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Philipp Theodor Stegmann

Responsibility of the EU and the Member States under EU International Investment Protection Agreements

Between Traditional Rules, Proceduralisation and Federalisation

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Preface

This book is the result of a doctoral thesis accepted by the University of Halle-Wittenberg in Germany. It was written in large part during my time as a visiting research student at Queen Mary University of London. This book takes into account the legal situation, literature and case law until August 2018.

I wish to express my sincere gratitude to my doctoral thesis supervisor, Professor Dr. Christian Tietje, for his encouragement, valuable advice and the opportunity to embark on this interesting research topic. I am also thankful to Professor Dr. Dirk Hanschel who kindly undertook the second evaluation of my doctoral thesis. I especially want to thank Dr. Angelos Dimopoulos for the many fruitful discussions we had and his insightful, critical and thought-provoking comments on earlier drafts of my thesis, which greatly helped advance my work and contour my arguments. I would also like to mention the fantastic research environment at Queen Mary University and wish to thank my fellow research students for many wonderful discussions. Moreover, I am deeply thankful to my parents and my sister, Anne, for supporting me throughout my life.

Finally, I want to thank Juliane dearly for being the best support one can imagine. I dedicate this book to her.

Berlin, Germany
August 2018

Philipp Theodor Stegmann

Contents

About the Author

Philipp Theodor Stegmann was born in 1984 in Frankfurt am Main, Germany. He studied Law at the Goethe-University Frankfurt and the University Paris Nanterre between 2005 and 2011. After his studies, he conducted his legal traineeship at the Higher Regional Court in Frankfurt. From 2014 until 2015, he was a visiting research student at Queen Mary University of London. Since 2016, he works as a lawyer at an international law firm in Berlin.

Abbreviations

AETR	Accord Européen sur les Transports Routiers
AG	Advocate General
ALF	Amsterdam Law Forum
ARIA	American Review of International Arbitration
ARIO	ILC Articles on the Responsibility of International Organizations of 2011
ARS	ILC Articles on the Responsibility of States for Internationally Wrongful Acts of 2001
BGB	*Bürgerliches Gesetzbuch*, German Civil Code
BTransnatlWR	Beiträge zum Transnationalen Wirtschaftsrecht
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
BYULRev	Brigham Young University Law Review
CalLRev	California Law Review
CCP	Common Commercial Policy
CDTransnatl	Cuadernos de Derecho Transnacional
CETA	Comprehensive Economic and Trade Agreement with Canada
CJEU	Court of Justice of the European Union
CJIntlL	Chinese Journal of International Law
CMLRev	Common Market Law Review
CLEER	Centre for the Law of the EU External Relations
CWRJIntlL	Case Western Reserve Journal of International Law
CYELP	Croatian Yearbook of European Law and Policy
CYELS	Cambridge Yearbook of European Legal Studies
EC	European Communities
ECHR	European Convention on Human Rights
ECLRev	European Constitutional Law Review
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EdLRev	Edinburgh Law Review
EFARev	European Foreign Affairs Review
EJIntlL	European Journal of International Law

ELJ	European Law Journal
ELRev	European Law Review
EPL	European Public Law
ESIL	European Society of International Law
EU	European Union
EUI	European University Institute
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FIntlLJ	Fordham International Law Journal
FPI	Foreign Portfolio Investment
FTA	Free Trade Agreement
GARNET	Global Governance, Regionalisation and Regulation: the Role of the EU
GG	*Grundgesetz*, German Constitution
GYIntlL	German Yearbook of International Law
HarvIntlLJ	Harvard International Law Journal
HastIntlCLRev	Hastings International and Comparative Law Review
HitoJLP	Hitotsubashi Journal of Law and Politics
HJDipl	The Hague Journal of Diplomacy
HYIntlL	The Hague Yearbook of International Law
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSIDRev	ICSID Review
ICSIDRev-FILJ	ICSID Review—Foreign Investment Law Journal
IEUDS	Investor-to-EU Dispute Settlement
IIPA	International Investment Protection Agreement
ILA	International Law Association
ILC	United Nations' International Law Commission
ILC Articles	ARS and ARIO
IntlALRev	International Arbitration Law Review
IntlCLQ	International and Comparative Law Quarterly
IntlOrgLRev	International Organization Law Review
ISDS	Investor-to-State Dispute Settlement
JERL	Journal of Energy & Natural Resources Law
JIntlA	Journal of International Arbitration
JIntlDS	Journal of International Dispute Settlement
JIntlEcoL	Journal of International Economic Law
JIntlPOrg	Journal of International Peace and Organization
JWIT	Journal of World Investment and Trade
LastG	*Lastentragungsgesetz*, German Financial Responsibility Act
LIEcoI	Legal Issues of Economic Integration
LIEuropIntg	Legal Issues of European Integration
McGillLJ	McGill Law Journal

