Justice, *Draft Agreement relating to the creation of the European Economic Area*, *supra* note 4, para 35.

[43] Court of Justice, *Commission of the European Communities v Ireland (MOX Plant)*, Judgment of 30 May 2006, Case C-459/03, ECLI:EU:C:2006:345.

[44] For a thorough overview of the *MOX Plant* dispute, see Shany 2004.

legal remedies offered by EU law.[45] The circularity of this argument did not escape the claimant's attention, who argued that "the UK's recognition of a potential cause of action before the ECJ under the freedom of information provisions of Directive 90/313 undercuts the United Kingdom's contention that Ireland has no cause of action before the Tribunal".[46]

The arbitral tribunal noted that the OSPAR, and the Directive were two independent legal sources establishing "a distinct legal regime and provid[ing] for different legal remedies".[47] This entailed that "the OSPAR Convention contains a particular and self-contained dispute resolution mechanism in Article 32 […] and does not provide for an exception to the OSPAR disputes by referring, for instance, to an exclusive municipal remedy".[48] On this basis, the tribunal retained jurisdiction and addressed the merits of the case, finding that the UK had not breached its obligations under the OSPAR.[49] To our purpose, three things are worth being emphasised. Firstly, the OSPAR arbitral award seemed to conceive of EU law as the domestic law of the disputing parties, and of the ECJ as a municipal rather than an international court. Secondly, the arbitral tribunal's explicit refusal to take into account the existence of other rules of international law between the parties resulted in disregarding a whole body of law consisting of international rules, EU rules and case law that goes well beyond Directive 90/313. Had the tribunal taken due consideration of such rules, it would have probably reached a different conclusion.[50] Thirdly and finally, although the Tribunal did not explicitly mention Article 344 TFEU, the ECJ's competing jurisdiction was obviously the elephant in the room. In fairness, the UK did make mention of Article 344 TFEU in the final part of its counter-memorial devoted to jurisdictional issues.[51] However, the provision in question had marginal importance if put in context with the rest of the submissions. Arguably, had the UK put more emphasis on Article 344 TFEU, the outcome of the dispute could have been different.

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[45] Meaning, in essence, that Ireland should have started infringement proceedings under Article 259 TFEU if it considered that the UK had violated the Directive at stake. The UK's argument is summarised in the award. See Permanent Court of Arbitration, *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v. United Kingdom of Great Britain and Northern Ireland),* Final Award, 2 July 2003, paras 107–109.

[46] See Permanent Court of Arbitration, *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention*, para 113.

[47] See Permanent Court of Arbitration, *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention*, para 142.

[48] See Permanent Court of Arbitration, *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention*, para 143.

[49] For a general comment of this decision, see McDorman 2004.

[50] See the considerations made by Lavranos 2006a, pp. 236–237.

[51] See Permanent Court of Arbitration, *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention,* UK Counter-memorial of 6 June 2002, para 3.15. It is also noteworthy that Ireland also entirely ignored this issue, as promptly noted by the UK in its Rejoinder of 28 August 2002.

The second decision in which Article 344 TFEU came into play—this time in a very direct manner—is the *IJzeren Rijn* arbitral award.[52] The dispute concerned the reopening of an old railway line running from Antwerp through the Netherlands to the Rhine basin area in Germany. The main—and only—point of contention between the applicant (Belgium) and the defendant (the Netherlands) revolved around who had to pay the costs of the reopening, which were estimated at approximately EUR 500 million. However, as far as the law applicable to the dispute was concerned, this relatively trivial case raised issues of both international and EU law, ranging from the interpretation of the 1839 Treaty of Separation signed between the parties, to the application of EU environmental and railway legislation. Although neither party objected to the tribunal's jurisdiction, both made submissions concerning Article 344 TFEU,[53] and the tribunal engaged in its interpretation.

Without going into too much detail, the tribunal made a parallel between the provision in question and the preliminary ruling mechanism, finding itself "in a position analogous to that of a domestic court within the EC".[54] The Tribunal observed that the obligation laid down in Article 344 TFEU would be triggered only "if the Tribunal arrived at the conclusion that it could not decide the case brought before it without engaging in the interpretation of rules of EC law", in which case "the relevant questions […] would need to be submitted to the European Court of Justice".[55] After a careful and lengthy examination of the relevant EU legislation, the tribunal concluded that it needed not interpret or apply EU law in order to settle the dispute and therefore decided not to refer any questions to the ECJ.[56] Among other things, the tribunal found support for its conclusion in the fact that the parties did "not appear actually to be in dispute concerning the 'interpretation or application' of the relevant provisions of EC law (and thus it seems that in this regard a 'dispute' within the meaning of Article [344] has not arisen at all)".[57] For the purpose of this book, two things are noteworthy. First of all, as has been rightly pointed out by Lavranos, concluding that EU law needed not to be interpreted, the tribunal "did nothing other than interpret Community law […] spending

[52] See Permanent Court of Arbitration, *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Decision of 24 May 2005.

[53] See Lavranos 2006a, p. 228.

[54] See Permanent Court of Arbitration, *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Decision of 24 May 2005, para 103.

[55] See Permanent Court of Arbitration, *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Decision of 24 May 2005, para 103.

[56] See Permanent Court of Arbitration, *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Decision of 24 May 2005, paras 107–137.

[57] See Permanent Court of Arbitration, *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Decision of 24 May 2005, para 107.

15 pages of its award on it before concluding that it was not relevant!".[58] Secondly, the tribunal seemed to suggest that Article 344 TFEU could only be triggered if there was a dispute—in the sense of diverging views—between the parties as to the interpretation and application of the relevant EU rules. If anything, this finding seems to be a confirmation that the Tribunal needed to interpret—and has therefore interpreted—EU (primary) law. In light of this, it is safe to affirm that the logical coherence of the tribunal's interpretation of Article 344 TFEU was doubtful.

It is against this background that Article 344 TFEU made its grand debut in Luxembourg. While the OSPAR and the *IJzeren Rijn* arbitration were being litigated, the UNCLOS arbitral tribunal had stayed proceedings on the UK's objection that it lacked jurisdiction in accordance with Article 344 TFEU, ordering the parties first to find out whether the ECJ had jurisdiction on the dispute based on EU law.[59] The only instrument offered by the EU legal order was the infringement procedure, which the UK would have had to use against Ireland for the latter's failure to fulfil its EU law obligations. It was instead the Commission—supported by the United Kingdom—who took action against Ireland, alleging, among other things, the violation of Article 344 TFEU. The ECJ started its analysis by noting that the Irish claim before the UNCLOS arbitral tribunal concerned UNCLOS provisions relating to the protection of marine environment, which is a competence shared by the EU and the Member States internally. In order to decide whether the matters at stake in the *MOX Plant* dispute came under EU competence, it was, therefore, necessary to assess if the EU had exercised its competence in the field, and to what extent.[60] After examining the relevant EU rules, the Court observed that the UNCLOS provisions relied on by Ireland were largely covered by EU legislation and fell therefore within EU competence.[61] This, in turn, triggered the jurisdiction of the ECJ.[62] The Court then turned to assess whether its jurisdiction on the dispute was exclusive to preclude the Member States from bringing an action before an international dispute settlement.

In this part of the *MOX Plant* ruling, the ECJ resorted to arguments that are reminiscent of those used in the decisions examined in Sect. 3.3. First of all, the Court pointed out "that an international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy" of the EU legal order.[63] This sentence is almost identical to the one used at para 35 of Opinion

[58] See Lavranos 2006a, p. 238.

[59] See Permanent Court of Arbitration, *MOX Plant Case (Ireland v. United Kingdom)*, Procedural Order no. 3 of 24 June 2003, paras 20 et seq.

[60] See Court of Justice, *Commission of the European Communities v Ireland (MOX Plant)*, paras 88–96.

[61] See Court of Justice, *Commission of the European Communities v Ireland (MOX Plant)*, paras 110–120.

[62] See Court of Justice, *Commission of the European Communities v Ireland (MOX Plant)*, para 121.

[63] See Court of Justice, *Commission of the European Communities v Ireland (MOX Plant)*, para 123.

1/91. The Court found that its exclusive jurisdiction over this matter—namely, over the internal allocation of responsibilities between the EU and the Member States—was confirmed by Article 344 TFEU.[64] The logical consequence of this finding was that any dispute concerning the internal allocation of responsibility is one that concerns the interpretation or application of the Treaties within the meaning of Article 344 TFEU.[65] In other words, that "all disputes between […] Member States that might potentially involve Community law aspects" trigger the Court's exclusive jurisdiction.[66] As one can easily see, this is an interpretation of Article 344 TFEU that is much broader than the one offered in the *IJzeren Rijn* award.

Article 344 TFEU came again under the ECJ's (rather cursory) scrutiny in Opinion 2/13. As already mentioned above, this was one of the grounds based on which the legality of the Draft Accession Agreement was rejected. In the relevant part of the decision, the Court recalled its established case law by pointing out that "an international agreement cannot affect the allocation of powers fixed by the Treaties or, *consequently*, the autonomy of the EU legal system, observance of which is ensured by the Court".[67] This sentence is also almost identical to the ones seen above, with only minor differences concerning the style. Upon accession, the ECJ continued, the ECHR would become an integral part of the EU legal order, as such subject to the exclusive jurisdiction of the ECJ as far as the relations between the Member States were concerned.[68] From this perspective, the possibility that "the Member States or the EU are able to submit an application to the ECtHR [against one another under Article 33 ECHR] is liable in itself to undermine the objective of Article 344 TFEU and […] goes against the very nature of EU law".[69]

The ECJ devoted barely two pages of Opinion 2/13 to the analysis of Article 344 TFEU. It was inevitable, therefore, that its reasoning on this matter would leave much room for interpretation. First and foremost, although the Court did not say it explicitly, its conclusions on this point are "likely to be read in the sense that Article 33 […] would still apply to disputes between EU Member States which do *not* concern EU law".[70] In other words, it seems reasonable to assume that the Court left the door open to an international dispute settlement to which both the EU and

[64] See Court of Justice, *Commission of the European Communities v Ireland (MOX Plant)*, para 123.

[65] See Court of Justice, *Commission of the European Communities v Ireland (MOX Plant)*, para 127.

[66] See Lavranos 2006b, p. 295.

[67] See Court of Justice, *Draft Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, para 201, emphasis added.

[68] See Court of Justice, *Draft Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, para 204.

[69] See Court of Justice, *Draft Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, para 212.

[70] See Contartese 2017, p. 1651, emphasis in the original.

the Member States are a party under which they can bring applications against one another upon the condition that such applications fall outside the scope of EU law. The meaning of intra-EU dispute should be narrowed down to exclude disputes that do not raise issues of EU law. Put differently, a dispute that is intra-EU only in the sense that the parties to it are also a party to the EU would not be captured by Article 344 TFEU simply because EU competence—and the allocation of it made by the Treaties—would not be involved. From this perspective, it could be argued that Opinion 2/13 is at the same time a confirmation and a further specification of its previous case law on this matter.[71] Piet Eeckhout, however, has pointed out that the Court's reasoning in the decision in question might expand the boundaries of Article 344 TFEU so as to include disputes that do not fall within the ECJ's jurisdiction. In particular, this author observed that the broad language used by the Court could cover disputes "in which a Member State considers that a provision of EU primary law violates the Convention. The CJEU's jurisdiction does not, of course, extend to a review of primary law".[72]

The final ECJ judgment relevant under this section is the recent *Achmea* ruling. In brief, this was a preliminary reference from a German court before which the validity of an arbitral award rendered on the basis of a Netherlands-Slovakia Bilateral Investment Treaty (BIT) had been challenged. Scholars have long debated the questions concerning the compatibility of intra-EU BITs with EU law.[73] However, the question put to the ECJ by the German court was not phrased to challenge the compatibility with EU law of the BIT as such. Rather, the referring judge explicitly raised the issue of Article 344 TFEU, asking whether such provision precluded an investor from bringing a dispute to an arbitral tribunal on the basis of an intra-EU BIT. The Court started its analysis with its standard sentence recalling that "an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system,

[71] This is also the opinion of Contartese 2017, p. 1651. But see Eeckhout 2015, pp. 976–977, who observed that in order for the ECtHR to decide whether a dispute brought under Article 33 raises questions of EU law, its decision would "require just such an examination of basic EU law principles", which is admittedly contrary to the ECJ's expansive interpretation of the meaning of intra-EU dispute. This argument is, however, not entirely convincing. In Opinion 2/13 the ECJ has clearly connected Article 344 TFEU with questions concerning the division of competence, in much the same way it had done so in its previous case law. This should be read as meaning that only if EU competence is at stake, the ECtHR would be barred from issuing its interpretation of it. Cases that do not raise issues relating to the allocation of responsibilities as defined in the Treaties would not trigger Article 344 TFEU.

[72] See Eeckhout 2015, pp. 974–975. This argument is certainly fascinating. However, while it is true that the ECJ cannot review the validity of Treaty provisions, it can certainly interpret such provisions within the meaning of Article 344 TFEU—for example in an action brought by a Member State against another Member State under Article 259 TFEU.

[73] A non-comprehensive list of writings analysing the different aspects of this problem include Titje and Wackernagel 2015; Ortolani 2015; Moskovan 2015; Wehland 2016; Binder 2016; Bjørge 2017.

observance of which is ensured by the Court".[74] This is identical to the statement made in Opinion 2/13 and very similar to those made in the previous case law. The ECJ then moved on to examine whether, under the relevant provision of the BIT, the dispute brought to the arbitral tribunal was liable to be one concerning the interpretation or application of EU law. The relevant part of Article 8 of the Netherlands-Slovakia BIT was phrased as follows:

> The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:
>
> - The law in force of the Contracting Party concerned;
> - The provisions of this Agreement, and other relevant agreements between the Contracting Parties.

On this basis, the ECJ observed that EU law had to be "regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States".[75] In particular, the Court noted that the EU law provisions concerning the free movement of capital and the freedom of establishment were relevant to the dispute brought before the arbitral tribunal and needed to be interpreted and applied to settle the case. Having concluded that EU law was applicable to the dispute both as a domestic law of the parties and as an international law to which both parties had subscribed, the only residual possibility to save the arbitral tribunal was to place it within the domestic legal system of the Member States concerned. In that way, the preliminary ruling mechanism would have applied, and the Court's exclusive jurisdiction would have been preserved. After a relatively lengthy analysis of the tribunal's main characteristics, however, the ECJ concluded that it could not be considered part of the judicial system of the Member States.[76]

In light of the above analysis, it can be said that *Achmea* is a confirmation of the Court's settled case law on Article 344 TFEU. Namely, it is a confirmation that the ECJ places its reading of the provision in question within the boundaries of the allocation of powers fixed by the Treaties, to borrow from its own expression. On this point, the Court had already made abundantly clear that it considers itself the sole arbiter of these matters, and that the existence of an actual dispute—in the sense of diverging views of the parties—over EU law provisions is not necessary in order to trigger Article 344 TFEU. What matters is the fact that the interpretation and application of EU law is at stake in a dispute. It could be argued that the ECJ in *Achmea* seemed to go a step further than in previous cases. In particular, the Court juxtaposed its standard statement on the need to protect the allocation of powers under the Treaties with a broader consideration that called into question "the constitutional structure of the EU and the very nature of [its] law", listing legal principles such as primacy and direct effects as examples of the autonomy of the EU

[74] See Court of Justice, *Slowakische Republik v Achmea BV*, para 32.

[75] See Court of Justice, *Slowakische Republik v Achmea BV*, para 41.

[76] See Court of Justice, *Slowakische Republik v Achmea BV*, paras 44–57.

legal order.[77] However, it should be noted that this language was not entirely new. Opinion 2/13—to which *Achmea* referred—contained similar statements in the context of the Court's preliminary considerations,[78] and so did Opinion 1/09.[79] In the Author's opinion, these are statements of principle that should be understood in the broader context in which they are situated. Primacy and direct effects are substantive principles of EU law on which the ECJ exercises its exclusive jurisdiction in accordance with Article 344 TFEU, in much the same way it exercises exclusive jurisdiction over any other piece of EU law. If, because of its characteristics, an international dispute settlement is liable to interpret and apply EU law, Article 344 TFEU is triggered and represents an insurmountable obstacle. If otherwise, EU law does not come within the remit of such an international dispute settlement, Article 344 TFEU does not come into play. Neither does any other substantive principle of EU law, of which the ECJ remains the sole interpreter. This applies to primacy and direct effects as well as to any other principle of EU law. However, the principle of primacy and direct effects are core ingredients of the EU constitutional architecture, whose autonomy is safeguarded by Article 344 TFEU. They are the backbone of the internal autonomy of the EU, that is its autonomy *vis-à-vis* the legal order of the Member States.[80] It is therefore only logical that the Court mentioned these principles as prime examples of the need to protect the Union's autonomy. From this perspective, it is perhaps no accident that the Court concluded the *Achmea* ruling with a statement that was not strictly necessary in order to answer the referring court's question. In particular, the ECJ recalled its settled case law according to which the capacity of the EU to conclude international agreements "necessarily entail the power to submit to the decisions of a court" designed to interpret and apply such agreements.[81] *Achmea*, however, was clearly not a case concerning the conclusion of an international agreement by the EU, as the ECJ itself immediately acknowledged after it made the above statement.[82] The unnecessary recalling of the EU's ability to submit itself to an international court at the end of a judgment concerning an international agreement concluded by the Member States can perhaps be seen as expressive of the Court's willingness to narrow down the implications of its ruling. In other words, the ECJ seemed to warn against an extensive interpretation of the *Achmea* ruling that would go so far as precluding the EU itself from subscribing to an international dispute settlement. In light of the pending Opinion 1/17,[83] this might be a very meaningful message,

[77] See Court of Justice, *Slowakische Republik v Achmea BV*, para 33.

[78] See, in particular, Court of Justice, *Draft Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, paras 165–167.

[79] See supra, Sect. 4.3.

[80] See, more comprehensively on this issue, the considerations made in Sect. 6.3.

[81] See Court of Justice, *Slowakische Republik v Achmea BV*, para 57.

[82] See Court of Justice, *Slowakische Republik v Achmea BV*, para 58.

[83] As is well known, Belgium has requested an Opinion of the ECJ on the compatibility with EU law of the ICS established under CETA. Opinion 1/17 is expected to be delivered in early 2019.

insofar as it suggested that Article 344 TFEU does not come into play when a bilateral agreement is concluded by the EU and the Member States with a third country, as is the case with EU investment agreements.

3.5 The Problem of EU Acts That Are Not Subject to the ECJ's Jurisdiction

A final condition that an international dispute settlement needs to fulfil was stated for the first (and so far only) time in Opinion 2/13. It concerns EU acts that are not subject to judicial review at EU level, such as acts adopted within the framework of the CFSP.

In the relevant part of Opinion 2/13, the Court recalled that judicial review of CFSP acts in the EU legal order is limited to the monitoring of compliance with Article 40 TEU, on the one hand, and to review the legality of actions for annulment brought by individuals that are subject to restrictive measures,[84] now extended to questions of legality raised in the context of a preliminary reference.[85] Without providing much explanation other than a reference to Opinion 1/09, the ECJ found that the conferral of the jurisdiction to carry out judicial review of EU acts exclusively to a non-EU body was at variance with the autonomy of the EU legal order.[86] As has been rightly observed,[87] a reference to Opinion 1/09 in this context was probably misplaced. In fact, it should be recalled that the Patent Court was vested with the exclusive power to interpret and apply a whole sector of EU legislation, replacing the courts of the Member States entirely. This was not the case of the ECtHR. It is true that CFSP acts are only very limitedly subject to the judicial review of EU courts. However, domestic courts of the Member States—which are themselves EU courts when interpreting and applying EU law, as the ECJ itself strongly stated in Opinion 1/09—retain their powers in relation to CFSP acts. In addition, as noted by Eeckhout,[88] the Court of Justice failed to consider that the ECtHR would not scrutinise the lawfulness of CFSP acts as such, but rather carry out an assessment of whether such acts infringed the ECHR. The validity of EU acts

[84] See Court of Justice, *Draft Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, paras 249–250.

[85] On this issue, see Butler 2017.

[86] See Court of Justice, *Draft Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* note 2, paras 255–257.

[87] See, in particular, Contartese 2017, pp. 1656–1657.

[88] See Eeckhout 2015, p. 988.

under EU law would not be put into question—which is what the ECJ itself said of UN resolutions in the *Kadi* judgment.[89]

This final condition set out in Opinion 2/13 seems to require an absolute prohibition for an international dispute settlement to have jurisdiction over acts of EU law that are not subject to judicial scrutiny in the EU. Although the above analysis has demonstrated that this requirement is not entirely coherent, the only manner to comply with it would be to align the jurisdiction of an international court with that of the ECJ. This could be obtained either by imposing the same limits on both courts or by extending the jurisdiction of the latter where it is narrower than that granted to the former. At any rate, this last condition would only come into play in very exceptional cases.

3.6 Conclusion: A Checklist on the Autonomy of the EU Legal Order?

At the end of this overview of the relevant case law of the ECJ, it is possible to provide a list of requirements that an international dispute settlement to which the EU is a party needs to comply with in order to be compatible with EU law, and in particular with the principle of autonomy.

First of all, an international dispute settlement cannot be organically linked to the ECJ, with judges sitting on both benches and wearing a double hat. Secondly, it cannot have the power to rule directly or indirectly on the division of competence between the EU and the Member States, in respect of which the sole possible arbiter is the ECJ. Thirdly, it cannot issue binding interpretations of EU law. A combined reading of Opinion 1/91, Opinion 1/00 and Opinion 1/09, seems to warrant the conclusion that this issue does not arise where EU law does not constitute applicable law under the international agreement based on which the disputes are to be settled. This point will be farther clarified in Chap. 6. Fourthly, an international dispute settlement cannot have jurisdiction over intra-EU disputes in matters falling within the scope of EU law, that is to say, disputes brought by the Member States against each other. Finally, acts that are generally exempted from judicial review at EU level, such as those adopted in the context of the CFSP, cannot fall within the jurisdiction of an international dispute settlement to which the EU is a party.

On this basis, one could attempt to lay down a checklist concerning the legality under EU law of an international dispute settlement. Such a checklist would be as follows:

1. No organic link with the ECJ.
2. No power to rule on the internal division of competence.

[89] Court of Justice, *Kadi and Al Barakaat International Foundation v Council and Commission*, Judgment of 3 September 2008, Joined Cases C-402/05 and C-415/05, ECLI:EU:C:2008:461, paras 287–289. Further on this analogy, see Eeckhout 2015, pp. 988–989.

3. No power to issue binding interpretations of EU law.
4. No jurisdiction over intra-EU disputes where EU law issues are at stake.
5. No jurisdiction over EU acts not subject to the ECJ's review.[90]

This checklist should be understood as being necessarily non-exhaustive and subject to future expansions from the ECJ. Also, this is not to say that compliance with a complex legal principle such as autonomy can be encapsulated in the proposed checklist as if adherence to it would guarantee the safeguard of autonomy. It seems nonetheless a useful instrument that help to conceptualise and to summarise the conditions conditions set by the ECJ for the legality of an international dispute settlement under EU law. Chapter 6 will provide an examination of the ICS against such conditions, with a view to examining whether it complies with the ECJ's case law seen in this chapter. It will also analyse the ICS through the lens of international law, to shed light on whether the settlement of disputes as devised by EU investment agreements can serve as a general model of the settlement of international disputes against the EU.

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[90] A similar checklist is provided by Hillion and Wessel 2017, p. 30.

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Part II

Chapter 4
Dispute Settlement Under EU Investment Agreements: An Analysis of the Main Procedural Innovations

Contents

Abstract This chapter looks at the main procedural innovations brought by EU investment agreements, with a view to providing an account of how disputes will be conducted under them. In particular, the chapter illustrates the significant amount and magnitude of the ground-breaking innovations contained in these agreements. It includes an examination of the non-confrontational mechanism available at the pre-litigation stage, an assessment of the structure and functioning of the ICS and its internal articulation, as well as other procedural issues such as transparency. The chapter concludes that the ICS established by the likes of CETA is a carefully designed, highly institutionalised judicial mechanism to settle investment disputes.

Keywords ICS · investment arbitration · mediation · consultation · transparency · appellate tribunal

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4.1 Introduction

The provisions concerning the settlement of disputes represent the most innovative part of EU investment agreements. Compared to the traditional Investor-to-State Dispute Settlement (ISDS) based on BITs, the ICS established by EU investment agreements marks a radical change from the previous system. This is due to the insertion of a number of significant procedural novelties that are set to make the settlement of disputes under such agreements generally more coherent, more transparent and more advanced than under traditional *ad hoc* arbitral tribunals constituted under BITs.[1] As well shall see in this chapter, EU investment agreements feature a veritable state-of-the-art and highly institutionalised judicial dispute settlement. This chapter looks at procedural rules comprehensively, to provide a thorough account of how disputes will be conducted under such agreements.

Before getting underway with the analysis of the rules laid down in EU investment agreements, two caveats need to be flagged. First of all, the examination carried out in this chapter will be based on a working rule that will characterise all the following parts of this book. At the time of writing, in fact, the EU has made official the texts of three investment chapters included in as many broader comprehensive FTAs, namely the already mentioned CETA, EU-Vietnam FTA, and EU-Singapore Agreement.[2] As far as the latter is concerned, the investment chapter has been officially separated from the FTA in order to speed up the ratification of the trade component which now comes under EU exclusive competence as a result of Opinion 2/15.[3] The same thing has admittedly not (yet) been done in relation to the other two agreements. Although, recently it was announced that a conclusive compromise on a fourth agreement with Mexico has been reached, the text of this agreement is still unknown.[4] Since the situation at policy level is still relatively fluid, this chapter—as well as the rest of the book—will use CETA as a benchmark for the analysis, and will provide an explicit reference to other agreements only as long as there are significant textual differences.

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[1] The EU has also engaged in a general recalibration of the substantive standards typically included in an investment agreement. Such recalibration of substantive rules is also widely regarded as an improvement with respect to the old system of rules contained in BITs. For obvious reasons of coherence, these standards cannot be further analysed in this book. The reader is therefore referred to the existing literature dealing with these issues. See, in particular, Dimopoulos 2011, pp. 125 et ff; Titi 2015, pp. 639–661; Hoffmeister 2016, pp. 357–376.

[2] See the reference provided in Sect. 1.3.

[3] Whether this separation is legally necessary after Opinion 2/15 is an entirely different matter. See the considerations made in Sect. 5.3.

[4] See Joint statement by Commissioners Malmström and Hogan, and the Secretary of the Economy of Mexico, Guajardo Villarreal Joint statement by Commissioners Malmström and Hogan, and the Secretary of the Economy of Mexico, Guajardo Villarreal, of 21 April 2018, available at http://europa.eu/rapid/press-release_STATEMENT-18-3481_en.htm (accessed on 28 May 2018).

Secondly, this chapter has a slightly different focus than the rest of the book. The *leitmotiv* of the latter is to examine the ability of the settlement of disputes as designed under EU investment agreements to constitute a model for the settlement of international disputes involving the EU. This chapter, however, will not touch upon this issue. Still, in light of the importance and of the magnitude of the procedural innovations contained in EU investment agreements, it seems appropriate to provide an appraisal of the developments that eventually led the EU to replace *ad hoc* tribunals with a fully-fledged and permanently standing investment court.

4.2 The Road from *Ad Hoc* Arbitral Tribunals to a Permanent Investment Court

When the EU was laying down the foundations of its Common Investment Policy (CIP) in 2009–2010,[5] investment arbitration was amid a legitimacy crisis, which was commonly referred to as the backlash against investment arbitration.[6] Previously, ISDS had long remained an uncontroversial subject. For decades, investors from all over the world—but mostly from capital exporting Western countries—have been using it to settle disputes against (mostly developing) States, in order to protect the rights conferred to them by BITs concluded between their country of origin and the country where the investment is hosted.

Things started to change following what has been termed a "*veritable explosion* of foreign investment disputes […] resolved through international arbitration".[7] More or less at the turn of the millennium,[8] the number of cases brought against host States by foreign investors suddenly skyrocketed, amplifying the shortcomings of a system of rules located at the intersection between public international law and

[5] See European Commission (2010), Towards a comprehensive European international investment policy—Communication from the Commission to the Council and the Parliament, COM(2010)343 final, in particular pp. 9–10 where the settlement of investment disputes is discussed.

[6] See Waibel et al. 2010.

[7] See Bishop et al 2005, p. 1 (emphasis added). See also Menaker 2009, pp. 157–164.

[8] There are complex historical, political and economic reasons behind this explosion that cannot be analysed in this book in-depth. In summary, a veritable turning point has been the fall of the Soviet Union and the subsequent generalised collapse of the socialist conception of property, which led countries belonging to the former socialist bloc to embrace a transition to a capitalist economy. These countries were keen on profiting of the new international economic climate and started to conclude investment agreements—mostly in the form of BITs—with Western countries, in the attempt to attract foreign capital and catch up with more developed economies. See the considerations made by Dolzer and Schreuer 2012, pp. 4–6. This explosion of investment treaties has soon resulted in an explosion of disputes settled on their basis.

commercial law.[9] The public outrage caused by some disputes brought by multinational corporations did the rest, resulting in a rapid exacerbation of the situation and an escalation of the crisis.[10] The launch of the CIP was, therefore, taking place at a time when the reliability of investment arbitration, and more generally of investment law, was hitting record lows. It was the worst possible time for such a launch to take place.

Traditional ISDS has been harshly criticised for a variety of reasons. While some concerns raised by the scholarship and the public at large are perhaps not entirely justified,[11] it is undeniable that the system was in need of reforms. A major point of concern has been the inadequacy of the transparency standards applicable to investment disputes. Traditionally, arbitration rules have favoured confidentiality over publication of the documents related to a dispute,[12] and BITs rarely contain additional provisions on transparency that can fill the gaps left by arbitration

[9] There is undeniable proximity, and to some extent certain promiscuity, between commercial arbitration and investment arbitration, which is often acknowledged by arbitral tribunals. See, for example, UNCITRAL Arbitral Tribunal, *Glamis Gold, Ltd v. United States*, Award, 8 June 2009, para 3, where an ICSID Tribunal constituted under NAFTA stated that it saw "its mandate under Chapter 11 of the NAFTA as similar to the case-specific mandate ordinarily found in international commercial arbitration". Additionally, it is widely recognised that some arbitration rules (such as UNCITRAL) were designed to be used primarily in the context of commercial arbitration. See the early work of ICSID's 'founding father' Broches 1984–1985, p. 79. This observation, however, does not apply to ICSID, which was devised since the very beginning as an instrument governing disputes between foreign investors and States involving the exercise of sovereign powers by the latter. For a useful summary of the events that led to the establishment of ICSID, see Dolzer and Schreuer 2012, pp. 9–10.

