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Shared Responsibility and International Investment Law

Stephan Wittich[*]

1. Introduction

As a distinct body of international law, investment law may be defined loosely as the legal norms governing the protection of foreign investments and the relationship between foreign investors and their host states. As such, international investment law is not a uniform body of law, but consists of different layers of applicable law, some of which pertain to different legal orders. Essentially, investment law may consist of a mixture of 'traditional' public international law: general international law; bilateral treaties (notably bilateral investment treaties – BITs); or multilateral treaties, such as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention),[1] the North American Free Trade Agreement (NAFTA),[2] or the Energy Charter Treaty (ECT).[3] It is supplemented by contractual law arising under contracts between the host state and the investor, and also by municipal law of the host state.

This 'hybrid nature' is the most striking aspect of international investment law,[4] exemplified by its structural difference to 'traditional' public international law, also concerning the addressee of norms. Unlike traditional public international law, investment law not only provides for norms protecting legal interests between states, but also – and in fact mainly – governs the relationship between the host state and the investor. While these two sets of relationships in investment law are theoretically designed to perform complementary functions in terms of responsibility, they assume a quite distinct position in practice, notably when it comes to enforcement.

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[1] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 18 March 1965, in force 14 October 1966, 575 UNTS 159 (ICSID Convention).

[2] North American Free Trade Agreement, San Antonio, 17 December 1992, in force 1 January 1994, (1993) 32 ILM 289 (NAFTA).

[3] Energy Charter Treaty, Lisbon, 17 December 1994, in force 16 April 1998, (1994) OJ L 380/24 (ECT).

[4] Z. Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 BYIL 151.

Accordingly, dispute settlement provisions usually provide for both direct investor-state arbitration for disputes concerning the investment, and state-to-state arbitration or adjudication for disputes between the contracting parties of the BIT or the ICSID Convention. State-to-state disputes may concern a number of different issues, such as matters of general treaty law (e.g. interpretation, termination, or breach of treaty); responsibility and implementation (e.g. attribution, reparation, or diplomatic protection); procedural aspects, such as the relationship between investor-state arbitration and state-to-state arbitration; or recognition and enforcement of awards.[5] However, state-to-state disputes are extremely rare and play virtually no role in practice, not the least because of the overall effectiveness of investor-state arbitration.[6]

The specific nature of investment law is the main reason why cases of shared responsibility are extremely rare in investment law. Furthermore, in investment law there are usually no particular secondary rules or *leges speciales* on issues of responsibility, let alone concerning shared responsibility; rather, investment arbitration regularly invokes and refers to the general rules of the International Law Commission (ILC) as contained in the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA or Articles on State Responsibility)[7] (section 2). The few cases that have arisen will be discussed in terms of the obligations at issue and how investor-state tribunals have approached those aspects of shared responsibility (section 3). The situation differs significantly with regard to the European Union (EU or Union). With the Treaty of Lisbon, the EU has acquired probably exclusive competence concerning foreign direct investment (Article 207 TFEU),[8] including an external treaty-making power in the field. Therefore, the situation under EU law will be dealt with separately (section 4).

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[5] Z. Douglas, 'Other Specific Regimes of Responsibility: Investment Treaty Arbitration and ICSID', in J. Crawford, A. Pellet, and S. Olleson (eds.), *The Law of International Responsibility* (Oxford University Press, 2010), 815, at 816-817.
[6] See e.g. *Italy* v. *Cuba*, Interim Award, 15 March 2005; Final Award, 1 January 2008, available at www.italaw.com/cases/580. See M. Potestà, 'Case Note' (2012) 106 AJIL 341. See also *Ecuador* v. *USA*, PCA Case No. 2012-5, Award unpublished.
[7] Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA). Generally J. Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25 ICSID Rev – FILJ 128.
[8] Treaty on the Functioning of the European Union, Rome, 25 March 1957, in force 1 January 1958, (2012) OJ C 326/47 (TFEU). Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Lisbon, 13 December 2007, (2007) OJ C 306/1 (Treaty of Lisbon).

2. Investment law and the rules of (state) responsibility

Given the lack of specific secondary rules on responsibility for breaches of investment obligations, it seems quite obvious that the ARSIWA are the relevant yardstick for assessing the status of shared responsibility in investment law. Indeed, it is usually taken for granted that the ARSIWA are applicable to investment law, but this is far from clear and warrants a closer look.[9]

To begin with, the ARSIWA do not contain a general clause determining their scope of application. However – and despite some ambiguous statements in the Commentary[10] – the ARSIWA make it clear that only the provisions contained in Part One are applicable to any breach of an international obligation by a state, whoever the holder of the corresponding right. This follows from Article 33 ARSIWA, which defines the scope of Part Two concerning the content of state responsibility. Article 33(1) provides that '[t]he obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole', thus excluding the breach of obligations owed towards non-state entities. Accordingly, Article 33(2) ARSIWA provides that Part Two 'is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State'. This clearly suggests that in contrast to Part One of the Articles on State Responsibility, the scope of Part Two is confined to breaches of inter-state obligations only. This is also confirmed by the Commentary.[11]

As for Part Three of the ARSIWA, entitled '[t]he Implementation of the International Responsibility of a State', a perusal of the relevant Articles shows that they are formulated in terms of the injured state or, per Article 48 ARSIWA, of a state 'other than the injured State'.

[9] See in more detail S. Wittich, 'State Responsibility', in M. Bungenberg, J. Griebel, S. Hobe, and A. Reinisch (eds.), *International Investment Law* (Oxford: Hart Publishing, 2014), 23, especially at 39-45, marginal notes 33-43.

[10] Thus para. 5 of the General Commentary to the ARSIWA states that these 'apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole'. This statement seems at least misleading as it insinuates that the Articles in their entirety also apply to legal relations between states and individuals. Commentary to the Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA Commentary), General Commentary, 32, para. 5.

[11] See the ARSIWA Commentary, ibid., Commentary to Article 28 ARSIWA, 87-88, para. 3, stating that 'while Part One applies to all the cases in which an internationally wrongful act may be committed by a State, Part Two has a more limited scope. It does not apply to obligations of reparation to the extent that these arise towards or are invoked by a person or entity other than a State'. Similarly, the Introductory Commentary to Chapter 1 of Part Two, at 87, para. 2, clarifies that 'article 33 specifies the scope of the Part, both in terms of the States to which obligations are owed and also in terms of certain legal consequences which, because they accrue directly to persons or entities other than States, are not covered by Parts Two or Three of the articles'.