MFN	Most-Favoured-Nation Treatment
MJIntlL	Michigan Journal of International Law
MPUNYB	Max Planck Yearbook of United Nations Law
NIntlLRev	Netherlands International Law Review
NordicJIntlL	Nordic Journal of International Law
NT	National Treatment
NwJIntlLB	Northwestern Journal of International Law and Business
NYIntlL	Netherlands Yearbook of International Law
NVwZ	Neue Zeitschrift für Verwaltungsrecht
NZLRev	New Zealand Law Review
OECD	Organisation for Economic Co-operation and Development
OLRev	Ottawa Law Review
PELRev	Pace Environmental Law Review
PPA	Power Purchase Agreements
REG	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
RFS	Regional & Federal Studies
RevBDIntl	Revue belge de droit international
SCJIntlLB	South Carolina Journal of International Law and Business
SIEL	Society of International Economic Law
SIEPS	Swedish Institute for European Policy Studies
SELJ	Stanford Environmental Law Journal
StClJIntlL	Santa Clara Journal of International Law
STransnatlLP	Studies in Transnational Legal Policy
TEC	Treaty on the European Communities
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TDM	Transnational Dispute Management
TTIP	Transatlantic Trade and Investment Partnership
ULRev	Utrecht Law Review
UMIntlCLRev	University of Miami International and Comparative Law Review
UNCLOS	United Nations Convention on the Law of the Sea
VandJTransnatlL	Vanderbilt Journal of Transnational Law
VCLT	Vienna Convention on the Law of Treaties of 1969
VCLT-IO	Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations of 1986
WHI	Walter Hallstein-Institut
WTO	World Trade Organization
YEL	Yearbook of European Law

Chapter 1
Introduction

1.1 Setting the Scene: Responsibility of the EU and the Member States Under EU IIPAs

The responsibility of the European Union (EU) and its Member States for breaches of International Investment Protection Agreements to which the EU is a party (EU IIPAs) is a highly topical and, to a large degree, unexplored subject. This is due to recent developments: The entry into force of the Lisbon Treaty in 2009 that shifted treaty-making competences for IIPAs to the EU, the imminent conclusion of the first post-Lisbon EU IIPAs and the adoption of internal EU legislation, which deals both with the management of disputes under EU IIPAs and the internal allocation of financial responsibility flowing from these disputes between the EU and its Member States. The subject is further of significant importance to its stakeholders: Arbitral awards and settlements arising out of disputes under EU IIPAs can and most certainly will, as experience has shown, churn out tremendous sums payable to aggrieved investors. Financial responsibility arising from these disputes can cut into the budgets of both the EU and the Member States depending on who is responsible; financial responsibility of the EU is practically shared by all Member States. A clear, fair and balanced delineation of responsibility between the EU and the Member States for breaches of EU IIPAs is, hence, crucial for a successful post-Lisbon EU international investment policy.

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1.1.1 The Concept of IIPAs and ISDS: Abridged

IIPAs are international treaties concluded usually between two or more contracting states. They aim at protecting investments made in the jurisdiction of a contracting state (host state) by foreign investors, which are nationals of another contracting state (home state), against adverse and unduly conduct of the host state. To this end, IIPAs stipulate protection standards addressed at the host state. For example, the host state shall not expropriate foreign investors without compensation, shall not discriminate them against domestic or other foreign investors and shall afford protection and security and fair and equitable treatment. In case of a breach, IIPAs predominantly provide for compensation to be paid by the host state to the aggrieved investor. The contracting parties under IIPAs do not only assume obligations towards each other but also towards eligible investors of the contracting parties, which—though not parties to the treaty—obtain direct substantive rights under the IIPAs. In order to vindicating these rights, investors do not have to rely on diplomatic protection and the willingness of their home state to pursue their claims. Rather, IIPAs give investors procedural standing so that they can directly enforce their substantive rights against the host state by means of international arbitration proceedings. This enforcement mechanism is called investor-to-state dispute settlement, or just 'ISDS', a term which must be coined differently in the event the EU is at the respondent end, i.e. 'IEUDS'. ISDS or IEUDS is made possible by the arbitration clause contained in IIPAs, whereby the contracting parties waive their right to immunity from jurisdiction vis-à-vis eligible investors and agree to submit future disputes to arbitration. The jurisdiction of Arbitral Tribunals derives from the arbitration clause, which vests them with the competence to decide all matters related to their own jurisdiction (so-called *Kompetenz-Kompetenz*). Importantly, the substantive and procedural obligations kick in once a foreign investment is admitted and established. IIPAs cover the post-establishment phase. They may come in the form of stand-alone bilateral or multilateral IIPAs, international investment agreements that additionally cover the admission and establishment of foreign investment or they may be part of broader free trade agreements (FTAs) with an investment protection chapter.

