

Philipp Stegmann

The Application of the
Financial Responsibility
Regulation in the Context of
the Energy Charter Treaty –
Case for Convergence or
“Square Peg, Round Hole”?

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The Application of the Financial Responsibility Regulation in the Context of the Energy Charter Treaty—Case for Convergence or “Square Peg, Round Hole”?

by

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A. Introduction

On 23 July 2014, the European Union (EU) adopted Regulation No. 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” (REG).¹ The REG is an attempt to structure disputes under EU-only and mixed international investment protection agreements (EU IIPAs) and to apportion resulting financial burdens between the EU and the Member States. With the EU having gained exclusive competence in the field of Foreign Direct Investment (FDI) as part of the Common Commercial Policy (CCP) in 2009, the European Commission (Commission) quickly identified international responsibility of the EU and the Member States for breaches of EU IIPAs and responsibility for ensuring monetary awards and settlements as subjects that would need to be addressed as part of the EU’s International Investment Policy and its related legal framework.²

By adopting the REG, the EU approached the subject of international responsibility at the EU level, yet to be comprehensively determinative for all existing and future EU IIPAs, under which questions of responsibility might come to the fore. This way, which, of course, requires that the REG can at all become effective under EU IIPAs, the EU intends to create a uniform and consistent responsibility framework for all EU IIPAs. And, most importantly, it is an approach that aims at having international responsibility for treatment(s) challenged by an investor—that an arbitral tribunal still has to assess for its illegality under the EU IIPA—exclusively determined at the EU level, and not at the international level. The EU rejected a “piecemeal” approach where each and every EU IIPA might tackle the issue of international responsibility differently or not at all, and where the determination of responsibility of the EU and the Member States for a certain treatment remains in the hands of arbitral tribunals. As to the “how” of addressing the issue of international responsibility under EU IIPAs, the REG sets out criteria, to be applied by the Commission, that determine the respondent party in a given dispute under a EU IIPA. The EU prioritised a single-respondent model—where only either the EU or a Member State may act as respondent—over a co-respondent model, as it is envisioned for the future mixed ECHR

* The views expressed in this article and all errors are exclusively those of the author. The article will also be published in Dimopoulos, Angelos (ed), *The EU and investment arbitration under the Energy Charter Treaty*, Cambridge University Press, Forthcoming.

¹ Regulation (EU) No. 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party (Aug. 28, 2014), OJL 257, 121–134.

² See Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Towards a comprehensive European international investment policy*, Brussels 7 July 2010, COM (2010) 343, 10: “In line with the Commission’s aim to develop an international investment policy at EU level, the issue of the international responsibility between the EU and the Member States in EU investment agreements needs to be addressed [...] [I]n developing its new international investment policy, the Commission will address this issue, and in particular that of financial compensation, relying on available instruments, including, possibly, new legislation”.

framework.³ Finally, the EU opted for a responsibility model where the last word on financial responsibility would not be spoken on the international plane, but at the EU level. In this respect, the REG governs as a matter of EU law the apportionment of financial responsibility ensuing from the investor-state dispute settlement (ISDS) proceedings in the form of awards and settlements. By doing so, the REG creates a two-fold interface with the international law sphere: first, it attempts to determine the internationally responsible party for certain conduct impugned by an investor in a given dispute under a EU IIPA and, second, it internally apportions the financial burden ensuing from the dispute between the EU and the Member State concerned.

The REG applies to ISDS proceedings initiated by an investor of a non-EU country against the EU or a Member State under a EU IIPA.⁴ This covers extra-EU disputes under mixed and EU-only IIPAs, concluded before or to be concluded after the adoption of the REG.⁵ Hence, in addition to disputes under future post-Lisbon EU IIPAs, it also covers disputes under the only existing pre-Lisbon EU IIPA to date: the Energy Charter Treaty (ECT). The ECT contains an investment protection chapter and the option of ISDS pursuant to Article 26 ECT. One of the ISDS options is international arbitration.⁶ The ECT was signed on 17 December 1994 and entered into force on 16 April 1998. The European Communities (EC, now succeeded by the EU) and its Member States became alongside other non-EU countries contracting parties to it. The ECT had to be concluded as a mixed agreement, as the EC and the Member States only together had the treaty-making competence for it.⁷ The mixed nature of the ECT is important, as the EU and each Member State is internationally bound under the ECT and consented to arbitration. This allows eligible investors, in principle, to sue in arbitration and hold responsible under international law the EU and each Member State for breaches of the ECT.

Importantly, the REG is not applicable to intra-EU disputes. This gains importance under the ECT, which contains a considerable intra-EU element and which is applicable in disputes between an investor of one Member State against another Member State.⁸ In fact, Member State investors have sued many times (and some successfully) other Member States under the ECT.⁹ Such intra-EU disputes will continue to proceed outside the realm of the REG.

Since the ECT preceded the REG by almost two decades, the drafters of the ECT, naturally, could not, in contrast to the drafters of post-Lisbon EU IIPAs, pre-

³ For why the Commission rejected a co-respondent system under EU IIPAs see Explanatory Memorandum to the Proposed Regulation, COM (2012) 335 final (June 21, 2012), available at: <http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149567.pdf> (last visited 31 August 2017), 7.

⁴ Article 1(1) REG in conjunction with Article 2(a) REG.

⁵ Pursuant to Article 24 REG only the claim must be submitted to arbitration and the allegedly illegal treatment must have occurred after the entry into force of the REG on 17 September 2014.

⁶ Article 26(2)(c) ECT.

⁷ *Tietje*, The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States, 7.

⁸ *Ibid.*, 5-17; *Burgstaller*, 26 *Journal of International Arbitration* (2009), 181 (206-210).

⁹ See <<http://www.energycharter.org/what-we-do/dispute-settlement/all-investment-dispute-settlement-cases/>> (last visited 31 August 2017).

pare for the REG and craft the ECT in a way that adequately accommodates the REG. This provides a conundrum for the REG, which governs key elements of ISDS. Specifically, whether a party can be a respondent in a given dispute is determined by the arbitration agreement and the applicable EU IIPA, and whether a party is the correct respondent is determined by international law and the law of international responsibility.¹⁰ So when determining whether an investor sued the correct respondent, arbitral tribunals typically only apply these sources of law. Yet the REG in and of itself is not part of that nomenclature. As a piece of secondary EU law it is from the perspective of an international arbitral tribunal to be considered domestic law, and, thus, as fact and not law. So, the REG's effectiveness under any EU IIPA depends on how a EU IIPA is structured. To this end, post-Lisbon EU IIPAs, such as CETA¹¹, the EU-Singapore FTA¹², the EU-Vietnam FTA¹³ and TTIP¹⁴, enshrine a mandatory procedural mechanism which docks into the REG, relegates the issue of respondent status as *per renvoi* to the EU to be determined by the Commission under the REG, and finally makes the determination binding on the disputing parties and the Tribunal. EU IIPAs, thereby, render effective the application of the provisions on respondent status of the REG in a given dispute under international law.

