The EU and Foreign Investment – Exclusive Competence, Shared Responsibility?

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Abstract

The European Union (EU), through the combined markets of its 28 member states, is both the world's largest exporter and recipient of foreign direct investment (FDI). With the entry into force of the Treaty of Lisbon on 1 December 2009, the EU acquired far-reaching and exclusive competence with regard to FDI. The EU's exclusive competence over FDI is meant to lead to better investment protection for foreign investors within the EU legal order and for EU investors abroad. However, member states have been reluctant to accept this new exclusive competence as part of their Common Commercial Policy. Against this background, Part II of this Article examines the exclusive competence of the EU in the light of the diverging positions taken by the EU Commission and EU member states. It will be argued that the EU does not hold a de facto exclusive competence over the negotiation and conclusion of bilateral investment treaties (BITs); rather, the competence over FDI remains shared between the EU and its member states. Part III sets out the current BIT-making practice of the EU and its member states, criticizing the fact that the EU continues to allow member states to conclude BITs independently. The Article will conclude by arguing that the EU should move towards a practice of concluding mixed agreements together with its member states to avoid parallel proceedings in different dispute settlement fora and to ensure the availability of effective remedies for injured investors.

Keywords: European Union, FDI, exclusive competence, shared competence, responsibility, investor-to-state dispute settlement. Treaty of Lisbon, Common Commercial Policy

Ⅰ. Introduction

The European Union (EU), through the combined markets of its 28 member states, is both the world's largest exporter and recipient of foreign direct investment (FDI).[1] In 2013, the EU's outward FDI flows amounted to 250 billion EUR and its inward FDI to 246 billion EUR, taking up 17.8% and 17% of the global FDI flows, respectively.[2] Considering the EU's significant investment volume,[3] it is not surprising that almost half of the bilateral investment treaties (BITs) in force around the world were concluded by EU member states.[4] However, substantive differences exist between BITs concluded by individual EU member states, reflecting diverging political views and socio-economic realities among them. These differences limit the potential impact of the EU as a global player in foreign investment – especially when compared to other major actors such as the United States.[5] Indeed, EU action in the area of trade and investment has been characterized by a lack of coherence or unity. In 2006, the EU Commission acknowledged that "[i]n comparison to NAFTA countries' agreements, EU agreements and achievements in the area of investment lag behind because of their narrow content. As a result, European investors are discriminated [against] vis-à-vis their foreign competitors and the EU is losing market shares."[6]

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1. 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, at 3, COM (2010) 343 final (July 7, 2010) [hereinafter European Investment Policy].
2. U.N. Conf. on Trade & Dev., World Investment Report 2014: Investing in the SDGs: An Action Plan, at xiv, Sales No. E.14.II.D.1 (2014).
3. As the European Commission emphasizes, "[d]espite the growing importance of emerging economies as hosts to foreign-owned firms, the EU remains the largest investor and recipient of FDI." (quoting European Commission, Economic and Financial Affairs, http://ec.europa.eu/economy_finance/international/globalisation/fdi/index_en.htm(last visited Sept. 20, 2015)).
4. *EU Investment Policy: State of Play, Civil Society Dialogue* (Apr. 2013), http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150853.pdf.
5. The comparison with the United States is also particularly interesting because the divergent economies and interests of the different states do not appear to undermine U.S. external relational relations in matters of foreign investment.
6. Note for the attention of the 133 Committee: Upgrading the EU Investment Policy (May 30, 2006), 2, http://www.iisd.org/pdf/2006/tas_upgrading_eu.pdf. As a result, the EU Commission sought to strengthen the EU as a unified actor with regard to

With the entry into force of the Treaty of Lisbon on 1 December 2009,[7] the EU acquired "exclusive competence" with regard to FDI.[8] In its 2010 communication "Towards a comprehensive European international investment policy," the EU Commission emphasized its ambition to create "a stable, sound and predictable environment" for foreign investors to enable them "to operate in an open, properly and fairly regulated business environment, both within and across a host country's borders."[9] In other words, with this new competence, the EU will extend the protection of its laws to foreign investors. At the same time, the Commission announced a "more activist approach" aimed at the creation of a level-playing field for EU investors abroad.[10] The EU has already made use of its more extensive competence in several negotiations, in particular regarding the investment chapters in the Free Trade Agreements (FTAs) with Canada, India and Singapore, and the Transatlantic Trade and Investment Partnership (TTIP) with the United States.[11]

Nonetheless, the scope of the EU's newly acquired "exclusive" competence in this area remains unclear. Since the entry into force of the Treaty of Lisbon, the EU Commission has taken an assertive stance, claiming that the EU has comprehensive competence regarding international protection and liberalization. However, member states have been reluctant to accept the EU's exclusive competence over foreign direct investment. Against this background, Part II of this Article examines the exclusive competence of the EU in the light of the diverging positions taken by the EU Commission and EU member states.[12] It will be argued that the EU *de facto* does not hold exclusive competence over the

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foreign direct investment. *See Draft Articles Concerning External Action in the Constitutional Treaty*, CONV (2003) 685/03 (Apr. 23, 2003).

7. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Dec. 3. 2007, 2007 O.J. (C 306) 1.
8. *See infra* Section II.A for a definition of exclusive competence.
9. European Investment Policy, *supra* note 1, at 4.
10. *Id.*
11. In 2011, the Council adopted negotiating directives also for four EUROMED countries (Tunisia, Morocco, Jordan, and Egypt) and in 2012 for Japan. EUROPEAN COMMISSION, TRADE, http://ec.europa.eu/trade/policy/accessing-markets/investment/ (last visited Sept. 30, 2015).
12. The EU Commission is used here as a shorthand for the EU's executive with the competence to instigate legislation. However, the adoption of such legislation will still depend on review and consent of the European Council and the European Parliament.

negotiation and conclusion of BITs.[13] Rather, the competence over foreign direct investment remains shared between the EU and its member states. Part III sets out the current BIT making practice of the EU and its member states, criticizing the fact that the EU will continue to allow its member states to conclude BITs independently. The Article will conclude by arguing that the EU should move towards a practice of concluding mixed agreements together with its member states so as to avoid parallel proceedings in different dispute settlement *fora* and to ensure the availability of effective remedies for injured investors.

Ⅱ. Unpacking the EU's Exclusive Competence in Foreign Investment

After several futile proposals to incorporate foreign investment among the exclusive competences of the EU during previous treaty provisions, it was finally included in the 2004 Constitutional Treaty.[14] Although the Constitutional Treaty was ultimately not adopted, the provisions on FDI survived its re-write into the Lisbon Treaty. Despite this long maturation process, it was only after the entry into force of the Treaty of Lisbon that the relevant stakeholders and commentators became aware of the potentially far-reaching repercussions of the EU's new exclusive competence in foreign investment. As one commentator notes, this shift of EU competences represents a change in "[t]he landscape of foreign investment not only in Europe, but at least to a certain extent worldwide."[15]

Part II of this Article intends to unpack the so-called exclusive competence of

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13. In this regard see the optimistic view by Bungenberg that "[t]he EU Member States have lost their competence to negotiate or conclude international agreements on foreign direct investments. The EU Member States cannot renegotiate existing BITs with third countries (outside the EU) that were concluded before the entry into force of the Lisbon Treaty, except if permission to do so is given by the EU." (quoting Marc Bungenberg, *The Division of Competences Between the EU and Its Member States in the Area of Investment Politics,* EUR. Y.B. INT'L ECON. L. 29, 38 (2011)).

14. Draft Treaty Establishing a Constitution for Europe, arts. III-216, 217(1), *adopted by* Document of 13 June 2003 and 10 July 2003, CONV 850/03 (2003). For a discussion, *see* Jan Ceyssens, *Towards a Common Foreign Investment Policy? Foreign Investments in the European Constitution,* 31 LEGAL ISSUES OF ECON. INTEGRATION 259 (2005).

15. Richard Happ & Christian Tietje, *EU, Investment Treaties, and Investment Treaty Arbitration-Current Developments and Challenges,* 2 TRANSNATIONAL DISPUTE SETTLEMENT (2013), *available at* http://www.transnational-dispute-management.com/article.asp?key=1937.

the EU in foreign direct investment. Due to the inherently controversial term "foreign direct investment" (explained further in Section II.A.2 below), member states and the EU Commission have entered into a veritable tug-of-war over competences. While the EU Commission insists on an extensive and comprehensive competence, member states have tried to hold on to their pre-existing powers (Section II.A). As a result, it is not surprising that the EU Commission most recently acknowledged that acts by members may independently violate investment protection standards, and therefore lead to their financial responsibility (Section II.B). Considering the on-going tug-of-war and the EU Commission's increasingly relenting position, it is submitted that the EU and its members have *de facto* shared competence over foreign investment at the moment.

