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The International Responsibility of the European Union—The EU Perspective: Between Pragmatism and Proceduralisation

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Abstract

EU management of its international responsibility for wrongful acts varies between a pragmatic approach and the proceduralisation of its responsibility. The EU either lays down complex procedures in order to manage the allocation of responsibility in order to (allegedly) preserve the internal division of competences or takes a pragmatic approach which disregards any internal division of competences. This chapter critically analyses these two trends in EU practice. More precisely, it identifies from the ongoing development in the incipient foreign direct investment policy of the EU and in its accession to the European Convention on Human Rights the problems linked to this way of managing the EU's international responsibility. Overall, it argues that instead of complex and slow procedures or ad hoc pragmatic solutions, the EU should adhere to a rule-based approach which is at the same time pragmatic and respects the principles underpinning the proceduralisation of responsibility.

I. Introduction

The EU's participation in international agreements is a complex and fascinating issue which has attracted plenty of scholarly attention in recent years. Issues including the way in which the EU and its Member States negotiate, conclude and ratify international agreements,¹ or the

* The author would like to thank Markus Gehring and Robert Schuetze for their useful comments and suggestions. The usual disclaimer applies.

¹ See, for instance, A Dashwood, 'Mixity in the Era of the Lisbon Treaty' in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited. The EU and its Member States in the World* (Oxford, Hart Publishing, 2010); C-D Ehlermann, 'Mixed Agreements: A List of Problems' in D O'Keefe and HG Schermers (eds), *Mixed Agreements* (Deventer, Kluwer Law and Taxation, 1983); F Hoffmeister, 'Curse or Blessing? Mixed Agreements in the Recent Practice of the European Community and its Member States' in C Hillion and P Koutrakos (eds), *Mixed Agreements in EU Law Revisited. The EU and its Member States in the World* (Oxford, Hart Publishing, 2010); S Amadeo, *Unione Europea e Treaty-Making Power* (Milan, Dott A Giuffrè Editore, 2005); JHJ Bourgeois, JL Dewost and MA Gaiffe, *La Communauté européenne et les accords mixtes. Quelles perspectives?* (Brussels, Presses Interuniversitaires Européennes, 1997); PJ Kuijper, *Of 'Mixity' and 'Double-Hatting': EU External Relations Law*

relationship between the EU and international law have been thoroughly discussed in the EU external relations law literature.² By contrast, discussions on the international responsibility of the EU, ie, the legal consequences following the breach of an international agreement by the EU, have not traditionally attracted the same level of interest. However, as a consequence of the surge in cases in which the attribution of responsibility to the EU played a rather important role in recent years³ and the publication of the Articles on the Responsibility of International Organizations (ARIO) by the International Law Commission,⁴ the responsibility of the EU under international law has begun to draw some attention. In this regard, the discussion on the responsibility of the EU has been approached from many different angles. For instance, how do the international rules on responsibility apply to the EU?⁵ How has the EU influenced the international rules on responsibility of international organisations?⁶ Or how is the EU responsible in practice?⁷ This chapter examines a different issue concerning the responsibility of the EU in international law: how does the EU manage its international responsibility in its treaty-making practice? In this regard, EU international responsibility poses very interesting questions. The complex division competences summed up with the multi-level system of implementation of EU law create legal uncertainty for third parties as to the liable subject of an internally wrongful act.⁸

Explained (Amsterdam, Amsterdam University Press, 2008) E Neframi, *L'action extérieure de l'Union européenne. Fondements, moyens, principes* (Paris, LGDJ, 2010).

² For a recent overview of all the issues, see E Cannizzaro, PP and RA Wessel, *International Law as Law of the European Union* (Leiden, Martinus Nijhoff, 2012).

