ARTICLES

RESPONDENT STATUS AND ALLOCATION OF INTERNATIONAL RESPONSIBILITY UNDER EU INVESTMENT AGREEMENTS

LUCA PANTALEO*

TABLE OF CONTENTS: I. Setting the scene. – II. Analysis of the legal framework set out in EU investment agreements. – III. The role of the claimant and of the arbitral tribunal: is there a possibility to set aside the determination of the respondent made by the EU? – IV. The regulation on financial responsibility. – V. Conclusions.

ABSTRACT: The academic debate on the international responsibility of the EU has flourished in recent years. Much ink has been spilled on the purported unsuitability to the EU of the rules on the responsibility of international organisations as codified by the International Law Commission (ILC). These rules are often criticised for having failed to take into due account the specific characteristics of a *sui generis* legal actor such as the EU. This friction becomes particularly acute when the EU and the Member States enter into an international agreement that includes a dispute settlement mechanism (IDS). In order to settle a dispute, an IDS would have to decide who acts as respondent and, as a consequence, bears international responsibility. Such decision may, in turn, directly or indirectly affect the autonomy of the EU legal order as defined by the case-law of the European Court of Justice over the years. For this reason, the EU has been attempting to devise tailor-made solutions aimed at preventing that an IDS established by an agreement to which it is a party alongside its Member States may make decisions on questions that would endanger the said autonomy. The aim of this article is to analyse the mechanism concerning the determination of the respondent party laid down in EU investment agreements (IAs) for the settlement of Investor-State disputes. It is argued that such determination amounts to an implicit acknowledgment of the international responsibility *vis-à-vis* the claimant on the part of the designated party. Furthermore, the article points out that EU IAs, with their internalisation of issues concerning international responsibility, seem to represent an excellent illustration of how IDS to which the EU is a party should be devised, and that the solution therein adopted should become EU's standard position when it comes to participating to IDS. To this end, the development of a constant and consistent practice may eventually give rise to the long-awaited "special rule" of International Law.

* Lecturer in EU Law, Faculty of Public Management, Law & Safety, The Hague University of Applied Sciences, l.pantaleo@hhs.nl. With the usual disclaimer, the author wishes to thank Prof. Enzo Cannizzaro and Prof. Paolo Palchetti for their valuable comments to an earlier draft of this article.

KEYWORDS: EU Law – investment agreements – international responsibility – TTIP – CETA – dispute settlement.

I. SETTING THE SCENE

The academic debate concerning the international responsibility of the EU has flourished in recent years.[1] 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 is well known, the EU has traditionally advocated that the allocation of responsibility between a regional economic international organisation (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 organization 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.[2] However, the ILC has embraced this doctrine only to a limited extent. As a result of the combined reading of Art. 6 of the Draft Articles on the Responsibility of International Organisations (DARIO) and Art. 4 of the Articles on State Responsibility (ASR), an act taken by a Member State of an international organisation remains attributable to the Member State in

[1] 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 F. HOFFEMEISTER, *Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?,* in *European Journal of International Law*, 2010, pp. 738-739; A. NOLLKAEMPER, *Joint Responsibility between the EU and Member States for Non-performance of Obligations under Multilateral Environmental Agreements*, in E. MORGERA (ed.), *The External Environmental Policy of the European Union: EU and International Law Perspectives*, Cambridge: Cambridge University Press, 2012, pp. 304-346; P.J. KUIJPER, E. PAASIVIRTA, *EU International Responsibility and its Attribution: From the Inside Looking Out*, in M.D. EVANS, P. KOUTRAKOS (eds), *The International Responsibility of the European Union: European and International Perspectives*, Oxford: Hart, 2013, pp. 35-71; E. CANNIZZARO, *Beyond the Either/Or: Dual Attribution to the European Union and to the Member State for Breach of the ECHR*, in M.D. EVANS, P. KOUTRAKOS (eds), *The International Responsibility of the European Union*, cit., pp. 295-312; J. HELISKOSKI, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States*, The Hague: Kluwer Law International, 2001; J. D'ASPREMONT, *A European Law of International Responsibility? The Articles on the Responsibility of International Organisations and the EU*, in V. KOSTA, N. SKOUTARIS, V. TZEVELEKOS (eds), *The EU Accession to the ECHR,* Oxford, Portland, Oregon: Hart Publishing, 2014, pp. 75-85; A. DIMOPOULOS, *The Involvement of the EU in Investor-State Dispute Settlement: A Question of Reponsibilities*, in *Common Market Law Review,* 2014, pp. 1671-1720; P. PALCHETTI, *The Allocation of International Responsibility in the Context of Investor-State Dispute Settlement Mechanism Established by EU International Agreements*, in L. PANTALEO, M. ANDENAS (eds), *The European Union as a Global Model for Trade and Investment,* in *Legal Studies Research Paper Series No. 2016-02*, University of Oslo, Faculty of Law, pp. 77-85.