[10] One can immediately think of a few paradigmatic examples, such as the lawsuits initiated by Philip Morris in 2010 and 2011 challenging Uruguayan and Australian legislation imposing so-called 'plain packaging' of tobacco products. These actions were met with strong criticism from the public, given that the measures in question were widely regarded as necessary to safeguard a public interest (i.e. the health of millions of people) as opposed to a purely private one (i.e. the profits of a large corporation). As an aggravating circumstance, in order to sue the Australian government Philip Morris perpetrated a flagrant abuse of rights by relocating its headquarters from Australia to Hong Kong for the sole purpose of activating the jurisdictional clause included in the Australia-Hong Kong BIT at a time when the dispute was already foreseeable (as later acknowledged by the Arbitral Tribunal). This incident was comprehensively (and very enjoyably) covered in an episode of 'Last Week Tonight', an American late-night talk and news satire television program hosted by British comedian John Oliver. It bears noting that Philip Morris lost both lawsuits. See ICSID Arbitral Tribunal, *Philip Morris Brands Sàrl and Abal Hermanos S.A. v. Oriental Republic of Uruguay,* Award, 8 July 2016, ICSID Case No. ARB/10/7; and UNCITRAL Arbitral Tribunal, *Philip Morris Asia Limited v. The Commonwealth of Australia,* Award on Jurisdiction and Admissibility, 17 December 2015, PCA Case No. 2012-12.

[11] This author has already expressed elsewhere his reservations in this regard. See, for example, Pantaleo 2016, p. 82 and pp. 87–90.

[12] For example, ICSID Convention Article 48(5) prevents the Secretary-General from publishing awards without the parties' consent. However, it is worth noting, that confidentiality is not imposed on the Parties, which remain free to disclose documents to their liking. Roughly the same reasoning applied to UNCITRAL before recent amendments.

rules.[13] Although, in practice, many awards do get published and broad information about disputes is often made available to the public, the lack of clear transparency standards has given rise to widespread dissatisfaction due to the sensitiveness of the public interests typically at stake in investment disputes.[14] Since the early days of the CIP, the EU has clarified that its investment agreements would aim at substantially improving this aspect.[15] As we shall see below, the EU has duly delivered: EU investment agreements lay down the most advanced transparency standards ever adopted in this field.[16]

Another highly controversial issue in investment arbitration has been the lack of a consistent arbitral case law, which has affected legal certainty and the predictability of the system.[17] The lack of binding precedents is the rule rather than the exception in international law. This characteristic finds its origins in the traditional consent-based structure of international litigation.[18] International arbitral and judicial decisions are usually binding only on the Parties to a dispute. This state of affairs has been seen as problematic given that in the field of investment law, dozens of cases are litigated every year, and sometimes overtly conflicting decisions have been issued within only a few months form one another.[19] It should, therefore,

[13] An exception to this state of affairs is represented by NAFTA. With a decision made by the NAFTA Free Trade Commission, the Parties to that agreement have committed to high transparency standards since 2004. In brief, the parties have engaged to ensure that the public is given notice of the existence of an arbitration, that documents submitted to the tribunal or issued by it are publicly available, and that hearings are fully open to the public. See NAFTA Free Trade Commission Joint Statement, *A Decade of Achievement* (16 July 2004). Similar standards are incorporated in the US and Canada Model BITs. See, for example, Article 29 of the US Model BIT. The European States, however, have never adopted similar standards in their BITs.

[14] See Tams and Asteriti 2010, pp. 787 et ff.

[15] See European Commission (2011), Follow up to the European Parliament Resolution on the Future European International Investment Policy, P7-TA-PROV(2011)0141.

[16] Substantial progress has been achieved at multilateral level as well. On 1 April 2014 UNCITRAL has adopted the Rules on Transparency in Treaty-based investor-State Arbitration, which represent a considerable improvement with respect to prior rules (available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html, accessed 19 January 2018). These rules, which lay down far-reaching transparency obligations, apply to disputes conducted under UNCITRAL Arbitration Rules and based on investment agreements concluded after 1 April 2014. Moreover, the applicability of UNCITRAL Rules on Transparency has been extended to all investment disputes by the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, adopted by the General Assembly on 10 December 2014. Remarkably, according to Article 7 ratification is open to any "regional economic integration organization that is constituted by States and is a contracting party to an investment treaty". Unfortunately, at the time of writing only three States have ratified the Convention. Neither the EU nor any Member State have done so.

[17] See Schreuer 2013, pp. 391 et ff.

[18] For a comprehensive analysis of this issue, see the seminal work of Shahabuddeen 1996.

[19] An emblematic example that is often mentioned is a trio of NAFTA awards issued between August 2000 and April 2001 that have reached opposite conclusions in relation to one and the same issue, namely fair and equitable treatment (FET). The awards in question are, in chronological order, ICSID Arbitral Tribunal, *Metalclad Corporation v. The United Mexican States*,

come as no surprise that discussions concerning consistency, and proposals aimed at improving it, have a relatively long history in international investment law. Traditionally, the debate has focused on the creation of a more structured and sophisticated system of dispute settlement (as opposed to a network of disconnected *ad hoc* tribunals), which would ideally include an appeal mechanism loosely based on the WTO model.[20] No progress, however, has been made at a multilateral level so far, and the lack of consistency remains an unresolved issue.[21] As we shall see below, the EU has decided to take the bull by the horns by establishing an appeals facility within the ICS. Like this, consistency at least within the same treaty regime should be adequately safeguarded.[22]

The rules governing the appointment and challenge of arbitrators have proved to be yet another point of contention in investment arbitration. Like in any other form of arbitral settlement of disputes, party autonomy has traditionally played a decisive role. Usually, each party to a dispute appoints one arbitrator, with a third, presiding arbitrator to be designated by a mutual agreement.[23] There have been cases of individuals purportedly appointed as arbitrators only because of their sympathy for one party's particular case or situation.[24] Alternatively, in cases of individuals that were considered unfit to serve in an arbitral tribunal because of their conflicting interests as private practitioners.[25] While instances of flagrant conflict of interests or

Award, 30 August 2000, ICSID Case No. ARB(AF)/97/1; UNCITRAL Arbitral Tribunal, *S.D. Myers, Inc. v. Government of Canada,* Partial Award, 13 November 2000; UNCITRAL Arbitral Tribunal, *Pope & Talbot Inc. v. The Government of Canada*, Award on the Merits of Phase 2, 10 April 2001. As a reaction to this contradictory line of cases, NAFTA's Free Trade Commission has issued an interpretive statement on 31 July 2001 aimed to make clarity, among other things, on the meaning and scope of the FET standard as laid down in Article 1105 NAFTA. See NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, July 31, 2001, available at http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp (accessed 19 January 2018).

[20] See McRae 2010, pp. 371 et ff.

[21] It should be noted that the challenges on the road to the creation of an appellate tribunal are massive. Among other things, suffice it to say that it would be necessary to amend the ICSID Convention, which requires unanimity among the Parties to it. This has never really seemed to be an achievable scenario.

[22] Another feature of EU investment agreements that may improve internal consistency is the creation of treaty bodies charged with the task of, among other things, issuing binding interpretations of the treaty under which they are constituted, as well as supplementing rules and amendments. This applies to substantive investment standards but also to the settlement of disputes, as explicitly indicated in 8.44(3) CETA concerning the Committee on Services and Investment established under this treaty. See on this matter Methymaki and Tzanakopoulos 2017.

[23] Some minor differences exist between different arbitration rules. For example, under the ICSID Convention, the President of the Tribunal has to be appointed by agreement between the parties, while under UNCITRAL it is for the two arbitrators chosen by the parties to appoint the President. The common *leitmotiv* is that the parties to the dispute have a direct role in shaping the composition of the arbitral tribunal.

[24] See Gill 2006, p. 26.

[25] See Kumm 2015, p. 7, who also points out that some private practitioners lack the necessary qualifications to be appointed as arbitrators.

blatant unsuitability of arbitrators are infrequent, the overall reliability of the system has none the less been called into question.[26]

Challenging arbitrators after their appointment has proved equally problematic. Subject to minor differences between different arbitration rules, the grounds based on which an arbitrator can be disqualified are usually very general ones. They are limited to, in essence, the integrity of arbitrators, encompassing cases of conflicts of interest and lack of independence and impartiality.[27] Concepts such as integrity and neutrality, however, have proved to be problematic in a field where the number of arbitrators is relatively small and repetitive appointments are not uncommon.[28] A major difference between existing arbitration rules is that under the International Centre for Settlement of Investment Disputes (ICSID), a manifest lack of qualities to be an arbitrator is required in order to disqualify an arbitrator, as opposed to the reasonable doubt test requested by other arbitration rules.[29] In addition, under ICSID challenges to arbitrators are decided by the arbitral tribunal itself. These and other reasons have made challenges under ICSID particularly difficult.[30]

As we shall see below, EU investment agreements will introduce significant innovations when it comes to the composition of the tribunal. In essence, they will do away with the involvement of private parties, and lay down quite advanced ethical requirements. Also on account of the highly institutionalised structure of the ICS, it seems safe to affirm that the integrity of ICS' members will not be an issue under EU investment agreements—at least not more than it is in the context of any other international or domestic adjudicatory body.[31]

The cost of arbitration is yet another problematic aspect of investment disputes. A recent study calculated that the approximate average cost of an investment arbitration is just below 10 million USD, of which the tribunal's costs account for less than 10%.[32] All other expenses cover experts, witnesses and counsels' costs, with the latter getting the lion's share. This makes investment arbitration a form of justice that is essentially only available to a circle of a privileged few. The high costs of litigation are also often connected with the question of so-called regulatory

[26] Lively academic debate has famously been triggered by the publication of an article authored by prominent scholar and arbitrator Jan Paulsson that vehemently criticised party-appointed arbitrators. See Paulsson 2010. This article was followed by an equally passionate reaction signed by Charles N. Brower and Charles B. Rosenberg, where these authors argued that party-appointed arbitrators are essential to the development of this branch of international law. See Brower and Rosenberg 2013.

[27] See Park 2010, p. 194.

[28] See Ciancio 2014, p. 446.

[29] For example, Article 12 of UNCITRAL Arbitration Rules unequivocally states that "[a]ny arbitrator may be challenged if circumstances exist that give rise to *justifiable doubts* as to the arbitrator's impartiality or independence" (emphasis added).

[30] See Daele 2012.

[31] But see the considerations made by Baetens 2016, particularly pp. 370–371.

[32] More specifically, the average party costs are more than 4.5 million USD per party, and tribunal costs around 800,000 USD. See Hodgson and Campbell 2017.

chill: States might sometimes refrain from adopting a new law fearing to be brought to costly litigation by big corporations that can invest a lot of resources in expensive lawyering—often more resources than many countries can afford.[33] This problem is further exacerbated by the astounding amounts of damages that are sometimes claimed by investors.[34] As we shall see below, the EU has attempted to tackle this problem in a twofold manner. First of all, the use of a Tribunal comprising a sole Member rather than three is encouraged (but not mandatory) when the claimant is a small or medium-sized enterprise.[35] This may help reduce the elitist character of investment litigation and make the ICS more accessible to small claimants, even though, as said above, the tribunal's costs have a relatively marginal impact on the overall cost of an investment dispute. Secondly, EU investment agreements incorporate the 'loser pays' principle, according to which both the ICS costs and party costs are to be borne by the unsuccessful party.[36] This rule may help in improving the overall fairness of the proceedings: for the winning party, having to bear its own (expensive) legal costs may make victory a somewhat bittersweet achievement. The 'loser pays' principle will tackle this problem.[37]

A final sensitive issue is worth being mentioned here before getting underway with a detailed analysis of the procedural rules governing the settlement of disputes under EU investment agreements. The traditional system based on *ad hoc* tribunals has demonstrated a certain inability to effectively filter out claims that are, for a variety of reasons, regarded as unworthy of protection. This applies essentially to frivolous claims as well as multiple and parallel claims.[38] EU investment agreements include a number of rules that are specifically devised to address these issues. First and foremost, they have a provision for the rejection at the stage of preliminary objections of claims that are "manifestly without legal merit".[39] Such a rule should allow the speedy dismissal of frivolous claims and prevent vexatious litigation—which also plays a role in the regulatory chill. Secondly, they will introduce very strict time-limits that investors must comply with in order to bring an action,

[33] Here again one can immediately think about the battle between tobacco giant Philip Morris and a small country like Uruguay (see *supra*, note 10). Uruguay was financially supported by external donors who embraced its anti-tobacco policies, such as, most notably, former New York Mayor Michael Bloomberg. See Davies, Michael Bloomberg Fights Big Tobacco in Uruguay, BBC News, 7 April 2015, http://www.bbc.com/news/world-latin-america-32199250 (accessed 2 February 2018).

[34] See Hodgson and Campbell 2017.

[35] See Article 8.27(9) CETA.

[36] See Article 8.39(5) CETA. For an overview of the rules concerning the allocation of costs under other arbitration rules, see Pantaleo 2016, pp. 78–80.

[37] The loser pays principle might, however, be somewhat of a double-edged sword. In fact, small claimants might be deterred from bringing a claim if they face the risk of bearing legal costs that they cannot afford.

[38] See Wehland 2013.

[39] See Article 8.32(1) CETA.

enhancing legal certainty and the rule of law.[40] Thirdly, they contain rules explicitly aimed at making sure that investors do not pursue other national or international judicial actions in parallel with, or in addition to, a claim submitted under an EU investment agreement.[41]

This brief comparison between the ICS and traditional ISDS has evidenced that EU investment agreements have attempted to address most of the contentious issues that have risen in investment arbitration over the last few years. This is not to say that the settlement of disputes under EU investment agreements is entirely immune from the criticism moved to traditional ISDS.[42] Nor is this to say that the process that led the EU to adopt the safeguards and adjustments discussed above was always a logical and orderly one. At times, it was quite the opposite. It should be noted that the starting point of the EU was a (reformed) ISDS rather than a permanent investment court.[43] The decision to switch to a more institutionalised dispute settlement—which the Commission announced in September 2015, much to the surprise of all the parties involved—only came about after a heated debate which culminated in a public consultation.[44] The proposal was made final in November 2015,[45] and it was initially believed to be limited to the Transatlantic Trade and Investment Partnership (TTIP). However, and again quite surprisingly, it made its way into CETA while this agreement was admittedly undergoing legal scrubbing.[46] This was not the only *coup de théâtre* that characterised the negotiations of EU investment agreements.[47] While incidents have occurred and problems certainly still exist, it is none the less difficult not to consider the ICS an impressive

[40] CETA lays down a veritable barrage of statutes of limitations, for example at Article 8.19(6) CETA. This and other rules will be examined in-depth below.

[41] This is done by means of a so-called fork-in-the-road (FITR) clause. Further detail will be provided below.

[42] This author has expressed elsewhere some reservations about the ICS, and more specifically about the appellate mechanism. See Pantaleo 2016, pp. 87–90.

[43] See *supra*, note 5.

[44] See Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), available at http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179 (accessed on 20 February 2018).

[45] See European Commission, 'EU finalises proposal for investment protection and Court System for TTIP', Press Release, http://europa.eu/rapid/press-release_IP-15-6059_en.htm (accessed on 20 February 2018).

[46] See European Commission, 'CETA: EU and Canada agree on new approach on investment in trade agreement', Press Release, http://europa.eu/rapid/press-release_IP-16-399_en.htm (accessed 20 February 2018).

[47] Another memorable moment was certainly the dramatic Wallonia *debacle*, that is to say, a diplomatic and political crisis triggered by the decision taken by a local parliament—representing 0.68% of the EU population—to take hostage the entire CETA for a few, melodramatic hours. The Walloon Parliament gave its go-ahead after complex negotiations that gave 'political assurances' on the effects of the provisional application. See Pantaleo 2017a, p. 61 (including footnotes). See also Rankin, EU-Canada trade deal in crisis as Canadian minister walks out, The Guardian, 22 October 2016, https://www.theguardian.com/world/2016/oct/21/eu-canada-ceta-trade-deal-meltdown-canadian-minister-walks-out (accessed 20 February 2018).

achievement. An achievement that will not only lead the way in international investment law, but that can also represent a viable paradigm for the settlement of disputes against the EU in general, as this book will attempt to explain in Chap. 5 and Chap. 6. We will now turn to a detailed analysis of the main procedural rules governing the settlement of disputes before the ICS.

4.3 The Pre-litigation Stage: Consultations and Mediation

The settlement of disputes under EU investment agreements includes innovative features starting already from the stage prior to the actual commencement of a dispute. In particular, there are two forms of non-confrontational mechanisms available during the pre-litigation stage: one is mandatory consultations, and the other is non-mandatory mediation.

Consultation is a common feature of investment treaties, which often make provision for a so-called cooling-off period. During this period, the parties to a potential, future dispute are usually under a 'best effort' obligation to attempt to settle the issue amicably, possibly resorting to third-party procedures.[48] EU investment agreements bring consultations to another level by making it a mandatory procedural step prior to the submission of a claim. Failure to comply with such a step will make a claim inadmissible. In accordance with Article 8.19 CETA, the investor shall submit a request for consultations in compliance with a number of requirements. Namely, the request has to include: (a) detailed information about the investor (all of them if there is more than one), including where the request is submitted on behalf of a locally established enterprise,[49] (b) the provisions of the investment agreements that have allegedly been breached, (c) the legal and factual basis of the claim, with reference to the measure that has allegedly given rise to a violation of the agreement, (d) the relief sought, and (e) an estimation of the damages claimed by the investor. It is expressly indicated that the information in question needs to be sufficiently specific to "allow the respondent to effectively engage in consultations and to prepare its defence".[50]

In addition to adhering to quite strict formal requirements, the request for consultations needs to meet equally rigorous time-limits. In particular, it has to be submitted: (a) within three years after the date on which an investor first acquired or should have first acquired knowledge of the alleged breach and the loss or damage incurred, or (b) two years after an investor ceases to pursue claims or proceedings before a domestic court of the respondent, or when such proceedings have

[48] See, for example, Article 23 of the US Model BIT.

[49] The definition of an investor is laid down in Article 8.1 CETA and includes legal persons incorporated in the respondent States that are directly or indirectly controlled by an investor of the other Party.

[50] See Article 8.19(5) CETA.

otherwise ended. At any rate, the request must be submitted no later than 10 years after the date on which the investor first acquired or should have first acquired knowledge of the alleged breach and the loss or damage incurred.[51] Finally, the submission of a request for consultations gives rise to an additional time-limit: starting from the date of such submission, and in case consultations fail, the investor has only 18 months to bring a dispute under the relevant provision of the agreement.[52] Considering that the provision under discussion further stipulates that consultations shall be held within 60 days of the submission of the request, and shall be completed within 90 days,[53] the investor is left with a little less than a one and half year window to initiate a dispute.

Three more aspects of consultations are worth being mentioned here. Firstly, it is stated that the place where consultations will take place are: (a) Ottawa, if the measures challenged are measures of Canada, (b) Brussels, if the measures challenged *include* a measure of the European Union, or (c) the capital of a Member State of the European Union, if the measures challenged are *exclusively* measures of that Member State.[54] Secondly, and in connection with this, it is established that requests "concerning an alleged breach by the European Union or a Member State of the European Union shall be sent to the European Union".[55] The provision in question does not indicate who, and on the basis of what rules, will determine what party (whether the EU or a Member State) will take part in the consultations. It employs the same ambiguous language (emphasised above) used in the corresponding provision concerning the determination of the respondent to the dispute in which the EU or one of its Member State is a party, namely Article 8.21 CETA. The rules on the determination of the respondent party and their broader implications on the settlement of investment disputes against the EU, including in relation to issues of international responsibility, will be examined in-depth in Sect. 5.2. Since the considerations made below equally apply to the determination of the party that will conduct consultations, the reader is referred to it. Thirdly and finally, it is stated that consultations can (but there is no obligation) be held through video conference or other appropriate means, in particular, "where the investor is a small or medium-sized enterprise".[56] This provision reinforces the idea that the settlement of disputes under EU investment agreements has been designed to be more accessible to small claimants to the extent possible.

In light of what precedes, it seems clear that consultations under EU investment agreements will have at least three main functions. The first, and most obvious, is that it will serve the purpose of providing for a chance to settle the dispute amicably and avoid litigation. Secondly, consultation will essentially define the contours of

[51] See Article 8.19(6) CETA.
[52] See Article 8.19(8) CETA.
[53] See Article 8.23(1) CETA.
[54] See Article 8.19(2) CETA.
[55] See Article 8.19(7) CETA.
[56] See Article 8.19(3) CETA.

the dispute. In fact, the provision on consultations must be read in conjunction with Article 8.22(1)(e) laying down a number of procedural requirements for the submission of a claim to the ICS. According to this provision, the claim cannot "identify a measure […] that was not identified in [the] request for consultation", thus creating a strict correspondence between the pre-litigation and the litigation stage.[57] It must be assumed that failure to meet the requirement in question will result in the inadmissibility of the claim, at least as far as the measures belatedly identified are concerned. Thirdly, and as a consequence of the second point, consultations will also work as yet another mechanism capable of filtering out claims, further enhancing legal certainty for all the parties involved. On the one hand, activation of the consultations stage will trigger a number of time limits as outlined above. Non-compliance with such limits would constitute yet another reason to reject a claim. On the other hand, and as just noted above, the substantial link created by EU investment agreements between the pre-litigation and the litigation stage will have a clear filtering-out effect, at least indirectly.

An interesting question that arises when the measure challenged is one taken by the EU, or a Member State concerns the relation between the determination of the party that will conduct the consultations, which is made in the pre-litigation stage, and the determination of the party that will act as respondent to the dispute, which is only made after a claim has been submitted. In fact, the relevant provisions do not seem to clarify whether the determination made in the consultations stage will have repercussions on the determination to be made in the next stage of the dispute.[58]

The second non-confrontational mechanism is mediation. Article 8.20 CETA states that "the disputing parties may at any time agree to have recourse to mediation". The use of the expression 'at any time' seems to suggest that such a provision also applies to disputes that have already reached the litigation stage. It is established that the mediation will be subject to the rules agreed upon by the parties, or to the rules adopted for this purpose by the Committee on Services and Investment, if available. The mediator is appointed by agreement of the disputing parties. Absent an agreement between them on this matter, they may agree to request ICSID Secretary-General to appoint a mediator. The repeated use of a singular noun suggests that there can only be one mediator and that the use of a multi-personal mediation panel is not possible. Article 8.20(4) further stipulates that the parties "shall endeavour to reach a resolution […] within 60 days from the appointment of the mediator". The use of hortatory language seems to suggest that this is only a best effort obligation. This aspect could be somewhat problematic in light of the subsequent provision. Article 8.20(5) states that the time limits laid

[57] The required correspondence between the pre-litigation and the litigation stage is not a unique feature of EU investment agreements. For example, a parallel can be drawn with the rules governing the infringement procedure in accordance with Article 258 TFEU, where a similar mechanism is envisaged. This aspect raises a number of interesting issues, such as the possibility to take into account conducts undertaken after the consultation stage, their impact on the dispute, and so forth. For a general comment on these matters, see the considerations made by Kuijper 2000.

[58] This question will be analysed in Sect. 5.2.

down in Article 8.19(6) and 8.19(8) are suspended during mediation until "either disputing party decides to terminate mediation". These time limits, as seen above, are intended to enhance legal certainty by setting out a clearly defined and time-bound window during which a claim can be submitted. Considering that one of the effects of activating mediation will be the suspension of such time limits, the inclusion of a mere best effort obligation in Article 8.20(4), coupled with the absence of a rule against undesirable behaviours in the conduct of mediation (such as dilatory strategies or similar), might open an opportunity to exploit mediation improperly. For this reason, it will be important for the disputing parties to address these issues in the rules that they will give themselves for the conduct of mediation. The mediator itself should also be able to play a role to make sure that mediation is not improperly used by one of the parties to the dispute.

The interest in the mediation of investment disputes has increased exponentially in recent years. Even though the practical relevance of mediation is still negligible in investment law,[59] the subject has recently attracted considerable attention from scholars,[60] practitioners and States.[61] EU investment agreements are, at the moment, the only existing investment agreements that include a provision on mediation. Other non-EU agreements, however, might follow suit in the next future.[62] Mediation offers a number of advantages, as well as some disadvantages, with respect to other mechanisms to settle investment disputes. Discussing these issues at length is, however, beyond the scope of this book.[63] The main benefits that are worth being mentioned here are the following ones. Firstly, mediation is more affordable, more informal and more flexible than other forms of dispute settlement, making it more attractive to private parties (particularly SMEs) and the respondent party alike. Secondly, the parties usually participate in a mediation on a 'without prejudice basis', which supposedly creates the conditions for them to make reciprocal concessions that they would possibly not make in a more formalised procedure. This is expressly recognised in Article 8.20(2), which stipulates that recourse "to mediation is without prejudice to the legal positions or rights of either disputing party". Thirdly, it seems that confidentiality can be better preserved in the mediation than in the dispute itself. This aspect might prove to be particularly important in

[59] To the best of the Author's knowledge, there is only one investment dispute that has actually been brought to mediation so far. See Peterson 2016. At the time of writing, the mediation seems to be still pending.

[60] ICSID Review has devoted a special issue to this matter. See ICSID Review, Volume 29, Issue 1, Alternative Dispute Resolution in Investment Dispute.

[61] As evidenced, for example, by the active role played by ICSID Secretariat. Information concerning the initiatives taken by ICSID can be found here: https://icsid.worldbank.org/en/Pages/resources/ICSID%20NewsLetter/2017-Issue3/Considering-the-Future-of-Investor-State-Mediation.aspx (accessed 1 March 2018).

[62] For example, it seems that a mediation mechanism could be incorporated in the Regional Comprehensive Economic Partnership between the ASEAN countries, Australia, China, India, Japan, South Korea and New Zealand. See Baker and Dowling 2017.

[63] The reader is, therefore, referred to the sources referenced above, in particular *supra*, note 60.

light of the wide-ranging transparency obligations laid down in EU investment agreements (see below, Sect. 4.6), which only apply to the confrontational stage. In other words, given the increased level of institutionalisation of disputes under EU investment agreements, mediation might offer a viable alternative in which to strike a balance between private and public interests. From this perspective, the growing attention that mediation has recently captured might be explained as a reaction to the general transition towards a higher judicialisation of disputes as operated by EU investment agreements and, more generally, as demanded by the public opinion.

4.4 The Submission of a Claim and the Constitution of the Tribunal

If a dispute cannot be resolved through consultations, the investor can submit a claim to the ICS, which consists of a Tribunal vested with the power to hear cases in the first instance and an appeals facility.

According to Article 8.23 CETA, it is established that an investor can submit a claim on its own behalf but also, as already explained above, on behalf of an enterprise incorporated in the respondent party that is directly or indirectly controlled by the investor. The claim can be submitted under the arbitration rules traditionally referred to in jurisdictional clauses included in investment treaties, namely: the ICSID Convention, the ICSID Additional Facility Rules, the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, and any other rules on the agreement of the disputing parties. These rules are, among others, the International Chamber of Commerce Arbitration Rules, the Stockholm Chamber of Commerce Arbitration Rules, and so forth. At this stage of the analysis, one might be surprised that EU investment agreements, which have supposedly created the most advanced and institutionalised dispute settlement in the field of investment law, rely in such a direct manner on existing arbitration rules, which are the same ones that the ICS is meant to replace. This might seem a contradiction at first sight. However, if one looks under the surface, the reliance on existing arbitration rules is only of a residual nature. As clarified by Article 8.23(6), the applicability of other arbitration rules is "subject to the specific rules set out in this Section and supplemented by the rules adopted pursuant to Article 8.44(3)(b)". The latter are additional procedural rules that can be adopted by the Committee on Services and Investment. The combined reading of these provisions should be interpreted as meaning that existing arbitration rules are applicable only: (a) so long as there is no conflict between such rules and the rules laid down in EU investment agreements as supplemented, as the case may be, by the rules adopted by the Committee on Services and Investment, or (b) where there is no rule whatsoever in EU investment agreements. In other words, existing arbitration rules should be seen as a fall-back option on which to rely in order to integrate, supplement and fill the gaps in the rules provided for by EU investment agreements. This can only be regarded as a sensible and logical solution. As we shall see below, the rules contained in EU investment agreements are of a foundational nature but are not

comprehensive ones from a procedural point of view. They are only intended to establish the ICS and lay down the main principles governing its functioning. They are not meant to set out in detail how disputes before it will be conducted. In this sense, making reference to existing arbitration rules that have successfully been used for decades seems quite a reasonable solution.

When submitting the claim, the investor can propose that the Tribunal comprising of a sole Member should hear the claim. Article 8.23(5) stipulates that, in such case, the respondent "shall give sympathetic consideration to that request, in particular, if the investor is a small or medium-sized enterprise or the compensation or damages claimed are relatively low". This is yet another provision designed to make the ICS more accessible to SMEs. The provision in question, however, clarifies that the final say lies with the respondent party, whose agreement is therefore necessary. Furthermore, the following Article 8.23(7) clarifies when a claim is to be considered submitted.[64] The date determined pursuant to the provision in question constitutes the *dies ad quem* for the purpose of the statutes of limitations referred to above as well as the *dies a quo* prompting new procedural time limits as it will be explained below. The submission of a claim marks the beginning of a dispute and triggers the activation of the Tribunal.

Article 8.27 states that the CETA Joint Committee shall appoint fifteen Members of the Tribunal.[65] Five Members will be nationals of a Member State of the European Union, five Members will be nationals of the other party to the agreement (i.e. Canadian nationals in the case of CETA), and the remaining five Members will be nationals of third countries that are not parties to the agreement. Members of the Tribunal are appointed for a five-year term renewable only once. The President and

[64] In particular, the provision in question states that a claim is submitted when: A claim is submitted for dispute settlement under this Section when:

> (a) the request under Article 36(1) of the ICSID Convention is received by the Secretary-General of ICSID;
>
> (b) the request under Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretariat of ICSID;
>
> (c) the notice under Article 3 of the UNCITRAL Arbitration Rules is received by the respondent;
>
> or
>
> (d) the request or notice initiating proceedings is received by the respondent in accordance with the rules agreed upon pursuant to subparagraph 2(d).

[65] The CETA Joint Committee is established under Article 26.1 and comprises representatives of the European Union and Canada. It will be presided by the Minister of International Trade of Canada and the European Commissioner for Trade. To our purpose, it is not necessary to dwell on the details of the wide-ranging powers attributed to the CETA Joint Committee. It is interesting to note, however, that the Member States as such will not be represented. The European Commission will take up the duty to represent the interests of the EU as a whole vis-à-vis the third-country involved.

the Vice-President of the Tribunal are chosen among the five Members that are nationals of third countries and shall serve on a rotating basis as established by the CETA Joint Committee. The appointment is for two years. Absent any indication to the contrary, it must be assumed that this term is not renewable. The President and the Vice-President are generally responsible for organisational issues and have the power to make the necessary appointments to constitute a division of the Tribunal upon receipt of a claim. In order to be appointed as a Member of the Tribunal, individuals must possess the qualifications required in their country of origin for appointment to judicial offices, or be jurists of recognised competence. In addition, demonstrated experience in public international law is required, and expertise in trade and investment law and dispute resolution is desirable but not mandatory. Compared to existing arbitration rules, EU investment agreements bring about significant innovations in this matter. As already mentioned above, the rules concerning the appointment of arbitrators have been subject to criticism. Apart from the issue of direct appointment by the parties already discussed above, the requirements set out in existing arbitration rules for individuals to be appointed as arbitrators are generally quite vague. For example, Article 14(1) ICSID demands "competence in the field of law, commerce, industry or finance". UNCITRAL is silent on the matter. Although, *de facto*, the vast majority of arbitrators appointed under existing rules are recognised experts whose experience and expertise cannot be put into question, the setting of high-quality standards operated by EU investment agreements is certainly to be welcomed.

