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Concluding International Investment-Related Agreements with Non-EU Countries: Roles of the EU and Its Member States

ABSTRACT: *The 2009 Lisbon Treaty has added an important exclusive competence for the European Union (EU) in the common commercial policy area, namely, foreign direct investment, thus making it a crucial actor in international investment protection. This has a huge impact on shaping international investment policy in Europe and has raised important questions, especially regarding the legal consequences of the EU's exclusive competence in the negotiation process of international investment agreements (IIAs) with third countries. This article explores the role of the EU and its member states in negotiating and concluding IIAs with third countries. In the first part, the article illustrates when individual member states are authorized to conclude a new bilateral investment treaty with a third country, with a focus on the EU´s Regulation No 1219/2012 and its implementation. In the second part, the article questions what it means for the EU and its member states to conclude investment mixed agreements with third countries, how the negotiation processes are conducted, and what is the impact of the division of competences between the EU and its member states. The final part of the article shows the current issues of ius standi and financial responsibility in investment dispute settlement involving foreign investors, with a focus on the EU´s Regulation No 912/2014 and the negotiation processes of the EU with third countries.*

KEYWORDS: International investment agreements, European Union, Bilateral investment agreements, European Union exclusive competence, Foreign direct investment.

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1. Designing a new European Union investment policy after Lisbon: An introductory overview

The Lisbon Treaty, in force since December 1, 2009, has added an important exclusive competence for the European Union (EU) in the common commercial policy (CCP) area, namely, foreign direct investment (FDI), thus making the EU a crucial actor in international investment protection. According to Article 206 of the Treaty on the Functioning of the European Union (TFEU), dealing with CCP, "the Union shall contribute, in the common interest, to ... *the progressive abolition of restrictions on ... foreign direct investment* [...]" (emphasis added).[2]

This has had a huge impact on the shaping of international investment policy in Europe, and in 2010, the European Commission issued a landmark Communication,[3] stating that the EU must develop an international investment policy to increase its competitiveness and contribute to the objectives of smart, sustainable, and inclusive growth. However, although a number of regulations and policy documents on investment protection have been adopted by EU institutions since the implementation of the Lisbon Treaty, to date, the EU has not defined a clear investment policy.[4] This has caused legal uncertainty in a number of issues, especially with regard to the legal consequences of the EU's exclusive competence on the implementation of intra-EU bilateral investment agreements (BITs), which were in force in 2009 and afterwards, and on the negotiation process of international investment agreements (IIAs) with third countries.

In the aftermath of the Lisbon Treaty, the question of termination of BITs between member states (intra-EU BITs) has been highly debated.[5] While it is beyond the scope of this chapter to enter into the details of the debate, the milestone judgment that the Court of Justice of the European Union (CJEU) issued on March 6, 2018 in the Achmea case is worth recalling,[6] where the Court found that "the arbitration clause in the [intra-EU The Netherlands-Slovakia] BIT has an adverse effect on the autonomy of EU law, and is therefore incompatible with EU law."[7] This judgement was followed by declarations of EU member states (MSs) in January 2019[8] and by the Agreement for

2 Article 206 of the Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390.

3 European Commission Towards a Comprehensive European International Investment Policy, COM (2010), July 7, 2010, 343 final.

4 Calamita, 2012, p. 301.

5 For a general overview, see Dimopoulos, 2011, pp. 63–93; Kokott and Sobotta, 2016, pp. 3–19; Nagy, 2018, pp. 981–1016.

6 B.V. Achmea, Case No C-284/16, Judgment CJEU, Slovak Republic v (March 6, 2018).

7 CJEU, Press Release No 26/18 (March 6, 2018), Available at: https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2018/03/Achmea-ruling-ECJ.pdf (Accessed: 19.10.2021).

8 Declaration of the representatives of the governments of the member states on the legal consequences of the judgment of the Court of Justice in Achmea and on investment protection in the European Union, January 15, 2019, https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf (19.10.2021).

the termination of intra-EU bilateral investment treaties signed by 23 EU MSs on May 5, 2020.[9] Overall, it took a decade for MSs to find an agreement on the termination of intra-EU BITs.