On that basis again, the Commentary to Article 33 ARSIWA expressly states that the 'articles do not deal with the possibility of the invocation of responsibility by persons or entities other than States', and refers to the relevant primary norm for determining whether and to what extent persons or non-state entities are entitled to invoke state responsibility on their own account.[12]

This contextual interpretation shows that only Part One is applicable to investor-state relations, whereas Parts Two and Three are confined to inter-state relations. That said, it must be added that tribunals in investor-state arbitration generally refer to, and apply, the ARSIWA as they stand, without distinction in terms of scope of application as to which part of the ARSIWA is at issue.[13] In fact, there seems not a single case in which an investment tribunal would have denied the application of ARSIWA for lack of scope, and tribunals as a rule do not even raise this issue.[14] And even where this is done, tribunals decided in favour of the applicability of the ARSIWA. Thus, the Annulment Committee in *MTD* v. *Chile*, faced with the question as to the applicability of Article 39 ARSIWA, expressly invoked Article 33 ARSIWA and held that '[p]art II of the ILC Articles … is concerned with claims between States', but immediately added that '[t]here is no reason not to apply the same principle of contribution to claims for breach of treaty brought by individuals'.[15]

The idea behind this application by analogy seems to be that it would be quite unreasonable for investment tribunals to 'invent' rules that would be different from those of the Articles on State Responsibility. Therefore, despite the narrow scope of the ARSIWA, arbitral practice has expanded their applicability also to the legal relations between investors and (their host) states. And this equally applies to those Articles relevant in the context of shared responsibility, such as Article 47 ARSIWA.

[12] ARSIWA Commentary, ibid., Commentary to Article 33, 95, para. 4.

[13] For references to case law see Wittich, 'State Responsibility', n. 9, especially at 41-42, marginal notes 38-40.

[14] For an exception see *Wintershall Aktiengesellschaft* v. *Argenina*, ICSID Case No. ARB/04/14, Award of 8 November 2008, para. 113. See also *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc.* v. *Mexico*, ICSID Case No. ARB(AF)/04/05, Award of 21 November 2007, para. 118.

[15] *MTD Equity Sdn Bhd. & MTD Chile S.A.* v. *Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007, para. 99 (*MTD* v. *Chile*).

3. The situation of shared responsibility in general investment law

3.1 General remarks

Situations of shared responsibility are rare in investment law practice, mainly because investment law is characterised by strictly bilateral relationships between states, or between a host state and an investor. Hence, virtually in all cases these relationships involve only two parties without involvement of a third party, which would be necessary to give rise to situations of shared responsibility. Furthermore, any application of the ‘principle’ of shared responsibility usually requires the existence of a primary norm providing for a common legal obligation, binding on the parties whose responsibility is to be shared. In investment law, this will only be the case in extremely rare situations because, as noted, it operates in circumstances where there are different layers of applicable law with mostly different parties and hence varying scope *ratione personae*. This makes it highly difficult to identify situations and conditions in which a principle of shared responsibility may be applicable.

Given the bilateral structure of performance of investment law obligations, the primary rules of investment law do not, as a rule, directly address the possible involvement of multiple actors. However, many rules in the field require the host state to guarantee certain standards of protection. Depending on the ‘nature’ of the standard at issue, obligations under investment treaties may require the host state to take measures to prevent a given event that may be attributable to private persons or entities, and not to the state in the first place. The standard of full protection and security, for instance, includes the obligation of the host state to provide physical safety to the investor and its investment, and to protect it from damage not only by the state and its organs, but also from private (third) parties. This amounts to a due diligence obligation, requiring the host state to take any reasonable measure that is necessary to secure the physical safety and legal security of the investment.[16] On this very general level, international investment law foresees the possibility of involvement of actors other than the host state.

Despite the particularly scarce practice, individual cases have arisen in which different situations of shared responsibility have been identified. Usually all these cases will concern

[16] G. Cordero Moss, ‘Full Protection and Security’, in A. Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press, 2008), 131, at 139; J.W. Salacuse, *The Law of Investment Treaties* (Oxford University Press, 2010), 210-217; R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford University Press, 2012), 161.

shared responsibility in the form of cooperative responsibility, where the responsibility of the actors involved arises out of joint or concerted action that has led to a single harmful outcome.[17]

3.2 Factual scenarios of shared responsibility

3.2.1 Shared responsibility between two host states

The 'classical' situation of shared responsibility is that among two or more states. This constellation is quite unique in investment law, as it requires that the investment is made in two or even more states. That this very unlikely situation may nevertheless occur in practice is borne out by the *Eurotunnel*[18] arbitration, which however is not one of investment law *stricto sensu*. This case concerned a situation where two states, France and the United Kingdom, by concluding corresponding concession agreements with private investors, may in principle become jointly and severally responsible for the breach of a common obligation.

Where there are two host states, the question as to the proper respondent in arbitral proceedings might arise as well. In *Ping An Life Insurance* v. *Belgium* for example, a foreign investor had sued Belgium as one of the two host states for nationalising a Dutch-Belgian bank. Belgium objected to the Tribunal's jurisdiction, one reason being that there had been a long-term cooperation between Dutch and Belgian regulators with respect to the supervision of the bank, and that both the Dutch and Belgian regulators and governments had intervened to avert the bankruptcy of the bank. On its face, Belgium's objection amounted to an argument of some kind of shared responsibility.[19]

[17] P.A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 MIJIL 359, at 368-369.

[18] *Eurotunnel Arbitration (The Channel Tunnel Group Ltd & France-Manche S.A.* v. *the Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland and le Ministre de l'Équipement, des Transports, de l'Aménagement du Territoire, du Tourisme et de la Mer du Gouvernement de la République Française)*, Partial Award, (2007) 132 ILR 1 (*Eurotunnel*).

[19] *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited* v. *Kingdom of Belgium*, ICSID Case No. ARB/12/29, Award of 30 April 2015, para. 127. Unfortunately, the Tribunal did not (have to) address the argument invoked by Belgium as it rejected jurisdiction *ratione temporis*, see ibid., paras. 203-233.

3.2.2 Shared responsibility between different organs of a host state

Secondly, it is possible that more than one 'entity' on the part of the host state is involved as responsible party. Investment agreements are often entered into not by the 'central' government, but by statutory corporations, public companies, agencies, instrumentalities, or territorial subdivisions (a province or municipality) of the host state.[20] Sometimes, such state entities are even created specifically for the purpose of dealing with (foreign) investors.[21] If such a state entity is in default of its obligations under the agreement, the question arises as to the responsible party. In principle, this will not be a matter of the substance of the claim, and in most cases not one of shared responsibility in the strict sense, because under international law these entities, agencies etc. are but organs of the state whose acts are in any event attributable to the latter (although attribution often is a complex matter).[22] For present purposes, however, this constellation may become relevant in terms of procedure and jurisdiction of investment tribunals, because Article 25 of the ICSID Convention allows for the possibility of such constituent subdivisions or agencies of the state to enjoy party status in ICSID proceedings.[23]

3.2.3 Shared responsibility between the host state and a private individual

A third situation involves a host state incurring responsibility towards an investor, and the responsibility being contingent in some way on the conduct of a private party, whether or not this conduct is unlawful. Such a situation was at issue in *CME* v. *Czech Republic*, in which an investment was destroyed by the host state in collaboration with a private individual who was a representative of the investor.[24] The Arbitral Tribunal sorted the problems of shared responsibility out by merely focusing on the issue of causation, but left open the possibility of both tortfeasors being held responsible separately.[25] A major problem raised by this constellation is that the norm breached – the breach then giving rise to some form of shared

[20] See Chapter 3 in this volume, G.I. Hernández, 'Federal States', in P.A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2016), __.
[21] Dolzer and Schreuer, *Principles of International Investment Law*, n. 16, 219; C.H. Schreuer, L. Malintoppi, A. Reinisch, and A. Sinclair, *The ICSID Convention. A Commentary*, 2nd edn (Cambridge University Press, 2009), Commentary to Article 25, 149, marginal note 230.
[22] L. Schicho, *State Entities in International Investment Law* (Baden-Baden: Nomos, 2012).
[23] See section 3.4 below.
[24] *CME Czech Republic B.V. (The Netherlands)* v. *Czech Republic*, UNCITRAL Arbitration, Partial Award, (2001) 9 ICSID Reports 113 (*CME* v. *Czech Republic*).
[25] See below n. 44 and 45.

responsibility – is not identical in relation to the investor and the host state on the one hand, and the investor and the private individual on the other.