It is established that the Tribunal will hear cases in divisions consisting of three Members, of whom one will be a national of a Member State of the EU, one of the other party to the agreement, and one will be a third-country national. The latter will chair the division. Each division will be appointed by the President of the Tribunal on a case-by-case basis within 90 days of the submission of a claim. The *dies a quo* from which to calculate this deadline is determined as described above. Before the constitution of the division, the claimant needs to inform the respondent of its intention to avail itself of the possibility to have the case heard by a sole Member of the Tribunal. Article 8.27(9) reiterates that the respondent shall give sympathetic consideration to such a request, especially where the claimant is an SME. If the parties agree, it is established that the sole Member shall be a third-country national appointed at random. It is not expressly stated who will make such an appointment. However, it seems logical to assume that it will be the President or the Vice President on its behalf as part of their general organisational function. Also, the provision does not contain any indication as to the power of the Tribunal to accept or reject the request to appoint a sole Member. It should, therefore, be assumed that the Tribunal does not have any power to make determinations on this matter.

4.5 The Appellate Tribunal

The establishment of an Appellate Tribunal is possibly the most ground-breaking innovation of EU investment agreements, which are the first of their kind to feature an appeal system. The reasons behind the creation of an appeals facility have all to do with the need to enhance the consistency and predictability of the dispute settlement system as already explained above. In order to achieve these goals, EU investment agreements have vested the Appellate Tribunal with wide-ranging reviewing powers of the awards issued by the Tribunal.

As far as the composition of the Appellate Tribunal is concerned, EU investment agreements contain significant differences between them. For this reason, it seems appropriate to deviate from the main working rule of this book—namely, taking CETA as the benchmark for the analysis—and directly examine the existing textual differences. To begin with, it is interesting to note that a previous version—more specifically, the version published prior to the decision to split the trade and investment components of the EU-Singapore Agreement did not feature an appeal tribunal but merely contained a provision on the basis of which the competent treaty organ could decide to establish such tribunal.[66] This, however, has changed in the authentic text, and the EU-Singapore Agreement now features an appellate mechanism that is largely similar to the one included in the EU-Vietnam Agreement. On its part, Article 8.28 CETA provides for the establishment of an Appellate Tribunal but contains little detail on its composition and functioning. Article 8.28(3) states that the Members of the Appellate Tribunal shall meet the requirements laid down for the appointment of Members of the Tribunal (of the first instance) and comply with the same ethical standards as set out in Article 8.30. It further stipulates that the Appellate Tribunal shall hear cases in divisions consisting of three Members randomly appointed (without specifying by whom). No more detail regarding the composition of the Appellate Tribunal or the divisions is given. The determination of all other aspects is in fact left to a decision of the CETA Joint Committee to be adopted 'promptly' (but with no fixed deadline). Such a decision will set out rules concerning: (a) administrative support, (b) procedural issues exclusively applicable to the Appellate Tribunal, including rules on referral of awards back to the Tribunal, (c) procedures for filling up vacancies, (d) issues of remuneration of the Members, (e) provisions related to the costs of the proceedings, (f) the number of Members of the Appellate Tribunal, and (g) any other relevant elements.

The EU-Vietnam Agreement lays down more detailed provisions concerning the appeals facility, which, under this agreement, is called Appeal Tribunal. The main provision is Article 13 of Chapter 8, Section 3, according to which the Appeal Tribunal will consist of six Members. Two will be nationals of a Member State of the EU, two will be Vietnamese nationals, and two will be third-country nationals. Members are appointed for a four-year term, renewable once. They need to have demonstrated experience in public international law and possess the qualifications

[66] The provision in question was, in accordance with the old numbering, Article 9.30(1)(c).

to be appointed to the highest judicial offices in their respective countries. Expertise in international trade and investment law is desirable but not mandatory. The President and the Vice President will be selected from the Members who are third-country nationals and will serve for a two-year term on the basis of a rotating system. The Appeal Tribunal will hear cases in divisions consisting of three Members, one of whom will be a national of an EU Member State, one of Vietnam and the third Member, who will also act as chairperson, will be a third-country national.

As far as the functioning of the divisions is concerned, CETA and the EU-Vietnam Agreement also differ to a large extent. While CETA only contains one provision stating that the Appellate Tribunal will hear appeals in divisions consisting of three randomly appointed Members, the EU-Vietnam lays down much more detailed provisions. In essence, such provisions follow the same principles governing the composition of divisions of CETA's (first instance) Tribunal. More specifically, the Appeal Tribunal under the EU-Vietnam FTA will hear appeals in divisions consisting of three members. As usual, one will be a national of a Member State of the EU, one will be a national of Vietnam, and the third member of the division will be a third-country national who will also serve as the Chair. The establishment of divisions is in the hands of the President, who will appoint the Members of a division based on a randomised rotating system ensuring that all Members of the Appeal Tribunal have equal opportunities to serve.

Moreover, Article 8.13 of the EU-Vietnam Agreement lays down an interesting rule concerning the decision-making process within the Appeal Tribunal. The provision in question deserves to be cited in full:

> A division of the Appeal Tribunal shall make every effort to make any decision by consensus. Where, nevertheless, a decision cannot be arrived at by consensus, a division of the Appeal Tribunal shall render its decision by *a majority of votes of all its Members*. Opinions expressed by individual Members of a division of Appeal Tribunal shall be anonymous.[67]

This provision raises some interesting questions. First of all, it seems at least unusual to impose on a tribunal what looks like a best effort obligation to reach decisions by consensus. This part of the provision seems to be directly inspired to Article 2(4) Understanding on rules and procedures governing the settlement of disputes annexed to the WTO Agreement, which states that "[w]here the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus". According to a footnote to that article, the consensus requirement is considered to be met where no Member of the DSB raises formal objections to a decision (i.e. constructive abstention rule). The difference between the two provisions lies precisely in the existence of a formal objection: under the EU-Vietnam FTA, it is possible for the Appeal Tribunal to vote by the majority rule. Therefore,

[67] Emphasis added. An identical provision governs the decision making of the first instance Tribunal. The EU-Singapore Agreement contains a similar rule which is, however, only applicable in the context of State to State disputes. See Article 3.43(1).

one might question the utility of the best effort obligation laid down in the first part of the provision under examination. Secondly, the final part of the provision is aimed at preventing Members of the Appeal Tribunal from issuing separate and dissenting opinions. This is a policy choice that does not raise any issue in and of itself and is also reminiscent of the WTO system. According to Articles 14 and 17 of the Understanding on rules and procedures governing the settlement of disputes annexed to the WTO Agreement, opinions expressed by the panellists are anonymous. Under the WTO rules, anonymity is regarded as a means to minimise external pressure and preserve the independence of the panel. However, it is generally recognised that, in many cases, experts in the field are often able to guess the identity of the dissenter.[68] It is questionable, therefore, whether under the EU-Vietnam FTA it would have been more appropriate to avoid any reference to separate opinions, or state that opinions are prohibited rather than anonymous, given the overall effort made by EU investment agreements in order to maximise the institutionalisation of the proceedings initiated under them.

A final, yet seminal issue that needs to be analysed in this section is the standard of review that the appeal facilities established under EU investment agreements can apply when reconsidering awards issued in the first instance.[69] CETA and the EU-Vietnam FTA differ greatly also on this matter. The latter provides no detail as to the powers of the Appeal Tribunal other than a quite succinct provision stating that it "will hear appeals from the awards issued by the Tribunal".[70] CETA also contains only one provision in this regard. It is, however, more meaningful than its EU-Vietnam Agreement counterpart. More specifically, Article 8.28(2) CETA stipulates that the Appellate Tribunal can "uphold, modify or reverse the Tribunal's award" on the following grounds:

> (a) errors in the *application or interpretation of applicable law*;
>
> (b) manifest errors in the *appreciation of the facts*, including the appreciation of relevant domestic law;
>
> (c) the grounds set out in Article 52(1) (a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b).[71]

The ground referred to under (c) concerns the annulment of an ICSID award and need not be analysed in-depth in this book.[72] Suffice it to say that the annulment procedure at ICSID is principally aimed at removing awards affected by gross violations—such as the Tribunal manifestly exceeding its powers, or corruption of

[68] See Raffaelli 2012, p. 33.

[69] For the writing of this part, a fundamental source of inspiration for the Author has been Loris Marotti and his Ph.D. thesis focused on the question of appeal in international law (which will soon be published in the form of a monograph).

[70] Article 13(1), Ch. 8, Sec. 3. This is also the solution adopted in the EU-Singapore Agreement. See Article 3.10(1).

[71] Emphasis added.

[72] The reader is referred to the existing relevant literature. See, in particular, Honlet et al. 2015.

one of its members. In addition, such procedure is an all-or-nothing mechanism: an annulment decision removes the defective award *in toto* or in part, with no possibility to correct it.

The other grounds of appeal under CETA seem to raise interesting questions that deserve further examination. Traditionally, the right to appeal represents the exception rather than the rule in international adjudication.[73] Existing appellate mechanisms have been justified essentially by two different sets of considerations. First of all, an appeals facility can be seen as a means to offer an additional remedy to the parties to the dispute. The main purpose served by such an appeal, and the rationale justifying it, is to guarantee a second chance to the parties involved. It is, in other words, a means to enhance the protection of individual rights. Examples of this type of appeal in international adjudication can be found in the context of international criminal tribunals and, to a limited extent, the European Convention on Human Rights.[74] Secondly, an appellate mechanism can serve the purpose of increasing predictability and consistency of the case law developed under a given regime. The main interest served in such contingency is to improve the overall credibility and legitimacy of a given dispute settlement system. A textbook illustration of this second function is carried out by the WTO Appellate Body.[75] The different justification of the ultimate function of these different forms of appeal is reflected in the provisions concerning their respective powers. Usually, and unsurprisingly, appeal facilities whose main function is to offer a second chance to the parties involved have the power to review both the law and the facts. An appellate mechanism serving the purpose of guaranteeing internal consistency is usually only empowered to review questions of law. For the reasons already discussed above, and similarly to the WTO system, the creation of an appellate system in international investment law has traditionally been justified by the primary need to increase consistency and predictability. On the basis of these considerations, an appeal mechanism vested with the power to review both legal and—to a certain extent—factual questions might be hard to reconcile with this logic. However, the reference to only "manifest errors in the appreciation of the facts" clearly indicates that the factual review is not intended to be a fully-fledged one. A sensible interpretation of this provision would, therefore, be to limit the Appellate Tribunal's power to review factual grounds to blatantly exorbitant mistakes made in the first

[73] This characteristic of the international legal order as opposed to domestic legal systems is so deeply rooted that a prominent scholar in 1991 declared that a "domestic lawyer […] might be forgiven for thinking it strange that the international community, though apparently well-equipped with means of judicial settlement, appears to lack what seems to be a natural or inherent feature on national judicial systems, namely, a comprehensive system of appeal". See Lauterpacht 1991, p. 99.

[74] See the considerations of the UN Secretary-General in relation to the creation of the ICTY, Report of the Secretary-General pursuant to para 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, paras 116 et seq.

[75] See Article 17(6) of the WTO Dispute Settlement Understanding, according to which an "appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel."

instance. In this way, this ground of appeal will be a sort of *extrema ratio* available when it is necessary to remove an appreciation of the facts lacking the minimal, indispensable requirements of a reasonable judicial decision, and not an opportunity to reconsider the merits of a case. It is not difficult to imagine that appellants will almost automatically attempt to get a second chance on the facts and systematically invoke both grounds in their appeals. It will, therefore, be of paramount importance for the Appellate Tribunal to quickly and firmly develop a clear case law on this point in order to avoid that the need to increase legitimacy and predictability will be overwhelmed by the parties' interest to get a second shot. This is all the more crucial in respect of the Appeal Tribunal established under the EU-Vietnam Agreement and the EU-Singapore Agreement. Given the silence of these agreements on the matter, it is highly likely that appellants will attempt to seek a full review of the factual grounds of a dispute on a regular basis. This, in the Author's opinion, should be carefully avoided.

As already mentioned, CETA enables the Appellate Tribunal to uphold, modify or reverse an award issued by the Tribunal in the first instance. This wording is reminiscent of Article 17(13) of the Understanding on rules and procedures governing the settlement of disputes annexed to the WTO Agreement. However, it is further established that rules concerning "procedures for referring issues back to the Tribunal for adjustment of the award, as appropriate" will be promptly established by CETA Joint Committee.[76] This provision suggests that the Appellate Tribunal will also have the power to refer cases back to the first instance. This is further confirmed by Article 8.28(9)(c)(iii), according to which a decision issued by the Appellate Tribunal will be considered final if 90 days have elapsed from such decision and "the Appellate Tribunal has not referred the matter back to the Tribunal". CETA, however, does not further elaborate on this matter. There is no further indication as to what degree of deference, if any, the Appellate Tribunal has to concede to the Tribunal's decisions. The matter will certainly be addressed in the decision made by the CETA Joint Committee as Article 8.28(7) itself states.

The importance of clearly defining the division of workload between the two instances should not be underestimated. In the WTO system, under which the appeal is limited to questions of law,[77] the lack of the so-called remand authority on the part of the Appellate Body has led the latter to fill the gap unilaterally by making so-called *de novo* decisions. However, the Appellate Body has repeatedly affirmed that this is only possible where the factual findings of the Panel allow it to do so.[78] Where this is not the case, the only alternative left to the appellant party would be, in essence, the launch of an entirely new dispute.[79] In light of this and of

[76] See Article 8.28(7).

[77] See Article 17(6) of the Understanding on rules and procedures governing the settlement of disputes.

[78] See, among others, Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products (14 December 1999) WT/DS98/12, para 92.

[79] For a more detailed analysis of these issues in the context of the WTO, see Palmenter 1998.

the considerations made above in relation to the grounds of appeal under EU investment agreements, it appears essential to clearly address the question of the division of workload between the different levels of the ICS. In this Author's opinion, it might be a sensible idea to establish that the Appellate Tribunal will refer awards back to the Tribunal where serious flaws concerning the appreciation of the facts will be at stake, as well as where the Appellate Tribunal will not possess all the information necessary to reach a decision of its own.

4.6 Transparency

As already mentioned in Sect. 4.2, investment arbitration has often been regarded as a form of secret and untransparent justice, especially by civil society. Such perception has in recent years ignited the public debate.[80] We have already seen that confidentiality is not strictly a legal obligation under arbitration rules.[81] However, it is undeniable that investment disputes are sometimes kept confidential by the parties. This situation has raised awareness of the downsides of confidentiality and given rise to calls for greater transparency.[82]

Traditionally, European States have not favoured transparency in investment arbitration.[83] Their rather conservative positions were reflected in their BITs, which laid down no additional transparency obligations than those—already quite limited—included in arbitration rules.[84] EU investment agreements incorporate the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (hereinafter: the UNCITRAL Rules on Transparency) as the starting point,[85] with a number of additions towards even greater transparency. In particular, Article 8.36 CETA: (a) expands the categories of documents subject to publication under Article 3(1) of the UNCITRAL Rules on Transparency; (b) includes the publication of exhibits excluded pursuant to Article 3(2) UNCITRAL Rules on Transparency; and

[80] Especially around the time when the controversy surrounding the TTIP negotiations reached its apogee. See, for example, Stop TTIP, *Stop TTIP: Malmström's ISDS Proposal Misses the Point*, https://stop-ttip.org/stop-ttip-malmstroms-isds-proposal-misses-the-point/ (accessed 2 June 2018) where investment arbitration is referred to as a system of 'private parallel justice'.

[81] In general arbitration rules favour but do not impose confidentiality. See *supra*, note 12.

[82] The many reasons why lack of transparency in investment arbitration is a point of concern cannot be examined in-depth in this study. For a thorough analysis, see Jansen Calamita 2014.

[83] On these aspects, see the considerations made by this author elsewhere. In particular, Pantaleo 2017b, pp. 170–173.

[84] As we have already seen above (*supra*, note 15), the situation is different, for example, on the other side of the pond, as the NAFTA countries have adopted high standards by means of a decision of NAFTA Free Trade Commission. Higher standards are also included in the model BIT of those countries. See, for example, Article 29 of the US Model BIT.

[85] Adopted by UN General Assembly Resolution 68/109 of 16 December 2013 and come into force on 1 April 2014.

(c), contrary to Article 6 UNCITRAL Rules on Transparency, requires that hearings are open to the public with virtually no limitations.[86]

The adoption of a 'UNCITRAL-Plus' model in EU investment agreements constitutes a major development. While it is undeniable that investment arbitration may at times give rise to issues of industrial, commercial or other sorts of confidentiality, the choice between transparency and secrecy should not be left entirely in the hands of the parties to the dispute, let alone in the hands of only one party. Granting investors (or, for that matter, the respondent party) veto powers on vital issues such as transparency and publicity seems largely unnecessary, especially in the context of disputes that will be settled by a quasi-judicial organ characterised by a high degree of independence and institutionalisation. The need to protect certain information, which can surely arise in some investment disputes, does not justify the extension of confidentiality to the entire proceedings. The balance struck by EU investment agreements in this respect seems to be a sensible one which deserves to be welcomed. Besides, it appears to be largely in line with a global trend that has seen a gradual but steady increase of transparency in international arbitration, culminating in the adoption of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration.[87]

Another question partly related to transparency is the participation of third parties to disputes as *amici curiae*. In the field of investment, the role of *amicus curiae* has traditionally been carried out by non-governmental organisations (NGOs). However, in recent years actors other than NGOs—such as labour unions, representatives of indigenous peoples and the EU Commission—have requested and obtained permission to intervene as third parties to disputes.[88] In virtually all cases, the *amicus curiae* has intervened in favour of the respondent State. *Amici curiae* usually advocate in favour of issues concerning public, collective interests as opposed to the investor's private interests.[89] For this reason, the possibility to allow third parties interventions in an investment dispute is often viewed as a tool to guarantee greater consideration of public concerns.

Investment agreements traditionally do not contain provisions concerning the participation of non-disputing parties. The issue has therefore been governed by the arbitration rules chosen by the disputing parties. When it comes to the participation of third parties, the ICSID Arbitration Rules have been substantially improved by the 2006 amendments. Rule 32 allows third parties to attend or observe all or part of

[86] The only exception to public hearings occurs when the tribunal deems that appropriate arrangements are necessary to protect confidential or protected information. However, to avoid misuse, the provision in question makes it clear that only that part of the hearing requiring special protection shall be held behind closed door.

[87] See *supra*, note 16. For an analysis of the main features of the Convention, see Stephan Schill 2015, pp. 201–204.

[88] See Lucas Bastin 2014, pp. 127–129.

[89] The only exception is essentially the EU Commission whose intervention has been aimed at presenting interpretations of EU law without taking a position in favour of one of the parties to the dispute. See Bastin 2014, p. 134.

the hearings. Reference to the possibility 'to attend' a hearing leaves room for arguing that non-disputing parties may be authorised to make oral submissions. Moreover, Rule 32 contains a caveat granting disputing parties *de facto* veto powers. In fact, their objection has the effect of blocking the *amicus curiae*'s request to take part in the hearing altogether. Rule 37 allows the tribunal to authorise written submissions of non-disputing parties provided that such submissions would assist the tribunal, and that the party in question has a significant interest in the proceedings. The parties to the dispute must be consulted but have no veto. Written submissions by *amici curiae* have been authorised in a number of ICSID cases.[90] The UNCITRAL Rules on Transparency are somewhat more limited than ICSID in that they provide only for the possibility to file written submissions.[91] Within the North American Free Trade Agreement (NAFTA) regime, this issue is governed by a statement made by the Free Trade Commission (FTC) in 2003, which has no binding effect but is largely followed by arbitral tribunals. Only written submissions by third parties are authorised under NAFTA.[92] The same logic is followed by both the US Model BIT and Canadian BITs.[93] CETA does not seem to bring about much improvement regarding the participation of third parties to the proceedings. As already seen, this agreement incorporates an UNCITRAL-plus model when it comes to issues concerning transparency. This entails that if CETA does not explicitly lay down higher standards than the UNCITRAL Rules on Transparency, the latter will govern the matter.

4.7 Jurisdictional Overlap

Another procedural issue that deserves to be briefly examined in this chapter is the relation between proceedings instituted under EU investment agreements and other domestic and international proceedings. As already mentioned above, the pursuit of parallel and multiple claims on the part of investors has emerged as a problematic issue in investment arbitration. Traditionally, investment agreements contain only a few provisions on the matter. The most commonly used instrument is the so-called 'Fork-in-the-Road' (FITR) clause. In accordance with this clause, investors must waive their rights to initiate or continue any proceeding before a local court or other dispute settlement concerning the same measures. In other words, investors are in principle allowed to challenge a given measure only before one *forum*, and they are requested to make a choice when bringing a claim under an investment agreement.

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[90] See, *ex plurimis*, *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S. A. v. Argentine Republic,* ICSID Case No. ARB/03/19 (09 April 2015); *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa* ICSID Case No. ARB(AF)/07/01 (4 August 2010).

[91] See Article 4 UNCITRAL Rules on Transparency.

[92] See Bastin 2014, pp. 131–133.

[93] See US Model BIT Article 28(3), and Canada-Benin BIT Article 34.

The most illustrative example of a FITR clause is possibly the one included in NAFTA, which requires that the investor waive its rights to initiate or continue any proceeding before a local court or any other dispute settlement *forum*.[94] Such waiver usually takes the form of a written statement accompanying the notice of submission of a claim to arbitration. A few NAFTA cases in which the issue of the investor's waiver has been raised show that the application and interpretation of FITR clauses is problematic. Arbitral tribunals have at times been inclined to adopt permissive and perhaps creative interpretations of the waiver rule.[95] All in all, however, NAFTA practice reveals that the rule is often considered a condition to establish the jurisdiction of the arbitral tribunal. In *Waste Management v. Mexico*, an ICSID Tribunal not only checked whether the waiver was free of formal defects in that it was presented in writing, delivered to the respondent, and included in the submission. It also scrutinised the substantive adequacy of such waiver to reflect the claimant's effective intention to give up its rights in accordance with Article 1121 NAFTA. In this one particular case, the Tribunal dismissed the claim after it came to a negative conclusion.[96]

CETA lays down a somewhat classic FITR provision but also an article concerning, more generally, proceedings under other international agreements. The FITR clause is included in the provision already partly analysed above setting out procedural requirements for the submission of a claim to the Tribunal, namely Article 8.22. In particular, Article 8.22(1)(f) stipulates that an investor has to withdraw or discontinue any existing proceedings before a tribunal or court under the domestic or international law with respect to a measure challenged in its claim. Moreover, in case the investor has not yet brought any other proceeding with respect to the measure challenged in its claim, the following Article 8.22(1)(g) further requires that the investor has to waive its right to initiate any such claim or proceeding before a tribunal or court under domestic or international law. The fact that these rules are contained in a provision setting out procedural requirements for the submission of a claim leaves no doubt that failure to provide the waiver under discussion would result in the rejection of a claim. The case law developed by arbitral tribunals established under other investment agreements demonstrates that extravagant interpretations of FITR clauses are always possible. However, this

[94] See NAFTA Article 1121.

[95] See, in particular, *Ethyl Corporation v. The Government of Canada*, UNCITRAL Award, Award on Jurisdiction, para 91 (24 June 1998), in which the Tribunal stated that Article 1121 NAFTA lists a number of 'conditions precedent' without specifying what those conditions actually have to precede. It is worth noting that Article 1121 is titled 'Conditions Precedent to Submission of a Claim to Arbitration'. It is really hard to see what prevented the Tribunal from reading and applying the second half of the provision in question, which seems to be crystal clear as to what those conditions must precede.

[96] See *Waste Management, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/98/2, Decision on Jurisdiction, paras 18 et seq. (2 June 2000).

should be somewhat less problematic in the context of the ICS established under EU investment agreements, if only because the existence of an appeals facility guarantees that uniform case law—the famous *jurisprudence constante* which investment lawyers have been debating for decades—will be developed on this matter. Therefore, it seems safe to affirm that the risk of multiple, simultaneous proceedings should be virtually eliminated under EU investment agreements.

The second, and final provision that will be analysed in this section is Article 8.24 CETA. It states as follows:

> Where a claim is brought pursuant to this Section and another international agreement and:
>
> (a) there is a potential for overlapping compensation; or
>
> (b) the other international claim could have a significant impact on the resolution of the claim brought pursuant to this Section,
>
> the Tribunal shall, as soon as possible after hearing the disputing parties, stay its proceedings or otherwise ensure that proceedings brought pursuant to another international agreement are taken into account in its decision, order or award.

This is an extremely interesting provision governing the relationship between an investment claim and other international disputes. It is a coordination clause similar to an FITR clause yet with a different scope. The first difference with respect to the FITR clause is that the latter applies exclusively to claims concerning the same measure. The broad language employed by the provision under discussion suggests that a strict correspondence between the measures challenged in the parallel disputes is not required. A second major difference is that the FITR clause covers both international and domestic disputes while the provision under consideration only refers to claims brought under other international agreements. A third difference is that the FITR clause is a waiver proper in that it only applies to proceedings brought directly by an investor whereas Article 8.24 CETA can be extended to any other international dispute directly or indirectly related with a claim brought under EU investment agreements—including to disputes involving the Parties to the agreement. It is clear that a waiver imposed on a Canadian investor would have no bearing on the right of Canada to bring proceedings against the EU or the Member States under another international agreement, and vice versa.

There are two possible ways of interpreting this provision. First of all, as a general clause of coordination between international disputes, this provision seems to be aimed at avoiding that disputes that are clearly interrelated from a substantive viewpoint but that are (lawfully) litigated under different legal regimes result in a duplication,—or partial overlap as the provision itself states—of the damages caused by the same policy instruments. One can think about a variety of scenarios in which this could happen, at least in theory. For example, one could imagine that a given set of measures could simultaneously give rise to a claim brought by an investor under an EU investment agreement and one initiated by, say, Canada under

the UNCLOS,[97] or, more likely, under the WTO.[98] The second interpretation of this provision is perhaps less obvious but still sensible in the Author's view. It covers, in essence, what could be referred to as a *Yukos* scenario. This is evidently not the place to elaborate on the many complexities raised by the *Yukos* case. In short, it concerns a series of actions undertaken by the Russian Federation against the former oil and gas giant Yukos which eventually led to the company's bankruptcy. These events resulted in multiple legal actions brought by Yukos' shareholders against the Russian Federation. As is well known, both the claim brought to the ECtHR and the PCA established under the ECT were successful, with Yukos obtaining monetary compensation in both proceedings.[99]

Be that as it may, the phrasing of the provision under discussion seems to be partly unfortunate. It essentially establishes that the ICS is under an obligation (the use of 'shall' is unequivocal) to take either of the following actions: (a) stay proceedings, or (b) take into account the proceedings brought under another international agreement. The obligation under (b) does not seem particularly problematic. Taking into account what happens in the other international tribunal is by no means equivalent to an obligation to align the outcomes of the two disputes. This is quite reasonable. A given set of measures can be lawful under, say, the WTO but still encroach upon a right granted by an EU investment agreement and vice versa. The broad formulation of this part of the provision, therefore, seems to warrant sufficient leeway to the ICS to make autonomous decisions in accordance with the relevant law applicable to the disputes that it will settle. However, the obligation to stay proceedings seems to raise some serious concerns. Suspending proceedings is, in fact, quite a draconian measure to be taken. The two situations that would trigger this obligation are: (a) a potential overlap between compensations, and (b) the potential significant impact that the other proceedings might have on the resolution of the investment dispute. The situation under (a) seems to refer to the mentioned *Yukos* scenario, while (b) possibly alludes to a strict interdependence in terms of outcomes (i.e. if a measure is lawful under the other agreement, the investment claim must also be rejected). Given the different scope of international agreements

[97] As is well known, the EU and all its Member States are a Party to UNCLOS, as well as Canada. The involvement of the EU in the settlement of disputes under this agreement has been thoroughly discussed in Chap. 2, to which the reader is therefore referred.

[98] While it is true that EU investment agreements are part and parcel of broader FTAs, all of which also include a State to State dispute settlement covering the entire scope of the FTAs, it is also true that the Parties are under no obligation to choose the dispute settlement established under these FTAs rather than the WTO or other existing international disputes settlements to which they are a Party. Article 29.3(1) CETA, which is meaningfully titled "Choice of forum", makes this abundantly clear. It states that "[r]ecourse to the dispute settlement provisions of this Chapter is without prejudice to recourse to dispute settlement under the WTO Agreement or under any other agreement to which the Parties are party".

[99] In particular, the ECtHR has awarded almost €2 billion, and the PCA a staggering compensation of approximately €40 billion. These amounts marked a record high for both courts. For further details on the *Yukos* case see the thoughtful analysis carried out by De Brabandere 2015, pp. 345–355.

that might be at stake, and the potentially far-reaching consequences of the provision in question, one can only advise the ICS to make use of much prudence with such a coordination clause. It is certainly true that recent practice has shown the existence of an increasing overlap between investment disputes and, in particular, WTO disputes.[100] Therefore, the inclusion of a coordination clause is, in theory, a valuable instrument. However, as convincingly argued by Allen and Soave, such clauses ought to be phrased so as to empower tribunals to stay proceedings without necessarily compelling them to do so.[101]

4.8 Conclusions: The Road to a Multilateral Investment Court

The analysis of the rules of EU investment agreements concerning the procedural aspects identified in this chapter allows us to present some important conclusions.

First of all, the overview of the procedural rules provided above clearly reveals the significant amount and magnitude of the ground-breaking innovations contained in EU investment agreements. The ICS established by the likes of CETA appears to be a carefully designed, highly institutionalised (quasi)judicial mechanism to settle investment disputes. As has been rightly pointed out, the ICS places "investment dispute settlement squarely in the context of public international law".[102] This is not to say that it is immune from criticism. The above analysis has clearly evidenced that some features of the ICS may potentially give rise to a number of issues. Some of them will most probably be dealt with by the bodies established under EU investment agreements or by the ICS itself when it will set its own rules of procedure. This is the case, for example, of the division of workload between the first and second instance within the ICS. Other issues, however, are less likely to be resolved by subsequent decisions made by treaty bodies or by the ICS itself. One can think, for example, of Article 8.24 CETA and the likes.