1.1.2 The Emergence of EU IIPAs

The multilateral Energy Charter Treaty (ECT), concluded in 1998 by the European Communities (EC), the Member States and several extra-EU States, is to date the only IIPA to which the EU is a contracting party. Until 2009, the conclusion of IIPAs was under Member State competence. This explains the large web of BITs that Member States concluded with third states. As the ECT combines an investment protection chapter with rights and obligations concerning the admission and establishment of foreign investment, which was under the competence of the EU,

the ECT had to be concluded as a mixed agreement. The Lisbon Treaty marks a turning point. With its entry into force in 2009, the EU gained exclusive competence for Foreign Direct Investment (FDI) as part of its Common Commercial Policy (CCP). Whether IIPAs are fully covered by the EU's newly gained competence, and thus, whether IIPAs can be concluded by the EU alone or whether they have to be concluded together with its Member States, is subject of much debate and controversial. In Opinion 2/15, however, the Court of Justice of the European Union (CJEU) ruled that the investment protection chapter and the ISDS provisions of the former EU-Singapore FTA do fall under exclusive competence of the EU with respect to FDI but fall under shared competence when it comes to non-direct investments.[1] The CJEU decision can be seen as a signal that the participation of the Member States alongside the EU in the conclusion of benchmark IIPAs with third countries that cover all forms of investment will be the norm in future treaty-making. As a result, in April 2018 the EU-Singapore FTA was split into two separate agreements, one on trade and one on investment, allowing the trade agreement to go forward without the Member States' participation in the ratification procedure. In the same vein, the investment chapter of the EU-Vietnam FTA will also become a stand-alone IIPA concluded by the EU and its Member States.

By now, several post-Lisbon EU IIPAs have emerged. The Comprehensive Economic and Trade Agreement with Canada (CETA) and the EU-Singapore IIPA have surpassed the negotiation stage and entered the ratification processes. The EU-Vietnam IIPA awaits signature and ratification.[2] The fate of the Transatlantic Trade and Investment Partnership with the US (TTIP) is, with the new US administration that entered the White House in 2016, more uncertain than ever. Whether the other post-Lisbon EU IIPAs, just mentioned, will eventually enter into force is far from certain too—pending ratification in the Member States. However, they all have publicly accessible draft versions; with the exception of TTIP these versions are final. Most importantly, they will likely serve as the blueprint for post-Lisbon EU IIPAs.

Subject to this study are the latest draft versions of CETA, the EU-Vietnam FTA, the EU-Singapore IIPA and TTIP.[3] It should be noted that these EU IIPAs contain

[1] Opinion 2/15 *EU-Singapore Free Trade Agreement* (16 May 2017), para. 305.

[2] As the text of the EU-Vietnam IIPA is not yet available, this study will focus on the investment chapter of the EU-Vietnam FTA. The provisions will likely be the same.

[3] CETA is subject to this study in its September 2016 version. It is available at: http://data.consilium.europa.eu/doc/document/ST-10973-2016-INIT/en/pdf. Accessed 26 August 2018.

The EU-Singapore IIPA is subject to this study in its April 2018 version. It is available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=961. Accessed 26 August 2018.

The Investment Chapter of the EU-Vietnam FTA is subject to this study in its January 2016 version. It is available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437. Accessed 26 August 2018.