[2] See, among others, International Law Commission, *Responsibility of International Organizations - Comments and Observations Received from International Organizations*, 14 February 2011, 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.

question, irrespective of whether or not that very act was adopted in a field falling under the competence of the organisation. If the act in question constitutes a breach of an international obligation binding on the State, it will entail its international responsibility. However, Art. 17 DARIO also partly endorses the so-called "normative control" doctrine. 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 that advocated by the EU is, however, quite significant. Contrary to the position maintained by the EU, Art. 17 DARIO 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 jointly responsible, should the conditions set out in that provision be fulfilled.

From the perspective of the EU this state of play is clearly unsatisfactory. In brief, the application of ASR and DARIO may entail that international responsibility for breaches of agreements to which both the EU and the Member States are a party is apportioned independently of the internal rules of the organisation. The problem becomes particularly critical when the EU and the Member States enter into an agreement that includes an IDS. In order to settle a dispute, an IDS would have to decide who acts as the respondent and, as a consequence, bears international responsibility. Such decision may, in turn, directly or indirectly affect the division of competence between the Union and the Member States.

For this reason, the EU has been attempting to devise tailor-made solutions aimed at preventing that an IDS established by an agreement to which it is a party alongside its Member States may make decisions on questions that would endanger the autonomy of the EU legal order. The EU has so far resorted to a variety of techniques. A traditional one is the issuing of declarations of competence at the time of ratification, whose aim is – at least in theory – to provide guidance as to where the internal division of competence lies.[3] Declarations of competence have however proved problematic and have met with harsh criticism.[4] A second instrument devised by the EU is the inclusion in the international agreements of special rules, such as the co-respondent mechanism set out in the Draft EU Accession Agreement to the European Convention on Human Rights. However, the Draft Agreement was famously struck down by the European Court of Justice precisely because, among other things, it failed to prevent the European

[3] For an example of a (particularly complex) declaration of competence see Food and Agriculture Organisation of the United Nations (FAO), European Community declaration of 25 June 1998 in relation to the Agreement Establishing the General Fisheries Commission for the Mediterranean (GFCM).

[4] See A. DELGADO CASTELEIRO, *EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?*, in *European Foreign Affairs Review*, 2012, pp. 498-503.

Court of Human Rights from interfering "with the division of powers between the EU and its Member States".[5]

The aim of this article is to analyse the mechanism concerning the determination of the respondent party laid down in EU investment agreements (IAs) for the settlement of Investor-State disputes. As is well known, the EU is currently a party alongside its Member States to only one international investment agreement in force, namely the Energy Charter Treaty (ECT). At the time of writing, however, the Union is negotiating or about to conclude a number of investment agreements, or free trade agreements (FTAs) with an investment chapter, on the basis of the new competence concerning foreign direct investment conferred to the EU by the Lisbon Treaty.[6] All those agreements will supposedly include an IDS. More specifically, the EU-Singapore FTA, the EU-Vietnam FTA and EU-Canada Agreement (CETA) are currently awaiting ratification. More agreements are still in the negotiation stage, the most famous of which is certainly the Transatlantic Trade and Investment Partnership (TTIP).[7] The analysis that follows will mostly concentrate on these new-generation agreements. The ECT will not be examined.[8] Given that only the texts of the four agreements mentioned above have already been published, the analysis will be based on their provisions. As far as the determination of the respondent is concerned they are fairly similar to each other. It seems therefore safe to assume that the rules therein laid down will constitute a general model of EU IAs. In order to keep things simple the rules of the TTIP will be used as a base and a starting point of the analysis.[9] In addition, the examination of the provisions of the agreements

[5] Court of Justice, opinion 2/13 of 18 December 2014, para. 225. For a thoughtful commentary of the case and its implication see P. EECKHOUT, *Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?*, in *Fordham International Law Journal*, 2015, pp. 955-992; T. LOCK, *The Future of the European Union's Accession to the European Convention on Human Rights after Opinion 2/13: Is It Still Possible and Is It Still Desirable?*, in *European Constitutional Law Review*, 2015, pp. 239-273.

