Division of Competences, EU Autonomy and the Determination of the Respondent Party: Proceduralisation as a Possible Way-Out?

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I. Introduction

The academic debate concerning the international responsibility of the European Union (EU) has flourished in recent years.[1] Much ink has been

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The present contribution reflects the shared opinion of its authors. Nevertheless, Sections II and III should be attributed to Cristina Contartese, and Section IV to Luca Pantaleo. As for Cristina Contartese, the present project was supported by the National Research Fund – Luxembourg, and co-funded under the Marie Curie Actions of the European Commission (FP7-COFUND). The authors wish to thank Simone Vezzani for his useful comments. The usual disclaimer applies.

1 It would probably be impossible, and certainly unnecessary, to provide an exhaustive list of the scholarly writings devoted to this issue. See, in particular, 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?", *European Journal of International Law* 21, no. 3 (2010), 723-747; L. Gasbarri, "Responsabilità di un"organizzazione internazionale in materia di competenza esclusiva: imputazione e obbligo di risultato secondo il Tribunale internazionale del diritto del mare", *Rivista di diritto internazionale*, 2015, 911; 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), 304; P.J. Kuijper, E. Paasivirta, "EU International Responsibility and its Attribution: From the Inside Looking Out", in M. Evans, P. Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Oxford: Hart Publishing, 2013), 35; J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (Deventer: Kluwer Law International, 2001); J. D"Aspremont, "A European Law of International Responsibility?", in V. Kosta et al. (eds), *The EU Accession to the ECHR* (Oxford: Hart Publishing, 2014), 75; A. Dimopoulos, "The Involvement of the EU in Investor-State Dispute Settlement: A Question of Reponsibilities", *Common Market Law Review* 51, no. 6 (2014), 1671; P. Palchetti, "The Allocation of International Responsibility in the Context of In-

spilled on how well-suited the rules on the responsibility of international organisations as codified by the International Law Commission (ILC) are to the EU.[2] In particular, as is well known, the fact that the EU has traditionally advocated that the allocation of responsibility between a regional economic international organisation (REIO) and its Member States should follow the internal rules of the organisation, while the ILC has embraced this doctrine only to a limited extent, is at the heart of that debate. Less attention, however, has been devoted to the techniques for identifying the respondent in a dispute involving the EU and its Member States, notwithstanding that the determination of the respondent party is deeply intertwined with the question as to how to allocate responsibility. For instance, filing a claim against the wrong respondent, inevitably, entails consequences for the outcome of the proceedings, as the risk of a responsibility gap is not excluded should the wrong respondent be brought before an international court or tribunal. Furthermore, under certain circumstances, enabling the EU and its Member States to determine the respondent party would amount to an implicit recognition of their (alleged) responsibility. The relationship between the identification of the respondent and the allocation of responsibility is the issue that the present work aims to tackle.

In the course of the analysis, attention will be devoted to the principle of the autonomy of the EU legal order as well as to the requirements for legal certainty of the third parties involved in the dispute. The interests of both parties to a dispute, in fact, need to be secured while determining whether the Union and/or one or more of its Member State is the respondent. From a third party's perspective, the Union cannot underestimate their requests for predictability. From an EU perspective, the decision of an international court or tribunal regarding the determination of the respondent may potentially affect the division of competences between the Union and its Member States, resulting in an infringement of the autonomy of the EU legal order as defined by the case law of the Court of Justice of the European Union ("the CJEU", "the ECJ" or "the Court of Luxem-

vestor-State Dispute Settlement Mechanism Established by EU International Agreements", in L. Pantaleo, M. Andenas (eds.), C. Reul (ass. ed.), *The European Union as a Global Model for Trade and Investment,* University of Oslo Faculty of Law Legal Studies Research Paper Series no. 2 (2016), 77.

2 See Draft Articles on Responsibility of International Organisations (DARIO), UN Doc A/Res/66/100, 27 February 2012.

bourg") over the years.[3] As is well known, although the Court of Justice has constantly emphasised that "The Community's competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions",[4] it has also stated that "an international agreement may affect its own powers only if the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order".[5] In particular, regarding the need to protect the division of competences during the determination of the respondent by an international jurisdiction, the CJEU, in Opinion 1/91, observed that the fact that a court "may be called upon to interpret the expression 'Contracting Party', within the meaning of … the agreement, in order to determine whether, for the purposes of the provision at issue, [such an] expression … means the Community, the Community and the Member States, or simply the Member States [implies that such a court] will have to rule on the respective competences of the Community and the Member States as regards the matters governed by the provisions of the agreement".[6] In the more recent Opinion 2/13, the CJEU ruled that the European Court of Human Rights (ECtHR or "the Court of Strasbourg"), in reviewing whether the condi-

3 See C. Contartese, "The Autonomy of the EU Legal Order in the CJEU"s External Relations Case-Law: From the "Essential" to the "Specific Characteristics" of the Union and Back Again", *Common Market Law Review* 54 (2017), 1627-1672.

4 Opinion of 14 December 1991, 1/91, *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*, EU:C:1991:490, paras 40 and 70. Later recalled in Opinion of 8 March 2011, 1/09, *Creation of a unified patent litigation system*, EU:C:2011:123, para 74; and Opinion of 18 December 2014, 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, EU:C:2014:2454, para 182.

5 Opinion of 18 December 2014, 2/13, *supra* note 4, para 183. See also Opinion of 18 April 2002, 1/00, *Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area*, EU:C:2002:231, paras 21, 23 and 26, and Opinion of 8 March 2011, 1/09, *supra* note 4, para 76; and, to that effect, Judgment of 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P & C-415/05 P EU:C:2008:461, para 282.

6 Opinion of 14 December 1991, 1/91, *supra* note 4, para 34.

tions to allow both the Union and its Member State to be parties to the proceedings are met, "would be required to assess the rules of EU law governing the division of powers between the EU and its Member States as well as the criteria for the attribution of their acts or omissions, in order to adopt a final decision in that regard which would be binding both on the Member States and on the EU".[7] The Court of Luxembourg concluded that "such a review would be liable to interfere with the division of powers between the EU and its Member States".[8]

A succinct overview of the techniques to which an applicant and an international court or tribunal may refer in order to identify the respondent will be provided in Section II. These techniques, namely declarations of competence, rules providing for the automatic allocation of joint responsibility to both the EU and the Member State(s) concerned, and "proceduralisation", will be briefly presented from a comparative perspective aiming at identifying which is best suited to accommodate the interests of both third parties and the Union. After demonstrating that declarations of competence and rules on joint responsibility are not sufficient to safeguard the EU's *sui generis* characteristics, and that the former is unable to secure legal certainty and transparency for third parties, it will be suggested that a (procedural) rule that allows the EU and its Member States to coordinate their position on the matter is the most suitable solution, from an EU law perspective as well as from the point of view of the third party involved, in so far as it enables the latter to correctly address the respondent. The chapter will then focus on two recent case-studies concerning the codification of procedural rules. Section III will analyse the co-respondent mechanism as proposed under the Draft agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Draft EU Accession Agreement"). Section IV will examine the mechanism laid down in the EU investment agreements (such as CETA and TTIP) for the settlement of Investor-State disputes. Some conclusions will be presented in Section V.

7 Opinion of 18 December 2014, 2/13, *supra* note 4, para 224.
8 *Id.*, para 225.

II. Techniques for Identifying the Respondent: Declaration of Competences, Joint Responsibility and Rules of Proceduralisation

In order to identify the respondent, a party to a dispute as well as an international court or tribunal may rely on various techniques as set out under certain mixed agreements.[9] The first one is the declaration of competences, whereby the EU and its Member States attempt to inform the contracting parties of the division of competences in relation to provisions regulated in the agreement. The second technique is the "joint responsibility" rule, which implies an automatic allocation of responsibility to both the EU and its Member States in the case of mixed agreements without questioning the respective division of competences or any other relevant rule for that purpose. The third mechanism is "proceduralisation", which establishes a procedural framework for deciding the matter at stake. [10] In the context of the present chapter, attention will be given to those rules of proceduralisation that allow the Union and its Member States to determine, internally, the proper respondent. This section will provide an overview of the three mentioned techniques and will conclude, while highlighting differences and limits, that the mechanism that allows the EU and its Member States to manage the issue as an internal matter appears to be

9 For the purpose of the present work, only techniques expressly laid down in the agreements are taken into consideration. Consequently, treaties that are silent on the matter under consideration, such as the World Trade Organisation agreement (WTO), will not be part of the analysis. For the arrangements of the Union and its Member States before the WTO dispute settlement bodies that are the result of a pragmatic approach leading to an active role of the European Commission, see J. Heliskoski, "Joint Competence of the European Community and its Member States and the Dispute Settlement Practice of the WTO", *Cambridge Yearbook of European Legal Studies* (1999-2000), 61-85.