A. Internal Mixity: A Tug-of-War over Competences

The relations between the EU and its member states are expressed in terms of powers and competences.[16] EU law recognizes three types of competences, which are laid down in the first provisions of the Treaty on the Functioning of the EU (TFEU), including a non-exhaustive list of the fields covered by each type of competence.[17] First, Article 3 of the TFEU describes the EU's *exclusive competence,* prescribing that only the EU can legislate and adopt binding acts in the fields concerned. The role of the member states is largely confined to implementing the acts of the EU; however, the EU may authorize member states to adopt some acts independently. In contrast, the second category of *shared competence* – as the name conveys – is shared between the EU and it member states. Pursuant to Article 4 of the TFEU, the EU and its member states may adopt binding acts in the fields concerned with one decisive caveat: member states are only allowed to exercise their competence to the extent that the EU has not exercised, or decided not to exercise, its own competence.[18] The classification of competences is completed by Article 6 of the TFEU, which describes the *supporting competence* of the EU in areas in which the EU does not have any legislative power. As a result, the EU may only support, coordinate or complement the acts of

16. On the division of powers generally *see* Paul Craig, EU Administrative Law 367-99 (2012).
17. Consolidated Version of the Treaty on European Union and the Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 1 (hereinafter TFEU).
18. The competences under Article 4 are regulated by the principles of subsidiarity and proportionality contained in Articles 5(3) and (4) of the TEU. *See* TFEU arts. 4-5.

member states in these policy areas.

It is clear that a shift of competences from member states to the EU in a given field entails considerable limitations to each state's national sovereignty (in other words, their national autonomy), especially when the EU receives exclusive competence in a particular subject area. Certain areas like international investment protection have long been resistant to such a shift of competences. On the one hand, it is understandable that member states have been hesitant to confer the respective powers onto the EU in view of the fact that foreign investment has substantial economic impact on national economies. However, on the other hand, foreign investment is tightly linked to international trade,[19] which has been part of the EU's exclusive competence for quite a long time. This dilemma might explain why EU member states initially agreed to extend EU competence to foreign investment (Sub-section II.A.1) but are currently trying to claim some competence in the area for themselves (Sub-section II.A.2). The image that emerges from these conflicting trends is that the EU's competence over FDI *de facto* remains shared despite the recent Treaty revisions.

1. Codifying the EU's Exclusive Competence in Foreign Investment

Before the Treaty of Lisbon, the EU (then EC) did not have exclusive competence over foreign direct investment but shared competences with its member states. The reason for this shared competence was that none of the pertinent treaty provisions could have served as a basis for EU competence over the entire field of international investment protection.[20] Despite these limitations, the EU has made use of its shared competence with regard to foreign direct investment. For instance, the EU acceded to the National Treatment Instrument of the Organization for Economic Cooperation and Development (OECD) concerning foreign investors in other OECD countries.[21] Prior to the accession to the Instrument, the Court of Justice of the EU (CJEU) confirmed the shared competence to conclude

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19. *See generally* Lionel Fontagné, *Foreign Direct Investment and International Trade: Complements or Substitutes?,* OECD Science, Technology and Industry Working Papers, No. 3 (Oct. 14, 1999), *available at* http://dx.doi.org/10.1787/788565713012. On the trade-related reasons to include FDI into the chapter on the CCP, *see* Bungenberg, *supra* note 13, at 30.
20. Wenhua Shan & Sheng Zhang, *The Treaty of Lisbon: Half Way toward a Common Investment Policy,* 21 Eur. J. Int'l L. 1049, 1050 (2010).
21. Article 7 of the Decision provides for the possibility of accession by the European Economic Community. Third Revised Decision of the Council concerning National Treatment, C(91)147/FINAL - C(91)147/FINAL/CORR (Dec. 12, 1991) (OECD).

the agreement in its Opinion 2/92.[22] The Treaty of Nice further extended the Common Commercial Policy (CCP) to include the General Agreement on Trade in Services (GATS) commitments regarding market access and national treatment of certain forms of investments in the services sector.[23]

A notable initiative is also the Minimum Platform on Investment for EU FTAs (MPol),[24] which the EU established in 2006 "as a standardized negotiation proposal for the current and future free trade agreement negotiations with third parties".[25] The MPol constituted a significant attempt by the EU to not leave the area of international investment protection exclusively in the hands of its member states.[26] More recent FTAs negotiated by the EU such as the EU-Chile-Association Agreement or the EU-CARICOM Economic Partnership Agreement (EPA) thus included investment chapters.[27] Nonetheless, the MPol is a non-legally binding document that does not *per se* change the allocation of competences between the EU and its member states. As a result, FTAs negotiated by the EU still necessitate the consent of its member states. Moreover, the MPol is aimed at "measures by the Parties affecting establishment," and it does not extend to measures relating

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22. Opinion 2/92, Competence of the Community or One of its Institutions to Participate in the Third Revised Decision of the OECD on National Treatment, 1995 E.C.R. I-521.
23. Treaty of Nice Amending the TEU, the Treaties Establishing the European Communities and Certain Related Acts, Feb. 26, 2001, 2001 O.J. (C 80) 1. MICHAEL WAIBEL, UNIV. OF CAMBRIDGE, COMPETENCE REVIEW: TRADE AND INVESTMENT (2014), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270992/bis-14-511-trade-and-investment-competence-review-independent-review-legal-research-by-michael-waibel.pdf.
24. Minimum Platform on Investment for EU FTAs, General Secretariat No. 15375/06 (Nov. 27, 2006) (unpublished note), *based on* Note for the Attention of the 133 Committee, Minimum Platform on Investment for EU FTAs–Provisions on Establishment in Template for a Title on 'Establishment, Trade in Services and E-commerce, MD 381/06 (Jul. 28, 2006) (EC). [hereinafter Minimum Platform on Investment].
25. Shan & Zhang, *supra* note 20, at 1051.
26. *Id*.
27. Agreement establishing an association between the European Community and its member states, of the one part, and the Republic of Chile, of the other part, Dec. 30, 2002, 2002 O.J. (L 352) 3; Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, Oct. 15, 2008, 2008 O.J. (L 289) 3 (entry into force pending), *available at* http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?redirect=true&treatyId=7407.

to expropriation and investor-state dispute settlement.[28]

Against this background, it was decided to include more far-reaching investment competence in the 2009 Lisbon Treaty. Articles 206 and 207 of the TFEU extend the EU's CCP to foreign direct investment. The text of Articles 206 and 207 reads as follows:

> **Article 206**
> By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade *and on foreign direct investment,* and the lowering of customs and other barriers.
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> **Article 207**
> 1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, *foreign direct investment,* the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.
> . . .
> 6. The exercise of the competences conferred by this Article in the field of the common commercial policy *shall not affect the delimitation of competences between the Union and the Member States,* and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.

In view of the negative effects of the limited EU competence with regard to foreign investment, the adoption of Articles 206 and 207 in the Treaty of Lisbon has been promoted as a positive development and led to various initiatives on the part of the EU Commission. As noted in the introduction, the EU Commission has entered or is planning to enter into a number of negotiations on FTAs that include investments chapters.[29] The Commission has also begun to elaborate on

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28. *See* Minimum Platform on Investment, *supra* note 24.
29. Reference was made to the FTAs with Canada, India and Singapore, and the TTIP with the United States.

its common European investment policy, including the criteria for the selection of partner countries, investment protection standard-setting, and investor-state dispute settlement.[30]

2. A *De Facto* Shared Competence in Foreign Investment

While the expansion of competences to international investment law has found general approval, views on the interpretation of this new EU competence are divided among member states, EU institutions and legal scholarship.[31] Disagreement as to the new EU competence relates to two distinct but interrelated issues: the definition of FDI and the scope of EU competence. Such disagreement is due to the fact that neither the TFEU nor the Treaty on the European Union (TEU) defines the term "foreign direct investment" and the possible limits of the EU's competence.

Regarding the first issue, the CJEU has provided at least some clarification regarding the definition of "foreign direct investment". Based on an interpretation of Article 64(2) TFEU (former Article 57(2) of the Treaty Establishing the European Community (TEC))[32] in conjunction with Directive 88/361/EEC,[33] the CJEU has defined the term "direct investment" as:

> investments of all kinds by natural persons or commercial, industrial or financial undertakings, and which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to

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30. *European Investment Policy, supra* note 1, at 6ff; Transatlantic Trade and Investment Partnership-Trade in Services, Investment and E-Commerce, Chapter II: Investment (EU), *available at* http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf(last visited Sept. 20, 2015).
31. For a discussion in legal scholarship, *see,* e.g., Piet Eeckhout, EU External Relations Law 150 (2012); Anna De Luca, *The Legal Framework for Foreign Investment in the EU: The EU Internal Market Freedoms, the Destiny of Member States' BITs, and Future European Agreements on Protection of Foreign Agreements, in* Regionalism in International Investment Law 120, 133 (Leon E. Trakman & Nicola W. Ranieri eds., 2013); Bungenberg, *supra* note 13, at 35; August Reinisch, *The Division of Powers Between the EU and Its Member States "After Lisbon"*, Eur. Y.B. Int'l Econ. L. 43, 46 (2011); Shan & Zhang, *supra* note 20, at 1058.
32. Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) 3.
33. Council Directive 88/361/EEC, 1988 O.J. (L 178) 11.

carry on an economic activity. This concept must therefore be understood in its widest sense.[34]

This definition follows the widely accepted definitions of the International Monetary Fund (IMF) and the OECD.[35] Considering the emphasis on "lasting and direct links" in this definition, it has been argued that indirect or portfolio investment (such as short-term loans, contractual claims, and intellectual property rights) is not included in the CCP of the EU.[36] This restrictive understanding of FDI is shared by most EU member states[37] and the Council of the EU,[38] which is composed of member state ministers representing interests of member states. In contrast, the EU Commission claims that Articles 206 and 207 imply the EU's competence over portfolio investment. The EU Commission thereby relies on Article 3(2) of the TFEU, arguing that the EU has implied exclusive competence to regulate portfolio investment of EU investors in third countries to the extent that international investment agreements might affect common EU rules concerning