One thing, however, cannot be put into question. For good and for bad, the ICS does away with investment arbitration as we know it and imposes itself as the new global benchmark for the settlement of investment disputes. It should not go unmentioned that the EU has taken the lead in a global initiative aimed at establishing a Multilateral Investment Court (MIC). Although the final structure and features of the MIC will depend on the outcome of what seems to be a particularly challenging negotiation, it is clear that the ICS represents the EU starting point.[103]

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[100] See Sect. 5.2.4.

[101] See Allen and Soave 2014, pp. 55–56.

[102] See Titi 2017, p. 6.

[103] See the text of the negotiating directives approved by the Council in March 2018, available here: http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf (accessed 4 July 2018).

From this perspective, the functioning of the ICS at a bilateral level will ultimately constitute an interesting test case for the feasibility of the MIC and can potentially serve as a stepping stone on the road to a multilateral judicial organ.

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Chapter 5
Presenting the Internalisation Model of EU Investment Agreements and Related Issues

Contents

Abstract This chapter picks up on the discussion carried out in Part I concerning model dispute settlements by presenting the main characteristics of the internalisation model adopted under EU investment agreements. The analysis deals with some of the thorniest issues that arise in connection with the settlement of international disputes against the EU. In particular, the examination focuses on the allocation of international responsibility and of financial responsibility between the EU and the Member States. Secondly, it turns to the partially related question concerning the representation of the EU and the Member States in investment disputes. Finally, it carries out an assessment of the decisions of the ICS, focusing on their nature, enforcement and effects. The chapter reaches a number of important conclusions that will be further developed in Chap. 6 in order to assess the ability of EU investment agreements to serve as a general model for the settlement of disputes against the EU.

Keywords ICS · international responsibility · representation · enforcement · dispute settlement · internalisation

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5.1 Introduction

Following the overview of the main procedural rules of EU investment agreements provided in Chap. 4, we are now ready to move to the next stage of this study. This chapter will carry out an analysis of some of the thorniest issues that arise in connection with the settlement of international disputes with the EU. In particular, the analysis will focus on three main issues. First and foremost, an examination of the rules concerning the allocation of international responsibility and the apportionment of financial responsibility for violation of an EU investment agreement on the part of the Union or the Member States will be carried out. In this part, the rules laid down in such agreements will be assessed against the background of the relevant rules of international law, namely ARIO and ASR. The provisions of the Regulation (EU) No 912/2014 of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is a party will also be examined.[1] Secondly, the analysis will turn to the question concerning the representation of the EU and the Member States in investment disputes, which is partly related to the question of international and financial responsibility. Finally, the issuance of awards (better: decisions) of the ICS, as well as their nature, enforcement and effects will be discussed. This examination will take into account the relevant international law instruments, in particular, the ICSID Convention and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

5.2 Identification of the Respondent and International Responsibility

5.2.1 Overview of the Rules Laid Down in EU Investment Agreements

The academic debate concerning the international responsibility of the EU has flourished in recent years.[2] Much ink has been spilled on the suitability to the EU of the rules on the responsibility of international organisations as codified by the ILC. As already briefly mentioned, the EU has traditionally advocated that the allocation

[1] See Regulation (EU) No 912/2014 of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is a party.

[2] It would be probably impossible, and surely unnecessary, to provide an exhaustive list of scholarly writings devoted to this question. To name but a few, see Heliskoski 2001; Hoffmeister 2010; Nollkaemper 2012; Kuijper and Paasivirta 2013; Cannizzaro 2013; d'Aspremont 2014; Dimopoulos 2014; Delgado Casteleiro 2016; Palchetti 2017.

of responsibility between a REIO and its Member States should take into account the internal rules of the organisation. In particular, the EU has maintained that the allocation of responsibility between the organisation and its member states should be strictly dependent on the division of competences among these different actors: it is the entity that is vested with the competence to adopt the act that eventually led to an international wrong that has to be held responsible.[3] A more sophisticated understanding of the issues concerning the allocation of responsibility between the EU and the Member States has been provided by Delgado Casteleiro in his leading study in the field.[4] Without dwelling too much on the details, this author has convincingly pointed out that a special rule of international law governing the attribution of responsibility to the EU and the Member States seems to be emerging in the international practice—a rule that can be considered to be at an early stage of development and that is expressive of what this author has termed the 'normative control' doctrine.[5] At the same time, it cannot be forgotten that the ILC has embraced such doctrine only to a limited extent. As a result of the combined reading of Article 6 ARIO and Article 4 ASR, an act taken by a Member State of an international organisation remains attributable to the Member State in question, irrespective of whether that very act was adopted in a field falling under the competence of the organisation or under its normative control. If the act in question constitutes a breach of an international obligation binding on the State, it will entail its international responsibility. However, Article 17 ARIO also partly endorses the view maintained by the EU. It states that an international organisation incurs responsibility if it adopts a decision binding a Member State to commit an act that would be wrongful if committed by the organisation itself. The difference between the solution adopted by the ILC and the one advocated by the EU is, however, quite significant. Contrary to the position maintained by the EU, Article 17 ARIO does not exonerate the Member State of its own responsibility when an act falls under the exclusive competence of the organisation. It only implies that the organisation will be held jointly responsible, should the conditions set out in that provision be fulfilled. From the perspective of the EU, this state of play is unsatisfactory as it does not seem fit to accommodate the specific characteristics of the EU legal order as construed by the ECJ in its case law examined in Chap. 3. In brief, the application of ASR and ARIO may entail that international responsibility for breaches of agreements to which both the EU and the Member States are a party—as is the case with EU investment agreements—is apportioned independently of the internal rules of the organisation. An example will help in illustrating this issue.

Suppose that an investor is confronted with a *Micula* scenario in which a Member State has repealed business incentives that the Union has found to be

[3] See, among others, UN doc. A/CN.4/637, where the views of the EU are expressed in full details in the comments given by the European Commission to the ILC.

[4] See Delgado Casteleiro 2016.

[5] See, in particular, Delgado Casteleiro 2016, pp. 227–235.

incompatible with its state aid law.[6] Such repealing is challenged by a foreign investor for being a violation of its rights granted by EU investment agreements. Absent any rule in the relevant agreement, the investor would have to bring a claim against the party that it deems responsible in accordance with the rules of general international law concerning international responsibility. According to the provisions of ASR and ARIO, the investor could sue the Member State as the entity to which under the rules of ASR the wrongful act—in our example, the repealing of business incentives—is attributable. On the other hand, it could also invoke the (shared) responsibility of the EU under Article 17 ARIO for adopting a binding decision—such as a decision of the Commission or a ruling of the CJEU—that eventually led the Member State to breach the investor's rights. If the investor were left free to choose in accordance with the rules of international law, both the Member State in question and the Union could be designated as respondents—although not necessarily at the same time and within the same proceedings.[7] However, it is obvious that such a situation would run counter to the position traditionally advocated by the EU, namely, that international responsibility should follow the competence divide between the Union and the Member States. Most importantly for the purpose of this book, this situation will allow the international court seized of the dispute to make determinations concerning the division of powers and responsibilities between the Union and the Member States as fixed by the EU Treaties. It is exactly to avoid a scenario of this type that EU investment agreements, as we shall see, contemplate rules aimed at 'internalising' the choice of the respondent to an investment dispute.

In contexts other than investment agreements, the EU has already devised tailor-made solutions aimed at preventing that the dispute settlement mechanism to which it has subscribed makes decisions on the responsibility that would be at variance with the internal rules of the EU legal order. These other legal regimes have been analysed in-depth in Chap. 2. As we have seen in that context, none of the techniques examined has, however, proved entirely satisfactory. For this and other reasons, EU investment agreements have taken a completely different approach with regard to issues of international responsibility. As we shall see, under such agreements the substantial question concerning the allocation of responsibility has been completely eluded by the use of a procedural rule that allows the EU to indicate who is the party that will appear as respondent in a dispute. This will create an (almost) complete internalisation of issues relating to the apportionment of international responsibility.

[6] As is well known, in the *Micula* case Romania was ordered by an arbitral tribunal to pay compensation to a foreign investor for discontinuing business incentives that were found incompatible with EU state aid law. For an analysis of the case and its implications see Titje and Wackernagel 2015.

[7] It seems worth noting that while ARIO does indeed establish different forms of international responsibility, it does not seem to impose an obligation to invoke all of them in the context of the same dispute.

To begin with, EU investment agreements do not contain any rule concerning the attribution of responsibility between the EU and its Member States. Reference to responsibility is entirely omitted from the text. One can indirectly infer indications concerning issues of responsibility by analysing the rules relating to the submission of a claim against the EU and its Member States brought by an investor. In particular, EU investment agreements contain a mechanism aimed at identifying the respondent to such disputes. The mechanism in question is exemplified by Article 8.21 CETA. According to Article 8.21(1), an investor of the other party must send a notice exclusively to the EU—and not to the Member States—prior to the submission of a claim. The notice shall request the EU to make a determination as to who, whether the EU or a Member State, will act as a respondent in the dispute. The notice has the purpose of identifying the conduct allegedly in breach of the investor's rights. It is established that the EU has to inform the claimant within 60 days as to whether the EU itself or a Member State shall be the respondent in the dispute. However, the provision in question does not clarify what the criteria on the basis of which the determination in question must be made are. What is undisputed is that such determination will be made by the EU.

An at least indirect indication of the criteria that might be used for the purpose of identifying the respondent can be derived from Article 8.21(4) CETA. This provision applies in the event that "the investor has not been informed within 50 days of delivering its notice requesting" the determination of the respondent. Article 8.21 (4) states as follows:

(a) if the measures identified in the notice are *exclusively* measures of a Member State of the EU, the Member State shall be the respondent,
(b) If the measures identified in the notice *include* measures of the European Union, the European Union shall be the respondent.[8]

Article 8.21(7) further clarifies that the Tribunal shall be bound by the determination made by the EU or, absent such determination, by "the application of paragraph 4" of Article 8.21. It is interesting to point out, however, that the EU-Vietnam Agreement does not lay down any additional rule concerning the determination of the respondent. Not only it avoids elaborating on the criteria relied upon by the EU to make the determination in question. It also refrains from providing any guidance as to what rules the investor and the Tribunal would have to apply to identify the respondent should the EU fail to deliver a response within the established deadline.

The reader will certainly remember from Sect. 4.3 that a similar provision governs the determination of the party that will take part in the mandatory consultations prior to the dispute. In particular, Article 8.19(2) states that the place of consultations shall be Brussels, if the measures challenged include a measure of the EU, or a capital of a Member State if the measures challenged are exclusively

[8] Emphasis added.

measures of that Member State. The reader might also recall that the request for consultations must indicate the measure or measures challenged by the investor. As in the case of a request for the determination of the respondent to a dispute, the request for consultations must also be addressed to the EU if such request concerns "an alleged breach by the European Union or a Member State".[9] Contrary to Article 8.21, however, Article 8.19 does not clarify what party will make the decision concerning who, whether the EU or the Member State, will take part in the consultations. Nor does it shed light on whether the decision made in the pre-litigation stage will have a bearing on the determination of the respondent to a dispute under Article 8.21.

The answer to the first question is probably a simple one. Given the similarities between the two provisions, it seems safe to favour a conjunctive reading of them and apply by analogy to the determination of the party that will take part in the consultations the provision relating to the identification of the respondent to a dispute. It makes sense, in other words, to fill the gap in Article 8.19 with an analogical application of Article 8.21. Thus, it is reasonable to believe that it is the Union that will be equally competent to determine who acts as a party in the consultations and as a respondent in the dispute, despite the silence of Article 8.19 on the matter. This would also make sure that for the purpose of settling disputes under EU investment agreements, the EU and the Member States will appear as much possible as a unitary entity *vis-à-vis* both the other party to the dispute and the ICS. We will get back to this rather pivotal idea in Chap. 6, where the ability of EU investment agreements to serve as a general model for the settlement of disputes against the EU will be discussed.

Going back to Article 8.19, the question concerning the relation between the identification of the party to the consultations and the determination of the respondent to the dispute still needs to be answered. EU investment agreements do not contain any indication as to whether the party chosen to take part in the consultations has to be the same one that will eventually defend the measure in a dispute. However, given the similarities between Articles 8.19 and 8.21, and considering that there is a strict correspondence between the measure challenged in the request for consultations and the measure challenged in the claim, it would be logical to assume that the party involved in the consultations and the one involved in the dispute are the same. However, absent any express indication in the text of EU investment agreements, it seems difficult to affirm that this is an obligation imposed by the agreements. Therefore, in the event of conflicting determinations—i.e. the EU participates in the consultation and a Member State in the dispute, or vice versa—the Tribunal will not have the power to raise objections, bound as it will be by the determination of the respondent made by the EU pursuant to Article 8.21(7).

The absence of a provision expressly linking the identity of the party involved in the consultations and the party acting as respondent in a dispute might not be

[9] See Article 8.19(7).

fortuitous. At closer scrutiny, it could be seen as a solution aimed at preventing the ICS from carrying out determinations that would be at variance with the internal rules of the EU legal order. In fact, one could envisage a situation where a measure identified by the investor is at first sight assessed as being exclusively attributable to a Member State, which is subsequently designated as the party to be involved in the consultations. However, it is very well possible that in the course of the consultations, it becomes apparent that the measure in question involves a measure of the EU, raising the need to involve the latter in the subsequent dispute. It should be recalled that one of the purposes served by the consultations is precisely that of clarifying and setting the boundaries of a future dispute. From this perspective, the non-existence of an express link between the designation of the party to the consultations and the party to a dispute gives to the EU and the Member States some room for manoeuvre to rectify the first designation in the event that such designation turns out to be incorrect or erroneous in one way or another. It also makes the two decisions an internal EU law matter, leaving them outside the remit of the ICS.

Now that the relationship between the pre-litigation and the litigation stage in terms of the determination of the party that takes part in them has been clarified, we can go back to the analysis of Article 8.21. As we have said, the rationale behind this provision is to 'internalise' considerations relating to the attribution of international responsibility for the conduct giving rise to the claim brought by the investor. The determination of the respondent seems to be an entirely unilateral act of the EU to which the ICS is bound, and which it cannot disregard of its own motion. The provision in question, however, does not explicitly exclude the possibility for the investor to object the determination made by the EU.

5.2.2 *The Role of the Claimant and of the ICS: Is There a Possibility to Set Aside the Determination of the Respondent Made by the EU?*

As has been rightly pointed out, "arbitral tribunals must be satisfied that the respondent party bears international responsibility, in order to consider a claim admissible".[10] Hence, in order to ascertain whether the claim is admissible, investment tribunals have to make sure that the investor sued the respondent designated in accordance with the rules set out in the relevant investment agreement, and that the respondent so determined is the one that bears international responsibility. No doubt that a tribunal, including the ICS, must reach that *prima facie* conclusion at the stage of so-called preliminary objections in order not to reject the claim as inadmissible. Given that EU investment agreements, as already mentioned,

[10] See Dimopoulos 2014, p. 1683.

contain no rule whatsoever on issues of international responsibility, the question is, therefore, *how,* or *on the basis of what rules,* that assessment must be made.

First and foremost, it is worth emphasising that in principle it is highly unlikely that a claim is declared inadmissible by an investment tribunal *proprio motu*, that is to say without an explicit objection raised by the interested party.[11] In EU investment agreements, this seems to be further confirmed by the provision stating that the ICS is bound by the determination of the respondent made unilaterally by the EU. Consequently, in order for a claim to be found inadmissible *ratione personae* on this ground, an inadmissibility objection must be raised by one of the parties to the dispute. An examination of the rules of EU investment agreements clarifies that the EU and the Member States acting as respondents will not be able to raise such objection. In accordance with Article 8.21(6) CETA,

> If the European Union or a Member State of the European Union is the respondent, pursuant to paragraph 3 or 4, neither the European Union, nor the Member State of the European Union may assert the inadmissibility of the claim, lack of jurisdiction of the Tribunal or otherwise object to the claim or award on the ground that the respondent was not properly determined pursuant to paragraph 3 or identified on the basis of the application of paragraph 4.

This is, in essence, an explicit prohibition to raise an objection of the kind under discussion. The rationale of this provision seems to be to avoid that the EU and the Member States repudiate before the ICS the unilateral determination made by the EU. They are prevented from claiming that the determination thus made is wrong. This is a very sensible safeguard clause that seems to be based on elementary considerations of reasonableness and good faith in the application of a treaty. For the repudiation of the determination of the respondent made by the EU would be nonsensical and would suggest that it was made for the (sole) purpose of taking the dispute down into a blind alley. Designating the wrong respondent in order to render a claim inadmissible would offer a pathetically easy way-out of any dispute that may arise from EU investment agreements. Article 8.21(6) CETA is devised to prevent exactly that from happening. Hence, it seems safe to conclude that in the merely hypothetical event that the respondent party raised an objection concerning the inadmissibility of the claim on this ground, the ICS could easily reject the objection in question.

The provision analysed above does not, however, rule out the possibility that an inadmissibility objection is raised by the claimant. One could imagine that an investor who is not happy with the designated respondent may prefer to have the claim declared inadmissible rather than litigating with the party that, in the eyes of the claimant, looks like the wrong respondent. Raising an inadmissibility objection of a claim that the investor has itself brought may appear absurd at first sight. However, the practice concerning international adjudication tells us that this is not such an unusual occurrence. The most famous instance in which the applicant raised an objection as to the admissibility of its own claim dates back to the

[11] See Waibel 2014, pp. 67–68.

Monetary Gold case.[12] Without going into too much detail, in the case at hand the applicant State, namely Italy, objected the ICJ's jurisdiction to settle the dispute at the stage of preliminary objections. Italy had a clear interest in having the ICJ refusing to settle the dispute that it had itself brought to the court. For the (mandatory) seizure of the ICJ would have prevented the automatic transfer of the disputed gold to one of the respondent parties, namely the United Kingdom. As is very well known, the ICJ upheld Italy's objection, and the case never reached the merits. A partly comparable situation occurred in the *Legality of Use of Force* case.[13] In that instance, the applicant State, namely Serbia, did not raise objections itself but essentially requested the ICJ to uphold the objections to its jurisdictions raised by the respondent states. Without dwelling on the complexities of that case, suffice it to say that Serbia's attempt to have its claim rejected may have been aimed at obtaining a decision that could be used to its own advantage in a simultaneously pending case in which Serbia was the respondent party.[14] These precedents clearly show that it cannot be excluded, as a matter of principle, that the claimant may want to raise objections as to the admissibility of its own claim. They also suggest that the claimant would only raise such an objection if it has a direct interest in doing so. From this perspective, it cannot be excluded that an investor may in principle have an interest in obtaining an award rejecting the claim on the ground that the respondent designated by the EU is the wrong one, that is to say, it is not the one responsible for the breach of the treaty.[15]

One can, therefore, draw the conclusion that an investor who is unhappy with the determination of the respondent made by the EU in accordance with an EU investment agreement may indeed want to raise an inadmissibility objection. The question, therefore, becomes whether the ICS confronted with such objection would be able to review the EU's determination and identify a different respondent. It goes without saying that the identification of an alternative respondent could not be based on the text of the relevant EU investment agreement, for the latter does not include any rules that serve this purpose. Therefore, the only possibility would be

[12] See International Court of Justice, *Case of the Monetary Gold Removed from Rome in 1943* (Italy *v.* France, United Kingdom of Britain and Northern Ireland and United States of America), judgment of 15 June 1954.

[13] See, *ex plurimis*, International Court of Justice, *Legality of Use of Force* (Serbia and Montenegro v. Portugal), judgment of 15 December 2004.

[14] See, in particular, International Court of Justice, *Legality of Use of Force* (Serbia and Montenegro v. Portugal), paras 38 et seq.

[15] For example, one could think of an action for damages brought before EU courts in accordance with Article 340(2) TFEU. The conditions set out in the well-settled case law of the ECJ in order for such an action to be successful are quite strict. In very short terms, the following three requirements must be satisfied: (a) there is a sufficiently serious violation of an EU law rule intended to confer rights, (b) damages have actually occurred, and (c) there exist a causal link between the violation and the injury suffered by the claimant. Without dwelling on the details of this question, it cannot be excluded *a priori* that an investor will succeed in fulfilling the strict conditions required by the ECJ. For a thorough discussion of the action for damages see Gutman 2011.

that of determining the respondent in accordance with the rules of general international law concerning the attribution of international responsibility, namely ASR and ARIO. However, it is not easy to see why the ICS would be able to disregard the text of a treaty to the benefit of the rules of general international law. As will be seen more thoroughly in Chap. 6, the principle of *lex specialis* would seem to cover the instance under discussion. It could be objected that the rules concerning the identification of the respondent do not deal with responsibility issues and that, as a result, they are not *special* with respect to the *general* rules established by ASR and ARIO. After all, the principle in question only applies to rules governing the same subject-matter. As a result, it has been argued that "the attribution of respondent status to either the EU or a Member State cannot have the effect of automatically attributing responsibility to the party thus identified".[16] As a consequence, the tribunal, in assessing the admissibility of the claim, would have no choice but to make an "assessment of the attribution of responsibility under DARIO" and declare the claim inadmissible *ratione personae* "where the conduct or responsibility is attributed to a party other than the respondent".[17] This argument, however, is not very convincing. Rules concerning the unilateral identification of the respondent included in EU investment agreements are clearly aimed to circumvent the difficult process of attributing responsibility to a composite entity such as the EU and the Member States. By entirely internalising this issue, they make sure that the respondent acts on behalf of the whole entity, which remains a unitary one *vis-à-vis* the applicant—whereas the apportionment of responsibility formally remains an internal matter.[18] The consequential effect of this state of affairs is "to open the way to the logically subsequent step of allocating responsibility".[19] This, in turn, seems to suggest that the identification of the respondent made under EU investment agreements should be taken as an implicit recognition of responsibility, and of the (legal and material) consequences flowing therefrom, on the part of the designated entity *vis-à-vis* the claimant.[20] Put it differently, the effect of such rules is that the respondent accepts to act on behalf of the whole group to which it belongs and to bear international responsibility *vis-à-vis* the third party involved.[21] From this perspective, a distinction between rules on responsibility and rules on the determination of the respondent party appears to be only superficial. One thing necessarily entails the other.

[16] See Lenk 2016, p. 21.

[17] See Lenk 2016, pp. 20–21.

[18] This view is delightfully expressed by Cannizzaro 2013, pp. 308–312.

[19] See Cannizzaro 2013, p. 312.

[20] See Palchetti 2017, p. 84.

[21] It is worth mentioning that the determination of the respondent made under EU investment agreements could also be understood as 'acknowledgement and adoption' of a conduct within the meaning of Article 11 ASR and Article 9 ARIO. The EU practice in the context of the WTO might perhaps militate in favour of this interpretation. See Kuijper and Paasivirta 2013, pp. 60–61. See also the ILC in the *Report of the International Law Commission*, A/66/10, p. 97.

If the interpretation offered above is correct, it seems safe to conclude that the determination made by the EU in accordance with EU investment agreements cannot be set aside by the ICS as a consequence of an objection raised by the claimant based on the argument that the designated party is not the one *prima facie* responsible for the violation of the agreement in question. This conclusion confirms the idea that the 'internalisation' of issues of international responsibility operated by EU investment agreements is virtually a complete one, which provides for a comprehensive 'sealing-off' effect from the rules of general international law. Only in the event that the determination of the respondent is not made by the EU in due time, the rules of international law might be brought back into the picture.

5.2.3 *Falling Back on General International Law?*

The analysis carried out in the previous sections has led us to the conclusion that the rules concerning the determination of the respondent included in EU investment agreements seem capable of excluding the application of the rules of general international law concerning the attribution of international responsibility. By creating an identification between respondent status and responsible party, EU investment agreements will entirely internalise issues of attribution of responsibility. The analysis carried out above has been made on the assumption that the determination of the respondent will be issued on time. This seems to be a fair and logical assumption to make. It seems highly unlikely that the EU will not make such determination and frustrate the main purpose served by the rules in question. Yet, it is still appropriate to briefly examine what will happen in the event that the respondent will not be determined by the EU before the deadline. After all, what is improbable remains still possible. While the EU simply forgetting to act in due time seems a highly unrealistic contingency, one cannot exclude that the internal political dynamics might lead to a deadlock of the internal decision-making process resulting in the respondent not being determined on time.[22]

The provision of CETA governing this matter seems to be partly ill-phrased. In particular, some degree of ambiguity might derive from the reference to measures taken *exclusively* by the Member State as opposed to measures that *include* measures of the EU.[23] A literal interpretation of this provision seems to suggest that the investor will have to bring a claim against the EU in all cases but where the measures in question were taken by a Member State in matters that fall completely outside the scope of EU law. In other words, in relation to matters falling within the

[22] This is, in reality, also not very likely. As we shall see below, the power to determine the respondent belongs to the Commission and is part and parcel of the general executive role attributed to this institution. Only an internal failure within the Commission would, therefore, result in the determination not being made on time.

[23] The EU-Singapore Agreement replicates CETA's text with only some minor differences. See Article 3.5(3) of the Investment Protection Agreement.

exclusive competence of the Member State—such as direct taxation. The use of broad (and rather circular) language—a measure that *includes* a measure of the EU—seems to suggest that the rationale behind this provision is to make sure that the investor will litigate against the EU in all cases where EU law is at stake. In these cases, it will be the EU, and the EU alone, that will act as respondent to a dispute. Notably, this includes cases in which the claim identifies: (a) measures partly taken by the EU and partly by the Member State, or (b) measures taken by the Member State in order to implement EU law obligations. The possibility to bring a claim against multiple respondents—both the EU and one or more Member States—is not contemplated by CETA. Indirectly, this rules out the possibility to invoke joint responsibility. This is a major difference between EU investment agreements and some other agreements to which the EU is a party that have been analysed in Chap. 2, such as, for example, UNCLOS.

A difficult question might arise in connection with a *Micula* scenario, that is where a measure taken by a Member State in order to bring its domestic law into harmony with EU law results in the breach of an EU investment agreement. In such case, it might be challenging to apply the alternative criteria laid down in CETA. Especially in cases where the Member State non-compliance with EU law has been sanctioned in an act of the EU—whether a Commission decision or a judgment of the CJEU in the context of an infringement procedure—it would not be completely unreasonable to imagine that the investor will challenge the said EU act along with the Member State measure. While the Regulation on Financial Responsibility seems to include sufficient safeguard as far as the financial liability of the Union is concerned (see below, Sect. 5.2.4), it seems reasonable to interpret the alternative criteria set out in CETA as meaning that this would be a case that includes an EU measure. As a result, the EU would be designated as the sole respondent. If this interpretation is correct, it cannot be excluded the somewhat paradoxical situation in which the EU will have to defend a measure of a Member State taken for the purpose of remedying to a prior violation of EU law. However, this paradox might be partly ostensible. In fact, it is possible to imagine that in these cases, the Union will be able to argue that the obligation of the Member States to comply with EU law is well-known to the investor, and it cannot, therefore, give rise to a breach of substantive standards such as FET, legitimate expectations, or another substantive standard as the case may be. Whether this argument would succeed before the ICS is an entirely different matter, as exemplified by the findings of the Arbitral Tribunal in the *Micula* case.[24]

The situation will be different under the EU-Vietnam Agreement. As we have seen, this agreement does not contain any indication as to what criteria the investor should apply in the event that the EU does not issue a decision on the determination of the respondent. In this case, the only reasonable thing to do would be to resort to

[24] See, in particular, ICSID Arbitral Tribunal, *Ioan Micula, Viorel Micula, S.C. European Food S. A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, paras 665 et seq.

the rules of general international law concerning the attribution of responsibility and bring a claim against the party that looks *prima facie* responsible under these rules. As a result, the investor could litigate against the EU or the Member State, or against both, depending on the ground of international responsibility invoked by the investor in the claim. As noted above, the investor might also choose to bring two claims invoking the responsibility of the EU and of the Member States separately.[25]

Furthermore, the ICS might also have its say on the matter provided that one of the two parties to the dispute will raise an objection at the preliminary stage of the proceedings. In relation to this, it is interesting to note yet another discrepancy between CETA and the EU-Vietnam Agreement. As already observed above, Article 8.21(6) CETA prevents the EU and the Member States from raising such an objection not only where the determination of the respondent has been made by the EU, but also where it has been made by the investor. The EU-Vietnam Agreement replicates the prohibition laid down in CETA in the event that the determination has been made by the EU. However, it does not set out an equivalent prohibition where the determination is made autonomously by the investor.[26] This means that under CETA, the EU and the Member States can never raise an objection of inadmissibility *ratione personae* of a claim brought by an investor. This is perhaps a logical consequence of the fact that the alternative criteria set out in CETA are seemingly capable of guaranteeing that the determination of the respondent, even if made by the investor, will result in the EU acting as the respondent on behalf of the European bloc in the vast majority of cases. By allowing the investor to bring a claim against the Member States only in cases that fall outside the scope of EU law, as already clarified above, compliance with the internal EU rules concerning the division of roles and competence as fixed by the Treaties should be safeguarded. As a result, even in the unlikely event that an investor will raise an inadmissibility objection of the claim it has itself brought, the ICS will limit its assessment to a verification of the compliance with the alternative criteria set out in Article 8.21(4). In fact, and for the reasons explained in the previous section, it does not seem that the ICS will be able to fall-back on general international law in this case.

As already said above, the situation will be different under the EU-Vietnam Agreement. The lack of alternative criteria makes general international law the only remaining option not only for the investor that will have to choose a respondent but also for the ICS that will have to assess the correctness of the investor's choice in case of objection. As a consequence, it makes sense that the agreement in question does not prevent the respondent from raising an inadmissibility objection *ratione personae* in the event that the respondent will be determined by the investor. Suppose, for example, that an investor will bring a claim against a Member State for a measure that it has taken in order to fulfil an EU law obligation in a matter falling within EU exclusive competence. This would be possible, and perhaps inevitable in some cases, under the rules of ASR and ARIO. However, it would not be in line

[25] See *supra*, note 7.

[26] See Article 8.6(4) of Section 3.

with the internal division of competence as fixed by the Treaties, according to which this would be clearly a case where the responsibility is borne by the EU itself. In this fictional scenario, it is easy to imagine that the Member State will raise an objection, supported, in all likelihood, by the Commission intervened as *amicus curiae*. The matter will, in turn, be decided upon by the ICS, which would have to review, apply and interpret the rules of international law as applied and interpreted by the investor in order to determine the proper respondent and attribute international responsibility. Given the controversy revolving around the question concerning the supposed existence of a special rule of international law,[27] it is far from certain that at this stage of development of general international law the ICS will prefer a pure competence-based approach—or, for that matter, the more complex normative control standard—over the rules of ASR and ARIO. From this perspective, CETA seems to be more suitable to accommodate the specific characteristics of the EU legal order than the EU-Vietnam Agreement. Under the latter, the lack of a determination made by the EU would in fact trigger the application of the rules of general international law concerning international responsibility—in the sense that the choice of the respondent party would have to be made based on a *prima facie* assessment aimed at identifying the party that bears international responsibility. As seen above, however, this scenario should be of little practical relevance, as it would only apply in the unlikely event that the EU has not determined the respondent on time.