With respect to the ECT, interestingly enough, a Statement made upon ratification by the EC to the ECT Secretariat offers investors a procedural avenue to ask the EC and the Member States for the determination of the proper respondent to a given dispute (ECT Statement). This set-up is susceptible to absorbing the mechanism for the determination of the respondent under the REG. However, an investor is neither bound to request a respondent determination, nor, if initiated, to follow upon it. And if the investor sued the respondent as determined, a tribunal might still find that the determined respondent was the incorrect one. So, the application of the REG in proceedings under the ECT depends on investors' free choice and a finding by the Tribunal that the determination made under the REG is correct.

It is not only the external aspect of respondent status under the REG but also the internal aspect of apportionment of financial responsibility between the EU and the Member States that faces risks of being rendered moot and left unapplied in the context of disputes under the ECT. A respondent paying funds to a succeeding investor due to a monetary award or settlement might be identical with the party bearing financial responsibility under the REG. In such a case, no internal redress, no internal compensation between the EU and the Member States is necessary. However, there can be cases, where the party holding the bill vis-à-vis an investor is not internally the one that ought to be holding it. Critically, the REG only grants the EU, having acted as respondent, the exclusive right to recover the funds it paid to a successful investor

¹⁰ Cf. *Schill*, in: Trakman/Ranieri (eds), *Regionalism in International Investment Law*, 374 (378).

¹¹ CETA in its February 2016 version is available at: <http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf> (last visited 31 August 2017).

¹² The EU-Singapore FTA in its May 2015 version is available at: <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>> (last visited 31 August 2017).

¹³ The latest (agreed) version of the EU-Vietnam FTA in its January 2016 version is available at: <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>> (last visited 31 August 2017).

¹⁴ The Investment Chapter of TTIP in its November 2015 version is available at: <http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf> (last visited 31 August 2017).

from a Member State where that Member State bears all or part of financial responsibility pursuant to the REG. In contrast, Member States do not have such a right under the REG. Yet scenarios are conceivable where an investor sues a Member State under the ECT, by either relying on the determination made under the REG or on its own choice of respondent, and where that Member State is found internationally responsible for a breach and must pay compensation, although under the REG the EU should bear all or part of the financial responsibility. This provokes the question of accountability gaps under the REG as a consequence of disputes under the ECT: even though the REG allocates financial responsibility to the EU in certain cases, the Member States lack the legal basis to enforce it.

All in all, the question arises whether, and if so, to what extent the REG can be effectively applied in the context of the ECT. Though the REG governs other issues as well¹⁵, this article is limited to discussing the provisions in the REG on respondent status and apportionment of financial responsibility, as only their application and effectiveness is different in disputes under the ECT as opposed to disputes under post-Lisbon EU IIPAs.

The first part will start addressing the question who one can expect as respondent in disputes under the ECT provided the REG were determinative for that question, and who is to hold the bill in the end under the REG (B.). The contribution then seeks to show that the ECT in its current form, contrary to prospective post-Lisbon EU IIPAs, such as CETA, cannot fully accommodate the provisions on respondent status under REG, and that the respondent determination mechanism under the ECT Statement is and can only be a voluntary one (C.). The third part attempts to demonstrate that the current set-up of the REG, namely its one-sided redress mechanism, causes accountability gaps where a Member State acts as respondent in a dispute under ECT, yet the EU bears all or part of financial responsibility under the REG (D.).

B. Whom to expect as respondent and who is to hold the bill in the end?

At the outset, it is worth asking how a EU regulation can determine Member State rights and obligations in connection with disputes under EU IIPAs that are conducted on the international plane. As derives from the Explanatory Memorandum to the REG, the legal basis for the REG is Article 3(1)(e) TFEU in conjunction with Article 207 TFEU enshrining EU's exclusive competence for FDI as part of the CCP.¹⁶ In the eyes of the Commission, this competence encompasses the entire breadth of typical IIPAs.¹⁷ And, according to the Commission, the division of treaty-

¹⁵ The REG deals with the conditions under which the EU, acting as respondent, can and must settle a dispute (Articles 13-16 REG), who should pay monetary awards or settlements to an investor in case the EU acts as respondent (Articles 17-18 REG) and general cooperation and coordination duties between the EU and the Member State before and during a dispute (see e.g. Article 6 REG).

¹⁶ Explanatory Memorandum to the Proposed Regulation, COM (2012) 335 final (June 21, 2012), available at: <http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149567.pdf> (last visited 31 August 2017), 9.

¹⁷ *Supra*, 3-4.

making competences between the EU and the Member States under EU law determines international responsibility for breaches of EU IIPAs.¹⁸ It would follow that breaches of EU IIPAs, for which the EU is comprehensively competent, could only trigger the EU's international responsibility. Consequently, so the Commission, the EU can regulate the conditions for dispute settlement under EU IIPAs, decide who is to assume responsibility for a given conduct on the international plane and, finally, adopt internal rules on apportionment of financial responsibility.¹⁹

Article 3 REG deals with the apportionment of financial responsibility²⁰ arising out of ISDS proceedings between the EU and the Member States.²¹ Article 3 REG is the centrepiece of the REG as its criteria for apportionment equally determine, in principle, the respondent party to a dispute. And in case the EU, as respondent party, is not at all or only partially financially responsible, Article 19 REG gives the EU a right to recover from the Member State concerned. Importantly, financial responsibility in the sense of the REG is to be strictly distinguished from responsibility of the EU or a Member State vis-a-vis an investor for breaches of EU IIPAs as a matter of public international law.²² Financial responsibility solely pertains to the internal allocation of the financial burden arising out of awards or settlements as a matter of EU law.²³

The rule is that financial responsibility follows the origin of the treatment that led to the award or settlement. A financial burden caused by organs of the EU is allocated to the EU (Article 3(1)(a) REG); a financial burden caused by organs of a Member State is allocated to that Member State (Article 3(1)(b) REG). The attribution of treatment under the REG runs along strict organic and institutional lines: treatment of EU organs, e.g. the Commission, the Parliament, the Council, the EU Courts or any EU agency is attributed to the EU²⁴, whereas treatment of Member State organs is attributed to the Member State²⁵. Whether Member State organs implement EU law

¹⁸ Cf. Recital 3 REG; Explanatory Memorandum to the Proposed Regulation, COM (2012) 335 final (June 21, 2012), available at: <http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149567.pdf> (last visited 31 August 2017), 4-5.

¹⁹ Explanatory Memorandum to the Proposed Regulation, COM (2012) 335 final (June 21, 2012), available at: <http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149567.pdf> (last visited 31 August 2017), 5; *Kleinheisterkamp*, LSE Law, Society and Economy Working Papers, 15/2013, 1 (8).