3.2.4 Other constellations

A final set of cases concerns the investor's own contributory fault or, similarly, his duty to mitigate the damage that was caused by the host state in the first instance. While there have been several cases in which both concepts have been at issue, this was not viewed by the respective tribunal as a matter of responsibility shared between host state and investor.[26] Conceptually, this is certainly correct: neither contributory fault nor mitigation of damage is a matter of 'responsibility', because there is no legal obligation on the part of the investor. However, there is a strong presumption that it is the investor's responsibility to act in a certain way in order to avoid a specific result, and that the responsibility is shared with the host state's overall responsibility to protect the investment.

Also cases could be envisaged where several investors engage in joint ventures with a host state, and the latter colludes with one or several investors at the expense of other investors. This scenario would no doubt also produce some form of shared responsibility. In fact, it would be factually quite similar to the *CME* v. *Czech Republic* case, but the distinction is that in that case, the party interfering with the investment was not itself a foreign investor. However, it seems that to date such a case has not occurred in international investment arbitration.

3.3 Secondary rules

As noted, investment law does not contain specific rules concerning shared responsibility. Even with regard to basic issues of responsibility, investment tribunals normally are required to resort to the rules of general international law, as contained in the ARSIWA. This holds particularly true for assessing attribution, where investment law usually does not have its own rules.[27] True, some investment tribunals seem to readily accept the existence of *leges*

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[26] See e.g. *MTD* v. *Chile*, n. 15; *Yukos Universal Limited* v. *The Russian Federation*, PCA Case No. AA227, Final Award, 18 July 2014, paras. 1594-1637.
[27] See e.g. *Maffezini* v. *Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000, para. 76.

speciales on attribution, but often this is the result of confusing primary norms and secondary rules, and tribunals apply the *lex specialis* to cases of presumed conflict of norms, where such conflict simply does not exist. In *United Parcel Service* v. *Canada*, for instance, the Tribunal held that the ARSIWA Articles on attribution were inapplicable to monopolies and state enterprises, because of the 'special rules of law' established by Chapter 15 of NAFTA.[28] But it is highly doubtful whether this is correct,[29] because the relevant provisions in Chapter 15 are concerned with primary norms setting forth substantive obligations to prevent certain acts incompatible with treaty obligations. It is important here to distinguish the secondary rules of attribution from the substantive primary norms that lay down the scope of a specific obligation.[30] This is particularly relevant in investment law, where many standards of protection include obligations to prevent, implying a due diligence obligation.[31]

It is only in exceptional situations that investment law provides specific rules deviating from, and prevailing over, the ARSIWA, without however excluding the latter's applicability entirely. This is for instance the case with defences in case of breach of an obligation. BITs frequently contain a necessity clause or emergency exception which – if applicable – rules out the possibility of invoking the circumstances precluding wrongfulness under the ARSIWA.[32] Thus, if a host state correctly invokes an emergency clause, it will not be in breach of the treaty in the first place, and the circumstances precluding wrongfulness under the ARSIWA will not apply.

Therefore, any situation that might involve a third party, and imply shared responsibility, is currently governed by general international law. This is demonstrated by the case of *CME* v. *Czech Republic*, where the latter argued that the alleged breach of the BIT was in fact brought about by a private person on the payroll of the investor, and that no harm would have come to the investment but for the acts of the third party. In dismissing this defence, the Tribunal referred to 'international law and State practice', notably the ARSIWA.[33] In its conclusions

[28] *United Parcel Service of America Inc.* v. *Canada*, UNCITRAL, Award on the Merits, 11 June 2007, paras. 58-63.
[29] To the same effect M. Paparinskis, 'Investment Arbitration and the (New) Law of State Responsibility' (2013) 24 EJIL 617, at 629.
[30] Schicho, *State Entities in International Investment Law*, n. 22, 18-21. Similarly, designation of constituent subdivisions or agencies of a party to the ICSID Convention pursuant to Article 25 have to be distinguished from the rules of attribution (see section 3.4 below).
[31] See also Articles 22 and 23 ECT, n. 3.
[32] See A. Reinisch, 'Necessity in Investment Arbitration' (2010) 41 NYIL 137; and C. Binder, 'Circumstances Precluding Wrongfulness', in M. Bungenberg, J. Griebel, S. Hobe, and A. Reinisch (eds.), *International Investment Law* (Oxford: Hart Publishing, 2014), 442.
[33] *CME* v. *Czech Republic*, n. 24, paras. 580-585.

on the issue of causation, the Tribunal heavily invoked the Commentary to Article 31 ARSIWA, without establishing any specific rules of allocating injury to the wrongful act of a specific actor. The Tribunal argued that the ILC 'in its Commentary on State responsibility recognized [that] a State may be held responsible for injury to an alien investor where it is not the sole cause of the injury; the State is not absolved because of the participation of other tortfeasors in the infliction of the injury'.[34] While the Tribunal did not cite Article 47 of the ARSIWA, it indirectly invoked the 'liability of joint tortfeasors', thus indicating that it applied some form of joint and several liability.[35]

In *Eurotunnel*, the Tribunal looked at the various obligations contained in the bilateral treaty between France and Great Britain, and the concession agreement between these two and the two concessionaires, to determine the responsibility for a breach of the obligations of the two states. It started its analysis by looking at Article 47 ARSIWA. As the Tribunal emphasised, the key condition for the applicability of Article 47 is that this is agreed upon by the parties involved, because 'when the parties to the Concession Agreement wanted to create a regime of "joint and several" obligations they knew how to do it'.[36] The Tribunal proceeded on the assumption that under international law, the general principle in the case of a plurality of responsible states is that each state is separately responsible for conduct attributable to it.[37] In the case at hand it however denied that there was any agreement on such a regime. Ultimately, it concluded that while the primary norms (the treaty and the concession agreement) did not provide for joint and several liability,[38] the overall responsibility for the security for the Fixed Link 'was shared and not divided'.[39] The Tribunal thus recognised the concept of shared responsibility, but left the question of apportionment of that responsibility in the form of damages between the respondent states to be decided in the second phase of the proceedings.[40] The Tribunal clearly adopted a more general concept of 'shared responsibility', because the overall responsibility for the maintenance of security over the tunnel was shared and not divided. This shared responsibility would also materialise by the failure of the jointly established Intergovernmental Commission to act appropriately, as the Commission was acting on behalf of the two states.