³ See, eg, *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union)* Order 2009/1 ITLOS; *AES Summit Generation Ltd and AES-Tisza Erőmű Kft v Republic of Hungary* ICSID Case No ARB/07/22

⁴ International Law Commission, 'Draft Articles on the Responsibility of International Organizations' [2011] 2 *Yearbook of the International Law Commission*, Part Two.

⁵ PJ Kuijper, 'International Responsibility for EU Mixed Agreements' in Hillion and Koutrakos (n 1); S Talmon, 'Responsibility of International Organizations: Does the European Community Require Special Treatment?' in M Ragazzi (ed), *International Responsibility Today Essays in Memory of Oscar Schachter* (Leiden, Martinus Nijhoff, 2005); G Gaja, 'Some Reflections on the European Community's International Responsibility' in HG Schermers, T Heukels and P Mead (eds), *Non-contractual Liability of the European Communities* (Leiden, Martinus Nijhoff, 1988); E Paasivirta and PJ Kuijper, 'Does One Size Fit All? The European Community and the Responsibility of International Organizations' (2005) XXXVI *Netherlands Yearbook of International Law* 169.

⁶ PJ Kuijper and E Paasivirta, 'Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations' [2004] *International Organizations Law Review* 111

⁷ 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 *European Journal of International Law* 723; M Björklund, 'Responsibility in the EC for Mixed Agreements' [2001] *Nordic Journal Of International Law* 373; E Neframi, 'International Responsibility of the European Community and of Member States under Mixed Agreements' in E Cannizzaro (ed), *The European Union as an Actor in International Relations* (Leiden, Kluwer Law International, 2002).

⁸ P Eeckhout, 'External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law' in X Xenopoulos, *FIDE 2006* (Cyprus, FIDE, 2006).

Should the EU or its Member States be held liable for those actions committed by a Member State when implementing EU law? Furthermore, the vertical division of competences gives rise to plenty of disagreement, especially on issues of international responsibility.⁹ In other words, should the way in which the EU bears responsibility entail any kind of consequence as regards the division of competence?

As a response to these concerns, the EU, when concluding international agreements, negotiates the inclusion of different techniques dealing with these questions. These techniques range from pragmatic solutions like denying the existence of any potential issue regarding the EU's responsibility to setting up procedures to follow whenever there is a responsibility claim. Whereas these different approaches could prima facie solve the problems posed by the EU's international responsibility through managerial techniques,¹⁰ this chapter shows how these techniques do not completely solve the problems posed by the EU's violation of its international obligations. On the contrary, it shows how these techniques can add more uncertainty and exacerbate the inter-institutional discussions over the division of competences. The chapter is structured into three sections. Section II identifies the different interests which guide the different techniques used by the EU when dealing with its international responsibility. Section III focuses on how these interests have been taken into account in procedures dealing with the EU's international responsibility. Section IV provides some conclusions as to the direction to which these mediating strategies should move forward.

II. The Guiding Principles of the EU's International Responsibility

The international responsibility of the EU can be seen as the conjunction of different interests. First, there is the non-EU party to the international agreement which when faced with a breach on the EU side demands reparations. Moreover,¹¹ third parties might fear that the EU and its Member States could hide behind each other, avoiding their responsibilities.¹² In other words,

⁹ See, for instance, Case C-29/99 *Commission v Council (Convention on Nuclear Safety)* [2002] ECR I-11221; J Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (Leiden, Kluwer Law International, 2001) 118.

¹⁰ Heliskoski (n 9) 157.

¹¹ Hoffmeister (n 1).