In contrast, when it comes to negotiating IIAs with non-EU countries, the EU has become the principal actor involved in relevant negotiations.[10] After the implementation of the Lisbon Treaty, the EU launched several negotiations on IIAs with third countries,[11] including Australia, Canada, China, Vietnam, Singapore, and China.

Moreover, both the EU and its MSs are parties to the Energy Charter Treaty (ECT),[12] which can be considered both an intra-EU and extra-EU investment agreement.[13] It should be recalled that the European Commission and EU MSs are currently involved in the modernization process of the ECT,[14] which raises several questions, especially with respect to a possible reform of the dispute settlement mechanism.[15]

The following paragraphs explore the role of the EU and its MSs in negotiating and concluding international investment(-related) agreements with third countries. In this respect, the above-mentioned debate on the modernization of the ECT will not be considered; instead, the focus will be on bilateral relationships between the EU and its MSs on the one hand and third countries on the other, with respect to the conclusion of investment(-related) agreements.

2. Negotiating with non-EU third countries: When can MSs (still) conclude IIAs?

Before analyzing the division of roles between the EU and its MSs in negotiating IIAs with third countries, the exact scope of the new exclusive competence of the EU in FDI should be assessed. Indeed, the addition of the words “foreign direct investment” in Article 207 of the TFEU triggered a strong debate regarding the scope of the new competence. In particular, it raised questions such as whether portfolio investments are also covered by the competence and the concomitant issue of whether the new treaties will be concluded as mixed agreements.[16]

9 Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, May 5, 2020, https://ec.europa.eu/info/files/200505-bilateral-investment-treaties-agreement_en (19.10.2021).

10 We can briefly mention that IIAs can take the form of classic bilateral investment treaties (BITs) or BIT-like investment chapters in free trade agreements (FTAs).

11 See: Reinisch, 2014, pp. 111–157; Basedow, 2021, p. 643.

12 Energy Charter Treaty, Adopted December 17, 1994, in force UNTS (April 16, 1998), 2080, p. 95.

13 See: Quirico, 2021, p. 297.

14 Energy Charter Treaty, Modernisation of the Treaty (2021), Available at: https://www.energychartertreaty.org/modernisation-of-the-treaty (Accessed: 19.10.2021).

15 European Commission Overview of FTA and Other Trade Negotiations (October 2021), Available at: https://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf (Accessed: 19.10.2021).

16 Bungenberg, Griebel and Hindelang, 2011; Titi, 2015, pp. 639–661.

The Court of Justice of the European Union (CJEU) had the opportunity to clarify this issue in Opinion 2/15 of May 16, 2017. Indeed, after the EU and Singapore completed negotiations for a comprehensive free trade agreement (FTA),[17] the Commission deposited a request for an advisory opinion from the CJEU, with the following questions:

> Does the Union have the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore? More specifically, which provisions of the agreement fall within the Union's exclusive competence? Which provisions of the agreement fall within the Union's shared competence? Is there any provision of an agreement that falls within the exclusive competence of the Member States?[18]

The CJEU affirmed that the EU and its MSs share competences in concluding international investment agreements with non-EU countries when they include provisions on portfolio foreign investment, investor-state dispute settlement, and state-to-state dispute settlement related to provisions regarding portfolio investment.[19] Although the opinion was restricted to the competence to conclude the EU-Singapore FTA, it has been crucial in defining the overall division of horizontal and vertical competences between the EU and its MSs in the field of trade and investment protection and in determining how negotiations and conclusions of new IIAs should be conducted.

In this respect, it should be recalled that MSs have always been extremely active in concluding IIAs with third countries. Before 2009, they had concluded around 1,500 IIAs, which amounted to almost half of the 3,400 IIAs in force worldwide.[20] After the implementation of the Lisbon Treaty, all these agreements continued to be valid under public international law, but questions arose regarding their relationship with EU law and with the new EU exclusive competence over FDI. In this respect, in 2012, the European Commission submitted a proposal for a regulation on transitional arrangements for existing BITs of member states with third countries,[21] which finally came into force on January 9, 2013.[22]

17 For the text of the draft agreement of 17 October 2014, see: http://ec.europa.eu/trade/policy/countries-and-regions/countries/singapore (19.10.2021).