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34. Case C-463/00, Comm'n v. Spain and UK, 2 C.M.L.R. 18, 53, ¶¶ 6 (2003).
35. The glossary provides "[t]he direct or indirect ownership of 10% or more of the voting power of an enterprise resident in one economy by an investor resident in another economy is evidence of such a relationship." (quoting IMF/OECD, *Glossary of Foreign Direct Investment Terms and Definitions,* at 7 (2008), *available at* http://www.oecd.org/daf/inv/investmentfordevelopment/2487495.pdf).
36. *See* Ceyssens, *supra* note 14, at 274, making this argument on the basis of a comparison of the scope of member state BITs.
37. 'The extension of the common commercial policy to "foreign direct investment" (Article 207.1 TFEU) confers exclusive competence on the European Union also in this area. Much, however, argues in favour of assuming that the term "foreign direct investment" only encompasses investment which serves to obtain a controlling interest in an enterprise […]. The consequence of this would be that exclusive competence only exists for investment of this type whereas investment protection agreements that go beyond this would have to be concluded as mixed agreements.' (quoting Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 30, 2009, 2 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 2/08.
38. *See e.g.,* the negotiating mandates for FTAs in which the European Council requests the Commission to negotiate the inclusion "into the investment protection chapter of the agreement areas of *mixed competence,* such as *portfolio investment,* […]." [emphasis added] (quoting EU-Canada (CETA), India and Singapore FTAs - EC Negotiating Mandate on Investment, Sept, 12, 2011, *available at* http://www.bilaterals.org/spip.php?article20272&lang=en (last visited Sept. 20, 2015) [hereinafter EC Negotiating Mandate on Investment]).

capital and payments (as provided for in Articles 63 to 66 of the TFEU).[39]

Regarding the second issue of disagreement, it remains controversial whether the EU's new competence includes investment protection or is limited to investment liberalization. In other words, the question is whether the EU's competence covers standards of protection in the post-investment phase such as fair and equitable treatment, full protection and security, protection from unlawful expropriation, or only pre-establishment market access and national treatment.[40] Not surprisingly, the EU Commission has also taken a comprehensive point of view in this regard. The Commission pointed out that the EU's competence for FDI and capital movements extends to standards on post-establishment, including national treatment and most-favored nation treatment, fair and equitable treatment and protection against expropriation without compensation.[41] This view is supported by Opinion 1/94 where the CJEU established that the EU's CCP competence covers post-entry obligations even if member states may also adopt internal domestic rules on the matter.[42] By contrast, some member states and other commentators have argued that the EU's

39. As the Commission explains: "The Union's competence for portfolio investment stems, in the Commission's view, from Article 63 TFEU. That article provides that the movement of capital between Member States of the Union and third countries is to be free of restrictions. Article 3(2) TFEU provides for the exclusive competence of the Union whenever rules included in an international agreement 'may affect common rules or alter their scope'. In the Commission's view, the Union must have exclusive competence also over matters of portfolio investment since the rules being envisaged, which would apply indistinctly to portfolio investment, may affect the common rules on capital movement set down in Article 63 of the Treaty." (quoting *Commission 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,* at 1.2, COM(2012) 335 final (June 6, 2012) [hereinafter Commission Proposal on Financial Responsibility]). For a discussion *see* Waibel, *supra* note 23, at 14.

40. *See* Anna De Luca, *New developments on the scope of the EU Common Commercial policy under the Lisbon Treaty: Investment liberalization vs. investment protection,* Y.B. ON INT'L INVESTMENT L. & POL'Y 165 (2012).

41. Commission Proposal on Financial Responsibility, *supra* note 39, at 1.2. *See also* EC Negotiating Mandate on Investment, *supra* note 38.

42. Opinion 1/94, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property — Article 228(6) of the E C Treaty, 1994 E.C.R. I-5267; *See also* Bungenberg, *supra* note 13, at 34.

competence is limited to investment liberalization and member states maintain their competence for investment protection in full or in part (particularly with regard to expropriation).[43]

These two points illustrate that the allocation of competences in the area of EU's foreign investment is more controversial than the term "exclusive" might suggest. The EU's assertive, comprehensive and far-reaching approach is understandable. Considering that international investment agreements cover direct and indirect investment, this is certainly the more pragmatic position.[44] However, from a textual point of view, it is difficult to argue that the EU's competence under Articles 206 and 207 of the TFEU includes foreign "indirect" investment. In relation to investment protection standards, the argument that the EU's competence now extends to investment protection, including expropriation, is more convincing. Even before the entry into force of the Treaty of Lisbon, the EU had competence over investment liberalization. The added value of the Treaty of Lisbon thus lies in the extension of that competence to investment protection. Nonetheless, in view of the on-going tug-of-war between the EU Commission and its member states, the division of competences can best be described as *de facto* shared or rather concurrent because both member states and the EU currently regulate foreign investment.

B. Allocation of Internal Financial Responsibility

An important part of international investment agreements, whether of a bilateral or multilateral nature, are provisions on investor-state dispute settlement. If the European Union and/or its member states breach their obligations owed to third parties on the basis of an international investment agreement, they are responsible under international law to provide reparation in the form of restitution, compensation or satisfaction. While this international or external responsibility towards third parties will be discussed below,[45] the division of competences in matters of FDI might be decisive for the internal allocation of financial responsibility between the European Union and its member states for the reparation made. In general, the EU bears international responsibility for acts

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43. For an overview of the debate, *see* Waibel, *supra* note 23, at 15.

44. *See* Bungenberg, *supra* note 13, at 36, explaining that "[f]or reasons of efficiency and practicability (*effet utile*) the EU should possess the competence for all possible aspects of (foreign direct) investment promotion and protection."

45. *See infra* Section III.B.

taken in fields where it has exclusive competence, whereas both the EU and its member state might bear the responsibility in areas of shared competence.[46] Consequently, the division of competences conditions whether the obligation to provide reparation will be incumbent solely on the EU or jointly on the EU and its member state(s).

Given that the EU is supposed to have exclusive competence in the area of foreign direct investment, the logical conclusion would be that it bears exclusive responsibility for the respective wrongful conduct, even if implemented by its member states. Indeed, this was the initial position by the EU Commission (Sub-section II.B.1). As explained below, however, the EU Commission has modified its approach in its proposal for a "Regulation 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"[47] which seems to confirm the *de facto* shared competence between the EU and its member states (Sub-section II.B.2). In other words, this shift in position might indicate that the Commission has accepted the *de facto* shared or concurrent competence between the EU and its member states.

1. Exclusive Financial Responsibility

After the entry into force of the Treaty of Lisbon, the EU Commission emphasized that the EU will not only defend all actions by EU institutions, but

> "[g]iven the exclusive external competence, the Commission takes the view that the European Union will also be the sole defendant regarding any measure taken by a Member State which affects investments by third country nationals or companies falling within the scope of the agreement concerned."[48]

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46. *See* Frank Hoffmeister, *Litigating against the European Union and Its Member States–Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?,* 21 Eur. J. Int'l L. 723, 743-44 (2010).

47. *See* Commission Proposal on Financial Responsibility, *supra* note 39, *adopted as* 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 O.J. (L 257) [hereinafter Financial Responsibility Regulation].

48. *European Investment Policy, supra* note 1, at 10.

This far-reaching claim of competence has resulted in the fierce opposition by some member states, especially France, Germany and the Netherlands.[49] However, the underlying rationale behind the Commission's statement is sensible: if the EU has exclusive competence, then only the EU can provide an effective remedy for the violation of the investment protection standard.[50] Put differently, the scope of the EU's internal competence over FDI has to correspond to that of its external competence to guarantee effective remedies under international law, thus ultimately ensuring a climate of legal certainty for investors in the EU legal space.

Indeed, the EU Commission's initial approach to external representation in investor-state disputes reflects the EU's general position with regard to the internal allocation of responsibility for violations of obligations under international law. The EU made this position clear during the elaboration of the Articles on the Responsibility of International Organizations by the UN International Law Commission (ARIO).[51] Although the ARIO deal with "international"–as opposed to "internal"–responsibility, the internal structure of international organization is highly relevant for the attribution of conduct to the organization and its member states.[52] For instance, Article 6 of the ARIO provides that an international organization incurs responsibility for the acts of its organs. In this provision the ILC envisaged typical organs of an international organization such as the Council

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49. *See* De Luca, *Supra* note 31, at 154.
50. *See* Pieter Jan Kuijper, *Attribution–Responsibility–Remedy Some Comments on the EU in Different International Regimes,* 47 Revue belge de droit int'l 57, 66 (2013), illustrating this point on the example of the WTO; and the also the EU's statement under the Article 26(3) (b) (ii) of the Energy Charter Treaty: "Any arbitral award against the European Communities will be implemented by the Communities' Institutions, in accordance with their obligation under Article 26(8) of the Energy Charter Treaty." Statement submitted by the European Communities to the Secretariat of the Energy Charter Treaty pursuant to Article 26 (3) (b) (ii) of the Energy Charter, 1994 O.J. (L 336) 115 [hereinafter Statement to Energy Charter Treaty]. This is not to say that member states have retroactively subsidize the Union budget for it to make reparation.
51. Rep. of the Int'l Law Comm'n, Apr. 26–June 3, July 4–Aug. 12, 2011, U.N. Doc. A/66/10, at 52-172; GAOR, 63d Sess., Supp. No. 9 (2011), *reprinted in* [2011] 2 Y.B. Int'l. L. Comm'n [hereinafter ILC]. For a discussion, *see* Pieter Jan Kuijper & Esa Paasivirta, *Does One Size Fit All? The European Community and the Responsibility of International Organizations,* 36 Netherlands Y.B. Int'l L. 169 (2005), and Hoffmeister, *supra* note 46.
52. *See* ILC, *supra* note 51, at 84-85.

of the European Union or the EU Commission. However, the EU repeatedly pointed out that member states could also be qualified as *de jure* organs or *de facto* organs of the EU. In this context, the EU Commission speaks of an "executive federalism".[53] Since the EU does not have its own federal bureaucracy (except for the EU Commission), it needs to resort to the authorities of member states.[54] In cases of exclusive competence, directly applicable EU legislation is automatically integrated into the laws of member states and applied by domestic authorities.