10 For the definition of "proceduralisation", see J. Heliskoski J., *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States*, *supra* note 1, 158, who refers to the strategy of proceduralisation explaining that, as for mixed agreements, "in actual practice, the problems of whether the other parties are entitled to address at will anyone on the Community side or whether the latter should rather be given the right to object and decide the matter for themselves are capable of being subjected to a procedure which defers material solutions to the problems, in a sense that none of the interests relating to the conduct of the settlement will have to be overridden". See also A. Delgado Casteleiro Casteleiro, "The International Responsibility of the European Union— The EU Perspective: Between Pragmatism and Proceduralisation", *Cambridge Yearbook of European legal studies* 15 (2012), 575-577.

the most appropriate solution from an EU perspective, as it safeguards the autonomy of the EU legal order, as well as from a third party's side, as it ensures the correct respondent is addressed.

A. Declarations of Competence

Declarations of competence are instruments inserted into mixed multilateral agreements, and are usually adopted as an annex to the ratifying decision of the Council and filed with the agreement at the ratification or accession stage.[11] This practice is the result of a request from one or more third parties, who are concerned about the allocation of obligations and responsibility between the EU and its Member States for the purpose of the agreement at stake. However, despite being a widespread practice,[12] declarations of competence display several limits that undermine the purpose of their adoption. Amongst their criticisms of such declarations, legal scholars rightly point out that these are not accurately drafted because of the inherent difficulty in doing so, do not reflect the dynamic nature of the division of competences, and are not usually updated.[13]

Moreover, their (limited) application, at EU and international level, does not allow further light to be shed on the relevance of these instruments. As for their application by the CJEU,[14] it has been rightly stated

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11 On declarations of competence, see, in particular, L. Lijnzaad, "Declarations of Competence in the Law of the Sea, a Very European Affair", in M. W. Lodge, M. H. Nordquist (eds), *Peaceful Order in the World"s Oceans. Essays in Honor of Satya N. Nandan* (Leiden: Brill, 2014), 186-207; J. Heliskoski, "EU Declarations of Competence and International Responsibility", in M. Evans, P. Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives*, *supra* note 1, 189-212; A. Delgado Casteleiro Casteleiro, "EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?", *European Foreign Affairs Review* 17, no. 4 (2012), 491.

12 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.

13 A. Delgado Casteleiro Casteleiro, "EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?", *supra* note 11, 498; J. Heliskoski, "EU Declarations of Competence and International Responsibility", *supra* note 11, 200.

14 For the Court of Justice"s case law where declarations of competence played a role, see Judgment of 8 March 2011, *Lesoochranárske zoskupenie VLK* v *Ministerstvo zivotného prostredia Slovenskej republiky (LZ)*, C-240/09, EU:C:2011:125;

that the Court's case law is not consistent.[15] This emerges, in particular, from the comparison of the two most recent cases dealing with declarations of competence. While in the *MOX Plant* case the declaration of competence played an important role in the Court's concluding that "there has been a transfer to the Community of areas of shared competence" [16] and was deemed "a useful reference base",[17] in the "*Brown bear"* case it was dismissed by the Court, which did not provide any interpretation thereof for the purpose of defining its jurisdiction.[18]

At the international level, some cases seem to suggest that it was the existence of a declaration of competence that played a key role in identifying the proper respondent or the responsible entity in a dispute. In the *Chile* v *European Communities* case,[19] as regards the choice to bring the case against the EU rather than one of its Member States, the declaration of competence, laying down an EU exclusive competence on the subject in question, was probably decisive.[20] The recent *Advisory Opinion* of the International Tribunal for the Law of the Sea (ITLOS)[21] has in common with

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Judgment of 20 April 2010, *Commission* v *Sweden*, *(PFOS),* C-246/07, EU:C:2010:203; Judgment of 10 January 2006, *Commission* v *Council (Rotterdam Convention),* C-94/03, EU:C:2006:2; Judgment of 30 May 2006, *Commission* v *Ireland (MOX Plant),* C-459/03, EU:C:2006:345; Opinion of 6 December 2001, 2/00, *Cartagena Protocol*, EU:C:2001:664.

15 See, in particular, A. Delgado Casteleiro Casteleiro, "EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?", *supra* note 11, 491-510.

16 Judgment of 30 May 2006, *Commission* v *Ireland (MOX Plant), supra* note 14, paras 99-108.

17 *Id.*, para 109.

18 Judgment of 8 March 2011, *Lesoochranárske zoskupenie VLK* v *Ministerstvo zivotného prostredia Slovenskej republiky (LZ), supra* note 14*,* paras 39-40.

19 ITLOS, Case No. 7, *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union),* so-called "Swordfish" case.

20 See T. Treves, "The European Community and the Law of the Sea Convention: New Developments", in E. Cannizzaro (ed), *The European Union as an Actor in International Relations* (The Hague: Kluwer, 2002), 294.

21 ITLOS, "Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission", Case n. 21, 2 April 2015. See C. Contartese, "Competence-Based Approach, Normative Control and the International Responsibility of the EU and its Member States: What does the Recent Practice Add to the Debate?", *International Organizations Law Review* (forthcoming); L. Gasbarri, *supra* note 1, 911.

the aforementioned case the fact that it relates to matters falling under the exclusive competence of the Union as expressed in the declaration of competence. However, the ITLOS did not rely solely on the declaration of competence, as another legal element was also decisive. The Tribunal, as a preliminary point, recalled that, under the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the liability of an international organisation for an internationally wrongful act is linked to its competence and that the declaration of competence lays down the exclusive competence of the EU for the subject matter in question. It relied, moreover, on the fact that the EU was the only contracting party to the agreement with the third party concerned, as the Union declared in its written statement, to conclude 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".[22] The case in point, therefore, is one falling under the debate on the obligations and responsibility for pure EU agreements, that is, agreements concluded by the EU only, as opposed to mixed agreements.[23] What can be inferred from this (limited) practice is that the role of the declarations of competence cannot be ruled out, or that, at the very least, competences have a role to play together with other internal rules of the organisation concerned.

A further argument against adopting declarations of competence comes from the perspective of the international responsibility regime. Heliskoski, in particular, has questioned the direct relationship between the possession of a competence and the allocation of responsibility. The author observes that "if there had been a declaration of competence, however meticulously drafted, the relationship between the concepts of competence and responsibility is a much more nuanced one, so that, within the system of general international law of international responsibility, the incidence of competence should not be conceived of as providing an appropriate criterion for determining the incidence of responsibility".[24] He further explains that

22 ITLOS, Case n. 21, para 173.

23 On the responsibility under pure EU agreements, see A. Rosas, "International Responsibility of the EU and the European Court of Justice", in M. Evans, P. Koutrakos (eds.), *supra* note 1, p. 139, at 151; P. Palchetti, "The Allocation of International Responsibility in the Context of Investor-State Dispute Settlement Mechanisms Established by EU International Agreements", *supra* note 1, 82-83.

24 Heliskoski, "EU Declarations of Competence and International Responsibility", *supra* note 11, 192.

"the essential criterion for the purposes of establishing responsibility is rather the impact or influence that a measure undertaken by the organization (decision, authorization, recommendation) is deemed to have upon the Member States. The mere possession of certain "competence" by the organization is not sufficient for that organization to incur responsibility for an act attributable to its Member State".[25]

For the purposes of the present work, additional observations can be drawn from EU and third party perspectives. As far as the autonomy of the EU legal order is concerned, the declarations of competence do not seem able to preserve this principle, as the international court or tribunal that is required to give a ruling on the international responsibility of the Union and/or its Member States could potentially deal with the division of competences while interpreting these declarations. Moreover, in light of their "imprecise, incomplete and open-ended"[26] nature, much room for interpretation would be left to the international court or tribunal charged with applying them. Once again, because of their nature, they are not able to guarantee certainty to third parties. Against this background, it comes as no surprise that legal scholars are particularly critical of declarations of competence as a technique for informing third parties as to the division of competence between the EU and its Member States.[27]

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25 *Id.*, 194.

26 *Id.*, 202.