[6] See the general overview provided at www.ec.europa.eu.

[7] The literature devoted to the analysis of the TTIP and its various aspects is already abundant, despite the fact that the negotiations of the agreement have yet to be concluded. See, among many, L. PANTALEO, W. DOUMA, T. TAKACS (eds), *Tiptoeing the TTIP: What Kind of Agreement for What Kind of Partnership*, in *CLEER Paper* 1/2016; R. QUICK, *Why the TTIP Should Have an Investment Chapter Including ISDS*, in *Journal of World Trade*, 2015, pp. 199-209; I. ESPA, K. HOLZER, *Negotiating an Energy Deal under TTIP: Drivers and Impediments to U.S. Shale Exports to Europe*, in *Denver Journal of International Law and Policy*, 2015, pp. 357-377; I. BARBEE, S. LESTER, *Financial Services in the TTIP: Making the Prudential Exception Work,* in *Georgetown Journal of International Law*, 2014, pp. 953-970; M. BARTL, E. FAHEY, *A Postnational Marketplace: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)*, in E. FAHEY, D. CURTIN (eds), *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and the US Legal Orders*, Cambridge: Cambridge University Press, 2014, pp. 210-234.

[8] For a detailed analysis of the rules concerning the settlement of disputes under the ECT we shall refer the reader to the thoughtful examination of T. ROE, M. HAPPOLD, *Settlement of Investment Disputes under The Energy Charter Treaty*, Cambridge: Cambridge University Press, 2011, in particular ch. 4.

[9] In particular, see Commission Draft Text of 12 November 2015, *Transatlantic Trade and Investment Partnership - Trade in Services, Investment and E-Commerce*. For an overview of the proposal see L.

will be concisely complemented with that of Regulation (EU) 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party. Some conclusions will be presented in the final section.

However, before getting underway, it is necessary to clarify a preliminary question. The analysis that follows is based on the working hypothesis that EU IAs are concluded as mixed agreements and, therefore, create rights and obligations under International Law for both the EU and the Member States. The conclusion of IAs by the Union exclusively would render the entire examination superfluous, provided that an international agreement can only create obligations – and therefore be infringed – by the parties to it.

II. Analysis of the legal framework set out in EU investment agreements

To begin with, IAs concluded or negotiated hitherto by the EU do not contain any rule concerning the allocation of responsibility between the EU and its Member States. Reference to responsibility is entirely omitted from the text. However, 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, all EU IAs contain a mechanism aimed at identifying the respondent to such disputes. The mechanism in question is exemplified by Art. 5 TTIP.[10] It is meaningfully titled "Request for determination of the respondent". According to Art. 5, an investor of the other party must send a notice to the EU 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 respondent in the dispute. The notice has the purpose to identify the conduct allegedly in breach of the investor's rights. The notice must also be sent to the Member State concerned if the contested conduct was performed by that Member State. 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, Art. 5 does not clarify what are the criteria on the basis of which the determination in question must be made.

It is interesting to point out a divergence between the four IAs mentioned in Section I. The TTIP and the EU-Vietnam agreements do not lay down any additional rule concerning the determination of the respondent. Not only do they avoid to elaborate on the criteria relied upon by the EU to make the determination in question. They also refrain

PANTALEO, *Lights and Shadows of the TTIP Investment Court System*, in L. PANTALEO, W. DOUMA, T. TAKACS (eds), *Tiptoeing the TTIP*, cit., pp. 77-92.

[10] The text of the TTIP proposal is available here: www.trade.ec.europa.eu. Similar provisions included in other EU IAs are Art. 8.21 CETA, Art. 9.15, para. 2, of the EU-Singapore FTA, and Art. 6 of subsection 3 of the EU-Vietnam FTA concerning the settlement of investment disputes.

from providing any guidance as to what rules the investor and the arbitral tribunal would have to apply to identify the respondent should the EU fail to deliver a response within the established timeframe. On the contrary, CETA and the EU-Singapore agreements do contemplate such instance. They enclose a similar clause according to which in the event that the investor has not been informed on time:

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.[11]

Although the language employed by this provision contains some degree of ambiguity, it seems safe to affirm that the Member State will be the respondent *only* when the claim challenges measures that were taken *exclusively* by that Member State. In other words, this provision seems to refer to acts taken by the Member State not in execution of EU Law obligations and most probably in matters that fall completely outside the scope of EU Law, such as direct taxation.[12] The EU, and the EU alone, would be the respondent in all other cases; notably, including cases in which the claim identifies:

a) measures partly taken by the EU and partly by the Member State – in other words, in cases of potential joint responsibility (which is ruled out by EU IAs); or

b) measures taken by the Member State in order to implement EU Law obligations.