The reason for this argument is that the EU exercises institutional or normative control over its member states because it makes decisions that member states have to implement as a matter of binding EU law.[55] Although the ILC remained skeptical of the EU Commission's concept of executive federalism, many legal scholars and even the WTO have accepted it.[56] The argument continues to be controversial for purposes of international responsibility,[57] but the internal allocation of responsibility within the legal order of the EU generally follows the division of competences. In matters of international investment protection, this observation would imply that the EU alone is responsible in the EU legal order for a violation of investment protection standards as long as EU law required the wrongful act in question.

53. Pieter Jan Kuijper, *International Responsibility for EU Mixed Agreements, in* MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD 208, 213-14 (Christophe Hillion & Panos Koutrakos eds., 2010).

54. *Id*.

55. The terms "normative control" and "institutional control" control are both used in scholarship to distinguish the above-described control of an international organization over its organs from (factual or) "effective control". With regard to EU, *see* Hoffmeister, *supra* note 46, at 739, noting specifically that "the question of normative control must always be asked; most probably this factor will also come to the forefront in a number of investment arbitration awards involving EU Member States." *See also* Stefan Talmon, *Responsibility of International Organizations: Does the European Community Require Special Treatment? in* INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 405, 414 (Maurizio Ragazzi ed., 2005).

56. For a discussion of the different positions and the pertinent case law, *see* Hoffmeister, *supra* note 46, at 746.

57. The ILC eventually accepted the argument in terms of *lex specialis* specifically applicable to the EU. See ILC, *supra* note 51, at 100-01.

2. Shared Financial Responsibility

Since the adoption of this exclusive approach in relation to FDI, however, the EU Commission has nuanced its initial categorical position. In its 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 a Party",[58] the Commission acknowledged that some violations of international investment law might result from acts of member states that were not required by the EU. Accordingly, the regulation, as adopted by the Council and the Parliament, finds a compromise solution. Article 3(1) of the Regulation on Financial Responsibility stipulates that the main criterion for the apportionment of financial responsibility is the origin of the treatment of which the investor has complained.[59] If the treatment originates from an EU act, the EU will bear the financial burden. Conversely, if the treatment originates in a domestic act by the member state, then the member state will bear the financial burden.[60]

This model of allocating financial costs is similar to the modes of allocation that can be found in some federal states, especially in Germany.[61] Article 104a of the German Constitution (the Basic Law) provides for the apportionment of expenditures between the Federation and the Länder. The Article is based on the costs-by-cause principle *(Verursacherprinzip)*.[62] This *Verursacherprinzip* implies that the entity that breached the obligation bears the financial responsibility for

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58. Commission Proposal on Financial Responsibility, *supra* note 39.

59. *See* Financial Responsibility Regulation, *supra* note 47.

60. This includes situations in which a member state has to rectify a prior violation of EU law. The Financial Responsibility Regulation (in Article 3(1)) thus provides that "where 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." *See Id.*

61. *See* Study on Responsibility in Investor-State-Arbitration in the EU – Managing Financial Responsibility Linked to Investor-State Dispute Settlement Tribunals Established by EU's International Investment Agreements, EUR. PARL. Doc. EXPO/B/INTA/FWC/2009-01/Lot 7/31 (2012), on which the following discussion relies [hereinafter Managing Financial Responsibility].

62. Entwurf eine Gesetzes zur Änderung des Grundgesetzes, BT-Drucks.16/813 (Mar. 7, 2006), at 19 [hereinafter Entwurf eine Gesetzes]; WINFRIED KLUTH, FÖDERALISMUSREFORMGESETZ: EINFÜHRUNG UND KOMMENTIERUNG, Art. 104a GG, ¶ 12 (2007); Johannes Hellermann, *Art. 104a Grundgesetz, in* DAS BONNER GRUNDGESETZ. KOMMENTAR BAND 3 ¶ 203 (Hermann v. Mangoldt et al. eds., 2010).

this breach. In this context, financial responsibility is allocated according to the division of competences between the federal government and the Länder, regardless of the actual fault (*verschuldensunabha ngig*),[63] and based on the idea that the entity responsible for the action carries the financial burden.[64] This principle also applies in cases of responsibility on the international level where Germany represents its Länder externally, but might subsequently claim financial contributions internally.[65]

The EU Commission's Proposal on the Financial Allocation of Responsibility takes account of the fact that potential violations of international investment can result from a variety of acts that are not necessarily covered by the EU's exclusive competence. Therefore, the EU's competence over foreign investment might never be purely exclusive as a matter of internal EU law. Although the EU and its member states *de facto* share competences in the area of foreign investment, it would still be preferable that only the EU – similarly to the German model – represents its members vis-à-vis third parties. As discussed below, third parties could otherwise bring claims again the EU and its member states in multiple *fora.* If the EU was to pay compensation for an act also caused by a member state, it could seek contribution to the reparation made on the basis of the internal division of competences. The EU could, for instance, bring infringement procedures against its member states pursuant to Articles 258 and 260 of the TFEU.[66]

It has been criticized that resort to such internal infringement procedures would possibly duplicate the prior investor-state dispute settlement.[67] However, international investment tribunals are unlikely to deal with internal allocation of responsibility between the EU and its members when addressing the breach of international obligations.[68] A more serious concern is that the fines that could

63. Entwurf eine Gesetzes, *supra* note 62; Kluth, *supra* note 62, ¶ 26; Hellermann, *supra* note 62, ¶ 206.

64. *See* Kluth, *supra* note 62, ¶ 27.

65. *See* Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBl. I, art. 104(a), para. 6 (Ger.).

66. *See* Kuijper, *supra* note 50, at 67, noting that the possibility of the EU to discipline its members through infringement procedures seems to have played a role in bringing cases exclusively against the EU in WTO dispute settlement.

67. *See* Angelos Dimopoulos, *The Involvement of the EU in Investor-State Dispute Settlement: A Question of Responsibilities,* 51 COMMON MARKET L. REV. 1671, 1676 (2014).

68. The division of competences is the domain of CJEU, which is traditionally protective of the autonomy of the EU legal order. *See infra* note 90.

possibly be awarded in such procedures would not suffice for covering the damages paid in investor-state dispute settlement.[69] In this regard, investor-state dispute settlement is notably different from trade disputes under the WTO, which are typically settled by means of legal restitution.[70] However, the Financial Responsibility Regulation does not address this concern. Quite remarkably, the Financial Responsibility Regulation does not even foresee the scenario of joint responsibility between the EU and its member states,[71] which likely would have required the recognition that the competences between the EU and its member states in matters of foreign investment are *de facto* shared.[72] Thus, it remains to be seen how financial responsibility will be allocated internally when both the EU and its members are responsible for the violation of an international investment agreement. The practice of federal states such as Canada or the United States seems to suggest that it will not be easy for the EU to claim contributions to the reparations made at the international level.[73]

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69. *See* Dimopoulos, *supra* note 67, at 1676, but *see also* Kuijper, *supra* note 50, at 60-61, on the interplay of different remedies resulting from infringement procedures.
70. *See* Kuijper, *supra* note 50, at 62-65.
71. In a similar vein, *see* Dimopoulos, *supra* note 67, at 1703.
72. Note that the Financial Responsibility Regulation explicitly provides in Article 1(1) that it "shall not affect the delimitation of competences established by the Treaties, including in relation to the treatment afforded by the Member States or the Union and challenged by a claimant in investor-to-state dispute settlement conducted pursuant to an agreement." *See* Financial Responsibility Regulation, *supra* note 47.
73. In the United States, the federal government can force a state to change a law that is not compliant with rules under the North American Free Trade Agreement (NAFTA) and even declare the respective state law invalid pursuant to NAFTA regulations (19 U.S.C. § 3312(b)(2) (2006)); however, it cannot claim retroactive contributions for monetary payments resulting from the violation from states. In a similar vein, the Canadian government has repeatedly and unsuccessfully tried to obtain financial contributions to payments made under NAFTA. *See* e.g., AbitibiBowater, Inc. v. Government of Canada, NAFTA, Consent Award (Dec. 15, 2010) (concerning legislation by the government of Newfoundland and Labrador that led to AbitibiBowater's loss of its main assets in the province.); Mercer v. the Government of Canada, NAFTA, Notice of Intent (Jan. 26 2012); Mobil Investments Inc. and Murphy Oil Corporation v. Government of Canada, NAFTA, Notice of Intent (Aug. 3, 2007) (concerning a violation of NAFTA Article 1106 due to an award of damages for research and development requirements by the provincial government of Newfoundland and Labrador). As discussed in Managing Financial Responsibility, *supra* note 61, at 13.