¹² Eeckhout (n 8) 10

third parties might be concerned that the EU's participation in international agreement could lead to a gap in its responsibility. Second, the EU when acting externally might want to assert its autonomy from its Member States, both at the institutional level (ie, the EU is a distinct legal subject with its own separate legal personality) and at the competence level (ie, the EU is an autonomous legal order separate from both international and national law). Furthermore, this autonomy would also entail a certain degree of respect or cooperation from the Member States towards the EU.¹³ Third, EU Member States might want to preserve their autonomy from incursion by the EU. This is reflected in their narrow reading of the division of competences with the EU.¹⁴ Since the autonomy of EU law entails its supremacy over Member States legislation in those areas in which there is a transfer of powers, Member States can only safeguard their autonomy in those areas not transferred to the EU. Consequently, EU Member States have a clear interest in upholding a strict reading of the division of competences. This section examines how the EU's treaty-making practice deals with these divergent interests. It is divided into two parts. The first identifies the different principles which guide the EU's treaty-making practice and international responsibility, while the second conceptualises the different techniques used by the EU to reconcile these organising principles.

A. Diverging Interests as Principles of EU International Responsibility

In the EU's treaty-making practice, we can identify at least three different principles: legal certainty, the vertical division of powers and the duty of cooperation. The Commission has explicitly mentioned these three interests as the organising principles guiding the EU's action in the field of investment.¹⁵ More precisely, these principles need to be taken into account when managing the consequences of a responsibility claim.¹⁶ They are also mentioned in the draft of

¹³ Article 4(3) TEU; C-246/07 *Commission v Sweden (PFOS)* [2010] ECR I-03317.

¹⁴ See below, note 20.

¹⁵ 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 party' COM(2012) 335 final.

¹⁶ *ibid.* Furthermore, the Commission also mentions a new organising principle in the area of international investment: budget neutrality. However, it is not completely clear how this principle would operate in this area of international law, and whether it can and should be extended to other instances of the EU's treaty-making practice.

the EU's accession to the ECHR and explain the need for a special procedure to deal with the EU's responsibility under this agreement.¹⁷

i. The Vertical Division of Competences

The division of competences is undoubtedly one of the main principles guiding the EU's treaty-making practice. The inherent tension between attributed and implied powers has a marked influence on the EU's treaty-making power and responsibility.¹⁸ The different perspectives on the division of powers resemble the principal-agent dilemma. On the one hand, the Member States have delegated some functions to the EU to achieve certain objectives.¹⁹ On the other hand, Member States fear that the EU might not act in accordance with its conferred functions and objectives. In other words, EU Member States are reluctant to accept wide treaty-making powers to the EU given the moral hazard and the conflict of interests that this could entail. As a consequence of this tension, for instance, the Council during the 1980s clearly rejected the doctrine of parallelism as established by the Court of Justice.²⁰ More recently, in a similar vein, the UK decided to veto more than 70 EU statements to UN committees, insisting that these statements should be delivered on behalf of the 'EU and its Member States' rather than simply on behalf of the EU.²¹ The Council in the 1980s and the UK in recent times show the unease underpinning the transfer of power to the EU. The Member States do not completely trust the EU as regards the powers delegated to it.

Consequently, the EU in its treaty-making practice will try to balance between its own interests and power and the Member States' reluctance to allow the EU to act with complete autonomy. In this respect, the procedure for the conclusion of international agreements enshrined

¹⁷ Draft Explanatory Report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. The last version can be found in Steering Committee for Human Rights (CDDH), 'Report to the Committee of Ministers on the elaboration of legal instruments for the accession of the European Union to the European Convention on Human Rights', CDDH (2011) 009, para 32–33.

¹⁸ J Klabbers, *An Introduction to International Institutional Law* (Cambridge, Cambridge University Press, 2009) 64.

¹⁹ On functionalism and the EU, see J Klabbers, 'Contending Approaches to International Organizations: Between Functionalism and Constitutionalism' in J Klabbers and A Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Cheltenham, Edward Elgar, 2011).

²⁰ D McGoldrick, *International Relations of the European Union* (London, Longman, 1997) 99; M Cremona, 'The Doctrine of Exclusivity and the Position of Mixed Agreements in the External Relations of the European Community' [1982] *OJLS* 411.