The rationale behind the rules concerning the determination of the respondent analysed above is evidently that of avoiding that both the investor and the arbitrators make assessments concerning – at least indirectly – the apportionment of international responsibility between the EU and the Member States irrespective of the internal rules of the Union. An example will help illustrating this concept. Suppose that an investor is confronted with a *Micula*-scenario in which a Member State has repealed business incentives that the Union has found incompatible with its State Aid Law.[13] Such repealing is challenged by a foreign investor for being a violation of its rights. Absent any procedural rule in the relevant IA, the investor would have to identify the respondent in accordance with the rules of general international law concerning international responsibility. According to the provisions of the already mentioned ASR and DARIO, the investor could sue the Member State as the entity to which under the rules of ASR the

[11] See, for example, ch. 8, Art. 21, para. 4, CETA.

[12] For an analysis of the potential interaction between tax measures and investment protection see E. De Brabandere, *Complementarity or Conflict? Contrasting the Yukos Case before the European Court of Human Rights and Investment Tribunals*, in *ICSID Review*, 2015, pp. 345-355.

[13] 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 C. Tietje, C. Wackernagel, *Enforcement of Intra-EU ICSID Awards: Multilevel Governance, Investment Tribunals and the Lost Opportunity of the "Micula" Arbitration*, in *The Journal of World Investment and Trade*, 2015, pp. 205-247.

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 Art. 17 DARIO 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 (and the tribunal) 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.[14] 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. It is exactly to avoid a scenario of this type that the TTIP and other new generation IAs contemplate rules aimed at *internalising* the choice of the respondent to an investment dispute based on these Treaties.

The aforementioned internalisation of the choice of the respondent attempts to create a complete proceduralisation of the dispute and of the substantive issues relating to the attribution of responsibility between the EU and the Member States,[15] with a view to safeguarding the autonomy of the EU legal order from external interferences.[16] No doubt that the mechanism in question reduces the risk of interferences to a large extent. However, it does not eliminate such risk altogether. One has to consider that the EU may not determine the respondent party within the time limit set out by the agreements. In such instance, while under CETA and the EU-Singapore FTA the investor would have to apply the alternative criteria set out in the agreements, under the TTIP and the EU-Vietnam FTA it would have no indications whatsoever. Therefore, it seems reasonable to expect that the investor would resort to general international law and designate the respondent accordingly. In both cases the arbitral tribunal will also have its saying on the matter. Under CETA (and EU-Singapore) it would have to review whether or not the investor has correctly applied the alternative criteria laid down in Art. 21, para. 4, CETA (and in the corresponding EU-Singapore provision). Under the TTIP and EU-Vietnam it would review, apply and interpret the rules of international law as applied and interpreted by the investor in order to determine the proper respondent. From this perspective, the solution adopted by CETA and the EU-Singapore FTA seems to be more

[14] It seems worth noting that while DARIO 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.

[15] See A. DIMOPOULOS, *The Involvement of the EU in Investor-State Dispute Settlement: A Question of Reponsibilities*, cit., p. 1702.

[16] See N. LAVRANOS, *Is an International Investor-State Arbitration System under the Auspices of the ECJ Possible?*, in N. JANSEN CALAMITA, D.C. EARNEST, M. BURGSTALLER, *The Future of ICSID and the Place of Investment Treaties in International Law*, London: British Institute of International and Comparative Law, 2013, pp. 129-148; S.W. SCHILL, *Luxembourg Limits: Conditions for Investor-State Dispute Settlement under Future EU Investment Agreements*, in M. BUNGENBERG, A. REINISCH, C. TIETJE, *EU and Investment Agreements: Open Questions and Remaining Challenges*, Baden-Baden: Nomos, 2013, pp. 37-54.

suitable to the characteristics of the EU legal order. As has been already pointed out above, the broad language employed by the clause included in such agreements seems to make sure that the Member States will be the respondent only when the claim relates to questions falling under their exclusive competence – i.e. questions that are of no EU Law relevance. Whenever the dispute contains an EU Law component, it is the Union that will have to act as respondent, no matter how little relevant is the EU Law component with respect to the number and extent of legal issues at stake in the dispute taken as a whole. On the contrary, failure to determine the respondent on time may have massive consequences under the TTIP as it currently stands. Such failure 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. It is therefore regrettable that the TTIP and the EU-Vietnam FTA do not replicate the safeguard clause contained in CETA.