Ⅲ. Realizing Shared Responsibility between the EU and Member States

While the EU's competence over foreign investment might be *de jure* exclusive, it remains *de facto* a shared competence with its member states. As illustrated in Section II.A of this Article, the contours of this shared competence are far from clear. This lack of clarity might have serious implications outside the EU legal order (i.e. in relation to third parties under public international law) for both the EU and its members, and for foreign investors. As mentioned in the introduction, one of the primary goals of extending the EU's competence in foreign investment by the Treaty of Lisbon was the development of a common or unified foreign investment policy to create more favorable investment conditions in the EU legal space. In turn, the EU and its member states also intended to provide greater legal certainty for EU investors abroad.[74]

Nonetheless, in the light of the current tug-of-war, the EU and its member states are far away from these goals. In relation to treaty-making, the EU has not only authorized its member states to keep in force their existing BITs but also created the possibility for them to independently conclude new BITs (Section II.A). While this concurrent treaty-making practice certainly reflects the *de facto* shared competence between the EU and its member states, it might lead to problems and inefficiencies at the level of external responsibility (Section II.B). Since the EU and its member states are bound by different treaties, injured investors might bring parallel suits in different *fora*. In turn, these investors might not necessarily receive an effective remedy from the EU and/or its member states, depending on the party they sue. This Section therefore makes proposals on how the *de facto* shared competence between the EU and its member states can be translated into shared external responsibility. More precisely, it is suggested that member states and the EU should move towards concluding mixed agreements for the time being and share responsibility for a potential violation of these agreements.

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74. As the then Commissioner for External Trade Karel de Gucht pointed out during the parliamentary pre-appointment hearings: "There are about a thousand of them. We are going to do away with them. First of all we will preserve legal certainty, then we will look closely at what initiatives we should take, and towards which countries. Within our prerogatives with respect to investment, legal certainty for investments in third countries is a main topic..." Eur. Parl. Hearings, *Remarks by Mr. Karel de Gucht* (Jan. 12, 2010).

A. Treaty-Making: A Case for Mixed Agreements

Responsibility in international law, as in domestic law, is usually based on the breach of an obligation. In international investment law these obligations typically stem from BITs. While the negotiation and conclusion of BITs used to be in the hands of member states, the EU Commission has made it clear that it intends to conclude future EU BITs on the basis of its exclusive competence. Nonetheless, the tug-of-war over competences described above makes their scope and content difficult to determine. If the EU's competence is truly exclusive, then only the EU will be able to conclude future BITs. However, if the EU's competence is interpreted restrictively, then ratification by member states will be necessary. The result would be a so-called mixed agreement between the EU and its member states, on the one hand, and third states, on the other hand.[75]

While mixed agreements are not an ideal solution in terms of treaty-making, they reflect the shared competences between the EU and its members and are common practice in the EU's external relations. Instead of concluding mixed agreements, however, the EU Commission has proposed a mechanism to keep existing BITs in place and to allow EU member states to conclude new BITs with third states, so-called extra-EU BITs (Sub-section III.A.2). In addition, intra-EU BITs between member states also remain valid (Sub-section III.A.1). This approach will inevitably result in an unmanageable web of intra-EU BITs between member states and extra-EU BITs separately concluded by the EU and its member states with third parties. Against the background of the EU's *de facto* shared competence, it is suggested that the best solution for the time being is for the EU to phase out intra-EU BITs and conclude mixed agreements in relation to third parties outside the EU.

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75. On mixed agreements, *see* generally, Joni Heliskoski, Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States (2002); Alan Dashwood, *Why continue to have mixed agreements at all?, in* La Communauté Européenne et les accords mixtes 93 (Jacques H.J. Bourgeois et al eds., 1997); Allan Rosas, *Mixed Union – Mixed Agreements, in* International Law Aspects of the European Union 125 (Martti Koskenniemi ed., 1998); and on responsibility in cases concerning mixed agreements, *see* in particular Eleftheria Neframi, *International Responsibility of the European Community and of the Member States under Mixed Agreements, in* The European Union as an Actor in International Relations 193 (Enzo Cannizzaro ed., 2002).

1. Intra-EU BITs

Before the accession of ten new member states to the EU in 2004, intra-EU BITs were a rare occurrence. After the accession, the number of BITs between EU member states increased rapidly from an initial number of two to currently 190.[76] Many of these BITs were concluded during the transition of Eastern European countries into market economies in the 1990. The accession itself led to another increase in BITs in 2007 because all old member states (apart from Ireland and Portugal) concluded BITs with the new members.[77] These BITs provided for international investment protection among EU member states in the absence of EU competence in the area. As a matter of fact, intra-EU BITs serve as the basis for 65% of all disputes against Central and Eastern European countries.[78]

The extension of the EU's exclusive competence to FDI has now led to a lively debate on the continued validity of these intra-EU BITs. On the one hand, the EU Commission, together with Eastern and Central European countries, has doubted the validity of the BITs. In this context, it is significant that the CJEU takes the view that BITs violating EU law have to be modified or terminated.[79] On the other hand, Western European states (in particular The Netherlands, Germany, Belgium and the United Kingdom) have argued that these treaties continue to be valid.[80] Their view finds support in the decisions by several arbitral tribunals in cases such as *Eastern Sugar BV (Netherlands) v. The Czech Republic,*[81] *R.J. Binder v. The Czech Republic,*[82] *Saluka v. The Czech Republic,*[83]

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76. European Commission, Banking And Finance, http://ec.europa.eu/finance/capital/analysis/monitoring_activities_and_analysis/index_en.htm#foreigndirectinvestment (last visited Sept. 20, 2015).

77. *See* Shan & Zhang, *supra* note 20, 1065.

78. *See* Cecilia Olivet, *Intra-EU Bilateral Investment Treaties–A Test for European Solidarity* (2013), Summary, *available at http://www.tni.org/briefing/intra-eu-*bilateral-investment-treaties (last visited Sept. 20, 2015).

79. Case C-249/06, Comm'n v. Sweden, 2009 E.C.R. I-1335; Case C-205/06, Comm'n v. Austria, 2009 E.C.R. I-1301.

80. *See* Olivet, *supra* note 78, at 5.

81. Eastern Sugar BV (Netherlands) v. The Czech Republic, S.C.C. [Stockholm Chamber of Commerce] No. 088/2004, ¶¶ 95-181 (Apr. 12, 2007).

82. Vis Dunbar, 'Czech Republic Quietly Pursues Challenge to Jurisdictional Ruling in Prague Court', Investment Treaty News (Jan. 17, 2008), www.iisd.org/pdf/2008/itn_jan17_ 2008.pdf.

and *Micula v. Romania.*[84] Although these cases predate the entry into force of the Treaty of Lisbon, they illustrate that intra-BITs remain in force as a matter of public international law.

This finding raises the question whether the Treaty of Lisbon itself could be considered a new treaty replacing the old BITs. This question must be answered on the basis of the law of treaties. The pertinent provision in this regard is Article 59 of the Vienna Convention on the Law of Treaties (VCLT),[85] which provides:

> **Article 59: Termination or suspension of the operation of a treaty implied by conclusion of a later treaty**
> 1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same *subject-matter* and:
> (a) it appears from the later treaty or is otherwise established that the parties *intended* that the matter should be governed by that treaty; or
> (b) the provisions of the later treaty are so far *incompatible* with those of the earlier one that the two treaties are not capable of being applied at the same time.
> 2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

Pursuant to Article 59 of the VCLT, the following criteria appear to be relevant to assess the new EU competence under the Treaty of Lisbon in relation to the old intra-EU BITs: the treatment of the same subject-matter, the intention of the parties, and the incompatibility of the earlier and the later treaty.[86] Considering the tug-of-war between the EU and its member states, the assessment of these criteria will be difficult.

First, depending on the definition of FDI and the delimitation of the scope of the EU's competence, the Treaty of Lisbon and the intra-EU BITs may or may

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83. Saluka Investments BV v. Czech Republic, Partial Award (Perm. Ct. Arb. 2006), *available at* http://www.pca-cpa.org/showpaged5fc.html?pag_id=1149 (last visited Sept. 20, 2015).
84. Ioan Micula, Viorel Micula and others v. Romania, ICSID Case No. ARB/05/20, Final Award (Dec. 11, 2013), *available at* http://www.italaw.com/sites/default/files/case-documents/italaw3036.pdf.
85. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [emphasis added].
86. *See* Shan & Zhang, *supra* note 20, at 1066.

not cover the same subject-matter. If it was accepted that the EU's competence extends to portfolio investment and investment protection, then an overlap between subject-matters is highly likely. In view of the arbitral tribunal's decision in *Eastern Sugar BV (Netherlands) v. The Czech Republic,* it could be argued that EU law still does not provide for investor-state dispute settlement.[87] However, once the EU becomes the sole decision-maker with regard to foreign investment, possible claims could be brought by individual investors via the EU's regular complaint procedure. Second, member states are divided on the question of whether or not the Treaty of Lisbon replaces the old BITs. As long as this disagreement persists, one cannot speak of the common intention that would be necessary under Article 59 (1) lit. a of the VCLT. Third, the question of incompatibility ultimately has to be answered in light of the rules and standards imposed by the EU in the future. While it is likely that the EU will impose higher standards of investment protection (at least in comparison to the BITs of some member states),[88] this will not necessarily result in conflict with the old BITs.[89]

In sum, a plausible argument can be made that intra-EU BITs remain in force despite the extension of competences of the EU. While some might contend that the decision over the fate of these treaties lies in the hands of the CJEU,[90] they were concluded under public international law. Accordingly, they remain in force as long as they are not terminated under public international law. Of course, the CJEU could decide that intra-EU BITs violate EU law, as it has already done in the cases of *Commission v. Sweden and Commission v. Austria* with regard to pre-accession extra-EU BITs.[91] The EU Commission recently initiated infringement proceedings against five member states requesting them to terminate intra-EU bilateral investment treaties between them.[92] If the CJEU was to find that intra-EU

87. Eastern Sugar BV, *supra* note 81, ¶¶ 95-181.

88. *See* De Luca, *supra* note 31, at 156, noting that "the protection under future EU agreements should be above or at least equivalent to the overall level of protection granted by Member States BITs to EU investors."