²¹ See J Borger, 'EU Anger over British Stance on UN Statements' *The Guardian* (London, 20 October 2011). Available at: www.guardian.co.uk/world/2011/oct/20/uk-eu-un-statements-wording.

in Article 218 of the Treaty on the Functioning of the European Union (TFEU) shows the tension between the different interests as regards the division of competences. Even though Article 216 TFEU identifies the scenarios in which the Member States have transferred their treaty-making powers to the EU, Article 218 TFEU is designed in such a way that EU Member States continue to play a very relevant role in the decision-making process, regardless of the EU's competence. The Council not only authorises the opening of negotiations, it also address directives to the negotiator, authorises the signing of agreements and concludes them.

The conflict between the interests also arises when the exclusive nature of the conferred power is undisputed. Two examples can be given in this regard: first, the PROBA 20 arrangement²² is a clear illustration of how the diverging interests of the EU and its Member States also take place in those situations in which the conferral is complete, ie, exclusive competence on trade and commodity agreements.²³ The PROBA 20 arrangement established that the Member States would participate in the international negotiations concerning raw materials *leaving aside any legal or institutional consideration with regard to the respective powers* of the EU and the Member States. The second example will be analysed in further detail in section III. At this stage, it is enough to say that foreign direct investment (FDI) is another of those instances in which the question of the division of competences appears to have been settled. Article 207 TFEU grants the EU exclusive competence on FDI,²⁴ but the EU nevertheless has currently presented a proposal dealing with Member States' participation on FDI disputes.²⁵

As it has been shown in this section, the diverging interests regarding the division of competences run deeper within the EU's treaty-making practice than it might appear at first sight. Therefore, it seems logical that when speaking about the responsibility of the EU under

²² Arrangement between the Council and the Commission concerning participation in international negotiations on raw materials (PROBA 20). On file with the author.

²³ Article 5 TFEU; cf *Opinion 1/78 re International Agreement on Natural Rubber* [1978] ECR 2151.

²⁴ A Dimopoulos, *EU Foreign Investment Law* (Oxford, Oxford University Press, 2011); CW Herrmann, 'The Treaty of Lisbon Expands the EU's External Trade and Investment Powers' (2010) 14 *American Society of International Law Insight* 4; T Eilmasberger, 'Bilateral Investment Treaties and EU Law' (2009) 46 *CML Rev* 383; M Burgstaller, 'European Law and Investment Treaties' (2009) 26 *Journal of International Arbitration* 181; A Radu, 'Foreign Investors in the EU: Which "Best Treatment"? Interactions between Bilateral Investment Treaties and EU Law' (2008) 14 *European Law Journal* 237.

²⁵ European Commission (n 14) 2.

international law, the division of competences and the tension between the EU and its Member States will play a pivotal role.²⁶

ii. Legal Certainty

In the past, third states have had certain concerns regarding the EU's participation in international agreements.²⁷ These concerns stem from the nature of the EU as a legal subject.²⁸ Third states might have problems in accepting that the EU has assumed certain functions that previously belonged to sovereign states. In other words, they are suspicious of the EU's functional nature and the extent to which the EU Member States might avoid their responsibilities or take advantage of the special status of the EU.²⁹ In other words, third states have an interest in a clear rule over the diverging interests of the EU and its Member States.

However, in certain situations the EU and its Member States might prefer to leave certain legal questions unresolved when concluding an international agreement. For instance, the PROBA 20 arrangement clearly stated that the joint participation of the EU and its Member States in an international agreement was irrespective of any legal or institutional consideration with regard to the respective powers of the EU and the Member States.³⁰ The lack of agreement between the EU and its Member States as to the division of competences in a specific area can create legal uncertainty in relation to the other subjects. Therefore, third parties might be confused as to who is competent and responsible for a specific matter covered by the agreement, and demand some sort of ex ante explanation as to when the EU is going to speak, vote and implement within that agreement. For instance, last year's UN GA Resolution on the participation of the EU aims at giving legal certainty to third states on when it is going to be the EU and when it is going to be its Member States to participate in the work of the UN bodies.³¹

iii. The Duty of Cooperation

²⁶ A Nollkaemper, 'Constitutionalization and the Unity of the Law of International Responsibility' (2009) 16 *Indiana Journal of Global Studies* 535.