²⁰ Pursuant to Article 2(g) REG financial responsibility means “an obligation to pay a sum of money awarded by an arbitration tribunal or agreed as part of a settlement and including the costs arising from the arbitration”.

²¹ Interestingly, the federal State of Germany equally has legislation that apportions financial responsibility arising out of international verdicts and settlements between the federal State (“the Bund”) and its subdivisions (“the Länder”). See Article 104a(6) Basic Law and implementing legislation (“Lastentragungsgesetz”).

²² See Explanatory Memorandum to the Proposed Regulation, COM (2012) 335 final (June 21, 2012), available at: <http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149567.pdf> (last visited 31 August 2017), 5 and 9.

²³ Recital 5 REG: “[...] It is therefore necessary that financial responsibility be allocated, as a matter of Union law, between the Union itself and the Member State responsible for the treatment afforded on the basis of criteria established by this Regulation”.

²⁴ Articles 3(1)(a) and 4(1) REG: “[...] treatment afforded by the institutions, bodies, offices or agencies of the Union”.

²⁵ Articles 3(1)(b) and 5 REG.

does not affect the attributability of that conduct to the Member State under the REG. The attribution rules in the REG mirror the organic attribution approach under the EU state responsibility regime²⁶, Article 4 of the ILC Articles on Responsibility of States for internationally wrongful conduct (ARS)²⁷ and Article 6 ILC of the Articles on the Responsibility of International Organizations (ARIO)²⁸.

Article 3(1)(c) REG²⁹ is as an exception to Article 3(1)(b) REG and allocates financial responsibility to the EU in case a Member State treatment was “required under the law of the Union”. These are situations where a breach of the EU IIPA occurs when a Member State implements EU law, e.g. implements a Commission decision, enforces a CJEU judgment, applies a EU regulation, or transposes a EU directive into Member State law. Specifically, Article 2(l) REG stipulates that a Member State is “required under the law of the Union” where it “could not have avoided the alleged breach of the [EU IIPA] without disregarding an obligation under Union law”. Article 2(l) REG juxtaposes the obligations flowing from the EU IIPA against other EU law obligations incumbent on the Member States. The provision is an attempt to capture the power dynamics inherent in the decentralized implementation of EU law by the Member States and to factor in the conflict it can cause for Member States that equally have to comply with obligations flowing from EU IIPAs. In situations where a Member State faces a dilemma to either breach the EU IIPA or its obligations under EU law, it should be exempt from financial responsibility under the REG. The rationale is that when the EU creates an irreconcilable normative conflict for the Member States, the EU should bear the consequences. Oftentimes, a margin of manoeuvre or discretion helps Member States avoid that conflict. However, there are even situations conceivable where every discretionary conduct “could not have avoided the alleged breach of the” EU IIPA. At the centre of the test in Article 2(l) REG is identifying Member State treatment that would have been legal both under the EU IIPA and EU law.

The rule stipulated in Articles 3(1)(c) REG is reminiscent of the many varying attempts in doctrine and international case law to adequately address executive federalism in the law of international responsibility.³⁰ The only difference is that it is not an

²⁶ Article 340 TFEU.

²⁷ Article 4(1) ARS reads: “The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State”.

²⁸ Article 6(1) ARIO reads: “The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization”.

²⁹ Article 3(1)(c) 2nd sentence REG provides for an exception to Article 3(1)(c) REG in the case “the Member State concerned is required to act pursuant to Union law in order to remedy the inconsistency with Union law of a prior act, that Member State shall be financially responsible unless such prior act was required by Union law”. Furthermore, Article 3(3)(a) and (b) REG provide for Member State responsibility where it has accepted financial responsibility or agreed to a settlement.

³⁰ See e.g. *Hoffmeister*, 21 *European Journal of International Law* (2010), 723–747 and *Kuijper/Paasivirta*, in: Evans/Koutrakos (eds), *The International Responsibility of the European Union*, 35–71.

arbitral tribunal mandated with applying that rule under the REG, but the Commission and the CJEU. And it is exactly the aim of the REG to remove from the mandate of arbitral tribunals the assessment of whether, and if so, how executive federalism impacts international responsibility of the EU and the Member States under a EU IIPA.³¹ The effectiveness of that internalisation depends on whether under the applicable EU IIPA the respondent as determined under the REG is automatically internationally responsible for the treatment(s) challenged by the investor, and that arbitral tribunals may not assess and decide that issue. In this respect, post-Lisbon EU IIPAs, arguably, provide for such a constitutive effect of the respondent determination on international responsibility: they make the determination mechanism part of the arbitration agreement and render the determination itself binding on the parties and the Tribunal.³²

As to respondent status, the criteria in the REG that determine the respondent in ISDS proceedings under EU IIPAs generally run along the lines of apportionment of financial responsibility. Where a dispute exclusively concerns treatment of EU organs, the EU acts as respondent (Article 4(1) REG), where a dispute concerns treatment of Member State organs, the Member State acts as respondent (Article 9(1) REG) and where such treatment was required by EU law pursuant to Article 3(1)(c) REG, the EU again may act as respondent (Article 9(2)(a) REG). Yet this is as far as the parallelism goes. First, Article 9(2)(a) REG provides for EU respondent status in cases where the EU would bear part of the “potential”³³ financial responsibility and, second, Article 9(2)(b) REG where the dispute concerns EU treatment in addition to Member State treatment.³⁴ Third, Article 9(3) REG provides for EU respondent status in case parallel proceedings are pending before a WTO panel. Finally, Article 9(1)(b) REG gives Member States the opportunity to decline respondent status and bindingly cede it to the EU. Importantly, under the latter two exceptions, the EU can act as respondent although the dispute has no link whatsoever to EU law – neither EU treatment is challenged nor is the challenged Member State treatment based on EU law. The four exceptions providing for EU respondent status made the adoption of the internal redress mechanism in Article 19 REG necessary in order to correct the discrepancy between respondent status of the EU and financial responsibility of Member States.

The rules on respondent status also create discrepancies with the rules of international responsibility. Whereas Article 9(1)(b), (2)(a) and (3) REG provide for respondent status of the EU, the attribution rule in Article 6 ARIO would not attribute the underlying conduct to the EU and Article 4 ARS would point at a Member State.

³¹ See below C.I.

³² See below note 42, and corresponding text.

³³ Article 9(2)(a) REG speaks of “potential” financial responsibility since at the time of determining the respondent under the REG, it is all but clear whether the investor will succeed on its claim(s). Hence, financial responsibility is only “potential” at that point.

³⁴ The difference between Article 9(2)(a) and (b) REG is that under the latter EU treatment must be part of the claim(s) the investor brought in arbitration, whilst under the former this is not the case. Article 3(1)(c) REG provides for EU financial responsibility even though no EU act was part of the arbitration proceedings. If a EU act was part of the international proceedings and led to an award or settlement, financial responsibility of the EU would already flow from Article 3(1)(a) REG.