27 See, in particular, A. Delgado Casteleiro, "EU Declarations of Competence to Multilateral agreements: A useful reference base?", *supra* note 11, 502-503, who concludes that "These declarations externalize not only the internal division of competences, but also the problems and questions attached to the vertical division of powers in the EU"; J. Heliskoski, ("EU Declarations of Competence and International Responsibility", *supra* note 11, 205), observes that "some of the objectives behind the requirement of such declarations, including the achievement of legal certainty and predictability in regard to the question of international responsibility, are, if not shattered, at least seriously compromised"; I. Govaere, ("Beware of the Trojan horse: Dispute Settlement in (Mixed) Agreements and the Autonomy of the EU Legal Order", in C. Hillion, P. Koutrakos (eds.), *Mixed Agreements Revisited. The EU and its Member States in the World* (Oxford: Hart Publishing, 2010), 204), states that the "practice of inserting a 'declaration of competence" … exports EU problems to the international level". For the perspective of third states, see P. Olson, ("Mixity from the Outside: the Perspective of a Treaty Partner", in Hillion, Koutrakos (eds.), 335-337, spec. 336), who argues that "Such a declaration is not a particularly useful document from the point of view of the EU"s treaty partners". See also A. Rosas, "Exclusive, Shared and National Competence in the Context of EU External Relations: Do Such Distinctions Matter?", in I. Govaere et

B. Joint Responsibility

Under mixed agreements, a further technique that may appear appropriate for "easily" identifying the respondent 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".[28] For the purpose of the present work, the existence of a rule of joint responsibility in an international agreement would suggest to an applicant party that the correct respondents are both the EU and its Member States, while an international court or tribunal would be able to allocate responsibility to both respondents without investigating EU law.

Amongst the agreements to which the EU and its Member States are parties, the ones that expressly foresee joint responsibility as the rule are rare.[29] Nevertheless, in academic debate, the relevance of joint responsi-

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al. (eds.), *The European Union in the World. Essays in Honour of Marc Maresceau* (The Hague: Martinus Nijhoff Publishers, 2014), 30, at 37; P.J. Kuijper, E. Paasivirta, "EU International Responsibility and its Attribution: From the Inside Looking Out", *supra* note 1, 55-57. A more nuanced position is expressed by F. Hoffmeister, ("Curse or Blessing? Mixed Agreements in the Recent Practice of the European Union and its Member States", in C. Hillion, P. Koutrakos (eds), *supra* 260), who, while recalling the vague nature of the declarations of competence, recognise some merits in them.

28 A. Nollkaemper, "Joint Responsibility between the EU and Member States for Non-Performance of Obligations under Multilateral Environmental Agreements", *supra* note 1, 310.

29 See United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) UNTS 1833, Article 139 "Responsibility to ensure compliance and liability for damage"; Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997, in force 16 February 2005), Article 4, para 6. Under other agreements, joint responsibility is a subsidiary rule should the European Union and its Member States be unable to provide the necessary information on their respective competence. See UNCLOS, footnote n. 48; and 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, Article 19 "Responsibility and Liability". For a comment on this latter, see P. Olson, "Mixity from the Outside: the Perspective of a Treaty Partner", in C. Hillion, P. Koutrakos (eds), *Mixed Agreements Revised, supra* note 27, 343-344,

bility arises from its having been supported, more broadly, in the case of mixed agreements.[30] This was so especially in light of the reading 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 international mixed agreements unless a declaration of competence is provided.[31] In reality, this case specifically refers to a mixed bilateral agreement where the then EC and its Member States were one, undivided contracting party to the treaty.

Moreover, further arguments militate against the automatic application of joint responsibility to any mixed agreement. It has been pointed out, in fact, that in some circumstances, joint responsibility would lead to unacceptable results, such as where wrongful acts are committed *ultra vires,*[32] and where the phenomenon of "false mixed agreements", that is, agree-

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332. P. Olson also stated 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". On joint responsibility and multilateral environmental agreements, see A. Nollkaemper, "Joint Responsibility Between the EU and Member States for Non-Performance of Obligations under Multilateral Environmental Agreements", *supra* note 1, 304.

30 For the early debate on mixed agreements and international responsibility, see, *inter alia*, G. Gaja, "The European Community"s Rights and Obligations under Mixed Agreements", in D. O"Keeffe, H. Schermers, (eds.), *Mixed Agreements* (Deventer: Kluwer, 1983), 133; C. Tomuschat, "Liability for Mixed Agreements", *id.,* 125; for the more recent debate, see E. Neframi, "International Responsibility of the European Community and its Member States under Mixed Agreements", in E. Cannizzaro (ed), *The European Union as an Actor in international relations*, *supra* note 20, 193; M. Cremona, "External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law", *EUI Working Papers*, no. 22/2006, 20; P-J. Kuijper, "International Responsibility for EU Mixed Agreements", in C. Hillion, P. Koutrakos (eds), *supra* note 27, 208.

31 Judgment of 2 March 1994, *European Parliament* v *Council*, C-316/91, EU:C:1994:76, paras 24-35; Judgment of 7 October 2004, *Commission* v *French Republic ("Etang de Berre")*, Case C-239/03, EU:C:2004:598, paras 26-30.

32 M. Björklund, "Responsibility in the EC for Mixed Agreements – Should non-member Parties Care?", *Nordic Journal of International Law* 70 (2001), 373, who argues that "if applied strictly, in what would have to be conceived as its fullest extent, joint liability in the context of mixed agreements might apparently lead to certain unacceptable results" (at 387).

ments where mixity is not necessary or is a mere possibility, takes place.[33] Most importantly, the main argument against joint responsibility under mixed agreements is based on the fact that it is not disputed that identifying who bears responsibility under international law goes beyond the (exclusive or shared) nature of the competences leading to mixity. As is well known, the attribution of responsibility may depend on different models, such as the organic model, the competence model or the consensus model,[34] suggesting that their application should be assessed on a case-by-case basis or, at least, within the framework of each individual international treaty regime.

To summarise, although there may be cases where joint responsibility is correctly attributed, what is challenged here is its automatic application under any mixed agreement. This technique could appear as an "easy solution" for accommodating the specific characteristics of the EU legal order, given that neither the applicant party nor the international jurisdiction is required to investigate the relevant EU norms at stake. However, the joint responsibility rule is "reductive" in relation to the complexities of the regime of international responsibility of international organisations.[35]

C. Proceduralisation

The third technique for identifying the respondent is "proceduralisation".[36] Historically, the first international agreement laying down a procedure in order to allow the Union and its Member States to identify the correct re-

33 P-J. Kuijper, E. Paasivirta, "EU International Responsibility and its Attribution: From the Inside Looking Out", in M. Evans, P. Koutrakos (eds), *supra* note 1, 44-45.

34 *Id.,* 48-67.

35 A. Nollkaemper (*supra* note 1, 346) referring to non-compliance institutions, concludes that joint responsibility is "not a very efficient approach" given that "eventually, responsibility needs to follow power [to undo the situations and ensure performance of the obligation] … – though it may be a means of last resort when even non-compliance proceedings cannot determine which party has the power to do what".

36 On the rules of proceduralisation under international agreements concluded by the EU, see J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States*, *supra* note 1, 157-208; A. Rosas, "International Dispute Settlement – EU Practices and Procedures", *German Yearbook of International Law*, 46 (2004), 299-303.

spondent was the Convention for the Protection of the Rhine against Chemical Pollution (Bonn Convention), adopted on 3 December 1976.[37] Under this Convention, the applicant party to the dispute is required to transmit its request to the Member State as well as to the Union, which will have to jointly notify the party of the correct respondent/s within two months. Should that time limit not be observed, both the Union and its Member State will be regarded as constituting "one and the same party to the dispute". The same applies should the Union and its Member States jointly be a party to the dispute. The provision at issue was added later, in the Convention on the Protection of the Rhine.[38] 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,[39] the Convention on the Conservation of the European Wildlife and Natural Habitats,[40] and the Convention on Transfrontier Television of 5 May 1989.[41]

The 1982 United Nations Convention on the Law of the Sea (UNCLOS)[42] laid down a procedural rule as well,[43] which nevertheless displays

37 OJ 1977 L 240/37.

38 OJ 2000 L 289/31. Annex – paragraph 7 of the Convention on the Protection of the Rhine: "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 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".

39 OJ 2004 L 241/22, Article 47, paragraph 2 of the Convention (ETS n. 65) as amended by the additional protocol (ETS n. 103).

40 OJ 1982 L 38/3, Chapter VIII, Article 18, paragraph 3 of the Convention on the Conservation of the European Wildlife and Natural Habitats (1979).

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

42 OJ 1998 L 179/3.

43 Article 6, paragraph 2 of Annex IX, on "participation by international organizations": "Any State Party may request an international organization or its member States which are States Parties for information as to who has responsibility in respect of any specific matter. The organization and the member States concerned

important differences in relation to the aforementioned provisions.[44] First of all, under the UNCLOS, the State Party is not under an obligation to request information from an international organisation or its Member States, the provision under consideration rather leaves it as an option for the applicant State. The expression "in the case of a dispute between two Contracting Parties …, the other Party shall simultaneously transmit its request to that Member State and to the Community" is, in fact, replaced, under the UNCLOS, with "any State Party may request an international organization or its member States which are States Parties for information". Second, the UNCLOS states that this information has to be provided "within a reasonable time", failing to specify a time limit, which is, under the other aforementioned provisions, "within two months following receipt of the request". There is no difference between the UNCLOS and the other provisions with regard to the consequence of the Union and/or its Member States failing to provide the requested information, where the rule of joint responsibility would apply.