18 See Request for an Opinion submitted by the European Commission pursuant to Article 218(11) TFEU, Opinion 2/15, July 10, 2015, https://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&doclang=EN (19.10.2021).

19 See CJEU, Opinion 2/15, Opinion pursuant to Article 218(11) TFEU – Free Trade Agreement between the European Union and the Republic of Singapore, ECLI:EU:C:2017:376, para. 305; for a comment, see the study commissioned by the European Parliament, EU investment protection after Opinion 2/15: Questions of competence and coherence. PE 603.476 (March 2019), http://www.europarl.europa.eu/thinktank (19.10.2021).

20 Basedow, 2021, p. 643.

21 European 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), July 7, 2010, 344 final.

22 Regulation No 1219/2012 of the European Parliament and of the Council of December 12, 2012 Establishing Transitional Arrangements for Bilateral Investment Agreements Between Member States and Third Countries OJ L 351/40 (2012).

According to the regulation, all BITs concluded by MSs will remain in force, while they will be progressively replaced by IIAs concluded by the EU with the same non-EU counterparts. Moreover, the regulation has established an authorization mechanism, according to which the Commission can authorize, under certain circumstances, MSs to open formal negotiations with a third country to amend or conclude a (new) BIT.[23] In particular, MSs shall (1) notify the Commission of all BITs which they wish to maintain – this process is referred to as "grandfathering" – and (2) request authorization from the European Commission to open negotiations or sign a (new) BIT.[24]

Articles 7–11 of the regulation illustrate the procedure under which MSs can be authorized to enter into negotiations with a third country to amend an existing BIT or conclude a new one; Article 12 is instead dedicated to BITs that had been signed after the implementation of the Lisbon Treaty and before that of the regulation (i.e., between December 1, 2009, and January 9, 2013).

Generally, the Commission cannot grant authorization if the EU has already started IIA-related negotiations with the same third country.

Following the regulation, MSs gave notice of 1,360 pre-Lisbon bilateral investment agreements which they wished to maintain or get authorization for.[25] In accordance with Article 4 of the regulation, the Commission publishes an updated and consolidated list of all BITs that have been signed and concluded by MSs.[26]

To date, the Commission has received around 300 requests from MSs to authorize the opening of formal negotiations on new BITs or amendments to existing agreements,[27] most of which came from the Czech Republic, Hungary, Italy, Lithuania, Malta, Portugal, Romania, the Slovak Republic, and Spain, to conclude BITs with Iran, Kazakhstan, Nigeria, Saudi Arabia, Qatar, and the United Arab Emirates.[28]

Regulation 1219/2012 foresees that eventually, all BITs concluded by MSs would be replaced by EU IIAs, but it does not provide for a specific time. However, the ultimate replacement of all existing MSs' BITs with EU agreements will take time, and the

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23 Article 9 of Regulation No (1219/2012).

24 Schacherer, 2016.

25 European Commission Report to the European Parliament and the Council on the Application of Regulation (EU) No 1219/2012 Establishing Transitional Arrangements for Bilateral Investment Agreements Between Member States and Third Countries, April 6, 2020 COM (2020), 134 final, p. 3.

26 During the reporting period, the respective annual lists were published on June 5, 2014 (OJ C 169), April 24, 2015 (OJ C 135), April 27, 2016 (OJ C 149), May 11, 2017 (OJ C 147), and April 27, 2018 (OJ C 149).

27 From February 18, 2020, the Commission has been publishing all its Implementing Decisions on authorizations granted to MSs for BITs. See the official website at https://ec.europa.eu/info/publications/commission-implementing-decisions-eu-equivalence-covid-19-certificates-issued-non-eu-countries_cs (19.10.2021).