And Article 9(2)(b) REG would provide for EU respondent status in classical scenarios of shared responsibility, where at least one challenged treatment is attributable to a Member State under Article 4 ARS. The rules on respondent status equally create divergences under a competence-based approach to international responsibility.³⁵ This shows that by determining the respondent under the REG the drafters of the REG and corresponding post-Lisbon EU IIPAs intend to determine the internationally responsible party in a given dispute. And it is in this sense that arbitral tribunals should interpret the mandatory respondent determination mechanism enshrined in post-Lisbon EU IIPAs.³⁶ If this were not the case, investors, who under post-Lisbon EU IIPAs cannot, as we will see in the next section, choose the respondent of their choice, but must outsource that decision to the EU and follow upon it, would always risk having their claims fully or partially dismissed on the merits.

EU respondent status is mandatory under Article 9(1)(b) REG when a Member State declines to act as respondent. Yet the Commission has discretion to seize respondent status for the EU under the other three exceptions.³⁷ The main factors driving the discretion are uniformity of external representation, and the right to defend treatment for which one bears financial responsibility in the end.³⁸ Whilst the latter point cuts both ways and should – as Member State treatment is regularly at the centre of the dispute – lead to a cautionary exercise of discretion, the former gives the Commission a path to override Member State interests whenever the dispute has a EU dimension, as infinitesimal as it may be. The question arises how the REG’s provisions on respondent status can gain effect in disputes under EU IIPAs generally, and under the ECT specifically.

C. ECT Disputes and respondent status under the REG

Before delving into the question how the ECT can provide an interface with the provisions on respondent status under the REG, this part will set out first the conditions necessary, and envisaged by the REG, to render it applicable under international law and how post-Lisbon EU IIPAs are modelled to that effect.

I. Post-Lisbon EU IIPAs and respondent status under the REG

As briefly noted in the introduction, a tribunal constituted under a EU IIPA would not apply the REG as a source of law to solve the dispute. Secondary EU law,

³⁵ See again Recital 3 REG; Explanatory Memorandum to the Proposed Regulation, COM (2012) 335 final (June 21, 2012), available at: <http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149567.pdf> (last visited 31 August 2017), 4; cf. *Baetens/Kreijen/Varga*, 47 *Vanderbilt Journal of Transnational Law* (2014), 1203 (1241-1243).

³⁶ Cf. below note 42, and corresponding text.

³⁷ Under Article 9(2) and (3) REG the Commission “may” decide that the EU acts as respondent. See also Explanatory Memorandum to the Proposed Regulation, COM (2012) 335 final (June 21, 2012), available at: <http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149567.pdf> (last visited 31 August 2017), 6.

³⁸ *Ibid.*

such as the REG, is not considered international law and, just as domestic law in general, is typically not part of the applicable law under EU IIPAs, but merely considered as fact. How, then, do the provisions on respondent status under the REG become effective under EU IIPAs? A direct way would be to render EU law part of the applicable law or to incorporate the REG into the EU IIPA either word by word or *per renvoi*.³⁹ Considering that the rules of the REG are geared towards application by the Commission and the CJEU, and given that arbitral tribunals might not be best suited and should not even be allowed to apply and interpret EU law, it is hardly surprising that this is not the approach found in the post-Lisbon EU IIPAs negotiated so far.

Rather, these post-Lisbon EU IIPAs provide for a mandatory “respondent determination mechanism”. This mechanism is designed to act as the interface between the REG and the international law regime created by the EU IIPA.⁴⁰ It is essentially a pre-arbitration channel, a process by which the investor of a third country requests the EU to determine the respondent, and thereby triggers the process under the REG for the determination of the respondent. The request is mandatory for the investor under these EU IIPAs: it is a non-waivable procedural requirement for initiating arbitration proceedings. What is more, the EU’s and, provided the post-Lisbon EU IIPA is mixed, the Member States’ consent to arbitration is conditional upon abiding by this mechanism. If the investor initiates arbitration proceedings but does not request a determination, a Tribunal must decline jurisdiction. Further, the request must include an identification of the treatment or treatments concerned, which the investor considers afoul of the EU IIPA.⁴¹ This permits a precise determination of the respondent under the REG.

After the mechanism is activated, the EU IIPA provides for the investor to be informed of the decision on the respondent within a fixed period of time. Once the investor is informed about that, the investor may, but may only, submit its claim(s) to arbitration against the determined respondent. As the EU IIPA makes the mandatory respondent determination mechanism part of the arbitration agreement, the Tribunal is bound by that determination and the determined respondent is estopped from claiming during or after the proceedings that it is or was the incorrect one. The EU IIPA also, though only declaratory in effect, explicitly provides that the respondent determination is binding on the parties and the Tribunal.⁴²

This whole set-up is primarily borne, on one hand, by the desire for clarity and legal certainty for the investor, who may have difficulties—at least under mixed IIPAs—in suing the correct respondent in the EU-Member State responsibility window.⁴³ On the other hand, the protection of the autonomy of EU law dictates that the

³⁹ Cf. *Baetens/Kreijen/Varga*, 47 *Vanderbilt Journal of Transnational Law* (2014), 1203 (1221).

⁴⁰ See Article 8.21 CETA, Article 9.15 EU-Singapore FTA, Article 6 Section 3 Investment Chapter EU-Vietnam FTA and Article 5 Section 3 Investment Chapter TTIP.

⁴¹ It should be noted that the investor will already have identified in its request for consultations the treatment concerned

⁴² Cf. Article 8.21(6)(7) CETA; Article 9.15(4) EU-Singapore FTA; Article 6(4)(5) Section 3 Investment Chapter EU-Vietnam FTA; Article 5(5)(6) Section 3 Investment Chapter TTIP.

⁴³ Explanatory Memorandum to the Proposed Regulation, COM (2012) 335 final (June 21, 2012), available at: <http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149567.pdf> (last visited 31 August 2017), 5.

determination of the correct respondent in a dispute under a EU IIPA should not be undertaken by an arbitral tribunal outside the jurisdiction of the CJEU.⁴⁴ The CJEU ruled on numerous occasions, most recently in Opinion 2/13⁴⁵, that it is contrary to EU law when an international dispute resolution body outside the confines of the EU Courts can rule upon the division of competences as laid out in the EU Treaties.⁴⁶ Under EU law, the allocation of respondent status, which falls together with the question of international responsibility, is a matter of competence.⁴⁷ Under international law, Article 64 ARIO—providing for the possibility of a *lex specialis*—opens an avenue to arbitral tribunals for consulting the division of competences as laid down in the EU Treaties for matters of respondent status and international responsibility.⁴⁸ Now, post-Lisbon EU IIPAs and the REG exclude that possibility, as the REG sets out the criteria for respondent status that may or may not coincide with the competence partition, and the EU IIPA renders the respondent determination binding on the parties and the arbitral tribunal.⁴⁹

To sum up, fueled by the need to create legal certainty for investors and to safeguard the autonomy of EU law, the EU IIPA renders the respondent mechanism under the REG effective by, first, making the request for a determination binding on the investor and, second, making the outcome of the determination binding on the disputing parties and the Tribunal.