The Investment Chapter of TTIP is subject to this study in its November 2015 version. It is available at: http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf. Accessed 26 August 2018.

changes to the traditional system of ISDS.[4] Most notably, these EU IIPAs establish a permanent and institutionalised Dispute Settlement Tribunal, which will be appointed by the contracting parties in advance. When a dispute arises, it is no longer the investor and the respondent appointing arbitrators of their liking. Furthermore, these EU IIPAs establish an Appellate Tribunal comparable to Appeal Courts in domestic legal systems that may look at errors in law and in fact allegedly made by the Dispute Settlement Tribunal. It is beyond the scope of this study to analyse all the facets of this newly and recently introduced system and all its deviations to the traditional ISDS system. However, the features of the new system are addressed whenever it is appropriate for this study. More importantly the Dispute Settlement Tribunals competent under these post-Lisbon EU IIPAs remain to be called 'Arbitral Tribunals' throughout this study. It is submitted that most of the core features of arbitration and ISDS remain intact under post-Lisbon EU IIPAs. To name a few, dispute settlement remains conditional upon an agreement by the investor claimant and the respondent. The disputing parties remain free to agree to the rules conducting the dispute and are free to agree to the procedural outfit applicable to the dispute settlement procedure. Most importantly, verdicts of the Dispute Settlement Tribunals continue to be considered arbitral awards in the sense of the International Centre for the Settlement of Investment Disputes (ICSID) Convention and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention).

1.1.3 With Power Comes Responsibility

As the EU has gained competence to conclude EU IIPAs, it necessarily enters the realm of international responsibility for breaches of these treaties. For almost 20 years the EU has not yet faced a single claim by an investor under the ECT, the only EU IIPA to date to which it is a party. However, as investors *can* sue the EU under the ECT and as the number of post-Lisbon EU IIPAs will mushroom in the future and eventually replace the existing Member State extra-EU BITs, the question of international responsibility of the EU and its Member States is pre-eminent. The issue of international responsibility of the EU and its Member States has been subject of debate and controversy for a long time. The difficulties surrounding the topic can be ascribed, for one, to the unique power-sharing arrangements set forth in the EU Treaties that divide treaty-making as well as regulatory competences between the EU and the Member States. On the other hand, the fact that the Member States regularly implement EU law—leaving sometimes more and sometimes less leeway to the Member States—causes complications when looking for the author of the breach of an international obligation. The debate and controversy has played out in

[4] See for an overview, European Commission (2017) A Multilateral Investment Court. http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf. Accessed 26 August 2018.

doctrine and in international adjudication under the treaties of the World Trade Organization (WTO) and the European Convention of Human Rights (ECHR), and it still causes headaches. In the meantime, the United Nations' International Law Commission (ILC) has issued, arguably, the most authoritative legal document on that subject yet: the ILC Articles on the Responsibility of States for Internationally Wrongful Acts of 2001, with Commentaries (ARS and ARS Commentary),[5] and the ILC Articles on the Responsibility of International Organizations of 2011, with Commentaries (ARIO and ARIO Commentary).[6] Though the ARS are applicable to states and, thus, to the Member States of the EU, the drafting history and final conception of the ARIO indicates that the EU has less in common with classical international organisations that the drafters of the ARIO had in mind when writing these rules.

1.1.4 The Dawn of a New Responsibility Regime

The EU has taken it in its own hands to create and shape a special responsibility framework applicable to EU IIPAs. In 2010, the Commission published a Communication regarding the EU's international investment policy. It wrote that '*[i]n 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 [emphasis added]*', and '*in 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 [emphasis added].*'[7] The EU soon addressed the issue of international responsibility and internal financial compensation. On 23 July 2014 it finally 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).[8] The Commission proposed a first version of the

[5] ILC Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, in ILC Report of the 53rd session (2001), UN Doc A/56/10 (2001).

[6] ILC, Articles on the Responsibility of International Organizations, with Commentaries, in ILC Report of the 63rd session (2011), UN Doc A/66/10 (2011).

[7] 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, p. 10.

[8] 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 [2014] OJ L 257, p. 121.