89. *See* Shan & Zhang, *supra* note 20, at 1068.

90. On the CJEU's protective stance towards the autonomy of the EU legal order, *see* August Reinisch, *The EU on the Investment Path – Quo Vadis Europe? The Future of EU BITs and other Investment Agreements,* 12 Santa Clara J. Int'l L. 111, 152ff. (2014).

91. Comm'n v. Sweden, Comm'n v. Austria, *supra* note 79.

92. Press Release, Commission asks Member States to terminate their intra-EU bilateral investment treaties (June 18, 2015), European Commission, Press Release Database, http://europa.eu/rapid/press-release_IP-15-5198_en.htm (last visited Sept. 20, 2015).

BITs are inconsistent with EU law, member states might have to terminate these treaties. Alternatively, member states could decide to terminate intra-EU BITs at the political level to prevent the possibility of parallel claims in and outside the European legal order.[93] Since most BITs contain sunset clauses with a considerable duration, investors will still be able to bring claims by means of international arbitration. These sunset clauses should give the EU the necessary time to elaborate its own internal protection standards for investors by providing them with the necessary legal certainty.

2. Extra-EU BITs

Extra-EU BITs between EU member states and third states pose additional challenges for at least two reasons: First, third parties are not subject to EU law or parties to the EU treaties. Second, with an estimate total of 1,400 BITs, EU member states account for almost half the number of total BITs in the world.[94] Although these BITs do not necessarily have to be terminated, they have to be modified so as to avoid incompatibility with EU law.[95] In fact, the sheer number of these BITs will make it difficult to terminate them, but they will also not be easily modified because the other contracting parties have to agree to any changes.

In the midst of these challenges, the EU Commission proposed a "Regulation, Establishing Transitional Arrangements for Bilateral Investment Agreements between Member States and Third Countries".[96] According to this Regulation, the EU may authorize its member states to maintain pre-Lisbon extra-EU BITs, which can stay in force under certain conditions. Through this authorization

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93. On parallel claims generally, *see* Richard H. Kreindler, *Parallel Proceedings: A Practitioner's Perspective, in* THE BACKLASH AGAINST INVESTMENT ARBITRATION 127 (Michael Waibel et al. eds., 2010).

94. Presentation at Civil Society Dialogue: EU Investment Policy - State of Play (Apr. 2013), *available at* http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150853. pdf.

95. Comm'n v. Sweden, Comm'n v. Austria, *supra* note 79.

96. *Commission Proposal for a Regulation of the European Parliament and of the Council Establishing Transitional Arrangements for Bilateral Investment Agreements between Member States and Third Countries,* COM (2010) 344 final (July 7, 2010) [hereinafter Proposal for a Regulation on Transitional BIT Arrangements], *adopted as* Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, 2012 O.J. (L 351) 40-46 [hereinafter Regulation on Transitional BIT Arrangements].

mechanism, the EU attempts to strike a balance between the member states' international obligations under existing BITs and the EU's new exclusive competence.[97] Member states had to notify the EU of these BITs until 8 February 2013 or within 30 days of their accession to the EU.[98] The EU will then evaluate these BITs, with particular regard to "whether one or more of their provisions constitute a serious obstacle to the negotiation or conclusion by the Union of bilateral investment agreements with third countries, with a view to the progressive replacement of the bilateral investment agreements notified pursuant to Article 2."[99] As a result of the tug-of-war between the EU Commission and its member states, it is significant that the Commission's original proposal contained much stricter evaluation standards such as a "conflict with the law of the Union" and "overlap, in part or in full, with an agreement of the Union in force with that third country."[100] The original proposal by the Commission had also foreseen the possibility that the Commission withdraws its authorization under these evaluation criteria.[101] Such withdrawals of authorizations would not have immediately affected relations with, or obligations owed to, third states. If an authorization is withdrawn, the BIT will usually remain in force for several years. Nevertheless, the final Regulation on Transitional BIT Arrangements merely provides for a consultation procedure in case that a member state BIT gives rise to "a serious obstacle to the negotiation or conclusion by the Union of bilateral investment agreements with third countries."[102]

While the continued validity of existing extra-EU BITs is understandable in the interest of legal certainty,[103] it is less cogent that the said Regulation also

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97. As the EU Commission stated in its Proposal the Regulation on Transitional BIT Arrangements: "Although agreements remain binding on the Member States as a matter of public international law, in the light of the entry into force of the TFEU the existence of Member States' agreements relating to investment and commitments undertaken therein should be addressed from the perspective of the EU's exclusive competence on foreign direct investment." (quoting Proposal for a Regulation on Transitional BIT Arrangements, *supra* note 96, section 1).

98. *See* List of the bilateral investment agreements referred to in Article 4(1) of Regulation (EU) No 1219/2012 of the European Parliament and of the Council Establishing Transitional Arrangements for Bilateral Investment Agreements between Member States and Third Countries, 2013 O.J. (C 131/2).

99. Regulation on Transitional BIT Arrangements, *supra* note 96, Article 5.

100. *Id.*

101. *Id.* Article 6.

102. *Id.*

allows EU member states to conclude new BITs. The conclusion of these new BITs remains subject to the authorization of the EU. Nevertheless, regarding public international law, it must be emphasized that such authorizations have no effect on third states. By allowing member states to continue concluding their own BITs, the EU acknowledges that it does not really have exclusive competence over foreign investment but at best *de facto* shared competence. Although the Regulation on Transitional BIT Arrangements foresees cooperation between the EU and its members, it counteracts the aim of developing a common investment policy. The exclusive conclusion of BITs through the EU might be unrealistic at this point, but the EU could at least conclude mixed agreements with their member states.[104] Due to the shifting nature of EU competences, such mixed agreements have the drawback that it is not readily apparent for third parties how competences are divided between the EU and its member states.[105] As discussed in the following Section, however, injured investors would at least be in a position to bring a claim against both the EU and its member state(s), thus increasing their chances of obtaining an effective remedy.

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103. As the EU Commission explains in its Proposal for a Regulation on BIT Transitional Arrangements: "The Commission is of the view that any legal uncertainty on the status and validity of these agreements, which could be detrimental for the activities of EU investments and investors abroad or foreign investments and investments in Member States, is to be avoided." (quoting Proposal for a Regulation on Transitional BIT Arrangements, *supra* note 96, section 2).

104. In this regard, *see also* the assessment by Bungenberg who states: "EU investment agreements comparable with US investment agreements in their scope of application and quality can only be concluded as 'mixed agreements'. Thus, a further transfer of competences from the Member States to the EU seems necessary to allow the EU to have a coherent and efficient investment policy in its international economic relations." (quoting Bungenberg, *supra* note 13, at 40).

105. This is even the case when the EU attaches a declaration of competences to the respective treaty. However, different treaties provide for mechanisms to seek clarification. *See generally* Pieter Jan Kuijper & Esa Paasivirta, *Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations,* INT'L ORG. L. REV. 111, 117ff. (2004); Hoffmeister, *supra* note 46, at 744; Frank Hoffmeister, *Curse or Blessing? Mixed Agreements in the Recent Practice of the European Community and its Member States, in* MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD 249 (Christophe Hillion & Panos Koutrakos eds., 2010).

B. External Responsibility: Which Model of Representation?

A breach of an international obligation by the EU and/or its member states will result in their international responsibility. In this context, the internal allocation of financial responsibility, as discussed above,[106] is to be distinguished from questions of external or international responsibility towards third parties. Such international responsibility is only partly and unsatisfactorily addressed by the Financial Responsibility Regulation. The Regulation only deals with modes of representation of EU interests vis-à-vis third parties in judicial or arbitral proceedings, but does not consider the underlying issue of the breach of a substantive obligation. In other words, the Financial Responsibility Regulation does not consider the question of responsibility *stricto sensu* or remedies.

As a result, it is not surprising that the Financial Responsibility Regulation leaves several important questions open. What happens if the treatment originates from the EU act but the EU is not a party to the relevant BIT? Based on the provisions of the Transitional Arrangements Regulation, it is fair to assume that the continued existence of intra-EU and extra-EU BITs will make this scenario likely. What if both the EU and the member states have a BIT with the third state concerned? Can the investor bring claims against both in different *fora*? These questions illustrate how problematic it can be that the EU does not conclude mixed agreements with third parties, but allows member states to continue concluding BITs independently. By considering different existing models of EU representation in dispute settlement, namely the Energy Charter Treaty and the WTO, it will be argued that some of these dispute settlement issues could be resolved if the EU concluded mixed bilateral investment treaties.