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[34] Ibid., at para. 580, with reference to the ARSIWA Commentary, n. 10, Commentary to Article 31.
[35] But this is problematic as the Tribunal did and could not establish any reason for liability of the private third party since any assessment of the latter's wrongfulness would have been beyond the scope of its jurisdiction.
[36] *Eurotunnel*, n. 18, para. 176.
[37] See ARSIWA Commentary, n. 10, Commentary to Article 47, 125, para. 6.
[38] *Eurotunnel*, n. 18, paras. 173-187.
[39] Ibid., para. 317.
[40] Ibid., para. 351.

However, despite these interesting statements, two reasons limit the significance of this case for investment law. First, the constellation in *Eurotunnel* was quite unique. It is very rare that an investment is made in two 'host' states, and given its peculiarity such situations would most likely have to be treated on a case-by-case basis and would hardly be generalisable. Thus the circumstances in *Eurotunnel* were certainly different from, and not representative of, the usual scenario in investment law. Furthermore, and perhaps even more importantly, it is not clear whether that case really concerned international investment law, properly speaking. The Tribunal itself doubted 'whether the Fixed Link was to be regarded as a foreign investment in either country'.[41]

3.4 Dispute settlement

Given the scarcity of cases involving issues of shared responsibility in investment law, there is little evidence how practice may handle the procedural aspects of shared responsibility. Generally, the process of enforcing shared responsibility against multiple tortfeasors will typically follow the substantive law as contained in the primary norm(s). Thus, where the parties to an investment protection arrangement provide *ex ante* for the possibility of shared responsibility, they will usually also agree on the modalities of enforcement thereof. In investment law this will be investor-state arbitration under available arbitration rules.[42] The best example is the *Eurotunnel* arbitration where the primary norms (Article 19 of the Treaty of Canterbury[43] and Article 40 of the Concession Agreement) provided for arbitration for disputes between the various parties involved.

This close connection between any arrangement of shared responsibility and enforcement is necessary for effective implementation of the primary norms. In investment law, this is difficult to achieve because the parties involved will usually not be bound by the same set of norms. For one, the host state will generally be bound towards the foreign investor either by a BIT with the state of nationality of the investor, in which case the investor will invoke rights as a beneficiary of a treaty providing for rights of third parties; or on the basis of a contract

[41] Ibid., para. 275.
[42] See F. Baetens, 'Procedural Issues relating to Shared Responsibility in Arbitral Proceedings' (2013) 4(2) JIDS 319.
[43] Treaty between the United Kingdom of Great Britain and Northern Ireland and the French Republic concerning the Construction and Operation by Private Concessionaires of a Channel Fixed Link, Canterbury, 12 February 1986, 1497 UNTS 325 (Treaty of Canterbury).

concluded directly with the investor. Furthermore, the legal relationship, if any, between an individual involved in the impairment of the investment and the investor will have its source in a contract concluded under domestic law. Accordingly, it may be difficult for an investor to seek redress against multiple tortfeasors. This proved to be crucial in the case of *CME* v. *Czech Republic*. There the situation was clear, as the individual who colluded with the host state at the expense of the investor was chief executive officer (CEO) of the company that was the essential part of the investment. This possibility of separate redress against the co-tortfeasor was envisaged by the Tribunal:

> CME as aggrieved Claimant may sue the Respondent in this arbitration and it may sue Dr. Železný in separate proceedings, if judicial protection is available under Czech or other national laws. In this arbitration the Claimant's claim is not reduced by the Claimant's and/or ÈNTS's possible claims to be pursued against Dr. Železný in other courts or arbitration proceedings, although the Claimant may collect from the Respondent and any other potential tortfeasor only the full amount of its damage.[44]

According to the *inter se* arrangements between the foreign investor and its CEO, the former could indeed resort to legal remedies against the private individual, and in fact successfully claimed for damages.[45]

Procedurally, and in terms of jurisdiction, investment arbitration proceeds on the assumption of independent responsibility, and thus follows the approach indicated when being faced with multiple tortfeasors. Accordingly, it is up to the claimant to identify the 'proper' respondent. The tribunal will then decide on party status in case of doubt.

Article 25 of the ICSID Convention enables constituent subdivisions or agencies of a state party to enjoy party status, on condition that any such entity is designated to the ICSID and gives its consent to jurisdiction. This possibility of extending party status is a matter that pertains to jurisdiction and procedure, and has to be distinguished from the issue of attribution, which has to be assessed according to the applicable (substantive) rules of attribution, irrespective of whether a subdivision or agency was designated under Article 25.[46]

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[44] *CME* v. *Czech Republic* n. 24, para. 582.

[45] CME instituted separate proceedings against Dr Železný. The Tribunal awarded USD 23.5 million in damages plus 5 per cent interest to be paid by Dr Železný to CME; see *CME Media Enterprises BV (The Netherlands)* v. *Vladimir Železny (Czech Republic)*, Case No. 10435/AER/ACS, issued in Amsterdam, International Chamber of Commerce International Court of Arbitration, Award, 9 February 2001.

[46] See section 3.2.2 above.

In other words, the state entity's party status is independent of the issue of the attribution of its conduct to the state.[47]

While designation and consent of the subdivision or agency, and approval of this consent by the state are indispensable,[48] the party status of a designated subdivision or agency may extend to both claimant and respondent. Furthermore, claims may be brought simultaneously against a state and one of its designated constituent subdivisions or agencies.[49]

As to the issue of indispensable third parties, this will rarely arise in investment arbitration unless there are two respondents that are both bound by the same substantive primary norm. In *Chevron Corporation and Texaco Petroleum Company* v. *Ecuador*, the respondent invoked the principle of an indispensable party. The Tribunal, leaving unanswered the question whether the *Monetary Gold*[50] principle is applicable in mixed arbitrations, applied the principle 'for the sake of argument'[51] and concluded that the third parties would not have rights 'that are directly engaged' by the question put to it,[52] because the alleged wrongfulness could only be attributed to Ecuador as respondent, but not to third parties.[53] In *Ping An Life Insurance Company of China, Limited* v. *Belgium*, Belgium invoked the *Monetary Gold* principle but the Tribunal declined jurisdiction *ratione personae*.[54]

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[47] Dolzer and Schreuer, *Principles of International Investment Law*, n. 16, 227.
[48] This turned out to be crucial in *Cable TV* v. *St. Kitts and Nevis*, ICSID Case No. ARB/95/2, Award, 13 January 1997, (1998) 13 ICSID Rev – FILJ 328.
[49] *Noble Energy* v. *Ecuador*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008, para. 8.
[50] *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary Question, ICJ Reports 1954, 19 (*Monetary Gold*).
[51] *Chevron Corporation and Texaco Petroleum Company* v. *Ecuador*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, 27 February 2012, para. 4.60 (*Chevron*). In *Lance Paul Larsen* v. *the Hawaiian Kingdom*, PCA, Award, 5 February 2001, paras. 11.8-12.19 (also published in (2001) 119 ILR 566), the Tribunal applied the *Monetary Gold* principle, although the parties were in agreement that the principle was confined to inter-state cases in the International Court of Justice (paras. 11.16-11.17). In applying the principle, the Tribunal concluded that it could not exercise its jurisdiction because 'both parties [had] expressly invited the Tribunal to decide that the United States of America had acted unlawfully' (para. 12.7). For the situation in commercial arbitration see S.L. Brekoulakis, *Third Parties in International Commercial Arbitration* (Oxford University Press, 2010).
[52] *Chevron*, ibid., paras. 4.61-4.70.
[53] See also the discussion in Baetens, 'Procedural Issues relating to Shared Responsibility in Arbitral Proceedings', n. 42, 19-22.
[54] Above n. 19.