REG on June 21, 2012 (Proposal REG).[9] The European Parliament amended the REG and adopted it on April 16, 2014, followed by the Council on July 23, 2014. Finally, on September 17, 2014 the REG entered into force. As to its scope and subject matter, the REG applies to ISDS disputes under IIPAs to which the EU is a party, which will include post-Lisbon EU-IIPAs in EU-only and mixed form as well as the pre-Lisbon ECT. The REG deals with the allocation of financial responsibility arising out of ISDS proceedings, namely arbitral awards and settlements. The allocation is internal between the EU and the Member States and is to be strictly distinguished from international responsibility. The Explanatory Memorandum to the Proposal REG (Explanatory Memorandum to the REG) underscores this distinction.[10] Contrary to what the name of the REG suggests, the REG also covers external aspects related to ISDS disputes. In this regard, it governs whether the EU or a Member State shall act as respondent in an ISDS dispute. It further stipulates conditions under which the EU may and must settle a dispute with an investor and who has to pay the investor in the end.

The REG is a piece of secondary EU law and not part of the applicable law in disputes both under the ECT and post-Lisbon EU IIPAs. The question arises: How do the external aspects of the REG gain effect under international law and in ISDS disputes under a given EU IIPA? The question of respondent status, i.e. whether a respondent *can* be a respondent and whether a respondent is the *correct* one, is typically determined by the arbitration clause and the law of international responsibility. A respondent in an arbitral dispute is free to enter into a settlement with an investor; a respondent does neither have to obtain anyone's approval nor can it be compelled to entering into one. In a similar vein, it is only the respondent that has payment obligations towards an investor under international law. Thus, for the external aspects of the REG to gain effect in ISDS proceedings, EU IIPAs require a specific drafting and modelling. To this end, CETA,[11] the EU-Singapore IIPA,[12] the EU-Vietnam FTA[13] and TTIP[14] provide for a 'mandatory respondent determination mechanism' that docks into the REG and thereby renders its provisions on respondent status effective under international law. Such modelling of post-Lisbon EU IIPAs represents a novel approach of proceduralising and internalising responsibility issues. This study goes even one step further and asserts that the determination

[9] Proposal for a Regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party, Brussels, 21 June 2012, COM (2012) 335.

[10] Explanatory Memorandum to the Proposal for a Regulation establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party, Brussels, 21 June 2012, COM (2012) 335, p. 5.

[11] See Article 8.21 CETA.

[12] See Article 3.5 EU-Singapore IIPA.

[13] See Article 6 Section 3 Investment Chapter EU-Vietnam FTA.

[14] See Article 5 Section 3 Investment Chapter TTIP.

of the respondent under the determination mechanism of post-Lisbon EU IIPAs has a constitutive effect on the international responsibility of the determined respondent: The determined respondent—being either the EU or a Member State—is internationally responsible for the conduct brought by the investor within the 'EU-Member State responsibility window'.[15]

The ECT does not have a system that docks into the REG and provides for a binding respondent determination mechanism. Interestingly, however, a Statement made by the EC on 17 November 1997 and submitted to the ECT Secretariat (ECT Statement)[16] offers investors a procedural avenue to ask the EU and the Member States for the determination of the proper respondent in case of an alleged breach of the ECT. In 2016, a proposal was made to replace the ECT Statement with a revised version (Proposal Revised ECT Statement).[17] It states that the EC—not to much surprise—is now replaced by the EU[18] and mentions the adoption of the REG and its application to extra-EU disputes under the ECT. It further explains how the provisions on respondent status function.[19] A crucial difference to the ECT Statement is that the Proposal Revised ECT Statement shall also be signed, and thus adopted, by the Member States. The Proposal Revised ECT Statement has not been sent to the ECT Secretariat yet. It even seems now rather unlikely that it ever will—due to either insufficient Member State support or the realisation that for the REG to fully gain force in an international investment dispute, the EU IIPA must provide welcoming provisions to that effect (which is not the case in the ECT). Be that as it may, the mechanism enshrined in both ECT Statements demonstrates that the external

[15] For a description of the term 'EU-Member State responsibility window' and a definition of the scope of the constitutive effect on international responsibility, see Sect. 4.3.2. The term is inspired by the term 'responsibility window' coined by Pieter Jan Kuijper in the context of the EU and the Member States in Pieter Jan Kuijper (2010) International Responsibility for EU Mixed Agreements. In: Christophe Hillion and Panos Koutrakos (eds.) Mixed Agreements Revisited – The EU and its Member States in the World. Hart Publishing, p. 224.

[16] Statement submitted by the EC to the Secretariat of the Energy Charter pursuant to Article 26(3)(b)(ii) of the Energy Charter Treaty made on 17 November 1997 [1998] OJ L 69, p. 115. The relevant part of the ECT Statement reads: '*[…] The European Communities are a regional economic integration organisation within the meaning of the Energy Charter Treaty. The Communities exercise the competences conferred on them by their member states through autonomous decision-making and judicial institutions. 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 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 […]*'.