II. The ECT and respondent status under the REG

The ECT itself does not enshrine in its primary treaty text a mandatory respondent determination mechanism, as does CETA, TTIP, the EU-Singapore FTA or the EU-Vietnam FTA. However, the EC upon ratification of the ECT submitted the ECT Statement pursuant to Article 26(3)(b)(ii) ECT.⁵⁰ A part of the ECT Statement

⁴⁴ *Ibid.*, 7.

⁴⁵ CJEU, C 2014/2454, Opinion 2/13 *EU Accession to ECHR*.

⁴⁶ See *Schill*, in: Bungenberg/Reinisch/Tietje (eds), *EU and Investment Agreements: Open Questions and Remaining Challenges*, 37-54.

⁴⁷ Explanatory Memorandum to the Proposed Regulation, COM (2012) 335 final (June 21, 2012), available at: <http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149567.pdf> (last visited 31 August 2017), 4-5.

⁴⁸ For a critical appraisal see *d'Aspremont*, in: Kosta/Skoutaris/Tzevelekos (eds), *The EU Accession to the ECHR*, 75 (80-82).

⁴⁹ Cf. Explanatory Memorandum to the Proposed Regulation, COM (2012) 335 final (June 21, 2012), 5: “rather than set up the mechanisms in a manner reflecting a strict application of the rules on competence, it is more appropriate to put forward pragmatic solutions which ensure legal certainty for the investor“. See also above note 42, and corresponding text.

⁵⁰ Statement submitted on 17 November 1997 by the European Communities to the Secretariat of the Energy Charter pursuant to Article 26(3)(b)(ii) ECT, [1998] OJ L 69, 115. The relevant parts of ECT Statement read: “The European Communities, as Contracting Parties to the Energy Charter Treaty, make the following statement concerning their policies, practices and conditions with regard to disputes between an investor and a Contracting Parties and their submission to international arbitration or conciliation: [...] The European Communities and their Member States have both concluded the Energy Charter Treaty and are thus internationally responsible for the fulfilment of the obligations contained therein, in accordance with their respective competences. The Communities and the Member States will, *if necessary, determine among them who is the respondent*

offers investors a procedural mechanism under which an investor can ask the EC and the Member States that they jointly determine the respondent to a dispute.

This mechanism can be seen as the precursor of the mechanism enshrined in post-Lisbon EU IIPAs and envisaged by the REG. The mechanism in the ECT Statement is susceptible to render effective the provisions on respondent status under the REG provided an investor decides to take that procedural avenue.⁵¹ However, an investor is not required to do so. This derives from the wording of the ECT Statement and the ECT itself.

1. *Investors protected under the ECT can, but are not required to, request a respondent determination under the ECT Statement*

The ECT Statement reads that the EC and the Member States will determine the respondent “if necessary”. *E contrario*, if not “necessary”, an investor can directly sue the respondent that it sees fit. For example, an investor might consider a determination “necessary” when it is unclear whether in a given case under the ECT the EU or a Member State is the correct respondent in the EU-Member State responsibility window.⁵² A footnote in the ECT Statement clarifies that “[the respondent determination] is without prejudice to the right of the investor to initiate proceedings against both the Communities and their Member States”. It, hence, follows from the wording of the ECT Statement that it offers investors an option to submit a request for a respondent determination rather than requiring them to do so.⁵³

Even if a revised ECT Statement⁵⁴, possibly approved by the Member States, were to stipulate a mandatory mechanism, eligible investors would still not have to abide by that mechanism in order to initiate arbitration proceedings against the EU or a Mem-

party to arbitration proceedings initiated by an Investor of another Contracting Party. In such case, upon the request of the Investor, the Communities and the Member States concerned will make such determination within a period of 30 days ([footnote:] This is without prejudice to the right of the investor to initiate proceedings against both the Communities and their Member States.). [...] Any case brought before the Court of Justice of the European Communities by an investor of another Contracting Party in application of the forms of action provided by the constituent treaties of the Communities falls under Article 26(2)(a) of the Energy Charter Treaty. Given that the Communities' legal system provides for means of such action, the European Communities have not given their unconditional consent to the submission of a dispute to international arbitration or conciliation [...].’ [emphasis added]”.

⁵¹ Dimopoulos, 51 *Common Market Law Review* (2014), 1672 (1702).

⁵² The ECT Statement links the issue of international responsibility under the ECT to the division of competences between the EU and the Member States. This reflects the Commission’s view, but does not bind arbitral tribunals constituted under the ECT, which might settle for a different approach. See *Roe/Happold*, *Settlement of Investment Disputes under the Energy Charter Treaty*, 172-175.

⁵³ Cf. Commission’s Submissions in *Electrabel SA v The Republic of Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 5.20, at subpara. 48: “the Communities and the Member States decided to offer a swift procedure to investors in order to assist them in their choice of the correct respondent party to arbitration proceedings”.

⁵⁴ The validity of a revision, generally, is under the premise that the time limit under Article 26(3)(b)(ii) ECT (“shall provide [...] no later than”) is not a strict one and that the statements submitted under the provision are open to revisions.

ber State.⁵⁵ Mandatory language in a revised ECT Statement could be to the effect that investors, as a precondition for initiating arbitration proceedings against the EU or a Member State, must request a respondent determination and follow upon it.

Generally, unless a State consents to treaty provisions it is not bound by them under the law of treaties.⁵⁶ The ECT Statement itself is not part of the primary treaty text of the ECT to which all treaty parties have consented. It is true that a (mandatory) mechanism in the ECT Statement could still bind the treaty parties and its investors if the ECT required or allowed the EU (and the Member States) to make such a statement stipulating such a (mandatory) mechanism. For example, some mixed treaties require the EU to issue a declaration of competence setting out the competence partition between the EU and the Member States with respect to the implementation of a treaty.⁵⁷ If the mixed treaty so provides, the obligations can be delimited along the lines of that partition. The ECT, however, does not require or allow the the EU (and the Member States) to make such a statement stipulating such a (mandatory) mechanism.

The EC made the ECT Statement under Article 26(3)(b)(ii) ECT. The provision reads:

“For the sake of transparency, each Contracting Party that is listed in Annex ID [which the EC is] shall provide a written statement of its policies, practices and conditions in this regard [emphasis added].”

As a preliminary remark, it is already questionable how a statement “for the sake of transparency” can even have a binding effect on the treaty parties.⁵⁸ Put differently, what is made public for transparency reasons can usually only be declaratory in nature. But more importantly, to what does “in this regard” refer?