4. Shared responsibility in the EU context

4.1 General remarks

An altogether different constellation for shared responsibility is produced by the new legal situation under European Union law. With the Treaty of Lisbon, the EU obtained comprehensive competence, as part of the Union's common commercial policy, to legislate in the field of foreign direct investment, and notably to conclude investment treaties with non-member states.[55] While the conclusion of those treaties is a matter of the EU, their application in practice will invariably also concern the member states. The main reasons for the transfer of competence concerning foreign direct investment to the European Union were harmonisation of external economic relations and standardisation of protection for all EU member states. These community interests also have an impact on the implementation of the shared responsibility between the EU and the member states.

Accordingly, the Union is currently in a process of 'harmonising' its rules on investment protection, by taking into account the received stock of law as contained in the BITs concluded by the member states.[56] To this end, the European Parliament and the Council adopted a Regulation that assures the continuation in force of all existing investment treaties of the member states, until they are replaced by new agreements concluded by the Union with third countries.[57] The EU is already party to the Energy Charter Treaty, as are the EU member states. Currently, the EU Commission is negotiating several trade agreements including rules on investment protection, as well as on investor-state dispute settlement. With the conclusion of such agreements, a host of problems will arise in cases where investors allege a breach of such an agreement by the EU and/or a member state. These problems will also concern the allocation of responsibility between the Union and the member state(s), and enforcement, especially investor-state dispute settlement (ISDS).

While on its face it might be tempting to look at the situation of the EU and its member states within the World Trade Organization (WTO) and its Dispute Settlement Understanding

[55] Article 207 TFEU, n. 8. See M. Bungenberg, A. Reinisch, and C. Tietje (eds.), *EU and Investment Agreements. Open Questions and Remaining Challenges* (Oxford: Hart Publishing, 2013).
[56] Communication from the Commission, 'Towards a Comprehensive European International Investment Policy', Brussels, 7 July 2010, COM(2010) 343 final.
[57] 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) OJ L 351/40.

(DSU) for guidance in answering these questions,[58] several conceptual and systemic differences militate against a mere transposition of the WTO practice to the 'new investment law' of the EU. First, the WTO is a strictly inter-governmental regime, establishing legal relations essentially between the contracting parties. In contrast, and as noted, investment law is a multi-layered regime that includes private investors as beneficiaries. What is more, the very gist of investment law is to grant the investors individual rights which are directly enforceable internationally,[59] whereas WTO law does not have direct effect within the legal order of the EU, and in a way only assumes an external dimension in terms of responsibility.

Furthermore, while WTO law is largely confined to assessing the existence, the appropriateness, and the consequences of regulatory measures discriminating foreign products or unduly restricting international trade, investment law is much broader in scope and effect. It basically applies to any sovereign act or omission with harmful (economic) effects on investors; crucially, the substantive standards of protection genuine to investment law do not distinguish between legislative and executive/administrative acts. Finally, the overall object of enforcement strongly differs between WTO and investment law. While in the former the ultimate aim is the withdrawal (or amendment) of the measure inconsistent with WTO law, in investment law the by far mostly sought remedy is monetary payment. All these conceptual distinctions require a different approach for dealing with issues of responsibility in relation to the EU and its member states.

4.2 Allocation of international (or external) responsibility

As a preliminary question, it must be asked who is bound by the provisions of an investment treaty concluded by the EU, and who will become responsible as a matter of international law in case of its breach – the EU, the member states, or both? Generally, investment treaties entered into by the EU may be concluded as mixed agreements, and despite the delegation of competence to the Union by the Treaty of Lisbon, this will also be the rule in the future. The

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[58] See the contribution by James Flett in Chapter 33 of this volume, J. Flett, 'The World Trade Organization and the European Union and its Member States in the WTO', in P.A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2016), __. Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, in force 1 January 1995, 1867 UNTS 3, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, 1869 UNTS 401 (Dispute Settlement Understanding or DSU).
[59] See J. Kleinheisterkamp, 'Financial Responsibility in European International Investment Policy' (2014) 63 ICLQ 449, at 463.

prevailing view in doctrine is that all parties to a mixed agreement are bound by all provisions of that agreement.[60] This entails a kind of joint responsibility[61] that found its way into the Commentary to the ILC Articles on the Responsibility of International Organizations (ARIO).[62] Accordingly, where an EU investment agreement is concluded as a mixed agreement, both the EU and member states are jointly responsible for its performance. The division of competences between the Union and the member states may be an indication as to who is responsible for complying with an EU agreement, and given that foreign direct investment comes within the competence of the Union, it will primarily be the EU that is responsible for compliance with the agreement.[63]

Such an indication may also be given by declarations of competence made under mixed agreements. However, while such a declaration may be important for internal EU purposes and is intended to make clear externally the internal division of competences, a declaration of competence will in most cases not provide clarity to third parties, and is generally not opposable to them.[64] Here one may mention the Energy Charter Treaty as an example. Article 26(3)(b)(ii) ECT allows, '[f]or the sake of transparency', contracting parties to submit statements of their policies, practices and conditions regarding consent to arbitration. Upon ratification of the ECT, the European Communities submitted such a statement, which provides that the EU and its member states 'have both concluded the Energy Charter Treaty and are thus internationally responsible for the fulfilment of the obligations contained therein, in accordance with their respective competences'.[65] This statement confirms the general principle that under a mixed agreement both the EU and the member states are internationally responsible for its performance.

[60] See already C. Tomuschat, 'Liability for Mixed Agreements', in D. O'Keeffe and H.G. Schermers, *Mixed Agreements* (Deventer: Kluwer, 1983), 13. See also P.A. Nollkaemper, 'Joint Responsibility between the EU and Member States for Non-Performance of Obligations under Multilateral Environmental Agreements', in E. Morgera (ed.), *The External Environmental Policy of the European Union. EU and International Law Perspectives* (Cambridge University Press, 2012), 304.

[61] See Opinion of Mr Advocate General Jacobs delivered on 10 November 1993, *Parliament* v. *Council*, European Court of Justice, Case C-316/91, [1994] ECR I–646, para. 69: 'Under a mixed agreement the Community and the Member States are jointly liable unless the provisions of the agreement point to the opposite conclusion.' This was adopted by the Court in its Judgment of 2 March 1994, ECR I-623, 660-661, para. 29.