[17] Proposal for a Statement submitted to the Secretariat of the ECT pursuant to Article 26(3)(b)(ii) ECT replacing the Statement made on 17 November 1997 on behalf of the EC. For the Proposal text, see https://www.parlament.gv.at/PAKT/EU/XXV/EU/09/88/EU_98816/imfname_10619760.pdf. Accessed 26 August 2018.

[18] See para. 1 Proposal Revised ECT Statement.

[19] See paras. 3, 4 Proposal Revised ECT Statement.

aspects of the REG, such as who acts as respondent, can gain relevance and may even apply in disputes under the ECT. Provided of course, an ECT investor wishes to go down that route.

1.2 Aim and Structure of This Study

The aim of this study is to identify how the EU and its Member States bear international responsibility under EU IIPAs vis-à-vis investors and how they bear internal financial responsibility under the REG towards each other. Is there a common thread? Does the law of international responsibility, as epitomised by the ILC Articles and international case law, capture the complexities and complications of executive federalism under EU law? What are the idiosyncrasies of international responsibility under EU IIPAs as opposed to let's say, under the WTO or ECHR frameworks? The study further focuses on the functioning of the framework of the REG and whether it is a viable approach to governing responsibility issues under EU IIPAs. This pertains to the external system of proceduralisation of responsibility under EU IIPAs that requires a close-knit interplay between the EU IIPA and the rules on respondent status of the REG and to the internal system of financial allocation and redress. What are the challenges for the Commission and the CJEU in applying the REG and where do they lie for Arbitral Tribunals that apply EU IIPAs? The study aims at illuminating both the advantages and the shortfalls of the system created by the REG and how it can and should be improved.

As regards structure, in Chap. 2 it is discussed as a preliminary question whether and if so, to what extent the EU and the Member States assume international obligations under EU IIPAs. To this end, this chapter looks at the division of treaty-making competences between the EU and the Member States with respect to IIPAs before the Lisbon Treaty and after the Lisbon Treaty. Under mixed IIPAs, the question arises whether the EU and the Member States are only internationally bound to the extent of their competences. If so, what are the conditions for that? Can the treaty parties contractually provide for such delimitation along competence lines? What is the state of affairs under the ECT and post-Lisbon mixed IIPAs?

Chapter 3 analyses the criteria according to which the EU and the Member States bear international responsibility for breaches of EU IIPAs under the ILC Articles and international case law. International responsibility implies a breach of international law, and a breach implies a conduct, i.e. an action or an omission, which has led to the breach. Member State conduct might breach international law, so can EU conduct. Therefore, the question of attribution of conduct to the EU and the Member States becomes relevant. Which criteria drive attribution? The ILC Articles stipulate general rules on international responsibility and further provide for the possibility of a *lex specialis* to govern international responsibility. Can the division of competences as derives from the EU Treaties serve as a *lex specialis*? Regarding mixed EU IIPAs, is there a *lex specialis* rule positing a rule of joint responsibility? Finally, can

an analogy be drawn to federal states for purposes of international responsibility of the EU under EU-only IIPAs?

After having set out the framework governing international responsibility for breaches of EU IIPAs, Chap. 4 is dedicated to examining another special framework that sets itself apart from and, if applicable, supersedes the framework discussed in Chap. 3. It is the approach of proceduralisation and internalisation of international responsibility under post-Lisbon mixed IIPAs, worded after CETA. Under this approach, a procedure kicks in where the EU determines the respondent to the dispute. The outcome is binding on the parties and the Tribunal. It is this procedural set-up and modelling of post-Lisbon mixed IIPAs that breathes life into the REG on the international plane. As this study argues, the determination of the respondent affects the international responsibility of the respondent.