With regard to investor-State disputes under the Energy Charter Treaty ("the ECT"),[45] the procedural rule was inserted in the Union's declaration to a treaty provision, rather than in the text of the agreement.[46] The wording of such a declaration appears weaker than the provisions mentioned

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shall provide this information. Failure to provide this information within a reasonable time or the provision of contradictory information shall result in joint and several liability". Although the rationale of UNCLOS" provision is to pursue the same result as the other procedural rules, it needs to be read in the broader context of the Convention. Article 6, paragraph 2 of Annex IX to the UNCLOS lays down a procedural rule, while Article 4, paragraph 2 and Article 5, paragraphs 1-2 recall the role of declarations of competence. The relationship between competence and responsibility is expressly set out under Article 6, paragraph 1, establishing that "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".

44 J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States, supra* note 1, 168-169.

45 OJ 1994 L 380/24.

46 Statement submitted by the European Communities to the Secretariat of the Energy Charter Treaty pursuant to Article 26, paragraph 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

above as the determination of the respondent by the Union and its Member States is not compulsory, but takes place, at the request of the investor, "if [deemed] necessary". Most importantly, the footnote to the declaration seems to frustrate the purpose of the statement as it specifies that such determination is "without prejudice to the right of the investor to initiate proceedings against both the Communities and their member states". As for bilateral agreements, third parties are not generally allowed to inquire into the division of competences between the EU and its Member States.[47] What can be regarded as an exception is the agreement concluded between the EU and US on the promotion, provision and use of Galileo and GPS based satellite systems and related applications,[48] which has succinctly established that, "if it is unclear whether an obligation under this Agreement is within the competence of either the [EU] or its Member States, at the request of the United States, the [EU] and its Member States shall provide the necessary information".[49]

It is worth emphasising that a rule of proceduralisation, in order to be effective, should foresee some specific legal features. The most appropriate solution is certainly to lay down a provision that is binding – and not a simple entitlement – on the applicant party. The binding nature of the provision would then avoid a scenario where bringing the case against the wrong respondent may be contested by the respondent party before the in-

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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 T. Roe, M. Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge: Cambridge University Press, 2011), 89-103, 171.

47 The recent mixed bilateral agreements usually refer to the EU and its Member States as an undivided contracting party, using the expression "the EU and its Member States, of the one part", and the third Party, "of the other part". See, for example, Association Agreements between the European Union and its Member States, and Ukraine (OJ 2014 L 161/3), Moldova (OJ 2014 L 260/4), and Georgia (OJ 2014 L 261/4). It not uncommon, however, that under some bilateral agreements, the wording of specific articles determines who is responsible for the implementation of those obligations. See, for instance, the Agreement on Trade, Development and Cooperation between the European Community and its Member States, on one side, and the Republic of South Africa, on the other part (OJ 1999 L 311).

48 OJ 2011 L 348/3.

49 Article 19.

ternational court or tribunal, and the claim rejected as inadmissible. A specific time limit should be established for the respondent party to provide the necessary information. Lastly, should the latter fail to do so, specific consequences are to be set out.

From this succinct overview on the different techniques for identifying the respondent, what can be inferred is that proceduralisation is an appropriate means of protecting the autonomy of the EU legal order, while enabling the applicant party to correctly address the respondent. Such a mechanism has to be preferred, therefore, to the other possible approaches for dealing with the division of competences and/or the allocation of responsibility mentioned above.[50] Currently, what is the trend in this area, and what can be expected in the future? Historically, the first of the three techniques to be put in place was the rule of proceduralisation under the Bonn Convention, in 1976. Nevertheless, from a quantitative point of view, what prevailed in subsequent treaties was declarations of competence, which to date have been added to about 30 agreements.[51] The agreements foreseeing a procedure which allows the Union and its Member States to identify the correct respondent are less frequent than the ones laying down declarations of competence, but less rare than the ones estab-

50 "Proceduralisation" is also to be preferred to treaties that are silent as to how to identify the correct respondent. The fact that a procedural rule is absent under the WTO agreement led the Panel, in the *Airbus* case (European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft, WT/DS316/R, 30 June 2010) to state that "whatever responsibility the European Communities bears for the actions of its member States does not diminish their rights and obligations as WTO Members, but is rather an internal matter concerning the relations between the European Communities and its member States" (para 7.175). Accordingly, although the Union declared that it "takes full responsibility in these proceedings for the actions of its member States [and requested] that the term 'and certain member states' be dropped from the name of the case" (para 7.171), the Member States were parties to the proceedings together with the EU (see P-J. Kujper, E. Paasivirta, "EU International Responsibility and its Attribution: From the Inside Looking Out", *supra* note 1, 62-63). This suggests that, before the WTO DS bodies, the EU and its Member States are entitled to affirm their view as far as the proper respondent is concerned: nevertheless, their statement is not binding in the dispute proceedings.

51 The list of agreements requiring declarations of competence is available on the European Union Treaty Office Database, available at http://ec.europa.eu/world/agreements/viewCollection.do?fileID=76198 (last access in February 2016), as well as in J. Heliskoski, "EU Declarations of Competence and International Responsibility", *supra* note 11, 210-212.

lishing a joint responsibility rule. This trend does not seem to have altered in recent years, where declarations of competence have been inserted into recent international agreements.[52] As a consequence, there is not sufficient evidence to indicate which approach will prevail in the future. Interestingly, in the recent Draft EU Accession Agreement, whose negotiation led to the co-respondent mechanism, and in the EU Investment Agreements, which took inspiration from the ECT, what prevails is the choice of a procedural rule. However, the provisions of these agreements, while drafted in detail, are far from unambiguous, as will be discussed in the following sections.

III. The Case of the Draft EU Accession Agreement to the European Convention of Human Rights: the Co-Respondent Mechanism

As is well known, under the Draft EU Accession Agreement to the European Convention of Human Rights (ECHR), two innovative mechanisms were introduced in order to accommodate the specific characteristics of the EU legal order, that is, the co-respondent mechanism and the prior involvement of the Court of Luxembourg in proceedings before the Court of Strasbourg. Under the first procedure, the European Union and its Member States are allowed, under certain circumstances, to both become parties to proceedings instituted against only one of them,[53] while the prior involvement procedure enables the CJEU to assess the compatibility with the rights enshrined in the Convention of the provision of EU law concerned, if it has not yet done so.[54] The two mechanisms are intertwined, as the prior involvement procedure is triggered when the Union has the status of co-respondent.[55]

The rationale behind the co-respondent mechanism is twofold. From a human rights protection perspective, it helps "to avoid gaps in participation, accountability and enforceability in the Convention system",[56] in the light of the specific nature of the EU as a non-State entity which implies that "there could arise the unique situation in the Convention system in

52 *Supra* note 12.
53 See Article 3 of the Draft EU Accession Agreement.
54 See Article 3, para 6, of the Draft EU Accession Agreement.
55 *Idem*.
56 Draft Explanatory Report, para 39.

which a legal act is enacted by one High Contracting Party and implemented by another".[57] From an EU law perspective, it provides "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 does not affect their rights as they are allowed to make submissions to the Court before a decision on adding a co-respondent is taken, and the admissibility of their applications "shall be assessed without regard to the participation of the co-respondent in the proceedings".[58]

The co-respondent mechanism is certainly a more sophisticated technique than the rules of proceduralisation.[59] Article 3, paragraphs 2 to 4, of the Draft EU Accession Agreement in fact, lays down the conditions for triggering that mechanism. The Union may obtain such a status to the proceedings if it appears that an alleged infringement by one or more Member States calls into question the compatibility between the ECHR and a provision of (primary or secondary) EU law.[60] It is also possible for one or more Member States to become a co-respondent. This is the case if the application is directed against the European Union and "it appears that [the alleged infringement] calls 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".[61] Should both the Union and its Member States be respondents in the case, the status of either may be changed to that of a co-respondent.[62] The rationale behind these triggering criteria, as indicated in the Draft Explanatory Report, is to bring the correct Party or Parties before the ECtHR. This means that the respondent is the Party to which the impugned act, measure or omission is to be attributed, while the co-respondent is the Party that has the power to bring about an amendment of the provisions of EU law relating to that act, measure or

57 *Id.*, para 38.
58 Draft explanatory report, para 40.
59 *Supra* Section II.
60 Article 3, paragraph 2, Draft EU Accession Agreement.
61 Article 3, paragraph 3, Draft EU Accession Agreement.
62 Article 3, paragraph 4, Draft EU Accession Agreement.