28 European Commission Report to the European Parliament and the Council on the Application of Regulation (EU) No 1219/2012 Establishing Transitional Arrangements for Bilateral Investment Agreements Between Member States and Third Countries, April 6, 2020 COM (2020), 134 final, p. 6.

high number of authorizations granted shows that MSs are willing to remain active in negotiating new BITs.[29]

3. IIAs between the EU and third countries: Who is negotiating?

The EU may start negotiations for the conclusion of international treaties on investment, in the form of FTAs with chapters on investment protection, or in the form of BITs. Article 207 TFEU provides that "for the negotiation and conclusion of agreements in the fields of [...] foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules."[30]

As already recalled, the CJEU has clarified that the EU and its MSs share competences in concluding international investment agreements with non-EU countries if they do not exclusively cover FDI, as well as on portfolio foreign investment protection provisions and the relevant dispute settlement mechanisms. Indeed, since 2009, the EU has negotiated IIAs in the form of "mixed" agreements, where EU and MSs constitute one party of the agreement, and the relevant third country represents the other counter-party. In particular, there is a tendency to divide the negotiation process of trade-related agreements, in matters where the EU enjoys exclusive competence (which are concluded only by the EU), from the negotiation process of investment agreements, which are concluded as mixed agreements.

Regarding the negotiation process, when the Council gives a green light to start the negotiations,[31] the Commission starts to negotiate with the third country. When the negotiation process is concluded, the Commission sends the text of the agreement for signature to the Council and Parliament. The agreement should then be ratified by the Council, as well as by all MSs, according to their own national procedures.[32] It should be briefly recalled that, under international law, an EU mixed agreement does not affect the scope of international obligations for the EU and its MSs, which are internationally bound by all obligations included in the agreement and not just by "those for which they have the treaty-making or implementing competences under EU law."[33]

Since the implementation of the Lisbon Treaty, the Commission has concluded the negotiations of four agreements covering investment protection, namely the

29 Schacherer, 2016.

30 See: Bungenberg and Herrmann, 2013; Reinisch, 2014, pp. 111–157; Titi, 2015, pp. 639–661.

31 Adopting a decision on the basis of Articles 207(3) and 218(2) of the TFEU.

32 European Parliament A Guide to EU Procedures for the Conclusion of International Trade Agreements Briefing (October 2016), Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/593489/EPRS_BRI(2016)593489_EN.pdf (Accessed: 19.10.2021).

33 See: Stegmann, 2019, p. 44; Neframi, 2002, p. 200.

Comprehensive Trade and Economic Agreement (CETA) with Canada,[34] the Global Agreement with Mexico,[35] the Investment Protection Agreement with Singapore,[36] and the Investment Protection Agreement with Vietnam,[37] which have not yet been implemented.[38] Upon implementation, these agreements replace 57 BITs concluded by the MSs. Investment negotiations at the EU level are currently ongoing with several third countries such as China, Chile, Indonesia, Japan, and Tunisia.[39]

The text of the EU IIA negotiated thus far resembles traditional IIAs concluded by MSs. They contain typical obligations regarding, for instance, non-expropriation and fair and equitable treatment and provide for international tribunals that have jurisdiction on the violation of investors' rights, in the context of investor-state disputes. However, they also present some innovative aspects: CETA, for instance, replaces ISDS with an investment court system (ICS), which should reduce conflicts of interest among arbitrators, notably by ensuring the permanent character of the tribunal.[40]

One of the major novelties of IIAs being concluded as mixed agreements by the EU and its MSs is that the EU–and not only MSs–may be involved in investment-related disputes. It follows that a foreign investor may be involved in investment arbitration not only against an EU MS, but also against the EU. In other words, it would be possible to have investor-state arbitrations as well as investor-EU arbitrations. [41] In this respect, one

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34 The EU concluded negotiations with Canada for a Comprehensive Trade and Economic Agreement (CETA) in August 2014; it entered into force provisionally in 2017, implying that most of the agreement is now applicable. All national (and in some cases regional) parliaments in EU countries need to approve CETA before it can take full effect. See Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L11/34.

35 Negotiations between the EU and Mexico started in May 2016, and both sides reached an agreement, in principle, on the trade part in April 2018. As regards the investment protection part, article 5 of Chapter 19 on investment dispute resolution follows Regulation 912/2014. See EU-Mexico Global Agreement, as agreed in principle, available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1833 (18.10.2021).

36 European Union and Singapore signed a Free Trade Agreement and an Investment Protection Agreement on October 19, 2018; the Free Trade Agreement entered into force on November 21, 2019, while the Investment Protection Agreement will enter into force after it has been ratified by all MSs according to their own national procedures. See Investment Protection Agreement between the European Union and its Members, of the one part, and the Republic of Singapore, of the other part, http://trade.ec.europa.eu/ doclib/press/index.cfm?id=961 (10. 19. 2021).