1. The Energy Charter Model

While the Financial Responsibility Regulation mainly deals with the internal apportionment of financial responsibility, it also elaborates on the EU's approach to external representation in investment disputes. Pursuant to Article 8 of the Regulation, the EU may decide, within 45 days of receiving a notice that a claim has been filed against either the EU or a member state, whether the EU should act as a respondent. The EU may act as a respondent if one or more of the following conditions are fulfilled:

(a) the Union would bear all or at least part of the potential financial

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106. *See supra* Section II.B.

> responsibility arising from the dispute in accordance with the criteria laid down in Article 3; or;
> (b) the dispute also concerns treatment afforded by the institutions, bodies, offices or agencies of the Union.[107]

The regulation appears to provide for flexibility: the EU and its member can determine among each other who should be the respondent. But this approach only works if both are parties to the agreement, which is generally not the case with most current existing and future intra-EU and extra-EU BITs.

The exception is the Energy Charter Treaty to which both the EU and its member states are parties.[108] Indeed, the approach to respondent status in the Financial Responsibility Regulation looks like the model applied by the Energy Charter Treaty. This model is characterized by the fact that the EU and its member state(s) decide among each other who is the proper respondent. As the EU stated:

> "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."[109]

The problem with the Energy Charter Model is that the EU is not a party to the Convention on the Settlement of Investment Disputes (ICSID Convention), which the EU equally acknowledges in the above-mentioned declaration. The ICSID Convention currently does not allow the possibility of the EU becoming a

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107. Para. 3 of Article 9 further provides: "The Commission may decide by means of implementing acts, based on a full and balanced factual analysis and legal reasoning provided to the Member States in accordance with the examination procedure referred to in Article 22(3), that the Union is to act as the respondent where similar treatment is being challenged in a related claim against the Union in the WTO, where a panel has been established and the claim concerns the same specific legal issue, and where it is necessary to ensure a consistent argumentation in the WTO case." Financial Responsibility Regulation, *supra* note 47, Article 9.2 (a) and (b).

108. Energy Charter Treaty, Dec. 17, 1991, 2080 U.N.T.S. 95. On the EU's participation in the Energy Charter regime, *see* THOMAS ROE & MATTHEW HAPPOLD, SETTLEMENT OF INVESTMENT DISPUTES UNDER THE ENERGY CHARTER TREATY 89-103 (2011).

109. Statement to Energy Charter Treaty, *supra* note 50.

party.[110] Moreover, the EU is not allowed to use the ICSID Additional Facility.[111]

Although an investor could conceivably resort to a dispute settlement forum other than ICSID, the challenge remains that the EU is not a party to most of the BITs concluded by its member states. As long as the EU is not a party to the relevant treaty, its possibilities to influence the outcome of a dispute are fairly limited. In the past, the EU has participated in arbitral proceedings as *amicus curiae* or interested third party.[112] In the cases of *AES v. Hungary* (No.2) and *Electrabel v. Hungary,* for example, the respective investor brought a claim against Hungary under the ICSID Convention in conjunction with Article 26 of the Energy Charter Treaty.[113] Since the cases took place after Hungary's accession to the EU, the Hungarian government claimed that its acts were taken to ensure compliance with EU law. In both of these cases, the EU Commission filed and was granted admission to the proceedings under Rule 37 (2) of the ICSID Arbitration Rules as a non-disputing party.[114] However, the EU's participation in these proceedings was limited to written submissions on certain

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110. *See* Convention on the Settlement of Investment Disputes (ICSID) Article 25, Mar. 18, 1965, 575 U.N.T.S. 159; and *Id*. Article 67, which provides: "This Convention shall be open for signature *on behalf of States* members of the Bank. …." [emphasis added].

111. As the EC acknowledged: "As far as international arbitration is concerned, it should be stated that the provisions of the ICSID Convention do not allow the European Communities to become parties to it. The provisions of the ICSID Additional Facility also do not allow the Communities to make use of them. Any arbitral award against the European Communities will be implemented by the Communities' institutions, in accordance with their obligation under Article 26 (8) of the Energy Charter Treaty." Statement to Energy Charter Treaty, *supra* note 50.

112. *See generally* Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The implications of an increase in third-party participation,* 29 Berkeley J. Int'l L. 200 (2011), but *see also* Lucas Bastin, *Amici Curiae in investor-State arbitration: Eight recent trends,* 30 Arb. Int'l 125, 137-40 (2014), noting that participation rights by amici curiae remain limited.

113. AES Summit Generation Ltd. and AES-Tisza Erömü Kft v. Republic of Hungary, ICSID Case No. ARB/07/22, Award (Sept. 23, 2010); Electrabel SA v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (Nov. 30, 2012).

114. *See* AES Summit Generation, *supra* note 113, Procedural Order Concerning the Application of a Non-Disputing Party to File a Written Submission Pursuant to ICSID Arbitration Rule 37(2) (Nov. 26, 2008) (not public); Electrabel, *supra* note 113, Procedural Order (Apr. 28, 2009) (not public).

aspects of the case,[115] which led to objections by the European Commission.[116]

While these limitations on the participation of the EU in arbitral proceedings might have been accepted before the entry into force of the Treaty of Lisbon, they are squarely at odds with the EU's purported new exclusive competence in foreign direct investment. Neither member states nor the EU have an interest in maintaining this situation. Member states will be unwilling to accept responsibility for acts that they were required to implement by virtue of European law and the EU. In turn, the EU is usually willing – if not eager – to assume responsibility on the international place as an autonomous actor. Accordingly, it seems desirable to modify existing agreements so as to allow for both the EU and its member states to be parties and thus respondents in a potential case. Possible arbitrations could take place in dispute settlement *fora* that are more open than ICSID and allow for the participation of the EU in the proceedings. In this way, the EU and its member states could avoid parallel claims brought in different *fora*.

A modified dispute settlement arrangement could look like the co-respondent mechanism that was included in the draft Accession Agreement of the EU to the European Convention on Human Rights (ECHR).[117] This co-respondent mechanism evidently presupposes that both the EU and its members are parties to the relevant agreement namely, the ECHR. Pursuant to Article 3, paragraphs (2) and (3), of this draft Agreement, where an application is brought against one or more member state, the EU may become a co-respondent to the proceedings and vice versa (the member states can join proceedings against the EU) when the compatibility of the rules provided for in the ECHR with EU law are in question. In this context, the European Court of Human Rights will not apportion responsibility between the EU and its member states in the co-respondent

115. AES Summit Generation Ltd, *supra* note 114, ¶ 24, as *cited in* Electrabel, *supra* note 113, ¶ 4.89.

116. The EU Commission noted in its submissions that it would also raise "certain questions concerning the jurisdiction of the Tribunal" and that it "would clarify that it presents its views as the external representative of the European Communities as a Contracting Party to the Energy Charter Treaty." (quoting Electrabel, *supra* note 113, ¶ 4.90).

117. Draft Revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, *Eur. Council Final Rep. to CDDH,* at 4, Apr. 3-5, 2013, 47+1(2013)008rev2 (June 10, 2013), http:/www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Meeting_reports/47_1(2013)008rev2_EN.pdf [hereinafter Draft Accession Agreement].

procedure,[118] thus preserving autonomy of the EU legal order.[119] Although the EU Commission rejected this co-respondent model in the context of foreign direct investment,[120] it might be a suitable solution in light of the *de facto* shared competence between the EU and its member.

2. The WTO Model

In the alternative to the Energy Charter dispute settlement model, the EU could aim at representing its members exclusively before the relevant dispute settlement mechanisms. The WTO is the pertinent example in this regard. Both the EU and its member states are parties to the relevant WTO Agreements and founding members of the WTO. Even before the EU (then EC) joined the WTO, it represented its members informally. In the WTO context, this representation has been increasingly recognized both in the negotiation and dispute settlement framework. Despite occasional attempts by other WTO members to bring claims against EU member states, panels have accepted the EU as the sole respondent.[121]

The exclusive representation of the EU is often justified by the fact that the EU has exclusive competence over commercial policy in line with the aforementioned concept of "executive federalism."[122] However, as the CJEU established in Opinion 1/94, only the Annex 1A agreements relating to goods are within the exclusive competence of the EU, while those aspects covered by the GATS and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) are part of the EU's shared competence.[123] It was only with the Treaty of Lisbon

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118. Draft Accession Agreement, *supra* note 117, Article 3(7) merely states that the EU and its member states "shall be jointly responsible for that violation." *See also* Draft Declaration by the European Union to be Made at the Time of Signature of the Accession Agreement, *Eur. Council Final Rep. to CDDH*, ¶ 62, Apr. 3-5, 2013, 47+1 (2013)008rev2, Appendix II (June 10, 2013), http://www.coe.int/t/dghl /standardsetting /hrpolicy/Accession/Meeting_reports/47_1%282013%29008rev2_EN.pdf., in which the EU explains: "Apportioning responsibility separately to the respondent and the co-respondent(s) on any other basis would entail the risk that the Court would assess the distribution of competences between the EU and its member States."

119. *See generally* Christina Eckes, *EU Accession to the ECHR: Between Autonomy and Adaptation,* 76 MODERN L. REV. 254 (2013).

120. Commission Proposal on Financial Responsibility, *supra* note 39, section 1.4.

121. On this point, including a discussion of the relevant case law, *see* Kuijper, *supra* note 53, at 213-15.

122. *See* the discussion in *supra* Sub-section II.B.2.

123. Opinion 1/94, *supra* note 42.

that the "commercial aspect of intellectual property" and all services were included in the exclusive competence of the EU under Article 207(1) of the TFEU.[124] This inclusion illustrates the continuous evolution and fluid nature of the division of competence between the EU and its member states.