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.[63] The Draft EU Accession Agreement assigns jurisdiction to decide on the status of co-respondent to the Court of Strasbourg. The latter can either invite a high contracting party to become a co-respondent or accept a party's request to that effect. In both circumstances, the Court of Strasbourg is 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 are met.[64] The mechanism obviously only works to the extent that the potential co-respondent does not refuse to play such a role. This is why the Union has added 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, paragraph 2, of the Accession Agreement are met".[65] In reality, any model of proceduralisation requires that both the Union and its Member States apply the principle of loyal cooperation in their reciprocal relationship.[66]

Although it is not disputed that the co-respondent mechanism is useful for safeguarding the principle of autonomy as well as for avoiding gaps under the system laid down by the ECHR, it displays limits and ambiguities from an EU as well as an ECHR system perspective. In particular, this section, especially in the light of Opinion 2/13 of the CJEU, will closer investigate three different – albeit interconnected – issues, which are: Who has to decide on the triggering of the co-respondent mechanism? What is the effect of the co-respondent mechanism on the allocation of responsibility? Who has the competence to review the correct application of the rules on responsibility?

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63 Draft Explanatory Report, para 56. For a critique of the capability of the EU and its Member States to amend the EU law at the origin of the ECHR violation, see A. Delgado Casteleiro, "United We Stand: The EU and its Member States in the Strasbourg Court", in V. Kosta et al. (eds), *The EU Accession to the ECHR*, *supra* note 1, 111-115.

64 Article 3, paragraph 5, of the Draft EU Accession Agreement.

65 Appendix II – Draft declaration by the European Union to be made at the time of signature of the Accession Agreement.

66 On the principle of loyal cooperation and the Draft EU Accession Agreement, see A. Delgado Casteleiro "United We Stand: The EU and its Member States in the Strasbourg Court", *supra* note 63, 117-119.

As for the triggering of the co-respondent mechanism, as recalled above, the Draft EU Accession Agreement lays down two options: invitation of the co-respondent by the ECtHR; or a request for involvement by the co-respondent. As regards observing the principle of autonomy, the Court of Luxembourg, in its Opinion 2/13, did not consider the Court of Strasbourg's competence to invite the Union or its Member States to become a co-respondent problematic. The CJEU explains that the fact that the invitation of the ECtHR is not binding[67] allows the Union and its Member States to "remain free to assess whether the material conditions for applying the co-respondent mechanism are met".[68] By contrast, a request by a contracting party to become co-respondent does not guarantee that the autonomy of the EU legal order will be protected. As the Court of Strasbourg is called to decide on the plausibility of the reasons provided by the Union or its Member States to that end, the CJEU has ruled 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".[69] The CJEU, therefore, concluded that "such review would be liable to interfere with the division of powers between the EU and its Member States".[70] As a consequence, as suggested in the academic debate on the subject, the most appropriate means of accommodating the co-respondent mechanism with Opinion 2/13 would be to remove the Court of Strasbourg's power to review it.[71]

While the aforementioned models of proceduralisation remain silent on the allocation of responsibility, or at the most, establish a joint responsibility rule in an alternative approach,[72] the draft article on the co-respondent mechanism expressly regulates this issue. Article 3, paragraph 7, of the

67 Draft Explanatory Report, para 53.
68 Opinion of 18 December 2014, 2/13, *supra* note 4, para 220.
69 *Id.*, para 221.
70 *Id.*, para 225.
71 See 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?", *European Constitutional Law Review* 11 (2015), 248.
72 *Supra* Section II.

Draft EU Accession Agreement, which is worth recalling in its entirety, lays down a rule on joint responsibility, 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 emphasised in the academic debate, the rationale behind joint responsibility as the general rule is to prevent the ECtHR from giving a ruling on the allocation of responsibility between the Union and its Member States and, hence, deciding on the relevant EU rules.[73] Nevertheless, the Court of Justice, in Opinion 2/13, is not satisfied with the text of the provision and criticises the rule on allocating responsibility as set out under Article 3, paragraph 7[74] for two reasons. First of all, the provision on joint responsibility may have the effect of holding a Member State responsible together

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73 See, in particular, J-P. Jacqué, "The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms", *Common Market Law Review* 48, no. 4 (2011), 995; O. De Schutter, "L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme : feuille de route de négotiation", *Revue trimestrielle des droits de l'homme* 83 (2010), 535, 555; P.J. Kuijper, E. Paasivirta, "EU International Responsibility and its Attribution: From the Inside Looking Out", *supra* note 1, 65.

74 For a critique of the text of Article 3, paragraph 7, see in particular, G. Gaja, ("The "Co-Respondent Mechanisms" According to the Draft Agreement for the Accession of the EU to the ECHR", in V. Kosta *et al*. (eds), *The EU Accession to the ECHR*, *supra* note 1, 346), who rightly observes that "letting the ECtHR decide when the EU is responsible would be more consistent with what is required by Protocol No 8 to the Treaties than what is suggested in Article 3(7) of the Draft [EU] Accession Agreement. The relevant text of the Protocol, which I quote again, requires the Agreement to provide for 'the mechanisms necessary to ensure that… individual applications are correctly addressed to Member States and/or the Union, as appropriate'. This requirement does not imply, but rather seems to exclude, that a mechanism be established according to which the EU be considered as a rule jointly responsible when, as in the example of a breach committed through the implementation of a directive, the application has been correctly addressed against a Member State which breached its obligations under the ECHR in the exercise of its discretion in the implementation of the directive. This would also correspond to the position that the EU may have taken as co-respondent in the case". See also T. Lock, "Accession of the EU to the ECHR: Who Would be Responsible in Strasbourg?", in D. Ashiagbor, N. Countouris, I. Lianos (eds), *The European Union after the Treaty of Lisbon* (Cambridge: Cambridge University Press, 2012), 129-34.

with the EU for an infringement of a provision of the ECHR in respect of which the Member State may have made a reservation under Article 57 ECHR. Such a possibility, which is in contrast with Article 2 of Protocol No 8 EU, providing that the accession agreement cannot affect the situation of Member States in relation to the ECHR, applies to reservations as well.[75] Second, the Court of Luxembourg has ruled, once again, on the Court of Strasbourg's jurisdiction to decide whether only one of them is to be held responsible for that infringement. The ECtHR is allowed to do so only on the basis of the reasons given by the respondent and the co-respondent, and after having sought the views of the applicant. The Court of Luxembourg 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".[76] The CJEU concludes that, "accordingly, to permit the ECtHR to adopt such a decision would also risk adversely affecting the division of powers between the EU and its Member States".[77] As for the question of allocation of responsibility, the Court of Justice clarifies that, "even [if] it is assumed that a request for the apportionment of responsibility is based on an agreement between the co-re-

75 Opinion of 18 December 2014, 2/13, *supra* note 4, paras 226-228. For a comment on this issue, see 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?", *supra* note 71, 249-250. See, in particular, S. Vezzani, "Addio My Darling, Goodbye My Love? Unione Europea e sistema CEDU dopo il parere 2/13", in L. Cassetti (ed), *Diritti, garanzie ed evoluzioni dei sistemi di protezione* (Perugia: Università degli Studi di Perugia, 2016), 478. After recalling that EU Member States cannot be responsible for breaches of norms where there is a reservation, and that the rationale of the co-respondent mechanism relies on avoiding a situation where the Court of Strasbourg would be required to apportion responsibility between the EU and its Member States. Vezzani suggests revising Article 3, paragraph 7 of the Draft EU Accession Agreement as follows: "7. 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. The European Union shall however bear exclusive responsibility where the violation concerns a provision of the ECHR in respect of which that Member State has made a reservation in accordance with Article 57 of the ECHR".

76 Opinion of 18 December 2014, 2/13, *supra* note 4, para 230.

77 *Id.*, para 231.

spondent and the respondent, that in itself would not be sufficient to rule out any adverse effect on the autonomy of EU law".[78] Recalling that the question of the apportionment of responsibility must be "resolved solely in accordance with the relevant rules of EU law",[79] the Court of Justice concludes 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".[80]

According to the Court of Justice of the Union, not only must the identification of the correct respondent remain an "internal" EU issue, so must the allocation of responsibility between the EU and its Member States. As for the possible revision of the co-respondent mechanism, it has been suggested that an amendment of the Draft EU Accession Agreement, to the effect that the ECtHR is unable to give a ruling on the allocation of responsibility, would be the appropriate solution.[81] This conclusion is consistent with the scenario, recalled above, where the provision on the co-respondent mechanism is to be revised so as to enable only the EU and its Member States to identify the correct respondent(s), while the Court of Strasbourg would have no discretion in reviewing the mechanism. Should this solution be foreseen in the new provision of the revised agreement, as a consequence, it will be for the Union and its Member States to acknowledge or indicate where the responsibility lies, as they have the right to do so. In this scenario, the joint responsibility rule would no longer appear as a "quick fix solution" laid down to prevent the Court of Strasbourg from deciding on the allocation of responsibility between the EU and its Member States. It will rather be allocated as deemed appropriate by the EU and its Member States, as the result of the application of the rules of EU law governing their relationship.