5.2.4 The Regulation on Financial Responsibility

At the end of this overview of the rules contained in EU investment agreements, it seems appropriate to turn to the analysis of the internal rules concerning the apportionment of financial responsibility arising out of these agreements as set out by Regulation No 912/2014 (hereinafter: the Regulation on Financial Responsibility).

From the outset, it is worth to emphasise that the Regulation on Financial Responsibility does not contain any rules concerning the attribution or the allocation of the international responsibility for breaches of EU investment agreements to the Union or its Member States. Needless to say, the Regulation on Financial Responsibility cannot unilaterally impose rules on third countries. This circumstance is explicitly recognised in its text. According to Recital 5, the Regulation on Financial Responsibility aims at attributing (financial) responsibility "as a matter of Union law". From the perspective of a third country and of the ICS, the Regulation on Financial Responsibility is either domestic law of one of the parties to the investment agreement, or *res inter alios acta* if seen as an emanation of an international agreement—namely, the TFEU—concluded by some parties to the

[27] On which see Hoffmeister 2010, pp. 745–747.

investment agreement in question. It seems more likely that the first interpretation will be preferred. At any rate, in both cases, the Regulation on Financial Responsibility cannot and will not be used by the ICS in order to interpret the investment agreement on which the dispute is based. As the domestic law of one of the parties, EU law may be considered by the ICS as a matter of fact and will not be applied as law.[28] As *res inter alios acta* within the meaning of international law, the Regulation on Financial Responsibility cannot be applied as a means of interpretation of a treaty under the relevant rules of the VCLT. In brief, the rules set out in the Regulation on Financial Responsibility have no external dimension and will have no bearing on the investment disputes that will be initiated against the EU and its Member States. With this clarification in mind, it is none the less necessary to examine its provisions, given that they are logically linked with questions concerning international responsibility.

To begin with, Recital 3 contains a declaration incorporating the traditional competence-based approach advocated by the Union in the field of international responsibility. According to this provision,

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

Furthermore, Recital 7 clarifies that joint financial responsibility of the EU and the Member States is possible, although somewhat exceptional. In fact, the provision in question stipulates that in "individual cases"—as opposed, it must be assumed, to the vast majority of cases—both the EU and the Member States will be held financially liable. This is in contrast with the rules set out in EU investment agreements. As we have seen above, the possibility of designating a co-respondent is generally ruled out by these agreements. The only, remaining possibility to bring proceedings against both parties occurs where the EU has not determined the respondent party within the prescribed time, and the agreement in question does not lay down any alternative criteria aimed to identify the respondent party. This is a first, strong indication that the international responsibility and the (internal) financial responsibility are two issues that must be considered separately. While responsibility on the international plane will always lie with one single party, financial responsibility will be internally apportioned on a different basis that might lead to dual liability.

Article 3(1) introduces the apportionment criteria. It states as follows:

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

[28] This is clearly stated, for example, by Article 8.31(2) CETA. The meaning of this provision and its broader implications will be discussed in Chap. 6, to which the reader is therefore referred.

(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.

The following subsection of Article 3(1) clarifies that where a Member State "is required to act pursuant to Union law in order to remedy the inconsistency with Union law of a prior act, the Member State shall be financially responsible". The aim of this provision is clearly to avoid that the EU (quite literally) pays the price of a *Micula* scenario. It must be pointed out that this does not mean that the Member State in question will also assume responsibility as a matter of international law. In fact, such responsibility will be attributed to the party that the EU will designate as respondent to a dispute. It cannot be assumed that such a party will necessarily be a Member State. The silence of EU investment agreements on the question concerning what criteria will be followed in order to determine the respondent leaves sufficient room for manoeuvre to the EU.[29] Where a determination of the respondent is not made within the prescribed time, it might even be in the interest of the investor to litigate against the EU rather than the Member State as demonstrated above. All this would be without prejudice to the internal allocation of financial liability.

Going back to the analysis of the provisions of the Regulation on Financial Responsibility, we can now move to its Chapter III, which deals with the attribution of the respondent status in an investment dispute. Article 4 is the only provision applicable to disputes where the Union will be the respondent. It states that the Union "shall act as respondent where the dispute concerns treatment afforded by the institutions, bodies, offices or agencies of the Union". Articles 5–12 govern the conduct of disputes concerning a treatment partly or fully afforded by a Member State. Albeit never expressly affirmed, the principle underlying these provisions is that the Member States will act as respondent where a treatment afforded by them in full or in part is at stake. As has been pointed out, and in light of the general implementing role of the Member States in relation to EU law, this would seem to suggest that the Regulation on Financial Responsibility has the effect of "elevating the Member State to the position of prima facie respondent to investment claims under EU investment agreements".[30] This circumstance would seem to be in direct contradiction with the provisions laid down in EU investment agreements, as well as to the competence-based approach to responsibility generally supported by the EU.[31] As we have seen above, such provisions seem to do precisely the opposite. Namely, they seem to elevate the EU to the position of default respondent in an investment dispute.

[29] The Union could decide, for example, that the entity to which the policy measures that have given rise to the claim are eventually attributable is the one that should take part in the dispute even in a *Micula* scenario.

[30] See Lenk 2016, p. 17.

[31] It also seems to be at variance with the normative control doctrine.

In the Author's opinion, the said contradiction might be only ostensible. If one looks under the surface, the Regulation on Financial Responsibility is devised in a manner that will make the attribution of respondent status to the Member States an exception rather than the rule. A succinct analysis of its provisions will clarify this assertion. First and foremost, Article 6(1) immediately clarifies that in the case at hand, the Commission and the Member State concerned shall "take all necessary steps to defend and protect the interests of the Union and of the Member State" in accordance with the principle of sincere cooperation (Article 4(3) TFEU). Article 6 (2) further clarifies that this obligation to cooperate takes the form of mandatory consultations between the Commission and the Member State concerned. These provisions do not distinguish between cases where the treatment is afforded by the Member State fully or partially, which means that they are applicable also to cases where no EU treatment is involved. No equivalent provision is contained in Article 4 concerning Union-only treatments. Nor is there in such provision any reference to the interest of the Member State. In short, Article 6 may be read as meaning that in all investment disputes brought under EU investment agreements the interest of the Union will almost automatically be called into question.

Secondly, Article 7(1) states that when the Commission receives a request for consultations in a case where treatment afforded by the Member State is at stake, the Commission shall inform the Member State concerned without delay, and vice versa. Here it is necessary to make one clarification. The reader will recall from Sect. 4.3 that a request for consultations has to be sent to the EU. That is what Article 8.19(7) CETA affirms.[32] The EU-Vietnam Agreement, however, states that where a measure of a Member State is identified by the investor, the request for consultations shall be sent to the Member State as well. This means that Article 7(1) of the Regulation only applies to the Member States under the EU-Vietnam Agreement, and under those agreements currently under negotiation that will take the same turn. Furthermore, Article 7(2) stipulates that the delegation of the Union that will take part in the consultations will consist of representatives of the Member State concerned and of the Commission. Put it differently, when the investor identifies a treatment afforded fully or partly by a Member State, consultations will still be conducted by the Union—though the EU delegation, in this case, will include representatives of the Member State too.

Thirdly, Article 8 of the Regulation stipulates that where the Commission receives a notice of intention to initiate arbitration from an investor in a case that includes treatment afforded by a Member State, it shall inform the Member State without delay. The same obligation applies to the Member State if it is the latter to receive the notice in question. There is no equivalent obligation to inform the Member States where the notice identifies exclusively measures of the EU. It bears noting that the notice referred to in this provision is the one that precedes the initiation of an investment dispute proper. Under both Article 8.23 CETA and 8.6 of

[32] A similar provision is contained in the EU-Singapore Agreement. See Article 3.3(6) of the Investment Protection Agreement.

Section 3 of the EU-Vietnam Agreement, the delivery of such notice follows the determination of the respondent made by the EU. In other words, when the investor will submit the notice in question it will have either already received a determination of the respondent from the EU, or, absent such determination, it will have itself identified the respondent party in accordance with either CETA's alternative criteria, or general international law as explained above. Leaving aside the exceptional cases where the determination of the respondent will not be made within the prescribed time, at the stage of the dispute referred to in Article 8 of the Regulation a respondent will have already been unilaterally identified by the Union. As already explained above, this circumstance is crystal clear and cannot be disputed: the request aimed at obtaining a determination of the respondent is expressly qualified as an admissibility requirement for the submission of a claim under the relevant provisions of EU investment agreements. As such, it must be submitted to the EU prior to the notice mentioned in Article 8.23.

In light of this, the provision of Article 8 of the Regulation seems to give rise to a contradiction. In fact, it makes little sense to impose an obligation on the Commission and on the Member State to inform each other at this stage of the dispute. It would be much more sensible to impose such obligation before the respondent has been determined, and precisely for the purpose of allowing the EU and the Member State to make that determination in accordance with the internal rules of the EU. This would be possible if one interpreted Article 8 as being referred to the notice mentioned in Article 8.21(1) CETA (or an equivalent provision of another EU investment agreement) rather than Article 8.23 CETA and equivalent. A literal interpretation of Article 8, however, does not seem to allow this reading. The expression "notice to initiate arbitration" seems to unequivocally refer to a notice within the meaning of Article 36(1) ICSID or Article 3(1) UNCITRAL. However, as already pointed out, an investor will be not able to submit such notice without the prior submission of a notice requesting the determination of the respondent pursuant to Article 8.21 CETA. If a literal interpretation rules out this possibility, one may wonder whether a different conclusion could be reached through a teleological interpretation of Article 8. In particular, Article 8 seems to be clearly aimed at making sure that the Commission and the Member State give each other all the information necessary to make a determination, on the basis of the rules of the Regulation on Financial Responsibility, as to who will act as a respondent in the investment dispute. This is further confirmed by the juxtaposition of Article 8 and Article 9, which lays down the rules concerning the determination of the respondent party in a dispute where a treatment afforded by a Member State is involved. Another circumstance may confirm this interpretation. As has already been observed in Chap. 2, the solution devised by EU investment agreements for the determination of the respondent party can be seen, among other things, as an incorporation of the conclusions reached by the CJEU in Opinion 2/13 in relation to the co-respondent mechanism set out in the Draft Accession Agreement to the ECHR. The Regulation on Financial Responsibility, however, has been approved

before the CJEU handed down that decision.[33] It is reasonable to presume that its framers did not foresee that the notice referred to in Article 8 would be preceded by the determination of the respondent under, for example, Article 8.21 CETA. Simply because when the Regulation on Financial Responsibility was drafted, there was no such provision in EU investment agreements. For these reasons, it is submitted that Article 8 of the Regulation should be interpreted as being referred to the notice requesting the determination of the respondent. Otherwise, the provision under consideration would be devoid of significance.

We will now move on to the analysis of Article 9, which seems to be the very heart of the Regulation on Financial Responsibility. This provision starts off by stating that the Member States will act as the respondent except where a number of situations arise. The least difficult of these situations is the one envisaged in Article 9(1)(b). It concerns cases where the Member State in question intentionally renounces to act as the respondent by means of a notification addressed to the Commission. This is a deliberate and unilateral choice of the Member State. Admittedly, the Commission will not have any power to challenge it save by means of bringing infringement proceedings against the Member State in question, which does not seem to be a particularly effective tool to prevent moral hazard concerns.[34] In addition, it is worth noting that the opposite renunciation is not possible. It is not foreseen that the Union can decide to retreat, so to say, and leave the conduct of a dispute involving treatments afforded by both the EU and a Member State in the hands of the latter.

Relatively uncontroversial is Article 9(3) of the Regulation. It states as follows:

> 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 in accordance with the examination procedure referred to in Article 22(3), 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.

As one can clearly infer from its wording, this provision only applies where there is a parallel dispute brought against the EU in the WTO. Given that under such regime the Union traditionally acts as the sole respondent on behalf of the whole European bloc based on the *de facto* arrangement analysed in Chap. 2, it seems logical to create a link of this kind between WTO disputes and claims brought under an EU investment agreement. This provision also fits squarely in line with

[33] What is more, the proposal presented by the Commission dates back to June 2012, at a time when the ECJ's Opinion had not even been asked. See Proposal for a Regulation of the European Parliament and 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 a party, COM(2012) 335 final.

[34] See, in particular, Dimopoulos 2014, p. 1676, who rightly emphasizes the risks connected with the possibility that the Member States consciously or unconsciously rely on the EU appearing as respondent and paying compensation that is ultimately (although indirectly) shared by all Member States.

Article 8.24 CETA (and similar) discussed above, according to which the ICS is meant to ensure coordination of an investment dispute with other connected international disputes, including WTO disputes.[35] Since the provision in question mentions explicitly claims concerning "the same specific legal issue", it seems to be applicable only to parallel disputes arising out of the exact same measure or set of measures. As a mere example, one can immediately think about the Australian plain packaging regulations that were challenged by Philip Morris before an arbitral tribunal,[36] and at the same time constituted the object of a WTO dispute initiated against the same State.[37] From this perspective, Article 9(3) of the Regulation seems to have a narrower scope than Article 8.24 CETA, which more generally speaks of 'potential overlap' and 'significant impact' of one dispute over the other without requiring correspondence between the measures challenged.

More problematic is Article 9(2) of the Regulation on Financial Responsibility, which states as follows:

> 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, in accordance with the advisory procedure referred to in Article 22(2), that the Union is to act as the respondent where one or more of the following circumstances arise:
>
> (a) the Union would bear all or at least part of the potential financial responsibility arising from the dispute in accordance with the criteria laid down in Article 3; or
> (b) the dispute also concerns treatment afforded by the institutions, bodies, offices or agencies of the Union.

First and foremost, it is worth noting that the two conditions are not cumulative, as evidenced by the use of 'or'. Secondly, and as a consequence thereof, the combined reading of point (a) and (b) suggests that the Union can be designated as a respondent—better: it can designate itself as the respondent—even if its financial liability is not at stake, provided that the dispute also concerns treatment afforded by the EU. In view of the structural features of the EU legal order, this solution deserves to be welcome. One can certainly think about a variety of situations where an EU measure or treatment might be involved yet it would be fair and sensible that the financial liability still lies on the Member State. The first and most obvious situation arises in case of wrongful implementation of EU law on the part of a Member State, such as in the case of incorrect transposition of a Directive.[38] Suppose that a measure adopted by a Member State in order to implement a Directive is challenged by an investor, along with or independently of the Directive itself. When a dispute is initiated, it might not be entirely clear whether the

[35] See Allen and Soave 2014.

[36] On which see Sect. 4.2 and footnotes.

[37] See *Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (28 June 2018).

[38] On the wrongful implementation of Directive see the thoughtful analysis carried out by Falkner et al. 2004.

infringement of the investor's right is caused by the Directive or by the wrongful implementation of the Member State. Not to mention that it might not be entirely clear that the Member State in question has incorrectly transposed the Directive.[39] In such case, it makes sense to leave the door open to the possibility that the EU will act as respondent in an investment dispute on the international plane, while the matter will be settled internally with the Member State by virtue of the instruments offered by the EU legal order. Even in cases where a Directive has not been incorrectly transposed, it might still be appropriate to designate the EU as the respondent to an investment dispute without prejudice to the financial liability connected with the dispute in question. One can think, for example, about harmonising Directives laying down only minimum rules in respect of which the Member States are free to go beyond in their national legislation.[40] Similarly to the case of incorrect implementation, in such case, it might also be difficult to determine whether the infringement of an investor's right is a consequence of the common floor set by the Directive, or of the additional floor laid down by the Member State, or of a combination of the two. In these and similar cases, it seems appropriate that the Regulation on Financial Responsibility explicitly makes provision for the possibility to designate the EU as respondent. Thirdly and finally, the list of circumstances mentioned in the provision under examination is not an exhaustive one: the expression 'one or more of the following circumstances', in fact, can only be interpreted as meaning that there may be other instances not mentioned in the provision that would none the less justify the designation of the Union as respondent. In light of the wide variety of situations in which it might not be clear where the financial liability lies at the commencement of a dispute, it is only logical to use an open-ended clause such as the one in question.

Another interesting feature of Article 9(2) is that it confers the power to make the determination as to who will act as the respondent to the Commission alone. It is true that the Commission will be assisted by the Committee for Investment Agreements that has been established under Article 16 of Regulation No 1219/2012, which consists of one representative for each Member State.[41] However, it is also true that Article 22(2) of the Regulation makes reference to the advisory procedure established by Article 4 of Regulation No 182/2011.[42] This means that

[39] After all, the incorrect transposition of a Directive can only be considered certain, in essence, if it has been confirmed by the CJEU in an infringement procedure or, at least indirectly, in a preliminary ruling. See also Report from the Commission—Monitoring the Application of European Union Law 2016 Annual Report, COM(2017) 370 final, in particular, pp. 17 et seq.

[40] For an overview on the different techniques used by the EU in order to harmonise the Member States' legislation see Barnard 2016, pp. 580 et seq.

[41] See Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ L 351, 20.12.2012, pp. 40–46.

[42] See 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, OJ L 55, 28.2.2011, pp. 13–18.

the Commission will have the final saying on the matter. While the Member States can certainly challenge the validity of the Commission's decision before the ECJ,[43] the average duration of an action for annulment makes it unlikely that the Member States will obtain a decision of the Court before the investment dispute will have started.

Two additional aspects of the Regulation on Financial Responsibility deserve to be analysed in this section. First of all, it bears noting that in accordance with Article 12, there is no obligation for the Member States to accept financial liability in disputes where the Union is the respondent. This provision must be interpreted in conjunction with Article 19 of the Regulation, which has to do precisely with disputes "where there is no agreement as to financial responsibility". It lays down a procedure at paras 2–5 through which the Commission and the Member State concerned are supposed to settle the matter internally. Without dwelling on the details of the procedure, what is worth being emphasised for the purpose of our analysis is that the ongoing international investment dispute will remain unaffected, and will continue to develop on a parallel track while the EU and the Member State sort out the issue internally. In fact, the Regulation makes provision for the advancement of payments by the Commission and the possibility that the costs so advanced will be recovered making use of the instruments offered by Union law, including litigation before the ECJ if the disagreement cannot be otherwise resolved.[44]

Finally, Article 15 of the Regulation also deserves special mention in this chapter. It concerns the settlement of disputes concerning treatment afforded exclusively by a Member State and where the Member State wishes to settle. In particular, Article 15(1)(c) stipulates that the Member State concerned can enter into such settlement only insofar as "the terms of the settlement are compatible with Union law". This provision seems primarily intended to prevent the Member State in question from committing to take legislative or administrative action that would result in an infringement of EU law. This would clearly be the case where the infringement of the investor's rights is caused by measures taken by the Member State in order to comply with an EU law obligation, as in the already discussed *Micula* scenario. As we shall see in Sect. 5.4, however, the ICS will not have the power to award remedies other than monetary compensation on its own motion. As a result, Article 15(1)(c) can only be understood as referring to cases where the terms of the settlement are spontaneously agreed by the parties to the dispute.

[43] In this sense, it seems appropriate that the provision in question imposes on the Commission the obligation to provide the Member State concerned with a "full and balanced factual analysis and legal reasoning" underlying its decisions.

[44] This is explicitly confirmed by Recital 20 of the Regulation.

5.2.5 *Connecting the Dots*

At the end of this overview of the rules concerning the apportionment of financial responsibility and their relationship with the designation of the respondent in disputes based on EU investment agreements, two main conclusions can be reached. First and foremost, the Regulation on Financial Responsibility reinforces the idea that in the majority of cases, it is the EU that will act as respondent and will, therefore, bear international responsibility *vis-à-vis* the investor and the ICS. This is confirmed by the fact that the decisions concerning the determination of the respondent are ultimately in the hands of the Commission. Secondly, the Regulation on Financial Responsibility has put in place a system whereby the internal and the international dimensions of investment disputes are entirely separated: the assumption of the financial liabilities arising out of an investment dispute is disconnected from the conduct of the dispute itself and the acceptance of international responsibility. This separation will be somewhat blatant where the EU will act as respondent internationally while the financial liability will lie entirely on a Member State, as envisaged in Article 9(2)(b). From this perspective, the Regulation on Financial Responsibility fits squarely in line with the solution of responsibility issues featured in EU investment agreements. As we have seen above, the provisions concerning the identification of the respondent party to a dispute included in such agreements lead to the conclusion that the default respondent will be the EU, with the Member States acting as respondents only in exceptional cases falling essentially outside the scope of EU law. As we have also seen above, this solution ensures that the European bloc appears as a unitary entity *vis-à-vis* the other party to the dispute and the ICS, thus avoiding litigation on issues concerning the internal relations between the Union and the Member States. The Regulation on Financial Responsibility, however, contains (perhaps not entirely satisfactory) legal safeguards aimed to make sure that this state of affairs does not translate into an excessive burden on the EU budget, and makes provision for the apportionment of financial responsibility on the Member States that may have caused, or at least contributed to, the infringement of the rights of an investor.

Before moving on to the next section, one final issue deserves to be discussed here. It was raised in a report prepared for the INTA Committee of the European Parliament by Christian Titje, Emily Sipiorski and Grit Töpfer. In their study, these authors pointed out that the assumption of respondent status on the part of the EU in areas that fall within the regulatory power of the Member States may lead to a violation of the prohibition to harmonise set out in Article 207(6) TFEU. The authors offered the example of education, which is an area largely in the hands of the Member States. If an investor brings a claim alleging that certain measures taken by a Member State constitute an infringement of its rights under an EU investment agreement, and the EU act as respondent, the ICS may require the Union to bring its law—which is, in reality, the law of the Member State concerned—in conformity with the agreement. This would translate into a violation of the Member

State's power to legislate in the area in question.[45] This argument, however, seems to be misplaced. First of all, it is difficult to see how the assumption of respondent status under EU investment agreements would affect the internal division of competence. EU investment agreements will create a watertight separation between the external and the internal dimension of disputes settled under them. By concluding and ratifying EU investment agreements, the Member States will accept that the EU will appear on behalf of the whole entity for the purpose of settling disputes. Secondly, as we shall see in the section of this chapter relating to the effects and enforcement of the decision of the ICS, EU investment agreements expressly rule out the possibility for the award to order so-called primary remedies instead of, or along with, monetary compensation. In other words, the ICS will not be able to order the EU or the Member States to change their legislation. Hence, no direct or indirect harmonisation in areas where it is excluded by the EU Treaties can take place—unless the parties to the dispute so agree as part of an amicable settlement finalised outside the context of the ICS proceedings. This instance, however, would be covered by the power of the EU to represent the European bloc as outlined in Sect. 5.3.

5.3 Questions of Representation

A different but partly related question is that concerning the representation of the EU and of the Member States in disputes initiated under EU investment agreements. This question seems to be of purely internal relevance: what are the internal rules governing the issue of representation, and how do they fit into the context of EU investment agreements? For the purpose of this book, the representation of the EU in investment disputes raises essentially two issues. The first issue concerns the scope and the extent of the powers of the Commission to represent the position of the EU before the ICS.[46] The second issue relates to the obligations of the Commission with regard to the position of the Member States. The analysis will start from the first question.

Traditionally, the Commission and the Council have advocated two opposite views concerning the power of the former to make representations on behalf of the Union before an international dispute settlement. In brief, the Commission considers that this power is part of its prerogatives attributed by Article 17(1) TEU,

[45] See Titje, Sipiorski and Töpfer 2012, pp. 15–17.

[46] The fact that it is the Commission that will represent the EU in investment disputes cannot, in fact, be put into question. The Commission derives this power from Article 335 TFEU, which states that the Union shall be represented by the Commission in legal proceedings initiated before Member States' courts. The ECJ has interpreted this provision as being the expression of a general principle covering the representation of the EU in legal proceedings in general terms. See European Court of Justice, *Reynolds Tobacco and Others v Commission*, Judgment of 12 September 2006, Case C-131/03, ECLI:EU:C:2006:541, para 94.

which states that the Commission shall "ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them". Given that international agreements concluded by the Union form an integral part of the EU legal order,[47] the interpretation and application of such agreements are covered by the general role of the Commission as 'Guardian of the Treaties'. Conversely, the Council has maintained that representing the EU before an international dispute settlement body involves policy-making decisions requiring the Council's approval "in a way comparable to the conclusion of international agreements".[48] In a recent case brought to the ECJ, the Council—supported by a large group of Member States—has based this argument on a combined reading of Article 16(1) TEU and Article 218(9) TFEU.[49] The former provision states that the Council "shall carry out policy-making and coordinating functions as laid down in the Treaties". The latter is part of a broader provision concerning the procedure to be followed by the EU for the negotiation and conclusion of international agreements. It states as follows:

> The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing *the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects*, with the exception of acts supplementing or amending the institutional framework of the agreement.[50]

In the Council's view, a dispute settlement mechanism constitutes a body adopting acts having legal effects within the meaning of the provision in question. The Court has, however, rejected this construction. In a recent judgment, the ECJ has formulated a general distinction between acts involving policy-making powers covered by Article 16(1) TEU and Article 218(9) TFEU, and acts concerning the interpretation and application of international agreements to which the EU is a party that fall within the remit of the Commission's general power of guardianship pursuant to Article 17(1) TEU. In particular, the Court found that the submissions to an international dispute settlement are aimed to set out "the manner in which the European Union envisage[s] the interpretation and application of the relevant provisions" of an international agreement to which it is a party, with a view to enabling the dispute settlement body in question to make an informed decision on the questions put to it.[51] This, according to the ECJ, could not be considered policy-making—in the sense of implying norm creation—within the meaning of Article 16(1).

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[47] European Court of Justice, *R. & V. Haegeman v Belgian State*, Judgment of 30 April 1974, Case 181/73, ECLI:EU:C:1974:41.

[48] See Rosas 2017, p. 21.

[49] See European Court of Justice, *Council of the European Union v European Commission*, Judgment of 6 October 2015, Case C-73/14, ECLI:EU:C:2015:663, paras 41–50.

[50] Emphasis added.

[51] See European Court of Justice, *Council of the European Union v European Commission*, *supra* note 151, para 70.

The judgment in question concerned the submission of written statements to the ITLOS in the context of the SRFC Advisory Opinion examined in Chap. 2.[52] It concerned, in essence, a non-binding procedure. Therefore, one may wonder whether this case law can be extended to an international dispute whose outcome is of a legally binding nature. The scholarship seems to be divided on this point. According to Dennis Engbrink, the judgment should be interpreted as "giving the Commission the right to speak on behalf of the EU and to give its legal opinion in a court procedure without prior authorization of the Council, if the outcome of that procedure is not legally binding on the EU".[53] On the basis of this interpretation, the Commission could not, for example, appear before the ICS and agree on a settlement requiring the Union to pay monetary compensation without prior approval from the Council, since in this way "the Commission would establish a new and substantial obligation for the EU under international law".[54] This construction has been challenged by Frank Hoffmeister, who has suggested that "an international judicial body decides on the basis of pre-established obligations duly ratified by the EU", and therefore only interprets and applies obligations already accepted by the EU without creating new ones.[55]

In the Author's opinion, in order to answer this question, one needs to look at the relevant rules of international law. According to a classic and generally accepted construction, international law lays down so-called primary and secondary rules. Primary rules set out the substantial obligations that States and international organisations have to comply with, as well as the conditions determining whether the obligations in question have been breached.[56] Primary rules are contained in treaties and in customary law. Secondary rules come into play when an internationally wrongful act has been committed, that is a primary rule has been breached.[57] Secondary rules have essentially two functions: (a) they determine the subject to which the breach is attributable, and (b) they set out the legal consequences of such breach.[58] Secondary rules are, in essence, the body of rules of international law concerning international responsibility that was widely discussed above, and possibly the body of international rules known as the law of treaties. Under international law, it is said that when an internationally wrongful act has been committed—that is, a primary rule has been breached—a new legal relationship arises between the parties involved. The essence of this new legal relationship is the emergence of a new obligation on the part of the wrongdoer: namely, the obligation to bring the wrongful act to an end and to make reparation.[59] This

[52] See Sect. 2.3.

[53] See Engbrink 2017, p. 39.

[54] See Engbrink 2017, p. 38.

[55] See Hoffmeister 2017, p. 15.

[56] E.g. if a degree of fault is required, and what kind of fault.

[57] See Crawford 2002.

[58] See Aust 2010, pp. 377–379.

[59] See Article 36(2)(d) of the Statute of the International Court of Justice.

discussion is directly relevant to the question concerning the power of the Commission to represent the EU in an international dispute, and in particular in an investment dispute.

As the analysis carried out above has clearly demonstrated, the applicability of secondary rules to the legal relationships arising out of EU investment agreements has largely been excluded by the rules of such agreements. Such exclusion is the very heart of the internalisation model, as will be explained in Chap. 6. On the one hand, questions of attribution have been entirely internalised by the provisions concerning the determination of the respondent. On the other hand, as we will see in the next section of this chapter, EU investment agreements also lay down their own rules concerning the legal consequences of a breach of these agreements. As a matter of international law, this is unproblematic. As we shall see in great detail in Chap. 6, the principle of *lex specialis*—coupled with the lack of hierarchy between sources of international law—allow the parties to an agreement to derogate from the general secondary rules. However, the fact that EU investment agreements lay down their own secondary rules in derogation from the general ones does not mean that the distinction between primary and secondary rules, and the conceptual framework behind such distinction, does not apply to breaches of such agreements. Therefore, the power of the Commission to represent the EU in an investment dispute under EU law seems to be ultimately dependent on a question of international law. Namely, whether under international law the breach of a primary rule entails the creation of a new substantial obligation on the part of the wrongdoer.

Many, if not all, international lawyers would agree that the commission of an internationally wrongful act triggers a new legal relationship between the author and the victim of the act in question. This is not to say, however, that this new legal relationship gives rise to a new substantial obligation of international law. It seems safe to affirm that the legal consequences of an internationally wrongful act are somewhat included in the primary rule that has been breached. They are certainly conceivable by the party that has assumed a primary obligation and has wittingly or unwittingly violated such obligation. This is all the more so when the primary obligation is laid down in a provision of a treaty that the perpetrator of the international wrong has freely accepted. Especially where the treaty in question sets out its own secondary rules, making clear from the outset what the consequences stemming from a violation of its provisions are. If this interpretation is correct, it seems safe to conclude that the acceptance of the secondary obligations arising out of EU investment agreements would be covered by the consent expressed by the EU to be bound by the primary rules of the agreement. Therefore, the Commission representing the Union in an international dispute would not enter into new substantial obligations that would require the Council's approval. Including in disputes whose outcome is legally binding for the EU.