Chapter 4 analyses the driving forces for this new approach to international responsibility. The chapter continues addressing how the system functions externally in a dispute under a mixed IIPA, and whether and if yes, to what extent the system works under the ECT. Chapter 4 further examines the criteria and functioning of the respondent determination under the REG and how the REG deals with settlement rights and payment obligations. Then, by interpreting the wording, purpose and objective of the respondent determination mechanism under post-Lisbon mixed IIPAs, namely under CETA, the chapter argues for the constitutive effect of the respondent determination on the international responsibility of the determined respondent. Throughout the chapter, comparisons will be drawn to another new form of proceduralisation under mixed agreements: the 'co-respondent mechanism' under the envisioned mixed ECHR framework. In the end, Chap. 4 finishes with an excursus into whether, and if so, how proceduralisation as provided under the REG and reflected under post-Lisbon EU IIPAs is possible under EU-only IIPAs. The question is more than warranted given that Member States *a priori* neither agree to dispute settlement nor assume international obligations under EU-only IIPAs.

Chapter 5 analyses the allocation of internal financial responsibility between the EU and the Member States under the REG. It explores the justifications for an internal allocation system and how it is different from a system of liability, appeal or review. The chapter examines the allocation criteria under the REG and how the REG addresses the scenarios where Member States implement EU law and thereby cause a financial burden. The chapter continues discussing the binding effect of awards and settlements on the internal allocation of financial responsibility. Specifically, does the question of illegality of treatment as found in an award or settlement have any relevance for the internal allocation? It follows a discussion on how under the REG a financial burden could and should be shared by the EU and the Member States when both are responsible for it. As a similar system to the REG exists in the federal state of Germany that allocates financial responsibility arising out of international law verdicts between the central state (*Bund*) and its constituent subdivisions (together *Länder* and separately *Land*), the study will venture into a comparative analysis. Finally, the chapter discusses the functioning of the reimbursement mechanism under the REG and how it should be improved.

Chapter 6, finally, discusses three specific problems caused by the interrelation between the application of EU IIPAs by Arbitral Tribunals and the disputing parties (in a settlement) and the application of the REG by the Commission and the CJEU. The chapter first discusses the dilemma of not being able to reconcile smooth arbitration proceedings with an effective legal protection before the CJEU against the Commission decision on respondent status pursuant to the REG. Second, this chapter addresses the risk that Arbitral Tribunals might be influenced in their own assessment on the merits by the application of the REG by the Commission. The third problem concerns the question whether the Commission and the CJEU, when allocating financial responsibility arising out of an award or a settlement, should look into the factual matrix underlying the arbitral case in order to find out which treatment is in breach of the EU IIPA where awards or settlements are unclear or silent on that issue.

Chapter 2
International Obligations of the EU and the Member States Under EU IIPAs

This chapter seeks to set out the incumbency of the international obligations under mixed and EU-only IIPAs. This issue is ultimately important for the international responsibility of the EU and the Member States: Being bound by an international obligation is a constituent element of international responsibility to arise. As Article 1 ARS and Article 3 ARIO make clear, international responsibility of a state or an international organisation requires an internationally wrongful act. Pursuant to Article 4(b) ARIO an internationally wrongful act of an international organisation consists of conduct attributable to an international organisation and '*in breach of an obligation of that international organization*'.[1] Article 2(b) ARS equally requires a '*breach of an international obligation of the state*'. Thus, without the *existence* of an international obligation incumbent upon either the EU or a Member State there is, generally, no case for international responsibility for either one.

The ARS and the ARIO understand treaty obligations as one form of international obligations that can be incumbent upon international organisations and states.[2] In the same vein, the International Court of Justice (ICJ) noted in its advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the*

[1] Pieter Jan Kuijper and Esa Paasivirta (2005) Does one size fit all?: The European Community and the responsibility of international organizations. 36(1) NYIntlL, p. 184; Mirka Möldner (2012) Responsibility of International Organizations – Introducing the ILC's DARIO. 16 MPUNYB, p. 295; ARIO Commentary, pre-Article 6: '*According to article 4 of the present articles, attribution of conduct under international law to an international organization is one condition for an international wrongful act of that international organization to arise, the other condition being that the same conduct constitutes a breach of an obligation that exists under international law for the international organization [emphasis added]*'.

[2] ARS Commentary, Article 2, para. 7: '*The terminology of breach of an international obligation of the State is long established and is used to cover both treaty and non-treaty obligations*'; ARIO Commentary, Article 4, para. 2: '*The obligation may result either from a treaty binding the international organization or from any other source of international law applicable to the organization*'.