III. The role of the claimant and of the arbitral tribunal: is there a possibility to set aside the determination of the respondent made by the EU?

A relevant question that may be raised is whether or not the investor and the arbitral tribunal would be able to make an independent assessment of questions relating to responsibility even when the determination of the respondent is duly and timely delivered by the EU. In order words, whether or not the investor and the arbitral tribunal would be able to challenge and review that determination.

As it has been rightly pointed out, "arbitral tribunals must be satisfied that the respondent party bears international responsibility, in order to consider a claim admissible".[17] Hence, in order to ascertain whether or not the claim is admissible, investment tribunals should make sure that the investor sued the respondent designated in accordance with the rules set out in the IA, and that the respondent so determined is the one that bears international responsibility. No doubt that the tribunal must reach that *prima facie* conclusion at the stage of so-called preliminary objections in order not to dismiss the claim as inadmissible. Given that EU IAs contain no rule whatsoever on issues of responsibility the question is therefore *how*, or *on the basis of what rules*, that *prima facie* assessment must be made.

First and foremost, it is worth emphasising that it is highly unlikely that a claim be declared inadmissible by the tribunal *proprio motu*, that is to say without an explicit ob-

[17] See A. Dimopoulos, *The Involvement of the EU in Investor-State Dispute Settlement: A Question of Reponsibilities*, cit., p. 1683.

jection raised by the interested party.[18] In other words, in order for a claim to be found inadmissible *ratione personae* on this ground, an inadmissibility objection must be raised by either the claimant, or by the respondent party. An examination of the rules of EU IAs clarifies that, in case the EU or a Member State acts as a respondent, they would not be able to raise such objection. In accordance with Art. 5 TTIP,

> "neither the European Union nor the Member State concerned may assert the inadmissibility of the claim, lack of jurisdiction of the Tribunal or otherwise assert that the claim or award is unfounded or invalid on the ground that the proper respondent should be or should have been the European Union rather than the Member State or vice versa".

Needless to say, such provision only applies if the determination was made by the EU. All other EU IAs include a similar provision, which by no accident is part of the clause concerning the determination of the respondent. The rationale of this provision seems to be to avoid that Member States repudiate the determination made by the EU in accordance with the agreement. They are prevented from claiming that the determination thus made is wrong. The safeguard clause in question seems to be based on elementary considerations of reasonableness and good faith in the application of a treaty. For the judicial repudiation of the determination of respondent made by the EU in the pre-judicial stage would be nonsensical and would suggest that the determination at hand was not made in good faith but for the 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 IAs. Art. 5 TTIP is devised to prevent exactly that contingency. 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 arbitral tribunal could easily reject the objection in question in accordance with Art. 5 TTIP and the likes.

The provision analysed above does not, however, rule out the possibility that an objection of inadmissibility 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 *Monetary Gold* case.[19] That is as early as 1954.

[18] See M. Waibel, *Investment Arbitration: Jurisdiction and Admissibility*, in *Legal Studies Research Paper Series,* Paper no. 9, University of Cambridge, 2014, pp. 67-68.

[19] 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.

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.[20] In that instance the applicant State, namely Serbia, did not raise objections itself but essentially requested the ICJ to uphold the objections to its jurisdiction 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.[21] A twofold lesson can be learnt from these precedents. On the one hand, they 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. On the other hand, they also suggest that the claimant would only raise such an objection if it has a direct interest – usually in the form of an immediate advantage – 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. If only to bring an action for damages against the Union before its own courts.