Having established that the Commission acting as a representative of the whole European bloc would not encroach upon the Council's prerogatives, it still remains to be seen whether the Member States' prerogatives would be infringed. Needless to say, no such thing can occur in disputes relating solely to matters coming under the exclusive competence of the Union. However, the analysis carried out above has

shown that the EU might act as respondent also in cases concerning areas falling at least in part within the competence of the Member States.[60] In such case, the question becomes whether the Commission acting as the sole representative of the European bloc can make representations before the ICS, and under what conditions. In addition, at the end of Sect. 5.2.5 we have seen that in some cases, the EU acting as respondent in a dispute may be required to take regulatory actions in order to make good of the breach of investors' rights. We have seen that the ICS cannot itself order primary remedies.[61] However, it cannot be excluded that the EU voluntarily agrees to take such remedies, for example as part of a total or partial amicable settlement of the dispute. Therefore, it is appropriate to examine whether, as a matter of Union law, the Commission's power to represent the Member States would be subject to limitations.

First of all, it seems useful to look at the practice that has been developed in different contexts. This (scarce) practice clearly reveals that the Member States have been determined to preserve their role to intervene in national and international disputes alongside the EU for the parts of the dispute they themselves believed to come under their competence. This has happened in at least two instances. First of all, there are a number of cases litigated before American courts concerning internal market and competition law matters in which some Member States have submitted *amicus curiae* briefs alongside the Commission in relation to matters they deemed to fall within the CFSP.[62] Secondly, in the *SRFC Advisory Opinion*, a number of Member States have submitted their own written statements—although only to plead the inadmissibility of the request made by the SRFC.[63] The situation is different in the WTO. Under this regime, the Commission has traditionally been the only representative of the whole European bloc. This is somewhat unsurprising today in light of the expansion of the CCP carried out by the Lisbon Treaty, which has brought the entirety of the WTO obligations under the exclusive competence of the EU.[64] However, it was also a stable practice under the pre-Lisbon legal framework, when the competence divide was less clear-cut.[65] At any rate, the Member States were (pre-Lisbon) and still are (post-Lisbon) involved in an

[60] In reality, as a result of a recent decision of the ECJ, the EU has exclusive competence in relation to all matters covered by EU comprehensive FTAs except foreign indirect investment. This is the only field in which shared competence is retained by the Member States. See European Court of Justice, *Free Trade Agreement between the European Union and the Republic of Singapore*, Opinion of 16 May 2017, Opinion 2/15, ECLI:EU:C:2017:376, paras 225–256.

[61] For additional details on this matter, see Sect. 5.4.

[62] This practice is reported and commented upon by Hoffmeister 2017, pp. 12–13.

[63] This is the case of Germany, Ireland, Portugal, the United Kingdom, the Netherlands, France and Spain. Their respective submissions can be found on the website of ITLOS at the following address: https://www.itlos.org/cases/list-of-cases/case-no-21/ (accessed on 16 April 2018).

[64] The matter is now governed by Regulation (EU) 2015/1843 of the European Parliament and of the Council of 6 October 2015 laying down Union procedures in the field of the common commercial policy in order to ensure the exercise of the Union's rights under international trade rules, in particular those established under the auspices of the World Trade Organization.

[65] For an overview of the pre-Lisbon practice, see Rosas 2002, pp. 64–70.

advisory capacity. The same obligation to consult the Member States also applies under a number of other mixed agreements featuring a dispute settlement mechanism, such as the Air Transport Agreement concluded in 2007 with the USA.[66]

In the context of EU investment agreements, the rules laid down in the Regulation on Financial Responsibility seem to acknowledge and confirm this practice. First of all, it makes clear in Article 6 that the Commission and the Member States have a duty to loyally cooperate under Article 4(3) TEU. In addition, there are detailed legal safeguards aimed to make sure that the parties keep each other constantly informed. It is even possible to create joint delegations in some cases.[67] All this, however, does not exclude the possibility of a breach of the Member States' role and prerogatives. As we have seen above, it is up to the Commission to make a final decision in case of disagreement. As the Regulation on Financial Responsibility itself recognises, the Commission's decisions can be challenged by the Member States with the instruments offered by Union law. A potential system failure would occur in the following scenario. Suppose that the Commission decides to act as respondent in a dispute where treatments afforded by both the Union and a Member State are at stake. The Commission will make a decision in accordance with the procedure laid down in Article 9(2) of the Regulation. In the eyes of the ICS and of the other party to the dispute, the Commission will appear as the sole representative of the only party to the dispute—namely, the Union—and it will make representations on its behalf. Internally, however, a number of EU law obligations will be triggered. To name but a few, the Commission will have to make sure that the financial interests of the Member State concerned will be protected (Article 9(4) of the Regulation), consult the Member State concerned on any pleading or observation prior to their submission to the ICS (Article 9(6) of the Regulation), allow the Member State to take part in the Union's delegation (Article 9(6) of the Regulation), and so forth. If, say, a Member State disagrees on the content of the Commission's submissions in relation to a matter falling within its competence, the Member State concerned might challenge the Commission's action alleging an infringement of the principle of conferral.

First of all, it bears noting that the scenario depicted above is not very likely to occur in practice. As has already been emphasised, EU investment agreements fall for the most part within the exclusive competence of the Union. The Member States only retain shared powers in connection with foreign indirect investment.[68] The chances that the Member States will successfully make a competence claim before the ECJ are therefore very slim. Where, however, such competence claim can be made, it could be said that the Regulation cannot empower the Commission to make decisions that are at variance with the principle of conferral. After all, a secondary source cannot derogate from a foundational principle set out in the Treaties. In addition, the argument that representation does not involve policy-making, which is

[66] See Rosas 2017, pp. 23–24.

[67] See, for example, Article 10(1)(c).

[68] See *supra*, note 60.

valid against the Council, cannot be invoked against the Member States. As a result, the Commission would be under an obligation imposed by the Treaties to make sure that the positions of the Member States in disputes raising issues coming under their competence are presented to the ICS. In these disputes, from an EU law perspective, the Commission would represent the Member States acting within the limits set out by them through the instruments offered by the Regulation on Financial Responsibility. Failure to comply with this obligation would result in the invalidity of the Commission's acts under EU law. In addition, in accordance with the ECJ's case law,[69] this state of affairs would only cover measures taken in the field of free movement of capital (Article 63 TFEU) and would be subject to the rule of pre-emption characterising shared competence. Finally, it should be noted that at any rate, the continuation and the orderly functioning of the investment dispute would remain unaffected. By virtue of the watertight separation between the internal and the external dimension of disputes created by EU investment agreements, these matters would remain of purely internal relevance. The international disputes would continue on a parallel track.

In the Author's opinion, however, the most recent jurisprudential developments concerning EU external competence may lead to a different conclusion. This book is clearly not the right venue to carry out a detailed analysis of competence issues. To our purpose, a number of brief observations will suffice. As is well known, the EU has exclusive and shared competence both internally and externally. Where the Union has exclusive competence, the Member States are prevented from taking any external action whatsoever unless empowered by the EU. This means that in these areas they cannot conclude an international agreement or appear before an international dispute settlement mechanism without infringing the principle of conferral. As far as shared competence is concerned, both the EU and the Member States—subject to pre-emption—are entitled to act on the international plane. In areas coming under shared competence, joint external action has become the default practice, as evidenced by the widespread use of so-called mixed agreements. However, this practice should by no means lead to the conclusion that joint action in the field of shared competence is a legal obligation under the Treaties. As has been correctly pointed out by a scholar in what has now become a famous quote, "there is no decision from the Court under the EC Treaty where the explicit justification for recourse to the mixed procedure would have been the limited scope of Community competence—commonly regarded as the principal legal explanation for the practice of mixed agreements".[70] According to this view, and contrary to a common misunderstanding of the foundations of EU external shared competence, joint action is not a legal obligation. It is a political compromise between Union institutions, and between the EU and the Member States, which led to the creation of the category of so-called facultative mixed agreements.[71] In other words, it is

[69] See, in particular, the considerations made by the ECJ in Opinion 2/15, *supra* note 60.

[70] See Heliskoski 2001, p. 68.

[71] For a critical appraisal of this practice, see Schütze 2010, pp. 82 et seq.

theoretically possible for the EU to take external action alone, as well as for the Member States, in areas coming under shared competence.

It is true that Opinion 2/15 contained contradictory indications in this respect. In particular, the ECJ stated that some parts of the EU-Singapore Agreement falling within shared competence could not be approved by the Union alone.[72] However, the Court has more recently clarified that "in making that finding, the Court did no more than acknowledge the fact that, as stated by the Council in the course of the proceedings relating to that Opinion, there was no possibility of the required majority being obtained within the Council for the Union to be able to exercise alone the external competence that it shares with the Member States".[73] The ruling in question related to the position to be taken by the Union within the Organization for International Carriage by Rail concerning certain amendments to the Convention Concerning International Carriage by Rail. The Council had adopted a decision on the basis of Article 218(9), whose validity had been challenged by Germany alleging an infringement of the Member States shared competence in the field of transport. It seems safe to conclude that if the Union *alone* can adopt a decision concerning norm creation in an area of shared competence—and therefore conclude a Union only agreement in such area—it can certainly also make representations on the basis of Article 17(1) TEU as long as an EU competence exists, and irrespective of the nature of such competence.

Member States that are unhappy with the conduct of proceedings by the Commission may, therefore, be tempted to pursue a different strategy. EU investment agreements make provision for the participation to pending proceedings of the non-disputing party to the dispute. A similar provision has appeared for the first time in the NAFTA and has now become a common feature of investment treaties.[74] The practice developed under these treaties reveals that non-disputing States make widespread use of the possibility to intervene in disputes to which they are not a party. The non-disputing States have submitted their interpretations on a variety of subjects, ranging from the scope of a treaty to the meaning of substantive standards such as national treatment or expropriation.[75] It is generally believed that these submissions are not binding on the tribunal that has to settle the dispute. However, it has been argued that where all the parties to an investment treaty agree on a matter of interpretation through their submissions, this practice should be relevant under Article 31(3)(b) of the VCLT and constitute authority on that one particular point of interpretation.[76] This is to say that the intervention of

[72] See ECJ in Opinion 2/15, paras 282 and 304.

[73] See European Court of Justice, *Federal Republic of Germany v Council of the European Union*, Judgment of 5 December 2017, Case C-600/14, ECLI:EU:C:2017:935, para 68.

[74] See, in particular, Article 1128 NAFTA.

[75] For a comprehensive analysis of the NAFTA practice and case law, see Kinnear et al. 2006, pp. 1128-1–1128-5.

[76] See Kinnear et al. 2006, p. 1128-3.

non-disputing parties may have far-reaching consequences on the international plane.

The relevant provision of EU investment agreements states as follows:

> The Tribunal shall accept or, after consultation with the disputing parties, may invite, oral or written submissions from the non-disputing Party regarding the interpretation of this Agreement. The non-disputing Party may attend a hearing held under this Section.[77]

A literal interpretation of this provision suggests that the parties have an unlimited right to take part in proceedings to which they are not a party. The use of the imperative mood 'shall' leaves no doubt as to the existence of an obligation on the part of the ICS to accept this kind of interventions. This is in line with the practice developed under other agreements, where tribunals have recognised that the non-disputing parties enjoy an absolute right to intervene.[78] But how is this provision relevant to the problems of representation that we were discussing above?

In general terms, the possibility that the Member States intervene in an international dispute to which the EU is a party would be problematic under EU law. First of all, any intervention of the Member States in relation to areas falling within the exclusive competence of the EU is simply not admissible.[79] Any action taken by the Member States on the international plane in these areas constitutes a clear violation of EU competence. An authorisation on the part of the EU is therefore always necessary. In an area coming under the Member States' shared competence, it is in theory possible for them to take action on the international plane independently of the EU's consent. However, by using a sort of nuclear weapon such as a unilateral, unagreed intervention in a dispute in which the EU has been designated as respondent, the Member States would certainly infringe the principle of sincere cooperation as well as the *effet utile* of the Regulation on Financial Responsibility, which is aimed, among other things, at making sure that internal EU law issues have no repercussions on the orderly conduct of disputes under EU investment agreements. Any internal disagreement would have to be resolved through the instruments offered by Union law.

It is for these reasons that EU investment agreements contain safeguards to avoid a unilateral intervention of the Member States. It is true that provisions such as Article 8.38(2) CETA grant an absolute right to intervene as a non-disputing party. However, taking CETA as the usual example, the non-disputing party is defined as follows:

> Non-disputing Party means Canada, if the European Union or a Member State of the European Union is the respondent, or the European Union, if Canada is the respondent.[80]

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[77] See Article 8.38(2) CETA.

[78] See UNCITRAL Tribunal, *Ethyl Corp. (U.S.) v. Canada*, Award on Jurisdiction, 24 June 1998, paras 35–48.

[79] See Hoffmeister 2017, p. 13.

[80] See Article 8.1 CETA.

The provision in question will clearly prevent the Member States from exercising their prerogatives as non-disputing parties. While it is certainly uncommon that a non-disputing party to an agreement cannot at the same time be a non-disputing party to a dispute initiated under that very agreement, the inclusion of a provision of this kind seems appropriate. Also, as it will be further elaborated in Chap. 6, it is in line with the general idea that for the sake of settling international disputes, the Union and the Member States will appear as a unitary entity *vis-à-vis* the other disputing party and the ICS. As we have seen above, this *fictio iuris* emerges from other provisions of EU investment agreements and is at the heart of the internalisation model.

A final issue concerning the representation of the EU in investment disputes deserves to be discussed in this chapter. As has been rightly observed by a prominent scholar, the case law of the ECJ mentioned above clearly points out that the Commission is under a general obligation to consult the Council before making submissions to an international dispute settlement.[81] The Court has grounded this obligation on the principle of sincere cooperation between institutions enshrined in Article 13(2) TEU.[82] The Commission's duty to consult the Council seems to include the need to take into account the views expressed within the Council so that the submissions presented to an international court are reflective of agreed EU policies.[83] As far as investment disputes are concerned, the principle of sincere cooperation has been fleshed out in detail in the Regulation on Financial Responsibility. There are several provisions in the Regulation concerning the obligation of the Commission to duly and timely inform the Council as well as the Parliament of the development of an investment dispute at all its stages.[84] While there is no specific provision laying down rules aimed at ensuring that the Commission takes into due consideration the positions expressed within the Council,[85] it can be assumed that the constant interaction between institutions foreseen in the Regulation on Financial Responsibility will offer sufficient guarantee of cooperation between them. At any rate, reproachable behaviours will remain subject to the general remedies offered by EU law.

[81] See Hoffmeister 2017, p. 15.

[82] European Court of Justice, *Council of the European Union v European Commission*, paras 84–88.

[83] See Hoffmeister 2017, p. 15.

[84] See Articles 3(2), 4(2), 7(4), 8(1) and (3), 9(7), 10(3), 11(2), and 19(3).

[85] The Committee for Investment Agreements referred to in Article 22 is in fact only composed of representatives of the Member States. The Council is technically not involved in its works.

5.4 The Decisions of the ICS

The last section of this chapter will deal with the decisions of the ICS, focusing on two main issues. First, the nature of the decisions issued by the ICS will be examined, with a view to assessing whether under international law they should be considered judicial or arbitral decisions. This discussion is closely intertwined with the question of their enforcement. As we shall see, the determination of the nature of such decisions may have direct repercussions on the on the availability of enforcing instruments. Secondly, the effects of the ICS' decisions in the EU legal order will be examined. While the first issue raises interesting questions of international law, the second is of exclusively EU law relevance.

As already seen above, one of the major innovations of EU investment agreements is the establishment of a brand-new dispute settlement system alternative to investment arbitration as we know it, despite the reference to existing arbitration rules and arbitral institutions scattered throughout the text of these agreements. EU investment agreements make provision for a *de facto* incorporation of existing arbitration rules subject to their compatibility with the provisions of EU investment agreements. We have seen that this is conceived as a fall-back option on which to rely in order to integrate, supplement and fill the gaps in the rules provided for by EU investment agreements. None the less, the above analysis has also shown that the ICS features traits that significantly distinguish it from an arbitral tribunal proper and bring it very close to a veritable judicial body. In light of this, it appears necessary to further investigate whether the ICS qualifies as an arbitral or judicial mechanism under international law, as well as to examine the logically subsequent question concerning whether its decisions can be considered arbitral awards proper.

A closer look into the structure of the ICS may in fact cast some doubts as to its arbitral nature. Under international law, arbitration and judicial settlement are traditionally considered legal means of settling international disputes, as opposed to diplomatic means. Legal means result in a binding outcome, while diplomatic means usually leave the parties free to accept or reject the terms of the settlement proposed to them. Even though arbitration and judicial settlement are similar in their outcomes, the common understanding is that there is a fundamental difference between them. This difference lies precisely with the structure of the bodies vested with the power to settle the dispute in question, and with the way in which the members to such bodies are appointed. The existence of a permanent structure, coupled with the lack of control of the parties over the composition of the body in question—as opposed to party-appointed arbitrators chosen on a case-by-case basis—are usually considered elements that differentiate judicial from the arbitral settlement of international disputes.[86] The ability of the body to set its own detailed procedural rules—which is the case of the ICS—can also be considered a relevant indicator of the judicial nature of an organ. By contrast, the compulsory nature of the jurisdiction of a dispute settlement body, as opposed to voluntary acceptance by

[86] See Amerasinghe 2003, pp. 19–33.

the parties, does not seem to play a decisive role in the traditionally consent-based international legal order. The regime governing the jurisdiction of the International Court of Justice is a demonstration thereof.[87] In light of the permanent structure of the ICS, and of the lack of any role of the disputing parties in shaping the composition of the divisions that will hear cases, it is hard to say that the ICS constitutes arbitration in a traditional fashion. In the international practice, however, there exist (rare) examples of legal means of settlement that combine the features of arbitration with those of judicial bodies, the most prominent of which is certainly the Iran-US Claims Tribunal. Its hybrid status has given rise to a lively debate in the past, but the arbitral nature of the decisions rendered by it is no longer disputed.[88] Furthermore, a number of other mixed claims commissions of an allegedly mixed nature have also been established in the past.[89]

The determination of the nature of the ICS and, as a consequence, of its decisions plays a decisive role in the enforcement stage. Traditionally, the enforcement of non-ICSID arbitral awards is based on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Under this Convention, neither 'arbitral award' nor 'arbitral tribunal' is defined. However, domestic courts confronted with this question have generally looked at the nature and content of a decision. In essence, courts have found that a decision can be considered an arbitral award under the New York Convention insofar as it meets three fundamental requirements: (a) it is made by arbitrators, (b) it settles a dispute partially or totally in a final manner, and (c) is binding on the parties to a dispute.[90] The decisions issued by the ICS will certainly fulfil the second and third requirement. However, doubts can be raised in relation to the first requirement. The permanence of arbitral tribunals is addressed at Article 1(2) of the New York Convention. This provision clarifies that arbitral awards "shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted". As a result, the decisions rendered by the ICS could fall under this second type of arbitral awards. The *travaux préparatoires* of the New York Convention suggest that an explicit mention of permanent arbitral tribunals was inserted essentially to please some then Soviet countries while being regarded as largely unnecessary by other parties to the Convention.[91] Be that as it may, domestic courts have recognised as permanent arbitral tribunals within the meaning of Article 1(2) a number of arbitration bodies and institutions, such as the said Iran-US Claims Tribunal, the ICC International Court of Arbitration, the Singapore International Arbitral Centre, the Commercial Arbitration Centre in Sweden, the

[87] See the considerations made by Reinisch 2016, p. 765.

[88] A thorough account of this debate and of the main questions connected with the Tribunal's hybrid nature is carried out by Caron 1990.

[89] This practice is mentioned by Reinisch 2016, p. 767.

[90] See Article 1(1)—UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, p. 12.

[91] See Bagner 2010, p. 21.

Court of International Commercial Arbitration at the Chamber of Commerce and Industry of Ukraine, the Arbitration Institute of the Central Chamber of Commerce of Finland, and the Vienna Commodity Exchange Arbitration Board.[92] Awards rendered by these bodies have therefore been enforced on the basis of the New York Convention.

It is doubtful whether these examples are relevant for the determination of the nature of the ICS, whose structure appears to be fundamentally different from the permanent arbitral institutions mentioned above. One scholar has argued that the decisive factor militating in favour of the arbitral nature of the ICS is that its jurisdiction will not be mandatory, in the sense of imposed on the parties. In particular, "investors would be regarded as freely accepting the Contracting Parties' offer of consent [to arbitration] contained in the agreements".[93] This would suffice to qualify the ICS as permanent arbitral tribunal within the meaning of the New York Convention. Others have expressed more skeptical views about this, on the basis of arguments pointing to those features of the ICS that recall a judicial rather than arbitral body.[94]

It bears mentioning that EU investment agreements feature a provision specifically addressing this problem. They expressly mandate that an ICS decision "is an arbitral award that is deemed to relate to claims arising out of a commercial relationship or transaction for the purposes of Article I of the New York Convention".[95] This provision can certainly be considered as indicative of the explicit will of the parties to EU investment agreements to qualify the decisions of the ICS as arbitral awards—at least for the sake of their enforcement under international law. However, it is clear that this provision alone cannot suffice to confer to the ICS' decisions the constitutive elements required to be qualified as arbitral awards within the meaning of Article 1 of the New York Convention. Domestic courts have in fact repeatedly stated that the label given to a decision is not a decisive element.[96] Moreover, for domestic courts of third countries, EU investment agreements remain non-binding *res inter alios acta*. Therefore, it should not be taken for granted that all domestic courts of third countries will treat the decisions of the ICS as foreign arbitral awards.

A similar yet somewhat more easily solvable dilemma arises under the ICSID regime. As is well known, one of the most distinctive features of ICSID is the enforcement system that it offers to the parties to a dispute. Article 54(1) makes provisions for the automatic enforcement of awards rendered pursuant to the ICSID Convention, granting a "direct private right of enforcement for both state and

[92] See Article 1(2)—UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, pp. 28–29.

[93] See Reinisch 2016, pp. 767–768.

[94] See Nappert 2015, as well as Pantaleo 2016, pp. 85–87.

[95] See Article 8.41(5) CETA.

[96] See the case law referred to in Article 1(1)—UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, p. 12, footnote 36.

private parties in the municipal courts of any contracting state".[97] However, the possibility of enforcing the ICS' decisions depends on whether such decisions qualify as ICSID awards. EU investment agreements contain a provision to that effect, making it obvious that the treaty framers have the intention to trigger the application of ICSID rules on enforcement.[98] However, given that the provisions of EU investment agreements are only binding on the parties to these agreements, it is questionable whether this would be enough to convince domestic courts of third countries that the decisions of the ICS are to be considered ICSID awards for the sake of enforcement. In theory, it could be argued that the conclusion of EU investment agreements would represent an *inter se* amendment of the ICSID Convention in accordance with Article 41 of the VCLT and that provisions such as those mandating the applicability of ICSID rules concerning enforcement would constitute one such amendment.[99] Even assuming that this *inter se* modification would be allowed under the law of treaties—which is doubtful[100]—the non-modifying parties to ICSID would remain bound by the original text only.[101] As a result, it seems safe to conclude that the availability of ICSID rules on enforcement will be precluded to the parties to a dispute litigated under EU investment agreements outside the territorial scope of these agreements.

Having concluded the analysis of the issues concerning enforcement raised by the establishment of the ICS, we can now move on to the second and final question that will be examined in this section. It concerns the effects of the decisions of the ICS in the EU legal order. As said above, this is a question of purely internal EU law relevance, which ultimately boils down to the way in which the EU legal order generally incorporates international law. The EU is often described as a monist system, in which international law is given effect automatically and without the need of an incorporating act.[102] As far as international agreements are concerned, Article 216(2) TFEU grants them the status of intermediate sources in the internal hierarchy of norms.[103] This circumstance means that international agreements are placed in a higher position than secondary law (i.e. regulations, directives, etc.) yet below the constitutive Treaties.[104] Article 216(2) TFEU makes no mention of

[97] See Caron 1990, p. 154.

[98] See, for example, Article 8.41(6) CETA, stating that where ICSID is chosen by the disputing parties as the applicable arbitration regime, "a final award issued pursuant to this section shall qualify as an award under Chapter IV, Section 6 of the ICSID Convention".

[99] But see Titi 2017, pp. 24–25, according to whom it cannot be affirmed with certainty that the intention of the parties to EU investment agreements is to modify the ICSID Convention.

[100] See Pantaleo 2016, pp. 85–86, as well as Titi 2017, p. 24.

[101] This is correctly pointed out by Reinisch 2016, p. 781.

[102] See Van Vooren and Wessel 2014, pp. 209–224, as well as Cannizzaro 2012. For a critical view on the use of monism and dualism as categories to describe the relationship between domestic and international law see Von Bogdandy 2008.

[103] See Gaja and Adinolfi 2008, p. 171.

[104] Whether this leads to the primacy of international agreements *vis-à-vis* EU secondary law is a different matter. See the thoughtful analysis of Delgado Casteleiro 2017, pp. 207–211.

decisions of international dispute settlement bodies established under international agreements binding on the EU. However, the ECJ has consistently held that such decisions have the same legal status in the EU legal order as the agreements from which they derive.[105] This nexus between dispute settlement decisions and the agreements on which they are based is visible also in relation to the question of direct effects. In fact, there is case law of the ECJ stating that such decisions cannot have direct effects in the EU legal order if the agreement from which they derive is not capable of producing such effects either.[106]

To begin with, it is safe to affirm that the decisions of the ICS will not produce direct effects. As is well known, the FTAs in which EU investment agreements are included feature a so-called no-direct effect clause. In other words, it is the text of the agreement itself that excludes the possibility for individuals to directly invoke its provisions before the municipal courts of the parties.[107] Such no-direct effect rule is phrased in general terms to cover the entire agreement. It is difficult to find reasons to carve out of its scope the decisions of the ICS. From this perspective, it will be appropriate that those EU investment agreements that will be concluded separately from the FTA will contain their own no-direct effect rule.[108] But even if one assumes, for the sake of argument, that the scope of such clauses does not extend to the decisions of the ICS, it seems that the problem of direct effects of such decisions will simply not arise. As has been already pointed out above, the ICS will not be able to order primary remedies in favour of the investors. Its decisions will be limited to awarding monetary compensation. It is self-evident that such a decision cannot give rise to any right whatsoever to be invoked before a domestic court other than the individual right of the investor to receive the payment.[109] This will be done through the enforcement instruments discussed above. Clearly, the lack of direct effects under EU law of the decisions of the ICS will not constitute a valid ground for refusing enforcement on the basis of ICSID or the New York Convention. Therefore, a problem of direct effects of the decisions of the ICS seems to be of little practical relevance.

[105] See, among others, European Court of Justice, *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*, paras 37–40.

[106] See European Court of Justice, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM)*, Judgment of 9 September 2008, Joined Cases C-120/06 P and C-121/06 P, ECLI:EU:C:2008:476, para 128.

[107] See, for example, Article 30.6 CETA.

[108] See Article 4.11 of the EU-Singapore Investment Protection Agreement.

[109] This is also the opinion of Delgado Casteleiro 2017, pp. 201–202.

5.5 Conclusions

The analysis of the rules of EU investment agreements concerning the institutional aspects identified in this chapter allows us to present some important conclusions.

First of all, as far as international responsibility is concerned, the determination of the respondent made by the Union according to the mechanisms mentioned in the previous pages, cannot be set aside by the ICS in case of objection on the part of the investor. The provisions—or lack thereof—contained in the agreements under discussion seem to rule out this possibility. By depriving the investor of the right to choose the respondent and the ICS of the power to review such choice, EU investment agreements will create a complete separation between the international and the internal dimension of investment disputes, thus internalising all discussions on the relationship between the competence divide as fixed by the Treaties and international responsibility. In addition, the rules of EU investment agreements seem to be an evolution of the *de facto* arrangement adopted in the WTO, as well as a sort of incorporation of the indications emerging from Opinion 2/13. They can also be regarded as a clear evolution of the ECT. As we have seen, contrary to CETA and the likes, under the ECT the investor is not obliged to seek clarification as to who has to act as respondent in an investment dispute originating under such agreement. The investor is free to avail itself of this possibility or ignore it altogether.[110] From an EU law viewpoint, it is clear that the mandatory designation provided for by EU investment agreements is more suitable to accommodate the specific characteristics of the EU legal order, especially in terms of safeguarding the internal rules of the organisation on the competence divide.

This aspect constitutes the foundational stone of the internalisation model adopted under EU investment agreements, as a model to settle disputes involving the EU as opposed to the other models examined in Chap. 2. In particular, in that context, we have seen that the dispute settlement systems to which the EU participates—or has attempted to participate—so far all share a common problem. Namely, under all those regimes the body that is vested with the power to settle disputes has, directly or indirectly, the ability to attribute responsibility to the EU and the Member States. This power can eventually result in determinations that are interwoven with the internal division of competence. In other words, in order to determine who is the entity that has the power to discharge of the obligations arising out of an international agreement—be that the WTO, UNCLOS, the ECHR or any other—a dispute settlement body would necessarily have to assess who is competent to do what. From an EU law perspective, this is an issue that is ultimately dependent on the distribution of powers and responsibilities as fixed by the Treaties. Therefore, a system such as that adopted under EU investment agreements seems to be more suitable to preserve the internal uniformity and the external unity of the EU legal order. This is done by virtue of an internalisation of issues concerning the assumption, on the international plane, of respondent status and of responsibility.

[110] See Hoffmeister 2010, pp. 735–736.

Chapter 6 will delve deeper into the conceptual foundations of this model, with a view to exploring the possibilities to extend it beyond the investment domain.

This chapter has, however, dealt with other issues too. As far as the representation of the EU in investment disputes is concerned, the examination carried out in this chapter has allowed us to come to two main conclusions. First of all, the power to represent the EU in international disputes of both a binding and non-binding nature lies with the Commission. In particular, it falls within its general role of guardian of the Treaties, that is of the organ that is primarily concerned with the application and implementation of EU law. We have seen that this would not encroach upon the prerogatives of the Council provided that the positions advocated by the Commission before an international dispute settlement mechanism are reflective of internally agreed policies. In the field of investment disputes, this should be adequately guaranteed by the adherence, on the part of the Commission, to the provisions of the Regulation on Financial Responsibility. As we have seen, the latter contains a number of legal safeguards that are aimed at ensuring, directly or indirectly, that there is constant interaction and cooperation between the political institutions, as well as between the Commission and the Member States where appropriate.

Speaking of the Member States, our analysis has also demonstrated that at least in the field of investment disputes, the general representative role of the Commission will not be at variance with the principle of conferral or restrict in any other way the rights and prerogatives of the Member States. The existence of EU exclusive competence covering the vast majority of the scope of EU investment agreements means that the Member States may be able to claim shared competence only in relation to disputes concerning indirect investment. However, this does not mean that the EU will be prevented from exercising its own shared competence independently of the Member States, including by appearing in an investment dispute before the ICS.