[62] Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO); Commentary to the Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO Commentary), Commentary to Article 48 ARIO, para. 1.

[63] A. Dimopoulos, *EU Foreign Investment Law* (Oxford University Press, 2011), 255-256.

[64] See Nollkaemper, 'Joint Responsibility between the EU and Member States for Non-performance', n. 60, 15-17.

[65] 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 Treaty, (1998) OJ L 69/115.

4.3 Attribution

A further question is that of attribution of an alleged breach. Under international law, the conduct of organs of states and of international organisations is attributable to the respective state or organisation. In the EU context, the crucial situations are those where the conduct of member state organs might be attributable to the EU or vice versa. From the viewpoint of EU law, there are cases where member state organs essentially act as organs of the EU – for instance because they apply, enforce or implement EU law – but this is not easily reconcilable with the rules of international law, at least with those laid down in the ARIO.[66] Notably, the ARIO do not recognise the specific situation that member state organs may be considered as 'executive organs' of the EU. Article 7 ARIO, for example, requires that the relevant state organ is in a formal sense 'placed at the disposal' of the organisation, which is not the case in the relationship between member state organs and the EU when the former 'execute' law deriving from the latter.[67] Exceptionally, conduct of EU member states may be attributed to the Union if it is acknowledged and adopted by it as its own conduct (Article 9 ARIO). As the Commentary states, it is however not always clear whether the acknowledgement operates as a rule of attribution or relates to responsibility as such.[68]

Another possibility is that the Union incurs responsibility if it directs and controls a member state in the commission of a wrongful act (Article 15 ARIO). While this rule is not one of attribution since it establishes a distinct responsibility of the organisation, it may come into play where the member states are obliged to follow binding decisions under EU law.[69] Another distinct ground of responsibility for the EU, rather than a rule on attribution, may be found in Article 17 ARIO, which establishes responsibility of the organisation if it adopts a decision binding its member states, or if it authorises them to commit an act that would be internationally wrongful if committed by the organisation.

Most importantly, however, Article 64 ARIO may seem fitting to the specific situation of the EU. This provision, drafted with strong input by the European Commission, gives precedence to existing special rules as *lex specialis* where they govern the condition or the content of

[66] See further F. Hoffmeister, 'Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?' (2010) 21 EJIL 723; Dimopoulos, *EU Foreign Investment Law*, n. 63, 260-265.

[67] In fact, Article 7 ARIO, n. 62, is mainly concerned with the secondment of military forces to an international organisation. But see the argument by the Tribunal in *Electrabel* (n. 80 below).

[68] ARIO Commentary, n. 62, Commentary to Article 9, 29, para. 3.

[69] See ARIO Commentary, ibid., Commentary to Article 15, 38 para. 4. See also Dimopoulos, *EU Foreign Investment Law*, n. 63, 263.

responsibility of an organisation. Crucially, Article 64 ARIO states that '[s]uch special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members'. It is argued that Article 64 ARIO 'can be used to render the internal rules of an international organization relevant for determining attribution'.[70] The ILC Commentary expressly refers to 'the possible existence of a special rule' in the context of the EU, where conduct of member state organs is attributed to the Union 'when they implement binding acts of the [Union]'.[71] This view is, unsurprisingly, also supported by the European Commission. In the Explanatory Memorandum to its proposal for a Financial Responsibility Regulation, it is noted that where both the EU and the member states are parties to an investment agreement

> and it needs to be decided who is responsible as a matter of international law for any particular action, the Commission takes the view that this has to be decided not by the author of the act, but on the basis of the competence for the subject matter of the international rules in question, as set down in the [TFEU].[72]

It is however doubtful whether the *lex specialis* rule really applies in such a case. While the internal regulation of competences between the Union and the member states no doubt has to be taken into account in assessing issues of allocating responsibility, several reasons militate against the use of Article 64 ARIO for this purpose. First of all, it is conceptually misleading to describe the internal rules of an organisation as *lex specialis*.[73] They are usually part of the constitutional framework of the organisation, which governs for example the relationship among the organs of the organisation and their respective competences, or the law applicable to the relationship between the organisation and its member states. On that basis, the 'rules of the organisation' are similar to the internal law of states. In any event, such internal rules of the organisation have nothing to do with a *lex specialis* rule under international law, which requires a genuine case of conflict that does not exist in the present context. Furthermore, internal rules of the organisation dealing with the allocation of competences between the EU

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[70] Ibid., Dimopoulos, at 265. Similarly P.J. Kuijper, 'International Responsibility for EU Mixed Agreements', in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited: The EU and its Member States in the World* (Oxford: Hart Publishing, 2010), 208, at 222-223; Hoffmeister, 'Litigating against the European Union and Its Member States', n. 66, 729-730. See also the references in the ARIO Commentary, n. 62, Commentary to Article 64 ARIO, para. 2, at 100 in note 364.
[71] ARIO Commentary, ibid., Commentary to Article 64 ARIO, 100, para. 2.
[72] Proposal for a Regulation of the European Union 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, Com(2012) 335 final, 2012/0163 (COD), 21 June 2012, Explanatory Memorandum, 4.
[73] C. Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility' (2011) 8 IOLR 397, at 437-443.

and its member states cannot generally or *ipso facto* have external binding effects on third parties.

4.4 (Internal) apportionment of financial responsibility

A further aspect concerns the internal allocation of the (especially financial) burden within the EU. On 23 July 2014, the EU Parliament and the Council adopted Regulation No. 912/2014, regulating the financial responsibility in investor-state dispute settlement.[74] The Regulation applies to all future EU investment agreements, as well as to the ECT,[75] but not to BITs concluded by member states.[76] There are three main issues addressed by this Regulation. First, it apportions financial responsibility within the EU arising from a dispute with an investor; secondly, it deals with the question who will be respondent in proceedings; thirdly, it provides for a procedure for the payment of awards and settlements towards a (successful) claimant. Each of these aspects will briefly be discussed in context.

Generally, the Regulation does not 'set up the mechanisms [on these questions] in a manner reflecting a strict application of the rules on competence', but attempts 'to put forward pragmatic solutions which ensure legal certainty for the investor and provide all the necessary mechanisms to allow for the smooth conduct of arbitration and, eventually, the appropriate allocation of financial responsibility'.[77] Accordingly, the main criterion for the allocation of financial responsibility should be the origin of the treatment of which the investor is complaining (Article 3). Thus, where the treatment concerned is afforded by the EU institutions, financial responsibility should rest with these institutions. Where the treatment concerned is afforded by a member state of the Union, financial responsibility should rest with that member state, unless the action of the member state was required by Union law, in which case financial responsibility should lie with the EU. This exception is warranted in

[74] Regulation (EU) No. 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, (2014) OJ L 257/121 (Regulation). See C. Brown and I. Naglis, 'Dispute Settlement in Future EU Investment Agreements', in M. Bungenberg, A. Reinisch, and C. Tietje (eds.), *EU and Investment Agreements. Open Questions and Remaining Challenges* (Oxford: Hart Publishing, 2013), 17, at 29-34.
[75] Brown and Naglis, ibid., 25.
[76] It would not be fair and equitable that the Union's budget and that of other member states would have to pay for breaches of BITs concluded by individual member states.
[77] Proposal, n. 72, Explanatory Memorandum, at 5.

those cases where the EU has 'normative control'[78] over the member state, which is required to follow or implement a decision (a regulation or directive) issued by it. There is however an exception to this exception: if the member state is required by Union law to remedy a prior act inconsistent with this law, the member state shall be financially responsible unless such prior act itself was required by EU law. This concerns situations where a state had granted an investor a certain treatment (e.g. in a concession of license agreement) which has become incompatible with subsequent EU law (e.g. competition or state aid law) and therefore must be remedied. Furthermore, if the member state has *a priori* accepted financial responsibility or agreed to settlement, then it shall also bear financial responsibility. However, where the Union acts as the respondent in proceedings in disputes concerning treatment afforded by the EU, then it also shall bear financial responsibility.