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78 *Id.*, para 234.

79 *Ibid.*

80 *Ibid.*

81 On the role of the applicant "to give permission to a request by the respondent and co-respondent that responsibility should be allocated to only one of them", see 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?", *supra* note 71, 248-249.

As recalled above, while ruling on the compatibility of the co-respondent mechanism with EU law, the Court of Justice reminded the EU institutions and the Member States of its role in reviewing, if necessary, agreements between co-respondents and respondents in accordance with the relevant rules of EU law. More specifically, the Court stated that "the question of the apportionment of responsibility must be resolved solely in accordance with the relevant rules of EU law and be subject to review, if necessary, by the Court of Justice, which has exclusive jurisdiction to ensure that any agreement between co-respondent and respondent respects those rules".[82] This statement in the Opinion deserves a close scrutiny in light of its potential impact on the co-respondent mechanism. The process of review, in fact, could be of particular relevance in the event of disagreement between the EU and the Member State as concerns their roles as respondent and co-respondent.[83] It is not disputed that loyal cooperation and the unity of external representation are the essential principles for ensuring the smooth implementation of the co-respondent mechanism as they imply a close level of coordination on the position to be submitted before the ECtHR.[84] Nevertheless, these principles do not rule out any potential disagreement between the EU institutions and the Member States.

In this situation, a key role could be played by the prior involvement of the Court of Justice of the Union.[85] This procedure, although it has been

82 Opinion of 18 December 2014, 2/13, *supra* note 4, para 234.

83 On disagreements between the Commission and the Member States as far as dispute settlement is concerned before the WTO DS bodies and investment-State disputes under the FRR, see, respectively, J. Heliskoski, "Joint competence of the European Community and its Member States and the Dispute Settlement Practice of the WTO", *supra* note 9, 83-84; A. Dimopoulos, "The Involvement of the EU in Investor-State Dispute Settlement: A Question of Reponsibilities", *supra* note 1, 1680.

84 On the role of the duty of cooperation and unity of external representation in the context of the co-respondent mechanism, see A. Delgado Casteleiro Casteleiro, "United We Stand: The EU and its Member States in the Strasbourg Court", in V. Kosta et al. (eds), *The EU Accession to the ECHR*, *supra* note 1, 117-119.

85 See T. Lock, "EU Accession to the ECHR: Implications for the Judicial Review in Strasbourg", *European Law Review* 35 (2010), 787. Lock suggests different solutions in order to solve potential disagreements between the EU and its Member States on the allocation of responsibility where compensation is awarded.

strongly criticised in the academic debate,[86] could in reality display some advantages at the EU internal level. Under the current Draft EU Accession Agreement, as recalled previously, that prior involvement is of limited application as this procedure can be triggered only when the EU is a co-respondent and provides the opportunity for the Court of Justice to rule on the "assessment of compatibility", that is, on the validity and interpretation of EU law. Nevertheless, the future text, adapting to Opinion 2/13, may be revised in order to allow the wider involvement of the Court of Justice.[87] The provision could be modified, for example, in order to enable the triggering of the procedure not only in the narrow circumstance where the EU is a co-respondent. Interestingly, Gaja has already observed that

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86 See, *inter alia*, L. Halleskov Storgaad, "EU Law Autonomy versus European Fundamental Rights Protection – On *Opinion 2/13* on EU Accession to the ECHR", *Human Rights Law Review* (2015), 502; A. Torres Pérez, "Too Many Voices? The Prior Involvement of the Court of Justice of the European Union", in V. Kosta et al. (eds), *The EU Accession to the ECHR*, *supra* note 1, 29; S. Vezzani, "The EU and its Member States before the Strasbourg Court: A Critical Appraisal of the Co-respondent Mechanism", in G. Repetto (ed), *The Constitutional Relevance of the ECHR in Domestic and European Law. An Italian Perspective* (Cambridge/Antwerp/Portland: Intersentia, 2013), 232; G. Gaja, "Accession to the ECHR", in A. Biondi, P. Eeckout, S. Ripley (eds), *EU Law after Lisbon* (Oxford: Oxford University Press, 2012), 180-196; J. P. Jacqué, "The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms", *supra* note 73, 1019.

87 Interestingly, A. Torres Pérez (*supra* note 86, 41-43), proposes broadening the range of actors that may trigger the prior involvement procedure so to include any of the parties, that is, the Commission – representing the EU, respondent States and individual applicants. Moreover, the author argues that, given that "enforcement could be further delayed if there were disagreements as to who should pay the compensation, or whether the violation was triggered by obligations under EU law. … In general, the prior intervention of the CJEU could help to indicate the allocation of responsibilities between the EU and its Member States" (at 42). The appropriateness of the conditions for triggering the co-respondent mechanism has been criticised because of its strict test by S. Vezzani ("The EU and its Member States before the Strasbourg Court: A Critical Appraisal of the Co-respondent Mechanism", *supra* note 86, 221-235), who recalls that a better model was unfortunately dropped during the *travaux préparatoires*, according to which "in cases in which there seems to be a substantive link between the alleged violation and a provision of EU law, and in which the application is directed against one or more Member State(s) of the European Union, but not against the European Union itself (or vice versa), the co-respondent mechanism would allow a High Contracting party which is substantively implicated by the application to join proceedings as a full party" (CDDH-UE(2010)16,2).

"there is little reason why this procedure should not be applicable also when the EU is respondent. It would be even more logical to make it applicable in all the instances in which a question of compatibility of a provision of EU law with the European Convention arises".[88] Moreover, under the current provision, the Court of Justice is allowed to rule on the interpretation of primary EU law and validity of EU acts, whereas, should the suggested amendment be inserted, it would be possible for the Court to clearly decide on the division of competences or any other relevant EU rule so that its role as the "guardian" of the interpretation of the EU Treaties is safeguarded. One may challenge this "internal" use of a procedure, which was laid down to accommodate not only the specific characteristics of the EU legal order, but also the requirements of the ECHR. Nevertheless, in the prior involvement procedure as currently drafted, the CJEU would already have jurisdiction to rule on matters of EU law that are not directly relevant for the purpose of the proceedings before the ECtHR, that is, assessing the validity of the EU norms at issue. After all, the prior involvement procedure is nothing more than an internal review before the ECtHR carries out its external review. Therefore, further tasks may be assigned to the Court of Luxembourg within the framework of this procedure. The advantage of this solution is that it offers clarity and transparency on questions of allocation of international responsibility that have not yet been settled at EU level.[89]

Although a solution which bases the allocation of responsibility on an agreement between respondent and co-respondent seems to accommodate the need to safeguard the autonomy of the EU legal order, this may appear a questionable approach from the perspective of the system laid down by the ECHR. The co-respondent mechanism, as conceived in Opinion 2/13, in fact, prevents the development of the Court of Strasbourg's case law in the field of international responsibility when the Union is a party to the proceedings, and would limit its role to merely declaring infringements of the ECHR. One may ask whether the protection of the principle of autonomy of the EU legal order should be stretched to this point.

88 G. Gaja, "The "Co-Respondent Mechanisms" According to the Draft Agreement for the Accession of the EU to the ECHR", *supra* note 74, 347.

89 *Supra* Section II.

IV. The Case of EU Investment Agreements: Unilateral Designation of the Respondent Party

The Union is a party alongside its Member States to only one international investment agreement currently in force, namely the Energy Charter Treaty. However, at the time of writing, the Union is negotiating or about to conclude a number of investment agreements (IAs) or free trade agreements (FTAs) with an investment chapter, on the basis of the new competence concerning foreign direct investment conferred on the EU by the Lisbon Treaty.[90] All those agreements include or will supposedly include investment dispute settlement (IDS) provisions. More specifically, the EU-Singapore FTA and the EU-Vietnam FTA are currently awaiting ratification,[91] while the EU-Canada Agreement (CETA) is also awaiting ratification but is currently being provisionally applied. The provisions concerning the settlement of disputes are to be exempted from that provisional application under agreements between the Parties.[92] More agreements are still in the negotiation phase, the most famous of which is certainly the (currently dormant) Transatlantic Trade and Investment Partnership (TTIP). The analysis that follows will mostly concentrate on this new generation of IAs. In order to keep things simple, the rules of the CETA will

90 See the general overview provided at http://ec.europa.eu/trade/policy/accessing-markets/investment/. As a result of the CJEU's findings in Opinion 2/15 (see below, note 91), the EU has decided to split the trade and the investment components of the new FTAs, which will therefore be concluded as separate agreements. See Council, New approach on negotiating and concluding EU trade agreements adopted by Council, Press Release, available at http://www.consilium.europa.eu/en/press/press-releases/2018/05/22/new-approach-on-negotiating-and-concluding-eu-trade-agreements-adopted-by-council/.