Finally, the examination of the decisions of the ICS has led us to two main findings. Firstly, since the nature of the ICS remains disputable, it is doubtful whether its decisions can be qualified as arbitral awards in accordance with the relevant instruments of international law. This might lead to possible challenges concerning the enforcement of such decisions outside the territorial scope of EU investment agreements. However, the creation of the ICS is conceived by EU (bilateral) investment agreements as a stepping stone towards the establishment of a multilateral investment court as already seen in Chap. 4. If and when this rather ambitious project will be achieved, the highlighted problems of enforcement may be solved at their root.

The second conclusion reached above is that from an EU law perspective, the ICS decisions will not be able to produce direct effects. This is due to the inclusion in EU investment agreements of a so-called no-direct effect clause and is in line with the case law of the ECJ. However, we have seen above that the lack of direct effects will most probably not be an issue in the context of investment disputes. In fact, the decisions of the ICS will merely order the EU (or the Member States) to pay monetary compensation to the investor concerned. The nature and the content

of such a decision will clearly not confer individual rights that can be invoked before a domestic court, other than the right to receive the payment obtained. This will be done at the enforcement stage, where no issues of direct effects will arise.

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Part III

Chapter 6
EU Investment Agreements as a Possible Paradigm for the Participation of the EU in International Adjudication

Contents

Abstract This chapter will assess the consistency of the ICS with the requirements set in the ECJ's case law concerning the principle of autonomy, with a view to examining whether the model designed in EU investment agreements can constitute a general paradigm for the settlement of disputes against the EU as far as EU law is concerned. This general paradigm will then be examined through the lens of international law, in particular in light of the body of secondary norms of general international law that the said paradigm is meant to replace. This will include an assessment of the possible obstacles posed by international law to a generalisation of the model dispute settlement designed by EU investment agreements (so-called internalisation model). This part will contain an assessment of whether such a model can be successfully extended beyond the field of investment law and adopted in other fields. The chapter will argue that a generalisation of the internalisation model is indeed possible owing to the principle of *lex specialis* and the traditionally consent-based structure of international law, which allow a great deal of flexibility to the parties to an agreement. It will conclude that a generalised adoption of this

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model may give rise to international practice recognising the special features of the EU as an actor in international relations and ultimately its federal ambitions.

Keywords autonomy · internalisation · responsibility · *lex specialis* · federalisation

6.1 Introduction

What is the EU? From this "seemingly simple question", Jed Odermatt started his recent attempt to conceptualise the Union within the traditional categories of international law,[1] and observed that "[i]t is difficult […] to develop a consistent conceptual model since legal arguments about the legal nature of the EU are closely intertwined with political debates about the EU's place in the international legal order".[2] Traditionally, international lawyers generally consider the EU no more than an international organisation, while EU lawyers tend to stress its hybrid nature, in the sense of something more than *just* an international organisation.[3] Not even the most enthusiastic proponents of the *sui generis* narrative would, however, argue that the EU is a State as a matter of international law. At the same time, it is difficult not to admit that the EU is a complex legal entity virtually unparalleled in international law. The broad law-making and treaty-making power transferred to it by the Member States on a permanent basis and, in some cases, exclusively and irreversibly, finds no equivalent in the international community. These unique features of the EU are at the heart of what the ECJ has attempted to safeguard in its case law on the autonomy of the EU legal order analysed in Chap. 3.[4]

This book, however, is not the right venue to carry out an abstract discussion of the legal nature of the EU. While certainly fascinating, this is an issue that falls well beyond the scope of this study. For the sake of the analysis that will be made in this chapter, we will start from the assumption that the EU does have some unique features and that those features raise peculiar problems in connection with the settlement of international disputes from both an EU law and an international law perspective. From an EU law perspective, such problems have been identified by the ECJ and encapsulated under the umbrella principle of autonomy, respect of which requires that the international dispute settlement to which the EU is a party complies with the conditions set out in the Court's case law examined in Chap. 3. To that end, this chapter will assess the consistency of the ICS with the requirements drawn in the said case law (Sect. 6.2), with a view to examining whether the model designed in EU investment agreements can constitute a general paradigm for

[1] See Odermatt 2018a, p. 5.

[2] See Odermatt 2018a, pp. 36–37.

[3] See Ziegler 2011, p. 270.

[4] See also the considerations made by Rosas and Armati 2018, pp. 7–17.

the settlement of disputes against the EU as far as EU law is concerned. This general paradigm will then be examined through the lens of international law (Sect. 6.3), in particular against the background of the body of secondary norms of general international law. This will include an assessment of the possible obstacles posed by international law to a generalisation of the model dispute settlement designed by EU investment agreements—a model which has been termed internalisation model in this book. This part will contain an assessment of whether such a model can be successfully extended beyond the field of investment law and adopted in other fields. The final part will attempt to present some conclusions (Sect. 6.4).

6.2 EU Investment Agreements and the Autonomy of the EU Legal Order

The analysis of the ECJ's case law carried out in Chap. 3 has allowed us to identify five main conditions that an international dispute settlement to which the EU is a party must fulfil in order to be consistent with EU law, and in particular with its autonomous nature. In brief, these conditions are as follows: (1) there can be no organic link between the dispute settlement mechanism and the ECJ, (2) such a mechanism cannot have the power to rule on the division of competence between the EU and the Member States as defined in the Treaties, (3) nor can it issue any binding interpretations of EU law, (4) it cannot have jurisdiction over intra-EU disputes where EU law is at stake, and (5) neither over acts that are exempted from judicial review at EU level. It should be noted that we referred to these conditions as the checklist on autonomy. In this section, the ICS established by EU investment agreements will be assessed against these conditions set by the ECJ, in order to shed light on its compatibility with EU law and to exploring the possibilities to serve as a model for the design of international dispute settlement to which the EU is a party. The analysis will demonstrate that the most problematic condition—and, as a consequence, the hardest obstacle to be overcome—is the second one mentioned above. The assessment will, therefore, start from such condition.

6.2.1 The Need to Safeguard the Internal Division of Competence

As we have comprehensively seen in Chap. 3, in virtually all relevant decisions, the ECJ has stated that the dispute settlement mechanism to which the EU is a party must be prevented from ruling on the internal division of competence between the EU and the Member States. From the said case law, it is apparent that the Court considers this to be a pivotal issue given its constitutional significance for the EU

legal order. In the eyes of the ECJ, an international court vested with the power to make determinations concerning the internal distribution of competence would pose a threat to the autonomy of the EU legal order. But why is the division of competence an issue at all when it comes to the settlement of international disputes? How would an international dispute settlement that has to settle a dispute based on an agreement to which the EU and the Member States are a party affect the internal division of competence?

The problem, in essence, is the following. International law is usually neutral to the internal structure of an international legal subject like a State or an international organisation. In fact, the internal allocation of powers, and more generally domestic law, does not affect the ability of an international legal person to accept an international obligation,[5] unless the principle outlined in Article 46 VCLT can be invoked. As far as the EU is concerned, this means that under international law, it can, in theory, enter into an international agreement even if its internal rules concerning the competence to conclude such an agreement have not been complied with in full or in part. This could not justify non-performance of the obligations binding on it unless the exceptionally stringent conditions to apply Article 46 VCLT were met. In other words, the internal law would remain an internal matter with no bearing on the international dimension. As far as the EU is concerned, the conclusion of an international agreement raises an additional, and closely intertwined, competence issue. Namely, the issue concerning who has the power to discharge the obligations stemming from the concluded international agreement. From this perspective, the use of mixed agreements can be seen, among other things, as a means to avoid the emergence of (internal) problems relating to the allocation of the competence necessary to ensure compliance with an international agreement. In the context of a mixed agreement, the fact that both the EU and the Member States are parties guarantees that there is certainly one party that is vested with the competence necessary to discharge the obligations stemming from the international agreement in question. Internally, competence conflicts can be resolved by virtue of the instruments offered by EU law. Externally, the competence divide is sometimes encapsulated in a declaration of competence as a guidance to third parties that might be interested to know who is competent to ensure compliance with an international agreement. Even though, as we have seen in Chap. 2, declarations of competence seldom fulfil the purpose for which they are devised owing to their inherent flaws.[6]

The situation is different when it comes to secondary norms of international law. When a primary norm is breached, the application of secondary norms is automatically triggered. Contrary to a State, whose local offshoots are not international legal subjects, the EU consists of sovereign States who are themselves legal persons

[5] As far as international agreements are concerned, this is neatly clarified by Article 27 VCLT, which states that domestic law cannot serve as a justification for failure to comply with a treaty provision.

[6] See, in particular, Sect. 2.3.

of international law. It remains, after all, an international organisation, no matter how special or exceptional one may consider it. This means that when an international agreement to which the EU and the Member States are parties is breached, the application of secondary norms comes into play. If the agreement in question features a dispute settlement mechanism, the latter will apply the secondary rules in order to settle the dispute that is put before it. First of all, the dispute settlement mechanism in question will have to attribute international responsibility for the breach of the relevant primary norm to either the EU or the Member States, or to both jointly and severally. Secondly, and consequently, it may make decisions aimed at removing the consequences of the wrongful act committed, for example by ordering measures aimed at obtaining the cessation of the conduct and the reparation of damages.[7]

The analysis carried out in Chap. 5 has already revealed that in some cases, it is virtually impossible to apportion (international) responsibility without assessing the (internal) distribution of powers under the Treaties. This is especially true in complex cases where the violation of an international agreement is the result of a set of measures adopted by the EU and the Member States, or where issues such as the —correct or incorrect—transposition of a directive might be at stake.[8] This is precisely what has motivated the ECJ's in its case law that has been examined in Chap. 3. In particular, the Court has emphasised this aspect when assessing the co-respondent mechanism in Opinion 2/13. In that occasion, it will be recalled that the ECJ found such a mechanism to be at variance with EU law insofar as it allowed the ECtHR to make determinations in relation to "the rules of EU law concerning the division of powers between the EU and its Member States and the criteria governing the attributability of an act or omission that may constitute a violation of the ECHR".[9] Less explicit, yet equally indicative of this inextricable link, was also the earlier Opinion 1/91.[10] As we have already observed in Chap. 3, the inextricable link existing between the allocation of competence and the attribution of responsibility has the indirect—yet inevitable—consequence of bringing issues of (international) responsibility within the exclusive remit of the ECJ—at least in the eyes of the ECJ itself. In essence, the Court's case law reveals that the autonomy of the EU legal order would be threatened if an international dispute settlement would have the power to circumvent the ECJ's exclusive role in determining the internal organisation of powers and responsibilities between the EU and the Member States fixed by the Treaties.

In light of this, one may wonder how to reconcile the autonomous nature of the EU legal order with the participation of the EU in an international dispute

[7] See Articles 30 and 31 ARIO. In some cases, however, a declaratory judgment acknowledging the violation of an international obligation may be sufficient.

[8] See Sect. 5.2.4.

[9] See Court of Justice, *Draft Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, para 221.

[10] See Sect. 3.3.

settlement. In fact, settling a dispute necessarily entails the making of assessments concerning attribution and responsibility. A dispute cannot be settled without finding a culprit, so to speak, to which the responsibility for the conduct that led to the rising of the dispute is attributed. It is submitted that the only possible solution to it is to devise tailor-made rules aimed at modulating the application of secondary norms of international law to the EU and the Member States in a dispute falling within the scope of EU law, especially secondary rules concerning attribution and responsibility. The EU practice analysed in Chap. 2 reveals that the EU has already made several attempts in that direction. In the WTO model, this is based on a *de facto* unilateral acceptance on the part of the EU of the consequences stemming from a breach of the WTO Agreements. This state of affairs is supposedly accepted by third countries and WTO organs alike although the practice reveals that it has not gone completely unchallenged. Another technique that has been used by the EU is the competence-based model that has been adopted, for example, under the UNCLOS. According to this model, responsibility is directly and explicitly linked to competence, whose internal division is (supposedly) clarified *ex ante* by a declaration issued by the EU. We have seen, however, that the competence-based model has two major flaws. First of all, declarations of competence often fail to serve the purpose for which they have been drafted because of their vagueness, imprecision and incompleteness. Secondly, and most importantly to our purpose, the ultimate interpreter of a declaration of competence is the international court established by the agreement to which the declaration is attached. It is difficult to see how an international court vested with the power to issue its own binding interpretations of the division of competence between the EU and the Member States as crystallised in a declaration of competence could be reconciled with the case law of the ECJ on the principle of autonomy. Another solution that has been attempted unsuccessfully by the EU was the co-respondent mechanism. Based on the ECJ's assessment of it, however, it seems that the only way to correctly achieve the accession of the EU to the ECHR would be to completely revise the mechanism in question. A viable solution would certainly be to enable the EU and its Member States to unilaterally identify the respondent, in much the same way as it is done under EU investment agreements.

In fact, the internalisation model seems to constitute an answer to this conundrum. Under EU investment agreements, the Union has the power to make a unilateral determination of the respondent party. As the analysis carried out in Chap. 5 has amply demonstrated, this determination cannot be challenged by the other party to the dispute, nor is it subject to the review of the ICS. For this reason, we have said that EU investment agreements will internalise all issues relating to responsibility and competence. In addition, EU investment agreements will elevate the EU to the status of default respondent to investment disputes, making sure that the Member States will appear as respondent only in disputes concerning exclusively measures taken by them. This default allocation will be without prejudice to the internal rules concerning the divisions of powers and the assumption of financial responsibility, which is governed by EU secondary legislation. The rules on the identification of the respondent should, therefore, be interpreted as a mechanism

allowing the EU to take up the legal relationship arising out of a breach of a primary norm included in EU investment agreements in all disputes where EU law is at stake. The Union will assume international responsibility and the logically subsequent obligation to make reparation to the injured party. Only in exceptional cases, the Member States will be designated as respondent, and this will occur, for the most part, in relation to cases falling outside the scope of EU law. At any rate, even in disputes where a Member State will appear as respondent, EU investment agreements exclude joint responsibility, and with it, they exclude that the ICS will make determinations concerning the internal division of powers.

The internalisation model devised by EU investment agreements appears therefore capable of reconciling the specific characteristics of the EU—as expressed in the ECJ's case law concerning the principle of autonomy—with the Union's participation in the settlement of international disputes. This reconciliation is based on a general derogation from the allocation of responsibility as it might result from the application of the pertinent secondary rules of international law. It is true that the general rules might come back through the backdoor where the EU does not make the determination of the respondent party within the prescribed time. However, the unlikelihood that this occurs in practice makes this possibility a purely theoretical one. Whether the internalisation model could serve as a general model applicable outside the investment domain is a question that will be analysed below in Sect. 6.3.

6.2.2 Absence of an Organic Link with the ECJ

Another condition established by the ECJ in its case law is the prohibition to establish an organic link between the Court itself and the international dispute settlement to which the EU subscribes. It will be recalled that the Court affirmed in two different decisions, namely Opinion 1/76 and Opinion 1/91, that members of the ECJ cannot be required to wear two hats by serving concurrently also in an international court established under an international agreement concluded by the EU. The Court justified this finding—although, perhaps, in a cursory way—claiming that double-hatting would negatively affect the impartiality and integrity of the judges concerned.[11]

The composition of the ICS has already been thoroughly analysed in Chap. 4, to which the reader is therefore referred. In summary, and taking CETA as the usual benchmark, it will be sufficient to recall in this context that the Members of the ICS will be appointed by the Joint Committee among experts of the field having the necessary qualifications to be appointed to judicial office in their respective jurisdictions. CETA does not explicitly exclude the appointment of individuals serving in other judicial organs. Therefore, it would be theoretically possible for the Joint

[11] See Sect. 3.2.

Committee to appoint an individual that is also sitting in Luxembourg either in the General Court or the ECJ. Evidently, this instance should be avoided in order to comply with the Court's case law. One may also wonder whether the condition in question could be extended to individuals who are serving in a domestic court of a Member State. Considering that EU investment agreements are mixed agreements, and that the internalisation model creates a legal fiction based on which the European bloc appears in a dispute as a unitary entity, it could be argued that the ECJ's case law on this point should be logically applied to judges of the Member States' courts.

The relevant provisions of EU investment agreements would, therefore, raise no issues relating to the impartiality of the ECJ provided that they are interpreted as meaning that EU judges cannot be appointed to be Members of the ICS. More generally, this condition set by the Court in Opinion 1/76 and 1/91 seems easy to be overcome by the drafters of the agreement establishing the dispute settlement mechanism to which the EU is a party.

6.2.3 Binding Interpretations of EU Law

Another condition set by the ECJ concerns the power of an international dispute settlement to issue binding interpretations of EU law. It will be recalled from the examination carried out in Chap. 3 that the Court has insisted on this point, in particular, in Opinion 1/91 and 1/09. In those decisions, the ECJ clarified that an international court cannot be vested with the power to interpret EU law, which is yet another feature of the Court's exclusive jurisdiction. It is submitted, however, that this line of case law is not applicable to the ICS, and more generally to an international dispute settlement that has to settle a dispute solely on the basis of an international agreement to which the EU is a party, provided that EU law does not qualify as applicable law to the dispute in question.

Both Opinion 1/91 and 1/09 had to do with international courts that had some very distinctive features. In both instances, EU law would come within their jurisdiction as the law applicable to the disputes that they were meant to settle in an indirect and direct way respectively. The EEA Court would have settled disputes based on a body of rules that was, in essence, a reproduction of EU Treaty provisions. The juxtaposition of the EEA Court's decision to those of the ECJ, coupled with the existence of a link between them, made the risk of reciprocal contamination inevitable, albeit only indirect. The interpretations of EEA law given by the EEA Court would have had foreseeable repercussions on the corresponding interpretations of EU law given by the ECJ. As far as the Patent Court was concerned, the power of the latter to interpret EU law was not even indirect. More specifically, the Patent Court had been vested with the power to interpret and apply the relevant instruments of EU law, including the relevant future EU legislation. These

circumstances clearly distinguish the courts examined in Opinion 1/91 and 1/09 from the ICS,[12] and more generally from any other international court or tribunal.

As a general point to make, it should be noted that domestic law does not come into play as applicable law in an international dispute. The role of an international court is not to interpret the domestic law of the parties to the dispute that is put before it, but rather to assess the conformity of the actions taken by such parties with their respective obligations of international law. In other words, in an international dispute domestic law comes into play as part of the factual elements that are taken into account by an international court when making the said conformity assessment. This point has been beautifully made in an often cited statement of the Permanent Court of International Justice (PCIJ) as early as in 1926. In the *German interests in Polish Upper Silesia* case, referring to the conduct taken by Poland, the PCIJ observed that

> [f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.[13]

This is the very essence of international dispute settlement, which the ECJ itself has repeatedly recognised. It should not be forgotten, in fact, that the Court emphasised this aspect in Opinion 1/09. When referring to the courts established—and approved by it—in Opinion 1/92 and 1/00, the ECJ stated that "the judicial systems under consideration in the above-mentioned Opinions were designed, in essence, to resolve disputes on the interpretation or application of the actual provisions of the international agreements concerned".[14] This statement confirms the idea that no issues of interpretation of EU law arise where an international dispute settlement is solely vested with the power to assess the conformity of the EU's action with the agreement on the basis of which it is established—which is the general rule in international litigation.

It is true that in the specific field of investment law things might be slightly different. As noted by Castellarin, there are several investment agreements, as well as some arbitration rules, that explicitly list the domestic law of the parties as the law applicable to the dispute, and arbitral tribunals have not shied away from doing exactly that including in cases where EU law was at stake in an investment dispute.[15] However, EU investment agreements contain a provision aimed at

[12] On the need to distinguish these decisions, and in particular Opinion 1/09, because of the specific features of the Patent Court see also the considerations made by Contartese 2017, p. 1657.

[13] See Permanent Court of International Justice, *Case Concerning Certain German Interests in Polish Upper Silesia (The Merits)*, Judgment of 25 May 1926, p. 19.

[14] See Court of Justice, *Draft Agreement on the Creation of a unified patent litigation system*, para 77.

[15] See, in particular, Castellarin 2017, pp. 437–453.

preventing the ICS from interpreting and applying EU law. For example, Article 8.31(2) CETA states as follows:

> The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.

The provision in question should be seen as doing no more than reaffirming the principle examined above governing international adjudication in general. Technically, a clause such as Article 8.31(2) CETA is not even strictly necessary. An international court does not usually interpret domestic law unless explicitly instructed to do so by the disputing parties. This is not to say that such clauses are entirely redundant. If anything, they have a reinforcing effect in that they provide for an interpretive framework indicating the intention of the parties to set precise boundaries to the jurisdiction of an international dispute settlement.

It is true that the considerations made by an international dispute settlement in connection with domestic law, even if applied as facts, might sometimes have so-called factual spillover effects.[16] However, it is submitted that it would be unwarranted and far-fetched to interpret the ECJ's case law mentioned in this sub-section as extending to the factual findings of an international dispute settlement. Such an expansive interpretation would essentially mean that the EU is under an absolute prohibition to subscribe to a dispute settlement mechanism, given that any decisions made by an international court is to some extent capable of having factual repercussions on the law of the parties to a dispute. Even the EU's participation in the WTO system would, therefore, be rendered illegal.

6.2.4 Intra-EU Disputes

Another requirement that the ICS has to fulfil to be in compliance with the ECJ's case law is, in essence, the need to exclude intra-EU disputes from its jurisdiction.

The prohibition set out in Article 344 TFEU does not seem to come into play in relation to the disputes that will fall within the remit of the ICS. As has been clarified in Chap. 4, the provision in question prohibits the Member States from settling disputes concerning the interpretation and application of EU law by means different than those offered by the Treaties. First of all, EU law will not be applicable law to disputes settled by the ICS in the manner clarified in Sect. 6.2.3. This circumstance, in itself, should avoid the triggering of Article 344 TFEU altogether. Secondly, the quintessential characteristic of any investment agreement, including

[16] See, on this point, Hindelang 2015, pp. 74–76.

EU investment agreements, is that disputes can only be brought by investors of a party to the agreement against the other party to the agreement. This means that only non-EU investors will be able to invoke the protection of EU investment agreements in the EU. Similarly, EU investors will be able to rely on EU investment agreements only against the third countries that are parties to them. The definition of Parties provided in Article 1.1 CETA leaves no doubt about this. Accordingly,

> Parties means, on the one hand, the European Union or its Member States or the European Union and its Member States within their respective areas of competence as derived from the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as the 'EU Party'), and on the other hand, Canada.

Article 8.18(1) further confirms this point by stating that "an investor of a Party may submit to the Tribunal constituted under this Section a claim that the other Party has breached an obligation" under the relevant EU investment agreement. Since EU investment agreements are bilateral mixed agreements, in which the EU and the Member States are considered one and the same party, the possibility of bringing intra-EU disputes is removed altogether.

This conclusion, however, would not automatically apply to other international agreements featuring a dispute settlement mechanism to which the EU may subscribe. After all, Article 344 TFEU does not come into play in connection with EU investment agreements because of their specific features and nature. Conversely, it is only logical to imagine that many other international agreements establishing an international court to which the EU and the Member States are parties would give rise to primary obligations that could apply to intra-EU relations as well. We have seen in Chap. 3 that this was precisely the case of the ECHR. The only solution in order to make sure that intra-EU disputes are not brought to any other court than the ECJ seems to be the inclusion of disconnection clauses, which are aimed at ensuring that in intra-EU relations, EU law prevails over the international agreement featuring such clauses. In the EU treaty practice, the use of disconnection clauses is quite frequent.[17] It is certainly possible to imagine the inclusion of a disconnection clause carving out the jurisdiction of an international court over intra-EU disputes where the interpretation and application of EU law is at stake. Conversely, it does not seem to be required by Article 344 TFEU to carve out all intra-EU law disputes, including those that do not concern EU law. However, one may wonder whether a generalised use of disconnection clauses in relation to the settlement of disputes is indeed feasible and desirable.[18]

[17] On this practice, see the thoughtful analysis carried out by Cremona 2010.

[18] For a critical view on the possibility to include a disconnection clause within the ECHR system, see Eeckhout 2015, pp. 977–978.

6.2.5 The Problem of CFSP Acts

A final issue that has emerged in the ECJ's case law concerns EU acts that are not subject to the judicial review of EU courts. These are, in essence, acts adopted in the field of the CFSP. The analysis carried out in Chap. 3 has already revealed that the reasoning of the Court on this one particular point was not massively coherent. The critical remarks expressed in Sect. 3.5 remain valid and the reader is therefore referred to them. To our purpose, this condition set by the Court begs the question of whether CFSP acts come into play at all in the context of EU investment agreements. The answer to this question is certainly affirmative. In fact, it seems safe to say that CFSP measures might indeed give rise to investment claims. This holds true, in particular, in relation to restrictive measures adopted by the EU that might affect natural or legal persons who might have the nationality of a country with which the EU has concluded an investment agreement.

As is well known, the EU makes widespread use of economic sanctions as a foreign policy instrument.[19] EU sanctions may take the form of assets freeze and travel bans imposed on natural and legal persons as well as of sectoral embargoes imposed on third countries. The potentially adverse effects of these measures on the individual rights of natural and legal persons are well known. In the EU practice, sanctions have given rise to a deluge of cases litigated in Luxembourg.[20] Conversely, so far there seems to be no case of restrictive measures that have given rise to a trade or investment treaty claims. This circumstance probably explains the relatively little amount of attention that the scholarship has devoted to the interplay between sanctions regimes and trade and investment claims.[21] One possible explanation for this lack of precedents is that trade and investment agreements usually allow for exceptions in relation to measures taken for the protection of essential security interests. Most of these exceptions are self-judging, that is, they refer to measures that a party to an agreement *itself considers* necessary to protect its essential security interests.[22] This, however, cannot in itself warrant the conclusion that CFSP acts will not be brought before the ICS. In theory, the imposition of economic sanctions can certainly result in the violation of standards of protection granted in an investment agreement. As noted by Dupont, the most relevant ones

[19] For an overview of the sanctions adopted by the EU that are currently in force see European Commission, Service for Foreign Policy Instruments, Restrictive Measures (sanctions) in Force, available at http://ec.europa.eu/dgs/fpi/documents/Restrictive_measures-2017-08-04-clean_en.pdf (accessed on 23 June 2018).

[20] For an overview of these cases, see Pantaleo 2016.

[21] See Ghodoosi 2014, p. 1783.

[22] See, for example, Article 18 of the US Model BIT. It should be noted that the same self-judging language is used in the relevant provisions of EU investment agreements, such as Article 28.6 CETA.

are (indirect) expropriation, fair and equitable treatment and full protection and security.[23] It is true that the partners with which the EU is meant to conclude an investment agreement are not targeted by restrictive measures. Nor is it likely that they will be targeted in the foreseeable future. However, it cannot be excluded that single natural or legal persons having the nationality of an EU treaty partner may be affected by EU sanctions. Even though more theoretical than practical, the possibility that CFSP acts will be brought to the ICS cannot, therefore, be excluded *a priori*.

Still, it seems safe to affirm that the findings of the ECJ in Opinion 2/13, according to which judicial review of CFSP acts cannot be outsourced to the exclusive jurisdiction of an external court, will not be relevant under EU investment agreements. In fact, it bears noting that restrictive measures constitute an exception to the general lack of jurisdiction of the Court over CFSP matters. According to Article 275 TFEU, the ECJ can review the legality of sanctions imposed on natural or legal persons in the context of an action for annulment. As we have mentioned in Chap. 3, this review has now been extended to questions of validity raised in the context of a preliminary ruling. As a result, and contrary to the situation analysed by the Court in Opinion 2/13, it cannot be said that the ICS' jurisdiction will not be aligned with that of the ECJ.

Clearly, this conclusion is justified by the scope of EU investment agreements and the unique features of the ICS. It would not, however, automatically apply to other international agreements featuring a dispute settlement mechanism to which the EU is a party. In other words, it cannot be excluded that CFSP acts will not come into play—better: will only come into play in relation to economic sanctions—under other international agreements featuring an international court to which the EU may become a party. As regards this one particular aspect, the significance of EU investment agreements cannot be generalised, and it seems that other safeguard mechanisms will have to be devised at the drafting stage. One solution could be the inclusion of a general carve-out of CFSP acts so that to ensure that the jurisdiction of the international dispute settlement in question is aligned to that of the ECJ.

6.2.6 *A Summary: Is the Division of Competence the Main Outstanding Issue?*

The analysis carried out above has reviewed the ICS established by EU investment agreements in light of the case law of the ECJ concerning the autonomy of the EU legal order. The ICS seems to meet all the requirements set out in the relevant case law, which have been referred to as the checklist on the autonomy of the EU legal order. One thing seems to emerge clearly from the above analysis. All the requirements set by the Court can be addressed with the inclusion of carefully

[23] See Dupont 2015, pp. 203–207.

drafted treaty clauses. Firstly, intra-EU disputes can be excluded by virtue of a disconnection clause. Secondly, CFSP acts can be removed from the jurisdiction of an international court with a simple carve-out clause. Thirdly, the need to avoid the existence of a link between the dispute settlement mechanism and the ECJ can also be dealt with at the drafting stage. In addition, the Court's requirement that an international court cannot issue binding interpretations of EU law also seems not to be a particularly pressing problem. We have seen above that unless EU law is considered applicable law to the dispute under the international agreement in question, the inherent nature of international adjudication entails that from the perspective of an international court, EU law is an integral part of the factual assessment of the conformity of the EU's conduct with the primary obligations binding on it. It is true, as observed above, that the ECJ's findings in Opinion 2/13 relating to the ECtHR's jurisdiction over CFSP acts may have blurred this distinction between domestic law as applicable law and domestic law as part of the factual conduct. However, it seems safe to assume that the reasons that led the Court to reject the ECtHR's jurisdiction over CFSP matters are not related to the fact that the Strasbourg Court would have issued binding interpretations of EU law —which it would have not. Rather, they were possibly dictated by other factors, some of which are admittedly not entirely of a legal nature.[24] From this perspective, it is to be hoped that the ECJ will clarify this point in future decisions and reaffirm, as it had already done in Opinion 1/92 and 1/00, that an international court "designed […] to resolve disputes on the interpretation or application of the actual provisions of the international agreements" under which it is established, is not at variance with the autonomy of the EU legal order.[25]

If the above reasoning is correct, the only condition that seems to require a major legal and conceptual deviation from the scheme usually followed in international adjudication is the need to prevent that the internal division of competence comes under the scrutiny of an international court. It requires, as we shall see in the next section, a shift from a paradigm that is well-established in the rules of international law concerning responsibility. In the following section, the internalisation model developed under EU investment agreements will be scrutinised through the lens of international law, in order to assess its ability to serve as a general model for the settlement of disputes against the EU.

[24] As observed by Halberstam, the ECJ may have been moved by a desire to prevent the creation of a perception that the ECtHR would become, *de facto* if not *de iure*, a sort of court of last resort in matters concerning the CFSP. See Halberstam 2015, p. 142. More generally, the findings of the ECJ on this point are a consequence of what can certainly be considered an anomaly of the EU legal order. Namely, the fact that its own courts are deprived of jurisdiction in relation to a whole branch of EU law.

[25] See Court of Justice, *Draft Agreement on the Creation of a unified patent litigation system*, para 77.