Thus, EU law in the field of investment protection provides for a form of shared financial responsibility for unlawful treatment of foreign investments, depending on the author of that treatment. The Regulation should also 'cover all actions taken by Member States and by the Union. In such cases, the Member States and the Union should bear financial responsibility for the specific treatment afforded by either of them'.[79] This implies the possibility of joint and several responsibility, albeit 'only' in the internal allocation of financial responsibility between the EU and the respective member state.

4.5 Determining the 'right' respondent

4.5.1 The *Electrabel* case and the ECT

There is already some rudimentary case law involving questions on the relationship between the EU and its member states in investment law. For present purposes, these cases are relevant in that they concern obligations prescribed by EU law and impinging on the rights of investors.[80] Most of these cases involve treatment afforded to investors under concession or license agreements that, according to EU law, may amount to state aid or may be incompatible with EU competition law.

[78] Hoffmeister, 'Litigating against the European Union and Its Member States', n. 66, 741-742.
[79] Regulation No. 912/2014, n. 74, Recital No. 7.
[80] See *AES Summit Generation Limited and AES-Tisza Erömü Kft* v. *Hungary*, ICSID Case No. ARB/07/22, Award of 23 October 2010; *Electrabel S.A.* v. *Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 (*Electrabel*); *Ioan Micula et al.* v. *Romania*, ICSID Case No. ARB/05/20, Award of 11 December 2013.

The most relevant case is *Electrabel* v. *Hungary* that arose under the ECT. In this case, an investor sued Hungary for terminating power purchase agreements under a binding decision of the EU Commission, which considered these agreements to provide state aid incompatible with the common market. Hence the questions arose whether the acts of Hungary, in implementing this decision of the Commission, were attributable to the EU or to Hungary, and who eventually bore responsibility. The Tribunal first looked at the ECT, whose Article 1(3) acknowledges the fact that EU member states are legally bound by certain decisions of EU organs under EU law. It concluded that '[a]s regards protection under the ECT, investors can have had no legitimate expectations in regard to the consequences of the implementation by an EU Member State of any such decision by the European Commission', because 'the possible interference with a foreign investment through the implementation by an EU Member State of a legally binding decision of the European Commission was and remains inherent in the framework of the ECT itself'.[81] After having found that there was no material inconsistency between the ECT and EU law,[82] the Tribunal continued by examining the question as to who bore responsibility in case of breach of the ECT. It emphasised that the ECT acknowledges the authority of the EU to take decisions that are binding on its member states under EU law, and that the ECT did not protect the claimant from the enforcement by Hungary of such a binding decision.[83] It further held:

> Where Hungary is required to act in compliance with a legally binding decision of an EU institution, recognized as such under the ECT, it cannot (by itself) entail international responsibility for Hungary. Under international law, Hungary can be responsible only for its own wrongful acts. The Tribunal considers that it would be absurd if Hungary could be liable under the ECT for doing precisely that which it was ordered to do by a supranational authority whose decisions the ECT itself recognises as legally binding on Hungary.[84]

At the same time, the Tribunal made it clear that this was without prejudice to the possible 'responsibility of the European Union under the ECT for decisions of the European Commission which violate rights of investors under the ECT'.[85] In its *amicus curiae* brief, the Commission argued that the responsibility for preventing unlawful state aid lay with the EU and not with the member states, and that therefore Hungary was the 'wrong' respondent. The Tribunal responded that this was only true on condition that the relevant dispute engages the

[81] *Electrabel*, ibid., para. 4.142.
[82] Ibid., paras. 4.167-4.172.
[83] Ibid., para. 4.169.
[84] Ibid., para. 6.72.
[85] Ibid., para. 4.170.

legal responsibility of the EU, under the ECT, for a decision of the Commission. However, the dispute the Tribunal had to decide was brought by the claimant against Hungary under the ECT, and the EU was not a named party to the arbitration.[86]

There are several important aspects to this interesting case. First, it is noteworthy that the Tribunal substantially followed the 'normative control approach' advanced by the European Commission.[87] According to this approach, member states do not assume international responsibility in carrying out conduct contrary to the rights of investors, if they are required by EU law to execute this conduct.[88] Secondly, the Tribunal essentially assimilated this situation to that where a state places its organs at the disposal of an international organisation.[89] Most importantly, the European Communities made a statement under the ECT, according to which the EC 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'. Furthermore, a footnote of the statement reads: 'This is without prejudice to the right of the investor to initiate proceedings against both the Communities and their Member States.'[90] This statement is aimed at determining the 'right' respondent, since under the ECT, a claimant may sue either the EU or the respective member state. It is however doubtful whether this aim is achieved, because the internal division of competences and allocation of financial responsibilities is one thing, but the external dimension of conducting arbitral proceedings is quite another. Thus, such a declaration may not produce the effect intended, since an investor accepting an offer for consent to arbitration will not be barred from instituting proceedings against a member state that might be the 'wrong' respondent in the opinion of the EU. A claimant may have different reasons for 'choosing' whom to sue. On the one hand, he may be guided by the idea that the Union, contrary to a specific member state, has the 'deeper pockets' in terms of financial resources. On the other hand, suing the Union may be unappealing given the imponderabilities involved in enforcing an award against the Union.

[86] Ibid., para. 4.171.
[87] Ibid., paras. 4.101-4.110, 6.75-6.76.
[88] See Hoffmeister, 'Litigating against the European Union and Its Member States', n. 66, 741-743. The Tribunal in *Electrabel*, ibid., cited that article, whose author also acted as agent for the European Commission in the arbitration.
[89] Ibid., *Electrabel*, para. 6.74. For reasons unknown, however, the Tribunal applied Article 6 ARSIWA by analogy, instead of invoking equivalent Article 7 ARIO.
[90] Statement submitted by the European Communities, n. 65.