91 As is well known, the EU-Singapore FTA has been the object of an Opinion issued by the CJEU on 16 May 2017. See Opinion of 16 May 2017, 2/15, *EU- Singapore Free Trade Agreement*, EU:C:2017:376. The Opinion is focused on the nature and scope of the EU external competence to conclude the agreement in question rather than on issues concerning the IDS. See, in this volume, the chapters by Merijn Chamon and by Eleftheria Neframi.

92 In particular, CETA"s provisional application has taken effect on 21 September 2017. See European Commission, Press Release, "EU-Canada trade agreement enters into force", available at http://europa.eu/rapid/press-release_IP-17-3121_en.htm.

be used as a model and a starting point.[93] In addition, the analysis of the provisions of the agreements will be complemented with that of Regulation (EU) n° 912/2014 "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" approved on 23 July 2014 ("the FRR").[94]

A. The Dispute Settlement Provisions of the Investment Agreements

To begin with, the EU IAs do not contain any rule concerning the allocation of responsibility between the EU and its Member States. Any reference to responsibility is entirely absent from the text. However, one can infer indications concerning issues of responsibility by analysing the rules relating to the submission of a claim against the EU and its Member States by an investor of the other party to the agreement. In particular, all EU IAs contain a mechanism aimed at identifying the respondent in such disputes. The mechanism in question is exemplified by Article 8.21 CETA. It is meaningfully titled "Determination of the respondent for disputes". According to this provision, an investor of the other party must send a notice to the EU prior to the submission of the claim. The notice shall request the EU to determine who will act as respondent in the proceedings. The notice has to identify the treatment that allegedly breached the investor's rights. The EU has to inform the claimant within 50 days as to whether the EU itself or a Member State is to be the respondent in the dispute. The determination thus made cannot be objected to by the investor and the arbitral tribunal. However, Article 8.21 CETA does not specify the criteria on the basis of which the determination in question is made.

It is interesting to point out a discrepancy between the four IAs mentioned above. The TTIP and the EU-Vietnam agreements do not lay down any other rules concerning the determination of the respondent. Not only do they avoid elaborating on the criteria relied on by the EU to determine

93 In particular, reference will be made to the TTIP investment court proposal tabled by the EU Commission in November 2015. For an overview of the proposal see L. Pantaleo, "Lights and Shadows of the TTIP Investment Court System", in L. Pantaleo, W. Douma, T. Takacs (eds), *Tiptoeing to TTIP: What Kind of Agreement for What Kind of Partnership*, CLEER Paper 1/2016, 77.

94 See Regulation (EU) 912/2014, OJ 2014 L 257/121.

who is going to act as respondent, they also refrain from providing any guidance as to what rules the investor and the arbitral tribunal would have to apply to make such a determination if the EU fails to deliver a response within the prescribed period. By contrast, CETA and the EU-Singapore agreements do foresee such an instance. They each contain a similar clause, according to which, in the event that the investor has not been informed in due 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.[95]

Although the language employed by this provision contains some degree of ambiguity, it seems safe to say 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 adopted by the Member State not in order to fulfil its EU law obligations and most probably in areas falling completely outside the scope of EU law, such as direct taxation.[96] The EU would be the respondent in all other cases, including where the claim identifies (a) measures that are partly attributable to the EU and partly to the Member State, in other words, in cases of potential joint responsibility (which is ruled out by the EU IAs), or (b) measures taken by the Member State in order to fulfil EU law obligations.

All in all, the rationale behind the rules for determining the respondent analysed above seems to be to avoid both the investor and the arbitrators passing judgement on issues of EU law. An example will help to illustrate 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 to be incompatible with its law on State aid.[97] If the choice as to the proper respondent were left to the investor, the latter

95 See, for example, Chapter 8, Article 21, paragraph 4, CETA.

96 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", *ICSID Review* (2015), 345.

97 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

would have to apply the rules of general international law. According to the provisions of the Draft Articles on Responsibility of States (DASR) and the Draft Articles on Responsibility of International Organisations (DARIO),[98] the investor could sue the Member State as the entity to which, under the rules of DASR, 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 DARIO for adopting a binding decision – such as a Decision of the Commission or a ruling of the ECJ – that eventually led the Member State to breach the investor's rights. However, the rules of international law may not necessarily be in line with what is considered to be the best solution in order to protect the autonomy of the EU legal order. In addition, one has to bear in mind that the EU has no proper administration: its legislation is implemented and enforced by Member States" administrations. Hence, it is likely that the breach of an investor's right may be the result of an act taken by an organ of a Member State on the basis of EU law. Here again, 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.[99] However, it is obvious that such a situation would run counter to positions traditionally advocated by the EU,[100] and would put into question its autonomy It is precisely in order to avoid a scenario of this type that the CETA and the like contain rules aimed at internalising the choice of the respondent to an investment dispute based on the EU IAs.

The aforementioned internalisation of the choice of the respondent creates a proceduralisation of the dispute and of the substantive issues relating to the attribution of responsibility between the EU and the Member

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", *The Journal of World Investment and Trade* 16 (2015), 205.

98 *Supra* note 2.

99 Although not necessarily at the same time. While it is true that DARIO establishes 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.

100 For a brief examination of such positions see *supra*, Section I.

States.[101] By depriving the investor of the right to choose the respondent, and the court or tribunal of the power to review such a choice, the EU IAs are intended to protect the autonomy of the EU legal order from external interference.[102] No doubt the mechanism in question reduces the risk of interference to a large extent. However, it does not eliminate the risk altogether. One has to consider that the EU may not determine the respondent party within the time limit prescribed by the agreements. In such a situation, while under CETA and the EU-Singapore FTA the investor would have to apply the alternative criteria set out in those 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 would also have its say on the matter. Under CETA and the EU-Singapore FTA it would have to review whether the investor has correctly applied the alternative criteria laid down in Article 8.21, paragraph 4, CETA and referred to above. Under the TTIP and EU-Vietnam FTA it would review, apply and interpret the rules of international law in order to determine the proper respondent. From this perspective, the solution adopted by CETA and the EU-Singapore FTA seems to be more suitable to protect the autonomy 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 – that is, questions that are of no EU law relevance whatsoever. Whenever the dispute contains an EU law component, it is the Union that will have to act as respondent, no matter how little relevance the EU law component has with respect to the number and range of legal issues at stake in the dispute taken as a whole. By contrast, failure to determine the respondent on time may have massive conse-

101 See A. Dimopoulos, "The Involvement of the EU in Investor-State Dispute Settlement: A Question of Reponsibilities", *supra* note 1, 1702.

102 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 (ed), *The Future of ICSID and the Place of Investment Treaties in International Law* (London: BIICL, 2013) 129; S. W. Schill, "Luxembourg Limits: Conditions for Investor-State Dispute Settlement under Future EU Investment Agreements", in M. Bungenberg, A. Reinisch, C. Tietje (eds), *EU and Investment Agreements: Open Questions and Remaining challenges* (Baden-Baden: Nomos/Hart, 2013), 37.

quences under the TTIP. Such a failure would trigger the application of the rules of general international law concerning international responsibility. It is therefore regrettable that the TTIP and the EU-Vietnam FTA do not replicate the safeguard clause contained in CETA.

Another relevant question is whether 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 delivered by the EU in good time. After all, 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".[103] Hence, the question may be put in these terms. In order to ascertain that the claim is admissible, investment tribunals should not only make sure that the investor has sued the respondent designated in accordance with the rules set out in the IA, they should also verify – albeit *prima facie* – that the respondent so determined is the one that bears international responsibility. No doubt the tribunal concerned must reach that *prima facie* conclusion at the "preliminary objections" stage in order not to dismiss the claim as inadmissible. Given that the 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. 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".[104] As a consequence, the tribunal concerned, in assessing the admissibility of the claim, would have no choice but to carry out 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".[105]

However, it is not easy to see how an arbitral tribunal could disregard the text of a treaty in favour of the rules of general international law. The principle of *lex specialis* would seem sufficient to authorise the tribunal to do exactly the opposite. 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 estab-

103 See A. Dimopoulos, *supra* note 1, 1683.

104 See H. Lenk, "Issues of Attribution: Responsibility of the EU in Investment Disputes under CETA", *Transnational Dispute Management* 13, no. 1 (2016), 21.