37 The EU and Vietnam signed a Trade Agreement and an Investment Protection Agreement on June 30, 2019; the Free Trade Agreement entered into force on August 1, 2020, while the Investment Protection Agreement will need to be ratified by all EU MSs (eight Member States have ratified it as of October 1, 2021). See EU-Vietnam Investment Protection Agreement, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437 (19.10.2021).

38 CETA and the Singapore Investment Protection Agreement are still in the process of ratification by Member States. The European Parliament gave its consent to the EU-Vietnam Investment Protection Agreement on February 12, 2020, and the Agreement is still subject to ratification by Member States. The text of the modernized EU-Mexico Association Agreement is close to finalization.

39 For the full list, see: https://trade.ec.europa.eu/doclib/html/118238.htm (19.10.2021).

40 Article 8.29 of CETA. See: Gatti, 2020, p. 94.

41 See: Dimopoulos, 2014, pp. 1671–1720.

question arises regarding who should be the respondent in an investor-state/EU dispute settlement and bear the financial consequences of such disputes.

■ *3.1. Who should be the respondent in an investment-related dispute? The EU as a new "litigator" and the question of financial responsibility*

With the EU as a new party in IIAs, together with its MSs, it must be assessed who–the EU or one of its MSs–should be the proper defendant in a case brought by a foreign investor under the relevant IIA.[42]

Usually, investor-state arbitrations occur within the framework of the 1965 International Convention for the Settlement of Investment Disputes between states and nationals of other states (ICSID Convention). However, the EU cannot become a party to the ICSID Convention, since the Convention currently does not foresee accession by an international organization. Whether (and how) the ICSID Convention could be changed in this respect remains an open question.[43]

Nevertheless, the European Commission is likely to intervene as *amicus curiae*–as a "non-disputing party" under Rule 37, paragraph 2 of the ICSID Rules of Procedure–to protect EU interest in the proper interpretation and application of EU law in ICSID arbitration cases brought against an MS.

Indeed, there are several arbitral proceedings of foreign investors against EU MSs based on BITs between EU MSs and/or concerning substantive legal problems related to EU law in which the Commission has filed *amicus curiae* briefs.[44] Among others, we can recall that the Commission sought to intervene in the *Iberdrola v. Guatemala* case, an ICSID proceeding under the Spain-Guatemala BIT.[45] In its application, the Commission claimed to have a "systemic interest" in the interpretation of investment treaties concluded by EU MSs. However, the *ad hoc* annulment committee rejected this request.[46] Moreover, the Commission requested to intervene as a non-disputing party in the ICSID *AES v. Hungary* case, without success,[47] and in the *Electrabel v. Hungary* case, with success,[48] and succeeded in intervening in a series of international arbitrations

42 See: Hoffmeister, 2012, p. 81.

43 See: Burgstaller, 2012, p. 207.

44 Eastern Sugar being the best-known example in this regard (Eastern Sugar B.V. (Netherlands) v. The Czech Republic, SCC Case 088/2004, UNCITRAL ad hoc Arbitration).

45 Iberdrola Energía S.A. v. Republic of Guatemala ICSID Case No. ARB/09/5.

46 See Iberdrola Energía S.A. v. Republic of Guatemala ICSID Case No. ARB/09/5, Decision on Annulment (January 13, 2015), Para. 25.

47 AES Summit Generation Limited and AES-Tisza Ero¨mu¨Kft v. Republic of Hungary, ICSID Case ARB/07/22. The arbitral tribunal ruled that the EU could, at least in principle, intervene in the arbitration; however, it denied access to the parties' submissions. For a comment, see: Hoffmeister, 2012, p. 92.

48 Even though the arbitral tribunal dismissed the case, it affirmed that ECT should be interpreted, if possible, in harmony with EU law, in that welcoming the Commissions submissions as amicus curiae. See Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, November 30, 2012, paras. 1.18 and 4.130.

involving the Czech Republic against investors in the PV power sector arbitrated under the UNCITRAL procedural rules.[49]

A peculiar *amicus* petition was filed in the *Micula v. Romania* case,[50] where the Commission submitted that the applicable Sweden-Romania BIT should be interpreted considering EU law–in light of EU state aid regulation–as otherwise, the award would be unenforceable in the EU. After the award was issued, the Commission sent a letter to Romania on May 26, 2014, informing it of the decision to issue a suspension injunction obliging Romania to suspend any action that may lead to the enforcement of the pending part of the award.[51] For the first time, the Commission's role evolved from its mere participation as *amicus curiae* to an active stance against the enforcement of an ICSID award.