Article 26(3) ECT provides that “[s]ubject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to [...] arbitration”. The exception in subparagraph (b)(i)⁵⁹ revokes the consent to arbitration in cases where “the Investor has previously submitted the dispute under subparagraph (2)(a) or (b)”. Under (2)(a) an investor may submit a dispute “to the courts or administrative tribunals of the Contracting Party to the dispute” and under (2)(b) it can submit a dispute

⁵⁵ Cf. *Heliskoski*, Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States, 173; *Happ/Bischoff*, in: Coop (ed), Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty, 155 (170); *Roe/Happold*, Settlement of Investment Disputes under the Energy Charter Treaty, 173-174; *Burgstaller*, 26 Journal of International Arbitration (2009), 181 (206, 208).

⁵⁶ See Articles 11 et seq. and 26 et seq. VCLT.

⁵⁷ See *Delgado Casteleiro*, 17 European Foreign Affairs Review (2012), 491-510.

⁵⁸ *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, para. 546: “[...] the wording of subparagraph (ii) [...], with its express indication that the requirement is merely ‘for the sake of transparency’”. In the case the Tribunal ruled that the absence of a statement under Article 26(3)(b)(ii) ECT in respect of the *res judicata* rule in (b)(i) does not invalidate the conditional consent to arbitration under (b)(i), which is automatically effected by the listing of a contracting party in Annex ID.

⁵⁹ Pursuant to subparagraph (c) the contracting parties listed in Annex IA do not give unconditional consent to arbitration with respect to disputes arising under the last sentence of Article 10(1) ECT, i.e. the umbrella clause.

“in accordance with any applicable, previously agreed dispute settlement procedure”.⁶⁰ It follows that Article 26(3)(b)(i) ECT is effectively a “fork-in-the-road” or *res judicata* provision that bars an investor to arbitrate when it previously took one of the two procedural paths laid out in (2)(a) or (b). Only to such extent the consent to arbitration of the EC, and the other contracting parties listed in Annex ID, is conditional. That is why Annex ID reads “List of Contracting Parties Not Allowing an Investor to Resubmit the Same Dispute to International Arbitration at a Later Stage under Article 26 (In accordance with Article 26(3)(b)(i)) [emphasis added]”.

It is in light of this context that Article 26(3)(b)(ii) ECT is to be read: the rule does not provide for a distinct exception to consent to arbitration apart from the two exceptions in subparagraph (b)(i) and (c).⁶¹ If it would, the contracting parties listed in Annex ID could in fact unilaterally and *ex post* condition their consent to arbitration upon any material or procedural requirement imaginable. This cannot be the case. Rather, (b)(ii) systematically, as part of subparagraph (b), and literally (“in this regard”) pertains to the exception in (b)(i). Therefore, the statements under (b)(ii) are intended to render transparent to investors the “policies, practices and conditions” with respect to the exception in (b)(i) in conjunction with (2)(a) and (2)(b).⁶² Against this backdrop, the respondent determination mechanism as set forth in the ECT Statement concerns the dispute settlement option of arbitration under (2)(c). It neither pertains to the dispute settlement option in (2)(a) or (2)(b), nor has anything to do with *res judicata*, and is, hence, outside the scope of (3)(b)(i). It follows that the mechanism contained in the ECT Statement is uncalled for by Article 26(3)(b)(ii) ECT. As the ECT currently stands, the EU (and the Member States) cannot render their consent to arbitration conditional upon investors complying with a mandatory respondent determination mechanism, as possibly enshrined in a revised ECT Statement.⁶³

There is no other provision in the primary treaty text of the ECT that would require or allow the EU (and the Member States) to stipulate such a (mandatory) mechanism. Quite the contrary: if the (mandatory) mechanism in the ECT Statement were to be seen as a reservation on the part of the EU (and the Member States), in that the

⁶⁰ To clarify, subparagraph (2)(b) means a dispute settlement procedure other than the ones in (2)(a) or (2)(c).

⁶¹ *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, paras. 539-548, especially at 546 and 547. See also *The Energy Charter Treaty: A Reader's Guide* (2002), 53 et seq.; *Brabandere*, in: Brabandere/Gazzini (ed), *Foreign Investment in the Energy Sector: Balancing Private and Public Interests*, 130 (142 et seq.); *Happ/Bischoff*, in: Coop (ed), *Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty*, 155 (177).

⁶² This is exactly what the EC did in the ECT Statement when it listed the CJEU as falling under Article 26(2)(a) ECT.

⁶³ Under the hypothesis that a mandatory respondent determination mechanism could be covered by Article 26(3)(b)(ii) ECT, it should be noted that a contracting party listed in Annex ID can only make a statement with respect to “its [own] policies, practices and conditions”. The mechanism stipulated by the EU would go beyond that and define those of other contracting parties, i.e. the Member States. Under the ECT, however, the EU and each Member State is an independent contracting party. Besides, such a mechanism (even if approved by all Member States) would sit at odds with the unconditional consent of those Member States, which are not even listed in Annex ID.

EU (and the Member States) would only consent to arbitration if investors sought a respondent determination and sued the respondent as determined, this would have no effect: reservations may not be made to the ECT.⁶⁴

In theory, consistent practice could be one way under treaty law to render the respondent determination mechanism contained in the ECT Statement binding on the contracting parties of the ECT and their investors. The problem is that the mechanism under the ECT Statement has never been used. And any attempt to construe the treaty parties' and investors' inactiveness and silence in that respect as acquiescence⁶⁵ should find no resonance given that the mechanism is, so far, merely formulated as an option. This might be different upon revision of the ECT Statement making the mechanism mandatory. However, one has to keep in mind that the mechanism is, it seems, unknown to most actors so far,⁶⁶ and cannot be reasonably expected, as it is uncalled for by the ECT.

As a result, the respondent determination mechanism in the ECT Statement – even if it were formulated in mandatory terms – neither binds the contracting parties to the ECT nor its investors: it is up to the investor to request a determination and follow upon it.

2. *Arbitral tribunals are not bound by the respondent determination made under the ECT Statement*

If, though, an investor did use the mechanism under the ECT Statement and did sue the respondent as determined, a Tribunal established under the ECT would not be bound by that determination.⁶⁷ This is because the mechanism, as stated in the previous section, is not part of the arbitration agreement that constitutes and determines the Tribunal's mandate under the ECT. Nowhere in the ECT it says, or otherwise derives from public international law, that the determination binds an arbitral tribunal. So a Tribunal can still assess and decide whether the determined respondent is the correct one. The legal basis for such assessment is not whether the determined has consented to arbitration. Both the EU and the Member States have given a standing offer to arbitrate under Article 26(3) ECT upon ratification of the treaty. Rather, the rules of international responsibility would determine whether the EU or a Member State concerned is the correct respondent in a given case. Central to this question is whether the challenged conduct can be attributed to the respondent or whether the respondent is otherwise, indirectly, responsible for the challenged conduct.⁶⁸ If the

⁶⁴ See Article 46 ECT. Pursuant to Article 19(a) VCLT reservations cannot be made to a treaty if prohibited by the treaty.