P. T. Stegmann, *Responsibility of the EU and the Member States under EU International Investment Protection Agreements*, European Yearbook of International Economic Law 6, https://doi.org/10.1007/978-3-030-04366-7_2

WHO and Egypt that international organisations '*are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties [emphasis added]*'.[3]

The ARS and ARIO, however, do no tackle the question of incumbency of obligations under treaties. This is the realm of the Vienna Convention on the Law of Treaties of 1969 (VCLT),[4] and the Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations of 1986 (VCLT-IO).[5] The VCLT is recognised as mirroring customary international law.[6] The VCLT-IO is not in force. It requires pursuant to Article 86 VCLT-IO the consent of 35 states, which it has not yet obtained. However, as it is verbatim to the VCLT, as international organisations are in a similar situation as states when it comes to the conclusion and implementation of treaties and because there is no other source governing treaty law with respect to international organisations, one can at least seek guidance from it in addition to the VCLT.[7]

The main avenue for assuming international obligations under treaties is their conclusion by signing and ratifying them. The first part of this chapter will briefly explain the EU's and the Member States' capacity to enter into IIPAs and to hold rights and obligations under them (Sect. 2.1). As the question of whether and why IIPAs are mixed or EU-only depends upon the division of treaty-making competences between the EU and the Member States with respect to the subject matter of IIPAs, the second part will, in a next step, briefly set out the division of competences regarding IIPAs pre- and post-Lisbon (Sect. 2.2). The third part will tackle the question of who is bound under mixed and EU-only EU IIPAs under international law, and to what extent (Sect. 2.3).

2.1 Capacity to Conclude IIPAs: The EU and the Member States as Subjects of International Law

States are subjects of international law vested with international legal personality.[8] This means that states have the capacity to hold rights and obligations under international law, that they can agree to international treaties that create such rights and

[3] *The Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, 1980 ICJ Reports, pp. 89–90, para. 37.

[4] Vienna Convention on the Law of Treaties of 1969, 1155 UNTS 331.

[5] Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations of 1986, UN Doc A/CONF.129/15.

[6] Martin Björklund (2001) Responsibility in the EC for Mixed Agreements – Should Non-Member Parties Care? 70(3) NordicJIntlL, p. 389.

[7] Eva Steinberger (2006) The WTO Treaty as a Mixed Agreement: Problems with the EC's and the EC Member States' Membership of the WTO. 17(4) EJIntlL, p. 843.

[8] Malcolm N Shaw (2017) International Law, 8th edn. Cambridge University Press, pp. 155–157.

obligations and that they can have *locus standi* in disputes before Courts and Tribunals constituted under international law.[9]

The EU succeeded the EC (Article 1(3) TEU). Just as its predecessor pursuant to Article 281 TEC, the EU has legal personality separate from those of its Member States, which is now encapsulated in Article 47 TEU.[10] Such conferral extends to the international sphere due to the conferral of external competences laid down the EU Treaties. This means that the EU Treaties provide for the conditions of the EU to be a subject of international law and to have the capacity to not only legislate in the internal sphere, with binding force on the Member States, but to conclude international agreements in accordance with its treaty-making competences creating rights and obligations under international law for the EU.

It is well established that international organisations—such as the EU—can have international legal personality with the legal capacity to enter into treaties. As confirmed by the ICJ in its opinion with respect to the UN, sovereignty is not required in order to hold legal personality on the international plane.[11] International legal personality does not even require the explicit consent of all states.[12] Article 6 VCLT-IO confirmed that by stating that international organisations have the capacity to enter into treaties to the extent that this is allowed according to their internal rules. The internal rules of the EU, as just mentioned, explicitly grant the EU such capacity. Moreover, the international legal personality of international organisations and their capacity to conclude treaties with international law effects is widely accepted.[13] With respect to the EU, this is perfectly witnessed by the vast array of international treaties concluded by the EU.[14]

[9] Ibid.

[10] Christian Tomuschat (2002) The International Responsibility of the European Union. In: Enzo Cannizzaro (ed.) The European Union as an Actor in International Relations. Kluwer Law International, p. 177; Gleider I Hernández (2013) Beyond the Control Paradigm? International Responsibility and the European Union. 15 CYELS, p. 648.

[11] *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 ICJ Reports 174.

[12] Hernández, this chapter, fn. 10, p. 648.

[13] Jan Klabbers (2015) An Introduction to International Organizations Law, 3rd edn. Cambridge University Press, pp. 267 et seq.

[14] A list of international agreements concluded by the EU can be found at the European Commission Treaty Office Database: http://ec.europa.eu/world/agreements/default.home.do. Accessed 26 August 2018.