Only time will tell us whether the EU will maintain its increasingly active presence as a non-disputing party and the effect of these interventions in investor-state proceedings.[52]

It should also be noted that the EU is already a party to the Energy Charter Treaty (ECT), which includes an elaborate investor-state dispute settlement regime. It is apparent from the statement made by the EU in relation to the ECT that the EU can become a party to an investment arbitration proceeding if that proceeding pertains to issues for which it bears the competence.[53]

Thus, what about the dispute settlement mechanisms envisaged in the investment-related agreements that the Commission is negotiating or that have already been concluded? In addition to the issue of *ius standi*, the allocation of the financial responsibility connected to investment arbitration–namely, managing the financial consequences of such disputes–should be addressed.

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49 Antaris Solar GmbH and others v. Czech Repulic PCA Case No (2014), 01, Award C.W. Europe Investments Ltd v. Czech Republic PCA Case No (May 2, 2018), I, pp. 2014–2022, Award Voltaic Network GmbH v. Czech Republic PCA Case No (May 15, 2019), pp. 2014–2020, Award Photovoltaik Knopf Betriebs-GmbH v. Czech Republic PCA Case No (May 15, 2019), pp. 2014–2021, Award (May 15, 2019) and WA Investments-Europa Nova Limited v Czech Republic PCA Case No 2014–2019, Award (May 15, 2019).

50 Ioan Micula, S.C. Viorel Micula European Food SA, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania ICSID Case No. ARB/05/20.

51 European Commission State Aid SA (2014)/C) – Romania Implementation of Arbitral award Micula v Romania of December 11, 2013, 38517, C (2014) 6848 final, October 1, 2014, para. 5.

52 For a comment see, among others, González-Bueno and Lozanoon, 2015.

53 European Communities (Statement sent by Council and Commission on November 17, 1997), Energy Charter Secretariat, Transparency Document Policies, Practices and Conditions of Contracting Parties Listed in Annex ID not Allowing an Investor to Resubmit the Same Dispute to International Arbitration at a Later Stage as Provided by Contracting Parties (in accordance with Article 26(3)(b)(ii) of the Energy Charter Treaty). However, the statement makes it clear that "[t]he Court of Justice of the European Communities, as the judicial institution of the Communities, is competent to examine any question relating to the application and interpretation of the constituent treaties and acts adopted thereunder, including international agreements concluded by the Communities, which under certain conditions may be invoked before the Court of Justice."

Preliminarily, the competence allocation in external relations between the EU and its member states must be considered as *res inter alios acta* for third States. But it is quite an important issue within the European framework, and one may wonder whether it may relieve a defendant MS from the financial burden derived from their liability.[54]

The Commission has proposed a Regulation of the European Parliament and the Council *to establish a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party* on June 21, 2012 (Draft Regulation).[55] The relevant Regulation (No 912/2014) was finally adopted on July 23, 2014,[56] and came into force on September 17, 2014.[57]

The Commission has stressed in the Draft Regulation that the external responsibility of the EU must be determined "on the basis of the competence for the subject matter of the international rules in question, as set down in the Treaty."[58] This was clarified in Regulation 912/2014, in which Preamble n. 3 affirms that:

> [i]nternational responsibility for treatment subject to dispute settlement follows the division of competences between the Union and the Member States. As a consequence, the Union will, in principle, be responsible for defending any claims alleging a violation of rules included in an agreement that fall within the Union's exclusive competence, irrespective of whether the treatment at issue is afforded by the Union itself or by a Member State.

The Regulation is built upon three main principles: (1) the overall operation of the allocation of financial responsibility must be "budget neutral" regarding the EU, implying that the EU should only bear the costs triggered by acts of its institutions; (2) a third-country investor should not be disadvantaged by the need to manage the financial responsibility within the EU; and (3) the mechanism must respect the fundamental principles governing the EU's external action as established by the Treaties and the case law of the ECJ, in particular, that of the unity of external representation and sincere co-operation.