⁶⁵ Cf. *Villiger*, Commentary on the 1969 Vienna Convention on the Law of Treaties, Issues of Customary International Law, para. 11.

⁶⁶ Cf. Tribunal's assessment in *Electrabel SA v The Republic of Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 3.20.

⁶⁷ Cf. *Roe/Happold*, Settlement of Investment Disputes under the Energy Charter Treaty, 185.

⁶⁸ In theory, the law of treaties may also become relevant as regards the "correctness" of a respondent in a mixed treaty setting, as some argue that the EU and the Member State only assume obligations alongside the division of their competences under EU law. However, where a mixed agreement, such as the ECT, does not delimit obligations along these lines, a partition of obligations

rules of international responsibility do not point at the determined respondent in a given dispute, the Tribunal might either decline jurisdiction, rule the claim inadmissible or dismiss the claim on the merits.⁶⁹ Alternatively, the determination might constitute adoption and acknowledgment of conduct⁷⁰ or a *lex specialis*⁷¹, leading to the international responsibility of the determined respondent for the challenged conduct. Considering that, in such a situation, the parties agree on the identity of the respondent, since the investor sued the respondent as determined by the EU and the respondent did not challenge its status or would likely be barred from doing so by estoppel⁷², and considering that the determination can justifiably be accommodated with the ILC Articles, it is likely that a Tribunal—though not bound to see it that way under the ECT—would reach that conclusion.

3. *Pros and cons of requesting a respondent determination under the ECT Statement*

The question remains: would an investor activate the mechanism in an upcoming dispute? As stated, it has never been used. That may be because there have been no cases brought against the EU or a Member State by an investor of a non-EU country. So far, no intra- or extra-EU investor has ever sued the EU under the ECT. As to the intra-EU disputes conducted against Member States, Member State investors may have been aware that an intra-EU case against the EU cannot, according to the Commission, be brought at all under the ECT and might face additional jurisdictional hurdles.⁷³ This may be why they did not ask for a determination, sued the Member State anyway and left the matter for the arbitral tribunal to assess and decide. Another reason, as stated, might be the non-binding language of the ECT Statement.

As for potential extra-EU investors, what are the pros and cons of using the determination mechanism? By activating the mechanism and following upon the determination, the risk of suing the incorrect respondent in the EU-Member State responsibility window is, as stated above, not entirely excluded yet significantly reduced. This is important in cases that have a strong EU element. For one, the proper treatment of the decentralized implementation of EU law by Member States under the law of international responsibility in general is all but clear. Neither the ILC Articles, nor international case law, nor doctrine provide for a coherent answer on that issue.⁷⁴ For two, the proper treatment of such implementation conduct might further depend on

under international law can only flow from Article 46 VCLT, which requires the division of competences to be “manifest”. With respect to the ECT that was not, and after the Treaty of Lisbon still is not, the case. Cf. *Dimopoulos*, EU Foreign Investment Law, 253-259.

⁶⁹ It is not settled whether attribution is part of jurisdiction, admissibility or the merits. See in this respect *El Hayek/Gilles*, 29 ICSID Review (2014), 1 (17-20).

⁷⁰ Article 11 ARS for the Member States and Article 9 ARIIO for the EU.

⁷¹ Via Article 64 ARIIO and Article 55 ARS.

⁷² Cf. *Roe/Happold*, Settlement of Investment Disputes under the Energy Charter Treaty, 174.

⁷³ Member State investors might qualify as EU investors under the ECT so that they cannot sue the EU as “another Party” under Article 26 ECT. See *Kleinheisterkamp*, 15 Journal of International Economic Law (2012), 85 (105); *Burgstaller*, 26 Journal of International Arbitration (2009), 181 (206-208); but see *Happ*, 10 International Arbitration Law Review (2007), 74-81.

⁷⁴ See above note 30.

a more profound understanding and assessment of EU law, namely whether the Member State acted under the scope of EU law, correctly implemented EU law and whether it enjoyed some discretionary leeway in doing so.⁷⁵ Hence, where a EU act and its implementation by a Member State is at the centre of the alleged breach, there is a risk of suing the incorrect respondent. Legal certainty for investors is, indeed, one of the driving forces for adopting the REG and for drafting corresponding EU IIPAs in the first place.

The downsides of using the mechanism relate to the fact that the respondent is determined pursuant to the REG. Specifically, the REG, as described above, broadly provides for EU respondent status, even in cases where the rules of international responsibility clearly point to a Member State. This might cause investors to either bypass the determination mechanism altogether and directly sue the Member State concerned, or to ignore a determination of the EU as respondent, and sue the respective Member State instead. Suing a Member State instead of the EU has certain benefits. The most obvious one is that ICSID arbitration is not available in disputes against the EU.⁷⁶ The benefit of ICSID arbitration is that its awards are binding and directly enforceable and can only be annulled before the ICSID Annulment Committee on few, very strict grounds. Conversely, annulment and enforcement proceedings of non-ICSID awards are conducted before Member State courts. This can open the gates to public policy considerations either leading to a successful challenge of the award or its unenforceability. Another benefit is that it might be easier to enforce an award against a Member State than against the EU.⁷⁷

In sum, whilst complex cases of executive federalism should prompt investors to seek a respondent determination from the EU as offered in the ECT Statement, clear-cut cases with no EU element are likely to prompt investors to directly sue the respective Member State in order to benefit from ICSID arbitration.

4. *How to make a respondent determination mechanism binding under the ECT*

In the end, what would it take to make a respondent determination mechanism under the ECT binding on investors, respondents and Tribunals? A revision of the ECT Statement would be insufficient. As stated above, the ECT neither requires nor allows the EU (and the Member States) to stipulate a (mandatory) respondent determination mechanism. And even if so, arbitral tribunals would not be bound to concur with the respondent determination made by the EU.

⁷⁵ Cf. *AES Summit Generation Ltd and Tisza Eromu Kft v The Republic of Hungary*, ICSID Case No ARB/07/22, Award, 23 September 2010; *Electrabel SA v The Republic of Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012.

⁷⁶ The EU is not party to the ICSID Convention, as it is only open to States. See Article 67 ICSID Convention.

⁷⁷ The EU is not bound by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. Thus, the EU might refuse to abide by an award on grounds outside the New York Convention. For two, immunity from execution may be broader with respect to the EU than with respect to Member States. See in this respect *Baetens/Kreijen/Varga*, 47 *Vanderbilt Journal of Transnational Law* (2014), 1203 (1255-1257).

The only path is the approach taken under post-Lisbon EU IIPAs that renders a respondent determination and its outcome binding on the parties and the Tribunal. This, however, would require an amendment of the treaty text of the ECT. An amendment requires a three-fourth majority of the treaty parties pursuant to Article 42(4) ECT. Given that such amendment would encroach upon the right of investors investing in the EU to sue the respondent of their choice (including using ICSID), it would at least be difficult to obtain the consent of the non-EU contracting parties.