Likewise, as surfaced in *Electrabel*, it may happen that an arbitral tribunal does not share the view of the EU as to the distribution of the role as respondent.[91] An investment tribunal will always have the last word on party status, an issue that belongs to the broader concept of competence, and it may view both the Union and the member state as respondents because their responsibility is shared and not divisible. This implies that any such arrangement on the 'proper' respondent, in order to be opposable towards third parties such as investors or an investment tribunal, must be contained in the investment agreement.[92] This is precisely what is envisaged in the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU.[93]

4.5.2 Comprehensive Economic and Trade Agreement

The investment part of the draft CETA contains a section on investor-state dispute settlement. Article X.20, dealing with the issue of determining the respondent for disputes with the EU or its member states, provides that in case of a dispute 'the investor shall deliver to the European Union a notice requesting a determination of the respondent' (para. 1). Within 50 days, the EU shall make such a determination (para. 3). Otherwise, para. 4 provides for a default rule: where the measures are exclusively those of a member state, the state shall be respondent; where the measures include those of the EU, the respondent shall be the Union. Crucially, that arrangement and the determination made are, according to Article X.20 CETA, binding on all sides – thus the EU and the member state concerned may not 'assert the inadmissibility of the claim, lack of jurisdiction of the tribunal or otherwise object to the claim or award on the ground that the respondent was not properly determined' (para. 6). The investor in turn may submit a claim on the basis of such determination or of the operation of the default rule (para. 5);[94] and the tribunal shall be bound accordingly (para. 7).

This sophisticated regime seems to avoid the problem that the internal allocation of responsibility and the determination of respondent status do not have external effect in

[91] Baetens, 'Procedural Issues relating to Shared Responsibility in Arbitral Proceedings', n. 42, 11-12.
[92] European Parliament, Directorate-General for External Policies of the Union, Directorate B, Policy Department, 'Responsibility in Investor-State Arbitration in the EU', December 2012, at 22-23; J. Klanheisterkamp, 'Financial Resonsibility in the European International Investment Policy', LSE Working Paper 15/2013, at 16 (available at www.lse.ac.uk).
[93] Comprehensive Economic and Trade Agreement (CETA). The Consolidated CETA text (as published on 26 September 2014) is available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.
[94] Para. 5 is to be read strictly so as to allow the investor to submit a claim exclusively on the basis of Article X.20 CETA, ibid. This follows from Article X.21 CETA.

relation to the treaty partner, the investor, and the tribunal. Since this provision is binding on all sides involved, the bindingness of the determination should be beyond dispute. At the same time, this regime raises a number of questions, the answers to which will have to be left to the application of that provision in the future. Thus, Article X.20 CETA speaks of ‘measures’ of the Union or the member state, respectively, but it is far from clear what these measures are and how their ‘authorship’ – is it a measure of the EU or the member state? – should be determined. In other words, Article X.20 precisely begs the question of attribution, which however is at the core of its very arrangement. These questions aside, it seems that Article X.20 CETA rules out the possibility of joint responsibility in terms of defending a claim. This is more or less what the EU has agreed upon internally in its Regulation 912/2014.

4.5.3 Conduct of disputes

Chapter III of Regulation 912/2014 deals with the conduct of disputes, and distinguishes between disputes concerning treatment afforded by the institutions of the Union, in which case the EU shall act as the respondent (Article 4), and disputes concerning treatment afforded by a member state (Article 9). In the latter case, the member state concerned shall, as a rule, act as the respondent, unless it declines to do so and yields to the EU. However, there are three exceptions. First, in case of ‘mixed treatment’, the Commission may decide that the Union shall act as the respondent where the dispute also concerns treatment afforded by the EU. Secondly, the Commission may make the same decision where the Union would potentially bear financial responsibility. This concerns cases of ‘normative control’, where the treatment by the member state was required by EU law (Article 9.2.a together with Article 3.1.c of the Regulation). Thus the question of respondent status is largely brought in line with that of apportionment of financial responsibility, and the decisive factor for respondent status accordingly is to look at who is the author of the act. Finally, Article 9(3) of the Regulation provides that the Commission may decide ‘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’. This referral to the Union may be warranted in order to ensure that the interests of the EU can be appropriately safeguarded, but is only necessary in ‘exceptional circumstances’, which are limited to cases ‘where it appears that the treatment afforded by a Member State [the one being the author of the breach] is required by Union law’.[95]

The Regulation also provides for certain mutual obligations in the conduct of arbitral proceedings (such as information, assistance, provision with relevant documents, and inclusion of Union or member state representatives in the respective delegation to the proceedings) in Articles 10 and 11. Furthermore, the Regulation establishes an elaborate regime of settlement of disputes in which the EU is the respondent, depending on who strives for such settlement (Articles 14-16 of the Regulation). Finally, the Regulation envisages a procedure for the payment of final awards or settlements in disputes in which the Union acts as the respondent (Articles 17-21 of the Regulation). It essentially provides that the Commission shall pay any award or settlement upon the request of a claimant (Article 18 of the Regulation). In case of disagreement, Article 19 of the Regulation sets up a procedure culminating in a decision by the Commission, binding on the member state concerned, in order to provide legal certainty to the claimant.

Genuine EU law problems aside, the approach taken in Regulation 912/2014 seems reasonable, particularly its close assimilation with the issue of allocation of financial responsibility. The *leitmotif* of the Regulation is to ensure that the interests of the Union can be appropriately safeguarded, and that the duty of sincere cooperation referred to in Article 4(3) TEU is complied with.[96] The Regulation is however not free from difficulty. Thus, the determination of respondent status between the EU and the respective member state will be virtually inapplicable in a case where an investor chooses to submit a claim for arbitration with ICSID, simply because the EU is not a party to the ICSID Convention which is open exclusively to states. Furthermore, the proper application of the Regulation will depend on the inclusion of a corresponding provision in the relevant investment agreement. Finally, the Regulation appears to rule out the possibility of co-respondents,[97] and shifts the problem of joint responsibility to the level of internal allocation of financial responsibility between the EU and the respective member state. Thus, the respondent will mainly be the Union, and only exceptionally the member state concerned.

[95] Regulation No. 912/2014, n. 74, Recital 11.
[96] See ibid, Recitals 11, 14 and 16. In its Proposal, the Commission further emphasised the respect of the unity of external representation of the Union, see Proposal, n. 72, 2, 5, 6, 7, and Recitals 11 and 13.
[97] The reasons for this decision were laid down by the Commission in its Proposal, ibid., Explanatory Memorandum, at 7.

5. Conclusions

To date there is only very scarce practice of forms of shared responsibility in general investment law, and the principles applied are still indistinct. However, the discussion of different factual scenarios has revealed that there is quite some potential for the incidence of shared responsibility, and two cases were identified where shared responsibility was indeed an issue in arbitral proceedings. In these situations, the general approach seems to be to either resort to *ex ante* agreements, if any, in the primary norms or to invoke the general rules of responsibility, albeit not *tels quels* but with variations.

As to EU-related investment law, the transfer of exclusive competence to the Union has prompted the need to regulate the allocation of responsibility and the distribution of roles as parties in arbitral proceedings. A reasonable solution, allocating responsibility pursuant to the criterion of who is the actor of the impugned act, is pursued by Regulation No. 912/2014. The Regulation however will only unfold its full potential, and achieve its intended effect, if the relevant parts, particularly those concerning the determination of the respondent, find their way into the particular investment agreement. This seems to have largely been accomplished in the case of CETA, but it remains to be seen how this solution will play out in practice.