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 the relevant IA may indeed want to raise an inadmissibility objection. There seems to be no rule in the Treaties concerned that would prevent the investor from doing so. The question therefore becomes whether or not an arbitral tribunal 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 IAs, for the latter do not lay down any rules that serve this purpose. The only possibility would be that of determining the respondent in accordance with the rules of general International Law, namely ASR and DARIO. However, it is not easy to see why an arbitral tribunal would be able to disregard the text of a treaty to the benefit of the rules of general international law. 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

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

[21] See, in particular, ivi, para. 38 *et seq.*

that, as a result, they are not *special* with respect to the *general* rules established by ASR and DARIO. After all, the principle in question only applies to rules governing the same subject-matter. As a result, according to one observer, "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".[22] 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 may declare the claim inadmissible *ratione personae* "where the conduct or responsibility is attributed to a party other than the respondent".[23] One might respectfully question the correctness of this position. Rules concerning the unilateral identification of the respondent, such as those analysed in this article, are aimed to circumvent the difficult process of attributing the wrongful conduct 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, and the attribution of the conduct, formally remain an internal matter.[24] The consequential effect of this state of affairs is "to open the way to the logically subsequent step of allocating responsibility".[25] This, in turn, seems to suggest that the identification of the respondent made under EU IAs 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.[26] Put it different, 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.[27] From this perspective, a distinction between rules on responsibility and rules on the determination of the respondent party appears to be only ostensible. One thing necessarily entails the other. If this interpretation is correct, it seems safe to conclude that the determination made by the EU in accordance with the IA cannot be set aside by the arbitral tribunal based on the argument that the designated party is not the one *prima facie* responsible of the violation of the agreement in question.

[22] See H. LENK, *Issues of Attribution: Responsibility of the EU in Investment Disputes under CETA*, in *Transnational Dispute Management*, 2016, p. 21.

[23] Ivi, pp. 20-21.

[24] This view is delightfully expressed by E. CANNIZZARO, *Beyond the Either/Or*, cit., notably at pp. 308-312.

[25] *Ibid*.

[26] See P. PALCHETTI, *The Allocation of International Responsibility in the Context of Investor-State Dispute Settlement Mechanism Established by EU International Agreements*, cit., p. 84.

[27] A different question is whether or not the determination of the respondent could also be understood as *acknowledgment and adoption* of a conduct within the meaning of Art. 11 ASR and Art. 9 DARIO. This question cannot be further analysed in this article. However, it is discussed, perhaps in a somewhat cursory way, by the Report of the International Law Commission, Sixty-third Session, 26 April-3 June and 4 July-12 August 2011, A/66/10, p. 97.

IV. The regulation on financial responsibility

At the end of this overview of the rules contained in EU IAs, it seems appropriate to succinctly analyse the internal rules laid down in Regulation 912/2014. From the outset, it is worth to emphasise that the Regulation does not contain rules concerning the attribution or the allocation of the international responsibility for breaches of EU IAs to the Union or its Member States. Of course, the regulation cannot unilaterally impose rules on third countries. This circumstance is explicitly recognised by Regulation 912/2014 itself. According to the fifth recital, the Regulation aims at attributing (financial) responsibility "as a matter of Union law". However, its provisions are inextricably interconnected with questions concerning international responsibility. The third recital 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".

In brief, according to the rules laid down by Regulation 912/2014 the attribution of financial responsibility generally corresponds with the acquisition of the respondent status in a dispute. Apart from a few exceptions,[28] the general principle is that the EU shall bear financial responsibility and act as respondent where a) the treatment challenged was afforded by the Union, or b) it was afforded by a Member State in order to comply with EU Law – unless the action taken by the Member State was necessary to remedy an inconsistency with Union law of a prior act.[29] The aim of this provision is clearly to avoid that the EU (literally) pays the price of a *Micula* scenario.[30] The rationale behind Regulation 912/2014 is that financial responsibility and respondent status lie with the entity that has the competence to adopt the treatment in question, in accordance with the EU longstanding competence-based approach to responsibility.[31] A general departure from the competence-based scheme would occur in case the treatment that has allegedly violated the investor's right was a consequence of a Member State's erroneous implementation or enforcement of EU Law. This instance would hardly be

[28] To name but one exception, according to Art. 9, para. 3, of Regulation 912/2014 the general criteria do not apply "where similar treatment is being challenged in a related claim against the Union in the WTO". In such instance, the Commission may decide that the EU is to act as respondent also in the investment dispute irrespective of any other rule laid down in Regulation 912/2014.

[29] See Art. 3 and Art. 9 of Regulation 912/2014.

[30] See footnote 12, *supra*.