D. The ECT and the apportionment of financial responsibility under the REG

When an ECT dispute has come to end and the EU or a Member State, having acted as respondent, makes payments to an investor due to a settlement or an arbitral award, the final apportionment of financial responsibility under the REG kicks in. This is necessary, as the respondent in a dispute under the ECT, and under any other EU IIPA, might not be one that bears financial responsibility under the REG. To this end, the REG provides for a reimbursement mechanism to enforce the final apportionment: it enables the respondent to recover the funds it paid to a succeeding investor from the party that is financially responsible pursuant to the REG. This mechanism, however, enshrined in Article 19 REG, only grants that right to the EU and not to the Member States. This means that whenever a Member State is successfully sued under the ECT, yet the EU bears full or partial financial responsibility, the REG creates accountability gaps, as the Member States cannot recover from the EU. One reason for such a one-sided redress mechanism is, as the Commission notes with respect to the rejected co-respondent model, that Member States seeking reimbursement from the EU would be contrary to EU budgetary procedures.⁷⁸ Another reason is that the Commission did not fully factor in the possibility that the ECT and the REG can cause situations where a Member State ends up as respondent and is found internationally responsible whilst financial responsibility lies with the EU pursuant to the REG. In fact, there are three procedural scenarios conceivable in disputes under the ECT that churn out such an undesirable outcome.⁷⁹

The first procedural scenario is where an investor sues a Member State without asking for a respondent determination via the ECT Statement. Nothing in the REG suggests that the rules on apportionment are only applicable if the respondent was

⁷⁸ Explanatory Memorandum to the Proposed Regulation, COM (2012) 335 final (June 21, 2012), available at: <http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149567.pdf> (last visited 31 August 2017), 7: “A Member State paying any eventual award and then seeking to recover from the European Union by itself seeking to determine which elements are required by the law of the Union would be neither consistent nor effective as regards budgetary procedures, nor would it recognise the Commission’s role in the implementation of Union law.” One remedy to address the Commission’s concerns would be to reverse the burden of proof in the redress mechanism initiated by a Member State, in that instead of the Member State the Commission must determine the elements of the Member State treatment that were not required by EU law.

⁷⁹ Under CETA and the EU-Singapore FTA there is another procedural scenario conceivable where a Member State is successfully sued under the default mechanism (Article 8.21(4)(a) CETA and Article 9.15(3)(a) EU-Singapore FTA) and the EU is financially responsible pursuant to Article 3(1)(c) REG.

determined under the REG. Now, where an investor successfully challenged treatment attributable to a Member State under Articles 4 ARS, external liability and internal financial responsibility (Article 3(1)(b) REG) go hand in hand and no problem under the REG arises. The same is true if an investor sues a Member State for treatment falling under Article 3(1)(a) REG, as such treatment would likely only be attributable to the EU under Article 6 ARIO and no international responsibility would arise for the Member State. However, where an investor successfully sues a Member State for treatment that was required under EU law pursuant to Article 3(1)(c) REG, external liability (of the Member State) and internal financial responsibility (of the EU) go astray. Such a scenario is possible. For example, a Tribunal might attribute treatment falling under Article 3(1)(c) REG to the Member State according to Article 4 ARS.

In the other two scenarios an investor chooses to sue a Member State as determined by the EU (i.e. the Commission) under the REG via the ECT Statement. For one, only in a perfect world would the Commission always correctly apply Article 9(2)(a) REG in conjunction with Article 3(1)(c) REG.⁸⁰ Hence, it cannot be excluded that the Commission wrongly decides to not seize respondent status in favour of the EU because it deems that the Member State treatment was not required under EU law, although it actually was.⁸¹ Under the other scenario, the Commission decides – under the discretion it is granted under Article 9(2) REG – to not vest the EU with respondent status although the conditions of Article 9(2)(b) or (a) REG are clearly met. Under Article 9(2)(b) REG financial responsibility for the EU could arise pursuant to Article 3(1)(a) REG, and under Article 9(2)(a) REG pursuant to Article 3(1)(c) REG. Now, in both scenarios, it might be that a Tribunal holds the Member State internationally responsible. A Tribunal might consider treatment falling under Article 3(1)(c) REG attributable to the Member State pursuant to Article 4 ARS. What is more, due to the fact that an investor used the mechanism under the ECT Statement and sued a Member State unobjected, a Tribunal might not only consider treatment falling Article 3(1)(c) REG but even treatment falling under Article 3(1)(a) REG attributable to the Member State pursuant to Article 11 ARS.

Nothing in the REG suggests that the apportionment in the scenarios just described should be suspended and that the Member States should be stuck with the financial burden although the apportionment criteria under the REG point to the EU. As there is no EU rule that the Member States could effectively use as a legal ba-

⁸⁰ The legal assessment under Article 9(2)(a) REG in conjunction with Article 3(1)(c) REG can only be conducted *prima facie*, as it is limited to the short time frame of 45 days under Article 9(1)(a) REG. Moreover, Explanatory Memorandum to the Proposed Regulation, COM (2012) 335 final (June 21, 2012), available at: <http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149567.pdf> (last visited 31 August 2017), 6; itself notes that “the allocation of financial responsibility between the Union and a Member State may give rise to complex considerations”. Thus, legal errors are possible.

⁸¹ Such a risk barely exists under Article 9(2)(b) REG, as it simply requires a verification as to whether an investor intends to challenge both treatment of the EU and treatment of a Member State which derives from the request for a respondent determination sent to the EU.

sis,⁸² the EU should amend the REG and explicitly create one so that the Member States can recover from the EU as well.

E. Conclusion: The ECT and the REG—a difficult marriage

As the ECT and the REG currently stand, it can be concluded that both regimes are neither fully convergent nor fully incompatible. Rather, they promise to have a difficult marriage: the REG can apply in the context of the ECT, yet with certain limits. The effectiveness of the provisions on respondent status in the REG depends on the willingness of investors to resort to the voluntary respondent determination mechanism offered in the ECT Statement—even if eventually formulated in mandatory terms—and a finding by the tribunal that the determined respondent is indeed the correct one in the EU-Member State responsibility window. The effectiveness of the provisions on apportionment of financial responsibility in the REG depends on whether the EU or a Member State is sued under the ECT. In the former case, the REG gives the EU a legal basis to recover from the financially responsible Member State. In the latter case, the Member States, which can be found internationally responsible under the ECT for treatment for which the EU bears internal financial responsibility, do not have an equivalent right of redress under the REG. There are means to bring both issues in full convergence: the one on respondent status must be remedied at the ECT level, and the one on apportionment at the EU level.

⁸² State liability of the EU under Article 340 TFEU, for example, has certain thresholds and requirements that might not be met when the Commission simply applied the REG. Cf. *Dimopoulos*, 51 *Common Market Law Review* (2014), 1672 (1705, 1710).

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