For present purposes, it is imperative to note that the EU represented its member states in trade disputes before the WTO even though some of the pertinent competences between the EU and its members were shared. In WTO, the EU therefore resembles federal states that – despite shared competences at the internal level – act as a unitary entity at the international level.[125] In the long run, it is suggested that the EU should try to pursue the WTO model of dispute settlement with regard to foreign investment. It is clear that member states have an interest in defending their own interests when it comes to international investment protection, particularly when they have to pay afterwards on the basis of the Financial Responsibility Regulation of the EU.[126] However, the prospect of possible parallel claims under different BITs and in different *fora* should outweigh those concerns. In addition, member states always have the possibility to consult internally with the EU Commission during the proceedings. The duty of cooperation will play a decisive role in this regard.[127] Injured investors will likely also prefer knowing exactly who they have to turn to in the case of a potential violation of protection standards. In view of the fluid division of competences between the EU and its members, it is likely that the EU can provide the most effective remedy in an increasing number of cases.[128]

Considering the translation of the WTO model of representation into an investment context, it is desirable that the EU becomes a party to the ICSID Convention as one of the most popular *fora* for international investment dispute settlement. However, the accession of the EU to the ICSID Convention would require a treaty amendment. According to Article 66 of the ICSID Convention, all parties to the Convention need to ratify before the amendment enters into force. In the current climate of withdrawals from ICSID and more general doubts

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124. *See* Waibel, *supra* note 23, at 9.

125. *See supra* Sub-section II.B.2) on internal allocation of financial responsibility in federal states.

126. *See* Stephan Schill, *The Relation of the European Union and its Member States in Investor-State Arbitration, in* REGIONALISM IN INTERNATIONAL INVESTMENT LAW 374 (Leon E. Trakman & Nicola W. Ranieri eds., 2013).

127. *See Id.* at 393.

128. *See* Kuijper, *supra* note 50, at 65, arguing that the EU is in the best position to provide effective remedies in trade-related disputes.

regarding investor-state dispute settlement,[129] the success of such an amendment would be even more unlikely. In the absence of an amendment to the ICSID Convention, the EU should focus on alternative dispute settlement *fora* that provide for more flexibility.

Ⅳ. Conclusion: Shared Competence, Shared Responsibility

The extension of the EU's competence over FDI has come at a difficult and tumultuous time for the international investment regime – some even speak of a "backlash against investment arbitration."[130] The international regime faces many challenges, ranging from the interpretation of investment protection standards to criticism of investor-state dispute settlement. States are dissatisfied with the limits that international investment law imposes on national sovereignty and have called into question the fairness of investor-state arbitration, in particular from the perspective of developing countries.[131] Several Latin American countries have withdrawn or at least threatened to withdraw from ICSID.[132] Others such as South Africa have terminated some of their BITs. [133] But also developed states have become increasingly skeptical of the investment regime. In

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129. *See* THE BACKLASH AGAINST INVESTMENT ARBITRATION (Michael Waibel et al. eds. 2010).

130. *Id.*

131. *See* Jeswald W. Salacuse, *The Emerging Global Regime for Investment,* 51 HARV. INT'L L. J. 427, 469 (2010).

132. The countries: Bolivia formally withdrew from ICSID in 2007, Ecuador in 2009 and Venezuela in 2012. *See* Press Release, Bolivia Submits a Notice under Article 71 of the ICSID Convention (May 16, 2007), ICSID NEWS RELEASE, https://icsid.worldbank.org/ICSID/StaticFiles/Announcement3.html (last visited Sept. 20, 2015); Press Release, Denunciation of the ICSID Convention by Ecuador (Jul. 9, 2009), ICSID NEWS RELEASE, https://icsid.worldbank.org/apps/ICSIDWEB/Pages/News.aspx?CID=97&ListID=74f1e8b5-96d0-4f0a-8f0c-2f3a92d84773&variation=en_us (last visited Sept. 20, 2015); Press Release, Venezuela Submits a Notice under Article 71 of the ICSID Convention (Jan. 26, 2012), https://icsid.worldbank.org/apps/ICSIDWEB/Pages/News.aspx?CID=57&ListID=74f1e8b5-96d0-4f0a-8f0c-2f3a92d84773&variation=en_us (last visited Sept. 20, 2015). Moreover, Argentina has repeatedly threatened to withdraw from ICSID.

133. *See* Adam Green, *South Africa: BITs in Pieces,* BEYONDBRICS BLOG (Oct. 19, 2012), http://blogs.ft.com/beyond-brics/2012/10/19/south-africa-bits-in-pieces/ (last visited Sept. 20, 2015).

2011, Australia announced its intention to no longer include investor-state dispute settlement provisions in bilateral and regional trade and investment agreements.[134] In Europe, the public protests against provisions on investor-state dispute settlement in the on-going TTIP negotiations also speak a clear language.[135]

In this time of forced change for the international investment regime, the EU's new exclusive competence over FDI has created additional uncertainties. At this point, it is evident that the EU and its member states have underestimated the potential implications of the extension of the EU's competence over FDI. Since 2009, the EU Commission has actively tried to make up for this omission by drafting a number of policy documents and regulations. However, these efforts are undermined by member states' attempts to retain their competences in this area and their insistence that the EU's competence over FDI does not extend to portfolio investments and to investment protection (as opposed to liberalization). In light of this tug-of-war over competences, this Article has argued that the competence over foreign investment remains *de facto* shared between the EU and its member states. This argument seems to find confirmation in the EU's Financial Responsibility Regulation, which foresees that both the EU and its member state might breach applicable investment law standards.

Nonetheless, the EU's current practice with regard to international responsibility reflects neither an exclusive competence nor a *de facto* shared competence. As a result of the EU's exclusive competence, one would expect the EU to bear exclusive international responsibility. The practical difficulty with implementing the EU's exclusive international responsibility will be that that the EU is not a party to the about 1,400s BITs concluded by its member states. However, instead of asking member states to terminate these BITs or to accede to them on the basis of shared competence, the EU has decided to leave these BITs in force. The continued validity of these BITs can be explained in the interest of legal

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134. *See* Kyla Tienhaara & Patricia Ranald, *Australia's Rejection of Investor-State Dispute Settlement: Four Potential Contributing Factors,* Investment Treaty News (July 12, 2011), http://www.iisd.org/itn/2011/07/12/australias-rejection-of-investor-state-dispute-settlement-four-potential-contributing-factors/. The government justified its position by reference to "no greater rights" for foreign investors government's own "right to regulate" to protect the public interest.

135. Against this background, it is not surprising that the EU Commission has recently made a proposal for a new Investment Court System. *See* Press Release IP/15/5651, Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations (Sept. 16, 2015), European Commission, Press Release Database, http://europa.eu/rapid/press-release_IP-15-5651_en.htm (last visited Sept. 20, 2015).

certainty, but it is less understandable why the EU's Regulation on Transitional BIT Arrangements also allows member states to conclude new BITs. Since the EU will also begin concluding BITs, the result of the parallel treaty-making practice of EU member state is very likely an unmanageable web of BITs concluded by the EU and its member states separately.

At the level of international responsibility, this might lead to problems and inefficiencies for both the EU and its member states and for injured investors. The former might be faced with parallel claims under different BITs and in different *fora*, whereas the latter might not receive an effective remedy if a claim is not addressed to the right respondent. Therefore, it was suggested that the EU and its member states – instead of making BITs independently – conclude mixed agreements with third states.[136] Such mixed agreements would translate the *de facto* shared competence between the EU and its members into shared responsibility. Indeed, the EU and its member states are already parties to the Energy Charter Treaty, which is a mixed agreement. Under the Energy Charter Treaty, claims can be brought against either the EU or its member states, as decided among the EU respondents. Arguably, the ideal model of representation would be the model that is presently practiced at the World Trade Organization. Although the EU and its member states are parties to the relevant WTO agreements, the EU is typically the sole respondent.

Many questions regarding the EU's new exclusive competence over FDI remain unanswered. As far as the internal division of competences between the EU and its member states is concerned, the CJEU is likely to rule on the issue eventually, and may thus provide further clarification.[137] However, this internal division of the subject at hand should not be confused with issues of external or international responsibility. Contrary to the views of some scholars, the CJEU – like domestic courts – does not and should not have a say over matters of external responsibility vis-à-vis third parties. These issues of international responsibility will be decided by arbitral tribunals on the basis of the applicable international investment agreements. At present, the EU is generally not a party to international investments agreements concluded by its member states, which

136. *See* in this regard the interesting proposal by Bungenberg that "[a] new, ambitious model EU investment agreement should be developed in close coordination with Member States." *See* Bungenberg, *supra* note 13, at 34, referring to Commission Staff Working Document, Annex to the Communication of the Commission, SEC/ 2006/1230, at 18 (EC).

137. On the CJEU's extensive case law regarding the EU's external relations competences, *see* Waibel, *supra* note 23, at 4ff.

might lead to situations where member states are held responsible for decisions taken at the EU level. As one commentator noted with regard to treaties closed to EU participation, "[s]uch hard cases and perverse situations make bad law"[138] – it might be added "within and outside the European legal order". The EU should be aware of the long-term validity of these treaties and make an effort to be included in the BIT regime crafted by its member states over decades. A meaningful exclusive competence of the EU over FDI presupposes agreement on the scope of this competence and exclusive external representation by the EU in investor-state dispute settlement.

138. Kuijper, *supra* note 53, at 227.

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