²⁷ Kuijper (n 5); PM Olson, 'Mixity from the Outside: the Perspective of a Treaty Partner.' in Hillion and Koutrakos (n 1).

²⁸ KR Simmonds, 'The European Economic Community and the New Law of the Sea' (1982) VI *Recueil de Cours de la Académie du Droit International* 218; Cremona, (n 20), 411; cf Ehlermann (n 1).

²⁹ Olson (n 26).

³⁰ PROBA 20, 1.

³¹ Participation of the European Union in the work of the United Nations. UNGA Res 65/276.

At first, the duty of cooperation did not appear to be an organising principle of EU external relations. Instead, it was a tool used to deal with the complexities of the division of powers in the external sphere. The ECJ clearly recognised that fact in Ruling 1/78³² when it made reference to the duty of cooperation as a way to manage the mixed participation of the EU and its Member States in the Nuclear Materials Convention. Since a duty in principle does not entail a legal obligation,³³ Article 4(3) TEU was used as a way to ensure that the division of powers did not affect the legal certainty of third parties, while at the same time leaving the questions on the exact delimitation of competence unanswered.

In this regard, the Court's pronouncement on Opinion 1/94 provided a very clear illustration on how the duty of cooperation mediated between the different interests of the EU and its Member States as regards the division of competences. The Court identified that:

[I]nterminable discussions will ensue to determine whether a given matter falls within the competence of the Community, so that the Community mechanisms laid down by the relevant provisions of the Treaty will apply, or whether it is within the competence of the Member States, in which case the consensus rule will operate. The Community's unity of action vis-à-vis the rest of the world will thus be undermined and its negotiating power greatly weakened.³⁴

In this paragraph the Court clearly highlighted how the diverging interests in the division of powers can negatively affect the legal certainty of third parties and consequently also negatively affect other interests at stake in the WTO agreement. Therefore, the Court proposed that in situations such as the one at stake:

[I]t is essential to ensure close co-operation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the Community.³⁵

Therefore, in order to balance between the different interests in the WTO agreement, the Court establishes the duty to cooperate between the EU and its Member States so that the division of competences does not become an issue. Moreover, according to the Court, that cooperation must ensure the unity of external representation, meaning that it is not only in the interests of the EU

³² *Ruling 1/78/EURATOM Nuclear Materials* [1978] ECR 2151.

³³ Heliskoski (n 9) 123. *cf* S Hyett, 'The Duty of Cooperation: A Flexible Concept' in A Dashwood and C Hillion (eds), *The General Law of EC External Relations* (London, Sweet & Maxwell, 2000).

³⁴ *Opinion 1/94 Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property* [1994] ECR I-05267 [106].

³⁵ *ibid.*

but also in the interests of the legal certainty of third parties that the EU does not send incoherent messages.

By recognising a duty to cooperate and not a legal obligation solving the diverging interest, the Court understood that Article 4(3) could serve as a managerial device.³⁶ By not creating a specific legal obligation on either the EU or its Member States, the duty allows any result of that cooperation to be contextualized. The outcome of such cooperation will not bind any of the parties cooperating in future arrangements.