54 See: Tietje, 2009.
55 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 a party, COM (2012), June 21, 2012, 335 final.
56 Published in the Official Journal of the European Union on August 28, 2014.
57 Article 25 of Regulation No 912/2014. For a general analysis of the Regulation, see: Dimopoulos, 2014, p. 1671; Baetens, Kreijen and Varga, 2014, p. 1203.
58 Explanatory Memorandum of the European 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 a Party COM (2012), June 21, 2012, 335 final, p. 4.

Regulation 912/2014 provides for the criteria to determine, on the one hand, the financial responsibility between the EU and the member state and, on the other, the *ius standi* before investor-State/EU dispute settlement tribunals.

Article 3 of Regulation 912/2014 links financial responsibility to the question of who– the EU or a member state–undertakes the conduct resulting in the foreign investor's claim.[59] This implies that when the measures concerned are taken by EU institutions, financial responsibility should rest with the EU institutions;[60] *vice versa*, when the measures complained of are taken by a member state of the EU, financial responsibility should rest with that member state.[61]

When the actions of the member state are "required" by the law of the EU, financial responsibility lies with the EU.[62] Here, the member state transposes an EU legislative act into its domestic regime.[63]

After determining the criteria for apportionment of financial responsibility, Chapter III of the Regulation provides the criteria to determine who should act as a respondent in an arbitral dispute (*ius standi*). Similar to financial responsibility, where the EU has afforded the treatment, it will act as the respondent in the claim.[64] Likewise, the member state acts as the respondent where it has afforded the treatment.[65]

Interestingly, and different from the rules of EU as a respondent before WTO dispute settlement organs, the Regulation in question does not provide for the possibility of joint responsibility of the EU and its MSs; rather, it adopts an "either/or" approach in determining the respondent status and allocating financial responsibility.

One might discuss whether the internal distribution of financial responsibility as a result of the Regulation is convincing and in line with Article 207(6) TFEU, which expressly provides that the competences of the EU

> ...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 harmonization.

Indeed, it is likely that the international responsibility of the EU regarding an investment agreement touches upon the internal competence of the member state.[66]

59 See: Kleinheisterkamp, 2014, p. 458.
60 Article 3, paragraph 1, letter a of the Regulation.
61 Article 3, paragraph 1, letter b of the Regulation.
62 Article 3, paragraph 1, letter c of the Regulation.
63 Opinion of Advocate General Geelhoed in the ECJ, Michael Hölterhoff v Ulrich Freiesleben, Case C-2/00, ECR I-04187 (2002), para. 31.
64 Article 4 of the Regulation.
65 According to Article 5 of the Regulation. Article 9, paragraph 1, letter b leaves the possibility that a member State may turn down responsibility by not reacting within 30 days after receiving the notice of initiation of the arbitral proceedings.
66 Tietje, Sipiorski and Töpfer, 2012.

Thus, for example, although the EU may conclude an international investment agreement that applies to investment in the area of education,[67] the organization of domestic education remains a regulatory competence of MSs.[68] In the event of a claim brought by a foreign investor in the education sector against certain legislative measures adopted by the member state, either the member state or the commission could act as the respondent. Moreover, if the arbitral tribunal rules that the investment agreement has been violated, it also has the authority to rule on both the financial compensation and the conformity of the member state's law on education with the relevant investment treaty. Therefore, an investment agreement concluded by the EU may also affect the internal competence of member states.[69]

The issues dealt with by the financial responsibility Regulation 912/2014 seem to be mostly technical. However, by including rules on the conduct of investor-state dispute settlement procedures, the proposal anticipates and indirectly frames the rights that future EU investment agreements can grant to non-EU investors. Generally, foreign investors must accept that they cannot choose whom to bring their claims.[70]

However, the Regulation is neither sufficient nor appropriate for guaranteeing legal certainty regarding the involvement of the EU in future investor-EU/member state(s) arbitrations.

Thus far, the IIAs negotiated and/or concluded by the EU include specific provisions for the allocation of financial responsibility between the EU and its member states.