6.3 EU Investment Agreements Through the Lens of International Law: Is the Internalisation Model Viable Beyond the Investment Domain?

The analysis carried out in previous chapters has allowed us to conclude that the rules concerning the unilateral identification of the respondent included in EU investment agreements are clearly aimed to circumvent the difficult process of attributing responsibility to a composite entity such as the EU and the Member States. By entirely internalising this issue, they make sure that the respondent acts on behalf of the whole entity, which remains a unitary one *vis-à-vis* the applicant—whereas the apportionment of responsibility formally remains an internal matter. We have also come to the conclusion that such rules seem to be able to set an excellent illustration of how dispute settlement to which the EU is a party should be devised from an EU law perspective. In particular, the internalisation model seems capable of guaranteeing the participation of the Union to international adjudication while preserving the internal specific characteristics of its legal order. Also, this model seems to be sufficiently satisfactory for the other party to the dispute as well. In fact, it seems to provide sufficient legal certainty in so far as it guarantees that a respondent is always identified—and, most importantly, is unable to raise preliminary objections on the grounds of inadmissibility *ratione personae* of the claim. For this reason, the internalisation model has been well received by third countries, whose main concern—at least in the context of an investment treaty—is to provide its nationals with adequate protection for their investments. The EU treaty practice so far suggests that the acceptance of the rules concerning the determination of the respondent has not been an issue in recent negotiations relating to trade and investment instruments. As already said, the fact that the European bloc appears in an investment dispute as a unitary entity can be justified, from an EU law perspective, by the need to protect its autonomy. A question that may be raised, however, is how to conceptualise the internalisation model within the categories of international law.

First and foremost, it should be noted that the claims of autonomy are not extraneous to international law. On the contrary, autonomy is a feature that has traditionally been associated with international organisations. The principle can be seen as consisting of two facets. The first facet of autonomy refers to the relations between international organisations and their founding members. Under this meaning, the principle refers to the degree of independence that an international organisation has acquired from its members, that is its ability to be an autonomous subject of international law that is capable of taking action on the international plane independently of its member states. This can be referred to as 'internal autonomy' in that it describes the internal relations between an international organisation and its constituents. Internal autonomy can be viewed as an indication of the degree of legal and institutional development of a given organisation. It is often regarded as a positive development from the perspective of international

law.[26] As we have seen, this internal autonomy exists in the EU legal order as well. More specifically, it is at the basis of foundational concepts such as primacy and direct effects.

A second facet of the principle of autonomy can be referred to as 'external autonomy' in that it aims to describe the ability of an international organisation to function on the basis of (its own) special rules of international law in derogation of, or integration to, the general ones.[27] This second type of autonomy is at the heart of the debate concerning so-called self-contained regimes, of which the EU is thought to be a leading example.[28] This shows that claims of autonomy are quite common in international law. In this sense, it is probably correct to affirm that all international organisations, and perhaps all sub-systems of international law, are somewhat special and autonomous.[29] The difference between them is therefore a matter of degree. For the purpose of this book, the notion of external autonomy is what has led the ECJ to set limits and conditions to the participation of the EU in international disputes settlement.

This brief digression on autonomy from the perspective of international law already indicates that the international legal order is somewhat used, so to speak, to deal with claims of autonomy. However, the question raised above remains: what are the broader international law implications of the internalisation model adopted under EU investment agreements? How can it be conceptualised from an international law perspective? From the viewpoint of the traditionally consent-based structure of international law, the inclusion in an agreement of rules derogating from the general secondary norms can easily be understood within the meaning of the *lex specialis* principle. The current practice shows that there is a very large number of treaty regimes that include secondary rules having precedence over the general law.[30] The most famous examples are probably the WTO regime and the EU itself.[31] The degree of derogation from the general rules can vary greatly. In the most far-reaching cases, it can go so far as creating the already mentioned legal phenomenon of self-contained regimes.[32] The *lex specialis* rule has been oulined in Article 55 ASR, which has an equivalent in Article 64 ARIO.[33] The provision in question, titled '*lex specialis*', states as follows:

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[26] See d'Aspremont 2011, p. 77. But see also Guzman 2013, who highlights the risks connected with international organisations that become excessively autonomous.

[27] See Odermatt 2018b, p. 296.

[28] See Weiler 1991, pp. 2422 et seq.

[29] See Klabbers 2011, p. 13.

[30] For an overview of different treaty regimes having their own secondary rule, see the classic studies carried out in Barnhoorn and Wellens 1995.

[31] See Kuijper 2013, pp. 59–65.

[32] See Koskenniemi 2006, paras 123–190.

[33] See ILC, 'Draft articles on the responsibility of international organizations, with commentaries' [2011] *Yearbook of the International Law Commission*, vol. II, Part Two, p. 103.

> These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

In its comments on Article 55 ASR, the ILC observed that "[w]hen defining the primary obligations that apply between them, States often make special provision for the legal consequences of breaches of those obligations, and even for determining whether there has been such a breach".[34] It seems, therefore, that the inclusion of special secondary rules in an international agreement is, in fact, a widespread practice, as acknowledged in the works of the ILC on international responsibility. The distinctive feature of EU investment agreements is that rather than including secondary rules on attribution and responsibility proper, they have resorted to a mechanism that deactivates such secondary rules without actually replacing them. It will be recalled that the agreements in question do not lay down any rules concerning attribution and responsibility. The provisions aimed at identifying the respondent to a dispute are in fact of a mere procedural nature. The assumption of international responsibility is only a logically inevitable—yet indirect—consequence of the designation of the respondent party. By appearing in the dispute, and by giving up any possibility to reject the designation, the designated party will accept to respond to the international consequences of a wrongful act. The deactivation of the rules concerning attribution and responsibility is a unique feature of EU investment agreements. The other existing special secondary rules mentioned above are, in fact, essentially devoted to the consequences of an internationally wrongful act (i.e. the remedies).

If this analysis is correct, it seems safe to affirm that a generalisation of the internalisation model would find its appropriate place in international law. The *lex specialis* principle, coupled with the traditionally consent-based structure of the international legal order, seems to be a sufficiently solid basis on which to ground the use of 'internalising' rules such as those contained in EU investment agreements. This is not to say, however, that the internalisation model can be freely adopted in all contexts in the same way as in investment agreements. There may be treaty regimes in which such a model may give rise to specific issues. Take, for example, the ECHR. As is well known, the ECtHR has developed its own case law on issues of attribution and responsibility. The Draft Accession Agreement was, by and large, the result of a delicate balancing exercise aimed at reconciling the well-established rules and principles developed under the ECHR regime, on the one hand, with the EU's *sui generis* nature on the other. Without going into too much detail, the Strasbourg Court's case law reveals the existence of a "tendency […] to attribute to the Member State conduct allegedly in breach of the Convention, regardless of the fact that the conduct in question was taken in pursuance of normative measures enacted by the EU".[35] It is to be noted that this case law played

[34] See ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' [2001] *Yearbook of the International Law Commission*, vol. II, Part Two, p. 140.

[35] See Cannizzaro 2013, p. 300.

an important role and exercised a great deal of influence on the works of the ILC that eventually led to the rules codified in ARIO.[36] It is undeniable that the adoption of the internalisation model in a future, potential new Draft Accession Agreement would run counter to the case law of the ECtHR. Would this be a problem under the system of protection established by ECHR?

According to Contartese, preventing the ECtHR "from applying its own rules on the attribution of international responsibility" would distort its role.[37] Similarly, Eeckhout has observed that "[f]or the ECtHR to be in a position to exercise its external control function, and to ensure that human rights violations are properly assessed and redressed, it will need to look into EU law, including the basic principles concerning the division of powers".[38] The underlying assumption of these claims is that the deactivation of rules on responsibility, with the subsequent removal of any scrutiny on the application of such rules on the part of the ECtHR, could create gaps in the system of protection of human rights established by the ECHR to the detriment of the victims. It is certainly true that investment agreements and human rights treaties are only partly comparable. However, it is submitted that the internalisation model will not give rise to any gap in the protection of human rights if included in a potential future Draft Accession Agreement. If one accepts the logical assumption that the acquisition of respondent status in a dispute necessarily entails the acceptance of all consequences of a breach of a primary norm, including acceptance of responsibility, it is difficult to see how the victims of human rights violations would be put in a disadvantageous position. It is true that the role of the ECtHR would, in such a scenario, "be limited to merely declaring whether the ECHR was breached".[39] Far from being a problem, however, this seems to constitute the very core of any international court's function. Namely, checking the conformity of State action with the primary obligations binding on it. In the internalisation model, there is always a respondent party in a dispute that necessarily accepts international responsibility and the subsequent duty to make good. On this basis, it seems difficult to affirm that the internalisation model is less protective of the victims of a wrongful act.

The obstacles to a generalised extension of the internalisation model do not seem to be of a legal nature. They are rather of a political one. In particular, it might be more difficult for the EU to impose such system in a multilateral framework, or in a context where the possibility of litigating against the EU and the Member States separately may be seen as a comparative advantage by other States parties. The *divide et impera* strategy used by the United States in the context of the WTO is a strong illustration of this risk.[40] After all, the internalisation model implies a shift of

[36] See ILC, 'Draft articles on the responsibility of international organizations, with commentaries' [2011] *Yearbook of the International Law Commission*, vol. II, Part Two, pp. 102–103.

[37] See Contartese 2017, p. 1654.

[38] See Eeckhout 2015, p. 981.

[39] See Contartese 2017, p. 1654.

[40] See Sect. 2.2.

paradigm when it comes to apportioning international responsibility that might raise some eyebrows in certain third countries. A lighthearted acceptance of it should not, therefore, be taken for granted. Not to mention the fact that a generalisation of the internalisation model might be met with some opposition from the Member States, whose international role is evidently demoted under this model.

From a theoretical perspective, the internalisation model can be considered as expressive of a federal principle. In fact, the EU and the Member States will appear as a unitary entity that is virtually inseparable *vis-à-vis* both the other party to the dispute and the international dispute settlement that has to settle it. We have seen above that the main characteristic of an international organisation is that, at the end of the day, its constituents remain international legal persons separate from the organisation that they have established. The internalisation model, however, seems to challenge this assumption. By centralising at EU level, the decision concerning the designation of the respondent party, with all the consequences of international law flowing therefrom, the idea that the Member States remain separate and independent international legal subject is directly called into question, at least as far as the settlement of disputes is concerned. Under the internalisation model, they will come closer to the organs of a State. It should not be forgotten that under this model the EU will be designated as the respondent party in the majority of cases where EU law is at stake, including where Member States action is also involved. The Member States will play a somewhat residual role, in that they will be designated as respondent only in cases that fall outside the scope of EU law.

This state of affairs is reminiscent of a federal paradigm. When the regional or federated components of a State take action that results in an internationally wrongful act, it is the central State that is held responsible under international law, as the *LaGrand* case clearly demonstrates.[41] The assumption on the part of the EU of respondent status and of the consequences under international law of an internationally wrongful act is, therefore, clearly expressive of a federal ambition. The Member States will largely give away their international role, save in exceptional cases where the EU is not involved at all. Indeed, the comparison between the EU and a federation is always a dangerous exercise. It is clear that the EU is not a federal state proper since it has its origins in international law. However, it is equally clear that it possesses a number of features and characteristics that trigger

[41] This case concerned Karl-Heinz and Walter Bernhard LaGrand, two German citizens convicted of murder and sentenced to death in the United States. In violation of the Vienna Convention on Consular Relations, the LaGrands were not granted the right to consular assistance from their State of nationality by Arizona State courts. The LaGrands were executed by Arizona authorities despite Germany having initiated proceedings before the International Court of Justice and obtained a provisional order requiring the United States to delay the execution pending resolution of the dispute. See *International Court of Justice, LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 466.

the federal analogy.[42] The internalisation model, and the institutional dynamics on which it rests, seem to be yet another indication of the EU's federal ambitions.

At the same time, third countries that are parties to EU investment agreements have also accepted this state of affairs. A broad acceptance of this model on the part of third countries may be expressive of an emerging practice pointing to the recognition that the settlement of disputes involving the EU must follow different rules than the general rules of international law. In other words, the development of a widespread treaty practice on the part of the EU can favour the emergence of special rules concerning its participation to dispute settlement and responsibility, which can make it sustainable from an EU law perspective and coherent from an international law perspective.

6.4 Conclusions

The analysis carried out in this chapter has demonstrated that the participation of the EU in international dispute settlement requires that the latter is designed so as to accommodate the specific characteristics of the EU as identified by the ECJ in its case law concerning the principle of external autonomy. For the most part, the inclusion of tailor-made treaty clauses seems to offer viable solutions to the problems analysed. This holds true, in particular, in relation to the need to safeguard

[42] Among the many scholarly contributions to this debate, special mention deserves here the exchange of views occurred in a recent edited volume between two giants of the field, namely Bruno de Witte and Joseph Weiler. In his contribution to the volume, Bruno de Witte argued that it makes little sense to conceptualise the EU by referring to the federal analogy or to a vague construction such as the *sui generis* legal subject. He based his conclusions, in essence, on two main arguments. On the one hand, he observed that the Member States' practice—including the practice relating to the revisions of EU treaties—confirms that they never intended to endorse the view that the EU's legal nature has evolved from an international organisation proper into something else. Secondly, he emphasised that the ECJ itself has always refrained from formulating any objection regarding the legal nature of the EU as an international organisation. See de Witte 2011, pp. 21–42. In his conclusions to the same volume, however, Joseph Weiler made a strong case in favour of the federal evolution of the EU by arguing that one need not to look at its formal origins—i.e. the EU being based on an international treaty concluded among States—but on its content and its substantive meaning. By means of an illuminating genealogical analogy, he observed the following: "there were apes. Then there were apes with a lot less hair—but they are still apes with a lot less hair. Then they stood up straight. These are apes which stand up straight. Then they developed a power of reasoning greater than the primitive power of reasoning of even so-called 'intelligent apes'—these are simply apes with superior power of reasoning. Genealogically, all this is correct. It is possible to describe humans as 'advanced apes', as 'experimental apes', but at a certain point, genealogy notwithstanding, it begins to make sense and there seems to be a substantive and substantial (rather than lexical) pay-off to speak of 'humans' rather than 'apes'". While recognising that the EU cannot be considered a federal state proper, he argued that the normative value of EU acts and their binding nature make it to some extent indistinguishable from a federal state despite originating from an instrument of international law. See Weiler 2011, pp. 266–269.

the ECJ's impartiality, the exclusion of so-called intra-EU disputes, as well as the alignment of the jurisdiction of the international dispute settlement to which the EU subscribes with that of the ECJ. The above examination has also demonstrated that the Court's request that international courts cannot issue binding interpretations of EU law is, in reality, an issue that does not arise in international adjudication traditionally conceived. In this sense, its findings in Opinion 1/91 and 1/09 should be understood in light of the specific characteristics of the courts established under the relevant agreements, both of which had the power to interpret and apply, directly or indirectly, EU law in the disputes that were put to them. This, however, is not the case in an international court proper.

The most pressing issue seems to be the allocation of international responsibility, due to the inevitable linkage existing between (international) responsibility and (internal) competence. Effectively, a decision of an international court concerning the attribution of responsibility between an organisation and its members may often involve an assessment of the competence divide. We have already seen that at the current stage of development of international law, it cannot be said that a special rule concerning the attribution of responsibility to the EU has already clearly emerged.[43] And even if it had emerged, the requirements of EU law autonomy as interpreted by the ECJ would most probably still bar an international dispute settlement from applying it to the internal relations between the EU and the Member States. As we have seen, especially in complex cases where an internationally wrongful act is the result of a set of measures taken by different actors at EU level, apportionment of international responsibility necessarily entails a determination of the responsibilities organised by the Treaties. The most obvious example—but certainly not the only one—is the case concerning the implementation of directives. From an EU law perspective, preserving the internal division of competence as fixed by the Treaties and interpreted by the ECJ is of the essence. Allowing an international dispute settlement to make determinations on these issues would be tantamount, to borrow from the Commission, to "an attack on its constitution".[44]

For these reasons, international agreements to which the EU and the Member States are parties that feature a dispute settlement mechanism need to include their own special rules, to derogate from the application of (general) secondary law. In the internalisation model, this is done by a deactivation of the general rules in favour of a system that gives the EU the power to unilaterally designate the party that will act as the respondent in a dispute brought against the European bloc. EU investment agreements not only internalise this choice. They make the EU the default respondent in the cases where EU law is at stake. The EU will assume responsibility and all other consequences of international law on behalf of the whole European bloc in all such cases. This, in turn, creates the legal fiction of a unitary entity that is reminiscent of a federal subject, as opposed to a traditional international organisation whose Member States remain international legal subjects

[43] See the considerations made in Sect. 5.2.1.

[44] See Sect. 2.2.

responsible of internationally wrongful acts in their own right. We have seen that in the internalisation model adopted under EU investment agreements, the Member States will largely—but not completely—give away their ability to be parties to an international dispute. This possibility will be dependent on a decision made by the EU. This state of affairs will be without prejudice to the internal division of competence and responsibilities. In fact, the Member States will remain accountable under EU law where appropriate.

From an international law perspective, the internalisation model can be understood within the meaning of the *lex specialis* principle. If adopted as a general model to settle disputes against the EU, it may be expressive of an emerging practice pointing to an increasing acceptance of the special place of the EU in the international community. More specifically, it will bring it closer to a State-like subject of international law, whose internal institutional dynamics have no bearing on the international plane. The internalisation model seems therefore capable of overcoming the difficulties connected with the challenging process of allocating responsibility to a composite entity that can hardly be conceptualised within the traditional categories of international law concerning attribution and responsibility. It does that not by laying down special rules on international responsibility as it is done under other regimes. Rather, it includes provisions removing the problem of apportioning responsibility from the equation, settling the issue at the logically precedent stage of identifying the respondent to a dispute.

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Chapter 7
Concluding Remarks

Contents

Abstract This chapter will summarise the findings of the previous chapters and make some general considerations concerning the contribution of the EU to the development of international dispute settlement through its external action and treaty practice.

Keywords international dispute settlement · EU · ILC · special rules · international responsibility · international organisations

7.1 The European Union and International Dispute Settlement

This monograph has analysed the main legal issues that come into play in relation to the participation of the EU and the Member States to the settlement of international disputes through legal means, with a focus on international judicial means. It has done so by carrying out both a practical observation of the practice that the EU has developed so far, and a more theoretical examination of the relevant legal principles of international and EU law. The analysis has led to the conclusion that the most challenging issue when it comes to the participation of the EU and the Member States to international disputes is the definition of the division of roles between them. For the purpose of settling disputes before an international judicial body, this translates, in turn, in another challenge that arises at the commencement of any dispute involving the responsibility of the EU and the Member States. Namely, the choice of who has to act as respondent in the dispute in question. The book has proposed a systematisation of disputes settlement regimes to which the EU and the Member States are parties jointly. These regimes have been divided in

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different models based on the rules concerning the identification of the respondent or, where appropriate, the allocation of responsibility. These different regimes have been examined in order to assess their suitability in relation to a composite, *sui generis* legal subject such as the EU.

Part I was devoted to the analysis of general issues and consisted of two chapters. In particular, Chap. 2 provided an overview of the existing practice of the EU in international adjudication. It addressed the main treaty regimes that include a dispute settlement mechanism to which the EU is a party, with a view to identifying and systematizing such practice into a coherent framework. In this chapter, existing models have been outlined. The analysis has focused on the WTO regime, which has been referred to as a model expressing a *de facto* unilateralism on the part of the EU when it comes to the participation in the disputes and assumption of responsibility. The examination, however, has revealed that this model has some important drawbacks. In particular, the absence of clear rules concerning the division of roles between the EU and the Member States in a dispute brought against the European bloc does not exclude that WTO bodies may make decisions that are at variance with the internal EU law rules governing the relations between the EU and the Member States and their division of competence.

The following system that has been analysed was the UNCLOS, which has been labelled competence-based model. In this model, the participation of the EU and of the Member States to the settlement of disputes is, essentially, reflective of the internal division of competence as crystallised in a declaration attached to the agreement. The examination has led us to the conclusion that the competence-based model also displays several limits. Some of them have to do with the well-known inherent inadequacy of declarations of competence to serve as a useful guidance to the body that has to settle a dispute. But most importantly to the purpose of this book, the competence-based model necessarily and inevitably entails that the relevant dispute settlement body is vested with the power to decide, in case of doubt, where the competence divide lies in a given case. This circumstance renders the dispute settlement mechanism in question the ultimate reviewer of issues relating to the division of competence between the EU and the Member States. In light of the principle of autonomy, this state of play seems problematic from an EU law perspective.

Finally, a number of other agreements to which the EU is a party have also been analysed. In particular, special attention has been devoted to agreements based on a default joint responsibility rule, to the co-respondent mechanism as devised under the Draft Accession Agreement to the ECHR, to the State-to-State dispute settlement featured in EU bilateral FTAs, and a number of other early agreements featuring a dispute settlement system. The analysis has showed that all these somewhat residual models are defective and unsuitable to the EU to different degrees and for different reasons. However, among the different models analysed, the proceduralisation model was identified as the one that most effectively suits the specific characteristics of the EU legal order provided that the relevant rule of proceduralisation included in these agreements contains some specific structural features—such as, for example, being binding on the other party to the dispute and

the dispute settlement body alike. The examination has showed that the proceduralisation model comes close to the model adopted under EU investment agreements, the so-called internalisation model.

Chapter 3 carried out an examination of the case law of the ECJ concerning the participation of the EU in international dispute settlement. It has analysed the main findings of the Court in some landmark decisions and provided an appraisal of the EU law principles—as interpreted by the ECJ—governing the participation of the EU in international dispute settlement. Special attention has been devoted to the so-called principle of autonomy of the EU legal order, which has been presented as a sort of umbrella concept encompassing what the Court considers 'the specific characteristics of the EU', and which has served as a means to assess the compatibility with EU law of international dispute settlements to which the EU and the Member States have subscribed. The analysis focused on international courts whose consistency with EU law has been rejected for a variety of reasons. These reasons were put together in order to provide a 'checklist' on autonomy, that is a list of requirements that an international court must fulfil in order to be compatible with EU law. The chapter concluded that there are five main principles that need to be respected when it comes to the design of an international dispute settlement to which the EU is a party. These are: (a) there can be no organic link between the ECJ and the established international court, (b) the latter cannot have the power to rule on the internal division of competence, (c) nor can it have the power to issue binding interpretations of EU law, (d) it must be excluded that such international court's jurisdiction extends over intra-EU disputes where EU law issues are at stake, and that (e) it exceeds the ECJ's own jurisdiction so as to include EU acts not subject to judicial review at EU level.

In Part II, the analysis has concentrated on EU investment agreements and on the dispute settlement system therein included. More specifically, Chap. 4 has looked at the main procedural innovations brought by EU investment agreements, with a view to providing an account of how disputes will be conducted under them. This chapter has illustrated the significance of the ground-breaking innovations contained in these agreements. It included an examination of the non-confrontational mechanism available at the pre-litigation stage, an assessment of the structure and functioning of the ICS and of its internal articulation, as well as other procedural issues such as transparency. The chapter traced back the developments that led the EU to abandon its initial intention to set up more traditional *ad hoc* arbitral tribunals, in favour of a fully-fledged judicial organ such as the ICS established by the likes of CETA. It concluded that the latter is a carefully designed, highly institutionalised judicial mechanism to settle investment disputes which is set to become the new standard in the field.

Chapter 5 has picked up the analysis left off in Chap. 2 concerning model dispute settlements and their suitability to the EU. In this chapter, the model designed by EU investment agreements, namely the internalisation model, has been thoroughly studied. The examination has focused on three main issues. Firstly, the allocation of international responsibility and of financial liability between the EU and the Member States in the context of investment disputes has been analysed. Secondly,

the examination has turned to the partly related question concerning the representation of the EU and the Member States in investment disputes. Finally, an assessment of the decisions of the ICS has been conducted. More specifically, the analysis has focused on their nature, enforcement and effects. This chapter has reached a number of important conclusions. First of all, it has explained in-depth the essential characteristics of the internalisation model. In particular, it emphasised that such model consists of a set of rules that allows the EU to unilaterally determine the respondent party to an investment dispute brought against the European bloc, and that such respondent will be the EU itself rather than the Member States in all cases where EU law is at stake. In other words, the cornerstone of the internalisation model is the idea that the EU will appear as the default respondent on behalf of the whole bloc. The examination has demonstrated that while being procedural in nature, this mechanism has broader substantial implications on the international plane. Namely, the designated party will not only assume respondent status, but also the logical consequences of having such status. These logical consequences are, in essence, the bearing of international responsibility and of the obligation to remedy to the consequences of an internationally wrongful act. Chapter 5 has also showed that this unilateral determination of the respondent party —and, as a logical consequence, of the responsible party—made by the EU cannot be put into question neither by the other party to the dispute, nor by the ICS itself. They will both be bound by the determination made by the EU. This will prevent them from making determinations concerning the internal division of competence that might be at variance with the responsibilities and powers as fixed by the EU Treaties and interpreted by the ECJ. Chapter 5 has also concluded that this state of affairs will be without prejudice to the financial liability that may arise in connection with investment disputes. Such liability will remain an internal matter governed by EU internal rules.

Part III concluded this study with a single chapter devoted to the assessment of the consistency of the ICS with the requirements set in the ECJ's case law concerning the principle of autonomy. In this part, the analysis has demonstrated that the ICS seems to successfully comply with the said case law.[1] This chapter has

[1] This is not to say that the ECJ will necessarily give the green light to the ICS in its pending Opinion 1/17. In particular, this book has not carried out an assessment of the potential incompatibilities existing between the ICS and substantive principles of EU law, especially of fundamental rights and principles such as non-discrimination and equal treatment. It bears noting that the application submitted to the Court explicitly raises these issues, which means, in turn, that the Court will most likely address them as well. For a view maintaining that the approval of ICS will result in a reverse discrimination against EU investor see Kleinheisterkamp 2014, pp. 452–457. Arguments based on discrimination and equal treatment seem, in reality, to be largely misplaced. The (admittedly) discriminatory disadvantage suffered by EU investors will be compensated by the corresponding advantage that they will enjoy with respect to foreign investors in the jurisdiction of their home state that has concluded an investment agreement with the EU. These dynamics are part and parcel of the scheme based on reciprocal concessions between the parties to an international agreement that is at the root of investment treaties and, ultimately, of international relations in general.

allowed us to conclude that the internalization operated by EU investment agreements appears capable of guaranteeing the participation of the EU in investment disputes without affecting the internal relations between the EU and the Member States. The analysis has shown that this seems to be by far the most relevant component of the autonomy of the EU legal order. Furthermore, Chap. 6 has assessed the internalization model through the lens of international law, with a view to examining whether such model can constitute a general paradigm for the settlement of disputes against the EU. This part has demonstrated that there appears to be no obstacles of international law towards a generalization of the model in question. This is due to the principle of *lex specialis* and the traditionally consent-based structure of international law, which allow for a great deal of flexibility to the parties to an agreement.

7.2 Towards a Recognition of the Special Nature of the EU?

One of the main arguments developed in this monograph revolves around one of the core features of the internalisation model, that is to say the power of the EU to unilaterally determine, upon request of the claimant, what is the party that will appear as respondent in a dispute brought against the EU or the Member States. In particular, it has been argued that this unilateral indication will create the legal fiction of a European bloc taking part in disputes as an inseparable unitary entity *vis-à-vis* both the other party to the dispute and the ICS established under EU investment agreements. The internal structure of this unitary bloc will formally remain an internal matter that will have no bearing on the international plane. This presupposes a shift of paradigm in matters of international responsibility. The unilateral acceptance of respondent status in a dispute will have, in essence, the consequence that the respondent party will take charge not only of a mere procedural role (i.e. representing the European bloc), but also of the substantive consequences of international law that will derive from this role. It should not go unmentioned that because of the set of rules contained in EU investment agreements, it will be the EU that will be the default respondent in investment disputes. The Member States will play a residual role mostly confined to disputes where EU law will not be at stake.

The rise of the EU as the legal subject that will take up the legal relationship arising out of a violation of a primary norm contained in an agreement to which both the EU and the Member States are parties is clearly expressive of a federal principle. Under the internalisation model, the Member States will resemble the local offshoots of a State proper, whose actions usually trigger the responsibility of the central State rather than of its internal ramifications, which are not international legal persons. Needless to say, the Member States will not lose their international legal personality, nor will they lose their status of independent parties to EU

investment agreements. Such status, however, will be severely limited, as demonstrated, among other things, by the rules preventing them from becoming autonomous non-disputing parties to a dispute where the EU has been designated as respondent. In other words, the internalisation model represents another manifestation of the EU as a State-like subject of international law.

From this perspective, the development of a widespread practice on the part of the EU, which presupposes its acceptance on the part of third countries, can be seen as an indication of the increased readiness of the international community to acknowledge the special nature of the EU. It is therefore regrettable that this practice has so far been confined to EU investment agreements, and to a handful of early treaties—i.e. the Rhine Conventions—that featured a similar mechanism. In particular, it is not easy to see why the internalisation model has not been extended to the State-to-State dispute settlement system included in EU FTAs. This is all the more contradictory in the post-Lisbon era, where the negotiation of FTAs and investment agreements is always conducted in unison. The reasons behind this choice are most likely of a political rather than legal nature. In particular, third countries seem to prefer to use the well-oiled machine of the WTO in order to challenge the adoption of EU trade measures rather than the bilateral instruments offered by EU FTAs. One should not forget, in fact, that the establishment of these bilateral instruments is without prejudice to the availability of the WTO dispute settlement system. This may explain why they have never been used in practice. Therefore, it is reasonable to believe that their limited practical relevance justifies the little amount of attention that has been put in their drafting. However, if the seemingly emerging practice of bringing WTO proceedings against both the EU and the Member States should gain additional ground, a generalisation of the internalisation model could offer a viable solution.

At any rate, the rise of the internalisation model is a development whose importance cannot be emphasised too much in the context of this study. Such model presupposes that the general secondary rules of international law are not applied to the settlement of disputes involving the EU because of their inability to adequately accommodate its special features. If generalised, the consequences of a widespread acceptance of this state of affairs would be a massive—yet necessary, in the Author's opinion—development in international law. It would signal the spreading of a generalised idea that the settlement of disputes involving a composite legal subject needs to follow special rules. Given that such special rules of international law do not seem to exist at the current stage of development of international law, their structure and content has to be agreed upon between the parties in the various international agreements they sign up to.

In light of the already mentioned proposal made recently by Sir Michael Wood to include the topic 'The settlement of international disputes to which international organizations are parties' in the long-term programme of the ILC,[2] the development of a sound and stable practice on the part of the EU seems particularly important.

[2] See Wood 2016.

Being one of the most important and most active existing international organisations, the Union can give a primary contribution towards the development of a coherent framework concerning the participation of international organisations in the settlement of international disputes. The ICS and the future MIC may therefore serve as possible models well beyond the EU borders.

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