105 *Ibidem.*

lished by DASR and DARIO. After all, the principle in question only applies to rules governing the same subject matter. That objection is, however, not very convincing. First of all, it is highly unlikely that a claim would be declared inadmissible by the tribunal *proprio motu*, that is to say without an explicit objection being raised by the interested party.[106] In other words, in order for a claim to be found inadmissible *ratione personae* on this ground, the EU or the Member State would have to repudiate their own determination of the respondent made in accordance with the agreement. They would have to claim that the determination thus made is wrong. That would evidently be nonsensical and would suggest that the determination of the respondent was not made in good faith. However, the EU IAs include a provision that seems to have been devised precisely to avoid such an absurd scenario. Pursuant to Article 8.21 CETA,

> "neither the European Union nor the Member State concerned 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".

All the other EU IAs include a similar provision, which is part of the clause concerning the determination of the respondent. Therefore, it seems more sensible to concur with the view, expressed by a scholar, that the identification of the respondent made under the EU IAs should be taken as an implicit recognition of responsibility.[107] A different question is whether or not the determination of the respondent could also be understood as acknowledgment and adoption of conduct within the meaning of Article 11 DASR and Article 9 DARIO.[108] In other words, in the absence of any special rules on the allocation of responsibility, the identification of the respondent by the EU under the EU IAs amounts to an indirect acceptance of the responsibility that would arise from the claim. From this perspective, a distinction between rules on responsibility and rules on the determi-

106 See M. Waibel, *Investment Arbitration: Jurisdiction and Admissibility*, Legal Studies Research Paper Series, Paper no. 9 (2014), University of Cambridge, 67-68.

107 See P. Palchetti, "The Allocation of International Responsibility in the Context of Investor-State Dispute Settlement Mechanism Established by EU International Agreements", *supra* note 1, 84.

108 This question cannot be further analysed in this article. However, it is discussed, perhaps in a somewhat cursory way, by the ILC in its commentary to Article 9 DARIO. See *Report of the International Law Commission*, A/66/10, 97.

nation of the respondent party seems to be only ostensible: the one necessarily entails the other. In the merely hypothetical – and slightly farcical – event that the respondent party raises an objection concerning the inadmissibility of the claim on this ground, the arbitral tribunal could easily reject the objection in question in accordance with Article 8.21 CETA and the like.[109]

B. The Financial Responsibility Regulation

At the end of this brief overview of the rules contained in the EU IAs, it seems appropriate to succinctly analyse the internal rules laid down in the Financial Responsibility Regulation (FRR). From the outset, it is worth emphasising that the latter does not contain rules concerning the allocation of international responsibility for breaches of the EU IAs to the Union or its Member States. From an international law perspective, that regulation represents domestic legislation. As such, it cannot unilaterally impose rules on third countries. This circumstance is explicitly recognised by the FRR itself. According to Recital 5, that regulation aims to allocate (financial) responsibility "as a matter of Union law". However, its provisions are inextricably interconnected with questions relating to international responsibility. 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,

> "international responsibility for treatment subject to dispute settlement follows the division of competences between the Union and the Member States. As a consequence, the Union will in principle be responsible for defending any claims alleging a violation of rules included in an agreement which fall

109 As a matter of principle, an objection of inadmissibility could be raised also by the claimant itself. However, if such an objection is upheld by the tribunal concerned and the claim is therefore set aside, the investor would have no other option than to start the proceedings all over again and hope that the EU designates a different respondent – which seems a very unlikely contingency. Alternatively, the investor may also challenge the determination of the respondent before the EU courts as an EU act affecting it directly and individually. However, it does not seem that the EU courts could come to a different conclusion. For an in-depth analysis of these and other questions see L. Pantaleo, "Respondent Status and Allocation of International Responsibility under EU Investment Agreements", *European Papers* 3 (2016), 854.

> 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 the FRR, the allocation of financial responsibility generally corresponds to the acquisition of the respondent status in a dispute – which, in turn, amounts to recognition of (international) responsibility for breach of the IA. With a few exceptions,[110] the general principle is that the EU is to 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.[111] The aim of this provision is clearly to avoid the EU (literally) paying the price of a *Micula* scenario.[112] The rationale behind the FRR 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's longstanding competence-based approach to responsibility.[113] A general departure from this scheme would occur if the treatment that has allegedly breached the investor's right were the result of a Member State's incorrect implementation or enforcement of EU law. This instance would hardly be covered by the provision of the FRR 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 might find itself acting as respondent in a dispute concerning a field falling under an EU competence, including an exclusive competence. However, given that the Member State's action was not strictly speaking required by EU law, an arbitral decision rendered against that action would hardly encroach upon an EU competence. In addition, the FRR seems to offer some adequate instruments to this end. For example, Article 9, paragraph 1, b, of the FRR stipulates that a Member State can agree with the Commission not to appear as respondent in a dispute in which it would otherwise do so accord-

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110 To name but one exception, according to Article 9, paragraph 3, FRR 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 the FRR.

111 See Article 3 and Article 9 FRR.

112 *Supra* note 98.

113 See P. Palchetti, *supra* note 1, 78.

ing to the rules set out in regulation. Such a 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 latter's exclusive competence, in accordance with Article 2, paragraph 1, TFEU. Acting as respondent in an investment dispute upon designation made by the EU could certainly be covered by such empowerment.

V. Conclusions

As Govaere has rightly stated, "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".[114] The EU, certainly aware of the importance of dispute settlement, negotiates provisions that endeavor to accommodate third parties" request for legal certainty as well as to safeguard the autonomy of its legal order. The techniques that, under some mixed agreements, address the matter of the identification of the respondent have to be assessed in the light of the need to balance these two competing and partly-conflicting interests. The overview presented above has clearly demonstrated that both declarations of competence and the joint responsibility rule appear less appropriate for reaching those purposes and present more disadvantages than advantages.

Against this background, the establishment of mechanisms aimed at "proceduralising" substantive issues concerning international responsibility by conferring on the EU the power to determine the appropriate respondent seems to represent the most viable solution. Such mechanisms should ensure that the matter remains an "internal" one and that international courts or tribunals are prevented from interpreting and applying EU law. As has been pointed out above, the Draft EU Accession Agreement and the EU Investment Agreements provide two recent examples of rules of proceduralisation. The Draft EU Accession Agreement, however, did not create proceduralisation allowing the determination of the proper respon-

114 I. Govaere, "Beware of the Trojan Horse: Dispute Settlement in (Mixed) Agreements and the Autonomy of the EU Legal Order", *supra* note 27, 190.

dent to integrally remain an EU internal matter. This was because it gave the ECtHR the power to decide on the plausibility of the reasons provided by the Union and/or its Member States for appearing as the respondent(s) in a dispute. In other words, it conferred on the Court of Strasbourg quite a broad power to review the choice made by the EU and its Member States, and to scrutinise the reasons behind it. Should the future text of the accession agreement be modified in accordance with Opinion 2/13, the determination of the correct respondent would have to remain a purely EU internal issue, as is already the case under the more recent EU IAs. These seem to rule out the possibility of an investor questioning the determination of the respondent made by the EU, and of the investment tribunal reviewing that determination. From an EU-perspective, no doubt this is the most suitable solution to protect the autonomy of the Union's legal order.

However, one may wonder whether the mechanism devised under the EU IAs is also suitable under the regime created by the ECHR. An investment tribunal and the ECtHR are in fact only partly comparable. While the former is based on a (brand new) bilateral agreement, the ECtHR is a court established under a multilateral human rights convention that has already developed case law on issues of responsibility. From this perspective, it should not go unmentioned that the Draft EU Accession Agreement is, by and large, the result of a delicate balancing exercise aimed at reconciling the (well-established) rules and principles developed under the regime laid down by the ECHR on the one hand and the EU's *sui generis* nature on the other. One may legitimately wonder whether the overall systemic coherence of the regime created by the ECHR should be sacrificed on the altar of EU autonomy, to the point of reducing the Court of Strasbourg's rulings to mere declarations as to whether the ECHR has (or has not) been breached.

The need to accommodate the specific characteristics of each different regime to which the EU is – or may become – a party does not, however, invalidate the conclusion that the adoption of rules of proceduralisation is the best way forward from the perspective of both the Union and the applicant party as far as the determination of the proper respondent is concerned. It should probably become the EU's standard position when it comes to participating in international dispute settlement.