However, in recent years the duty has started to evolve to become an organising principle, an interest on its own. The Court recognised that the duty of cooperation, in its unity of external representation principle facet,³⁷ was one of the interests to take into account when laying down procedural strategies in international agreements. In the Food and Agriculture Organisation (FAO) judgment, the Court recognised that the: ‘Arrangement between the Council and the Commission represents fulfilment of that duty of cooperation ... It is clear, moreover, from the terms of the Arrangement, that the two institutions intended to enter into a binding commitment towards each other.’³⁸

Recent cases like *PFOS*,³⁹ *IMO*⁴⁰ or *Inland Waterways*⁴¹ seem to point towards this new understanding of the duty of cooperation as an organising principle of EU external relations. The Court now sees the duty of cooperation not as a way to allow the different perspectives on the division of competences to coexist within the framework of an agreement, but as a legal duty of abstention imposed on the Member States.⁴² In other words, the duty of cooperation is no longer a managerial device aimed at ensuring that the interests of both the EU and its Member States are duly taken into account in the framework of an international agreement. Instead, the duty of

³⁶ cf J Heliskoski, ‘The “Duty of Cooperation” between the European Community and its Member States within the World Trade Organization’ (1996) VII *Finnish Yearbook of International Law* 59.

³⁷ C Hillion, ‘Mixity and Coherence in EU External Relations: The Significance of the “Duty of Cooperation”’ in Hillion and Koutrakos (n 1); E Neframi, ‘The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations’ (2011) 47 *CML Rev* 323.

³⁸ Case C-25/94 *Commission v Council (FAO)* [1996] ECR I-1469.

³⁹ Case C-246/07 *Commission v Sweden (PFOS)* [2010] ECR I-03317.

⁴⁰ Case C-45/07 *Commission v Greece (IMO)* [2009] ECR I-00701.

⁴¹ Case C-266/03 *Commission v Luxembourg (Inland Waterways)* [2005] ECR I-04805; Case C-433/03 *Commission v Germany (Inland Waterways)* [2005] ECR I-06985.

⁴² A Delgado Casteleiro and J Larik, ‘The Duty to Remain Silent: Limitless Loyalty in EU External Relations?’ (2011) 36 *European Law Review* 524.

cooperation works as another way of preserving the EU's autonomy and power. Regardless of the competence involved, the duty of cooperation imposes limits on EU Member States' room for manoeuvre in the international scene. This principle becomes especially important when dealing with the participation of the EU and its Member States in international disputes. By virtue of the duty of cooperation, Member States cannot bring claims to international courts without previously informing the EU,⁴³ and when acting as respondents in many instances must follow the EU's position.⁴⁴

B. Organising EU International Responsibility: Pragmatism and Procedures

The different and competing interests at stake when negotiating an international agreement with the EU create a conundrum that is not easily solvable. The different actors involved have different and often contradictory interests, for instance, the EU and its Member States have different views on the exact division of competences in external relations. Logically, any negotiation would involve giving preference to some interests over others. However, the different negotiators might not be willing to compromise on certain interests or principles. To reconcile these different diverging interests in an international agreement, the parties might include different legal techniques which mediate between these diverging interests.⁴⁵ However, these techniques would not provide a solution on how to balance those interests. Instead, they provide a simulacrum of consensus at the level of abstract principles or interests.⁴⁶ The strategy apparently makes the diverging interests or principles converge, either by creating a legal vacuum in which the principles seem to meet or by postponing the decision on how the diverging principles come together. Consequently, the problems linked with these diverging interests will usually surface in the implementation or responsibility stage of the life-cycle of the agreement. These organising techniques can range from pragmatic solutions, which disregard the different interests altogether, to procedures in which the parties can discuss how the different principles will apply to a specific situation.

⁴³ Case C-459/ 03 *Commission v Ireland (MOX Plant)* [2006] ECR I-04635.

⁴⁴ J Heliskoski, 'Joint Competence of the European Community and its Member States and the Dispute Settlement Practice of the World Trade Organization' (1999–2000) 2 *Cambridge Yearbook of European Legal Studies* 61.

⁴⁵ Heliskoski (n 9) 157.