Indeed, the EU-Singapore Investment Protection Agreement, EU-Vietnam Investment Protection Agreement, EU-Mexico Global Agreement, and CETA follow Regulation 912/2014 when it comes to regulating the *ius standi* question in investor-state dispute settlement mechanisms,[71] but do not mention the relevant financial responsibility.

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67 This may be subject to the requirement of unanimity decision in the Council according to Article 207, paragraph 4 TFEU. The example is from Tietje, Sipiorski and Töpfer, 2012.

68 Article 165, paragraph 4 TFEU: "In order to contribute to the achievement of the objectives referred to in this Article: the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonization of the laws and regulations of the Member States." See also Article 6 TFEU: "The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the member States. The areas of such action shall, at European level, be: [...] (e) education, vocational training, youth and sport [...]" and Article 2, paragraph 5 TFEU: "In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas."

69 Tietje, Sipiorski and Töpfer, 2012.

70 Kleinheisterkamp, 2014, p. 459.

71 Article 3.5 of the EU-Singapore Investment Protection Agreement, Article 8.21 of CETA. Article 3.32 of the EU-Vietnam Investment Protection Agreement and Article 5 of Chapter 19 of the EU-Mexico Global Agreement.

Accordingly, only the provisions of the EU Regulation will apply to determine who should "pay" in case of investor-EU/member state(s) arbitration. Given the lack of an EU investment policy dealing with substantial treatment of both EU and non-EU investors, it would be much safer to pause ongoing negotiations with important trading partners, such as China, and first work on the substantial framework for FDI protection. Thus, it would be possible to ensure the highest possible degree of legal certainty for EU and non-EU investors.

An–albeit weak–effort in this regard can be found in the Regulation on Financial Responsibility. According to preamble 4,

> Union agreements should afford foreign investors the same high level of protection as Union law and the general principles common to the laws of the Member States grant to investors from within the Union, *but not a higher level of protection*. Union agreements should ensure that the Union's legislative powers and right to regulate are respected and safeguarded (emphasis added).

This would avoid discrimination between foreign and EU investors, making the framework for managing financial responsibility subject to the interpretative safeguard that future EU investment agreements cannot provide more protection to foreign investors than what EU investors are granted under the current EU law. Thus, this is a politically attractive solution. However, it is unclear how ongoing negotiations will address these legal problems.

With the conclusion of the new IIAs by the EU with third countries and the subsequent flow of arbitrations, it will be intriguing to see how the system developed by the Regulation effectively works in practice.[72]

4. Concluding IIAs with non-EU Countries: Some concluding remarks

As noted in the previous paragraphs, the new exclusive competence of the EU over FDI has drastically changed how IIAs negotiate with third countries.

First, hereafter, IIAs that involve MSs–except for those cases where individual MSs are authorized to conclude a new BIT with a third country, according to the provisions included in Regulation No 1219/2012–will have mixed agreements of the EU, where both the EU and MSs are bound by relevant international obligations. Second, the EU would also tend to be sued in investment dispute settlement, which brings along the issues of *ius standi* and financial responsibility. Thus far, only four investment

72 Baetens, Kreijen and Varga, 2014, pp. 1203–1260.

agreements have been concluded by the EU,[73] and none of them have (fully) been implemented. Accordingly, there has been no occasion for the EU to be involved in investment-related disputes. Should this happen, it would be interesting to see how EU institutions and MSs would address the above mentioned questions, especially with respect to the financial burden of investment dispute settlement.

73 Trade and investment negotiations have been launched with Malaysia, Philippines, Myanmar, India, Australia, Chile. Moreover, negotiations continue for an Investment Protection Agreement. See European Commission, Overview of FTA and other Trade Negotiations, October 2021, https://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf (19.10.2012). It is also worth recalling that on December 30, 2020, the EU and China concluded, in principle, the negotiations on the Comprehensive Agreement on Investment (CAI). Both sides agreed to continue the negotiations on investment protection and investment dispute settlement, to be completed within two years of the signature of the agreement (Article 3 of Section VI of CAI). However, on May 20, 2021, the European Parliament voted to suspend ratification efforts of CAI with China, following Beijing's sanctions of five European officials. See IISD, 2021.

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