[31] See P. Palchetti, *The Allocation of International Responsibility in the Context of Investor-State Dispute Settlement Mechanism Established by EU International Agreements*, cit., p. 78.

covered by the provision of Regulation 912/2014 stating that the EU would assume responsibility where the Member State's action was required by Union Law. Thus, this would be the only scenario in which a Member State may find itself acting as respondent in a dispute concerning a field falling under EU competence, including exclusive competence. However, given that the Member State's action in question was not, strictly speaking, required by EU Law, an arbitral decision rendered against that action would hardly encroach upon the division of competence. In addition, Regulation 912/2014 seems to offer some adequate instruments to this end. For example, Art. 9, para. 1, let. b, stipulates that a Member State can agree with the Commission not to appear as respondent in a dispute in which it should do so according to the rules set out by Regulation 912/2014. Such rule could be applied whenever the dispute concerns an area falling under EU exclusive competence. Furthermore, one has to bear in mind that the Member States can always be empowered by the EU to act in areas falling within the exclusive competence of the latter, in accordance with Art. 2, para. 1, TFEU. Acting as respondent in an investment dispute could certainly be covered by such empowerment.

V. Conclusions

The analysis of the rules of EU IAs concerning the determination of the respondent status and of responsibility issues leads to some conclusions. First of all, the determination of the respondent made by the Union, according to the mechanisms mentioned in the previous pages, cannot be set aside by the tribunal 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. Secondly, and consequently, by depriving the investor of the right to choose the respondent, and the tribunal of the power to review such choice, EU IAs seem to create a complete proceduralisation of substantive issues concerning the allocation of responsibility between the EU and its Member States, thus internalising all discussions on the relation between the competence divide and international responsibility. Thirdly, the said proceduralisation is not fully accomplished under some EU IAs, more specifically the TTIP and the EU-Vietnam FTA. These agreements, in fact, do not lay down any rule concerning the determination of the respondent in case the EU does not identify it itself within the prescribed time limit. As already pointed out above, this appears to be a loophole. It could potentially allow the investor and the arbitral tribunal to resort to the rules of general International Law. Fourthly, the rules of this new generation of EU IAs seem to be an evolution of the solution adopted in the ECT. Contrary to the TTIP and the likes, the investor is not obliged to seek clarification as to who has to act as respondent in an investment dispute originating under the ECT. The investor is free to avail itself of this possibility or ignore it altogether.[32] From an EU

[32] See F. Hoffemeister, *Litigating against the European Union and Its Member States*, cit., pp. 735-736.

Law viewpoint, it is clear that the mandatory designation provided for by the TTIP is more suitable to accommodate the specific characteristics of the EU legal order, especially in terms of safeguarding the internal rules of the organisation.

In summary, the provisions of EU IAs concerning the determination of the respondent seem to be able to set an excellent illustration of how IDS to which the EU is a party should be devised. The adoption of rules of proceduralisation appears to be the best way forward. It seems capable of guaranteeing the participation of the Union to international adjudication while preserving the internal specific characteristics of its legal order. It should not go unmentioned that the solution in question seems also to be sufficiently satisfactory for the other party to the dispute. The examination carried out above has showed that, in principle, it cannot be excluded that the claimant is unhappy with the respondent identified by the EU. Nonetheless, the mechanism in question seems to provide sufficient legal certainty inasmuch as it guarantees that a respondent is always identified – and, most importantly, is unable to raise preliminary objections on grounds of inadmissibility *ratione personae* of the claim. For this reason, the solution devised by EU IAs seems also likely to be well received by third countries, whose main concern – at least in the context of an investment treaty – is to provide their nationals with adequate protection for their investments. The practice suggests that the acceptance of the rules concerning the determination of the respondent has not been an issue in recent negotiations.

Should such mechanism become the EU's standard position when it comes to participating to IDS, the development of a constant and consistent practice may eventually give rise to the long-awaited special rule of International Law,[33] at least in the long-run. It is true that rules of proceduralisation make the discussion concerning the allocation of responsibility an internal EU Law matter. However, it is also true that for each agreement concluded there is a third country that has accepted it. A broad acceptance of rules of this kind may be expressive of an emerging practice pointing to the recognition that the settlement of disputes involving a *sui generis* international actor such as the EU must follow different rules than those already existing under general International Law.

[33] For a tentative formulation of such *special rule*, see ivi, pp. 745-747.