⁴⁶ M Koskeniemi, 'Theory: Implications for the Practitioners' in British Institute of International and Comparative Law (ed), *Theory and International Law: An Introduction* (London, BIICL, 1991) 32.

i Mixed Agreements as a Pragmatic Solution to the Discussions on the Division of Competences and Legal Certainty

In the EU's treaty-making practice, these organising techniques have become common features, mixed agreements being the most obvious example. Mixed agreements are international agreements to which both the EU and its Member States are parties.⁴⁷ By concluding the agreement jointly, the EU and its Member States set aside the question on the division of competences.⁴⁸ While it is clear that the EU had competence to conclude the agreement, the extent to which the EU has exercised its competences on that agreement is left unanswered. In other words, the discussion on the division of competences is abandoned so as to conclude the agreement. Hence, mixed agreements seem to alleviate many of the problems concerning the EU's treaty-making practice from a pragmatic standpoint.⁴⁹ By leaving all the difficult questions floating in a legal vacuum, mixity postpones any problem to the implementation and responsibility stages. As Tomuschat noted: 'Mixed agreements create no great difficulties as long as their implementation proceeds smoothly.'⁵⁰ As an organising technique, mixed agreements suggest the existence of a consensus on the different opposing interests in the EU's treaty-making practice. It is assumed that all of the parties have reached an agreement regarding their different interests on the division of competences between the EU and its Member States, and that the legal certainty of the non-EU party to the agreement is not negatively affected by this division. Since the agreement was concluded, a consensus on the different principles is implied. However, when faced with a breach of this agreement, those opposing interests surface, questioning the effectiveness of mixed agreements.

An interesting example on how mixity leaves these diverging interests in a legal vacuum is the Palermo Convention against transnational organised crime⁵¹ (Palermo Convention) and the

⁴⁷ R Schütze, 'Federalism and Foreign Affairs: Mixity as a (Inter)national Phenomenon' in Hillion and Koutrakos (n 1); A Rosas, 'The European Union and Mixed Agreements' in A Dashwood and C Hillion (eds), *The General Law of EC External Relations* (London, Sweet & Maxwell, 2000); A Rosas, 'Mixed Union: Mixed Agreements' in M Koskenniemi (ed), *International Law Aspects of the European Union* (Leiden, Kluwer Law International, 1998).

⁴⁸ JHH Weiler, 'External Legal Relations of Non-Unitary Actors' in JHH Weiler (ed), *The Constitution of Europe: Do the New Clothes Have an Emperor?* (Cambridge, Cambridge University Press, 1999); cf NA Neuwahl, 'Mixed Agreements: Analysis of the Phenomenon and their Legal Significance' (Florence, European University Institute, 1988); HG Schermers, 'A Typology of Mixed Agreements' in O'Keefe and Schermers (n 1).

⁴⁹ A Rosas, 'The Future of Mixity' in Hillion and Koutrakos (n 1) 371; R Holdgard, *External Relations Law of the European Community: Legal Reasoning and Legal Discourses* (Leiden, Wolter Kluwer, 2008) 148.

⁵⁰ C Tomuschat, 'The International Responsibility of the European Union' in E Cannizzaro (ed), *The European Union as an Actor in International Relations* (Leiden, Kluwer Law International, 2002) 185.

⁵¹ United Nations Convention against Transnational Organised Crime [2004] OJ L261/70.

negotiations that led to its conclusion. The diverging interests previously identified were present throughout the negotiations. On the one hand, the issue of the EU's powers in relation to the subject matter covered by the agreement was not settled before the negotiations started. Initially, the Commission had an observer status in the negotiations while the EU's Member States were negotiating. In addition, the Council adopted a Joint Position exhorting the Member States 'to ensure that the provisions of the draft convention relating to the obligation to criminalise particular activities are consistent in particular with Articles 1 and 2 of Joint Action 98/733/JHA' *and to avoid any 'incompatibility between the proposed convention and instruments drawn up in the Union'*.⁵² This Joint Position shows how the EU Member States (seated in the Council) considered that the division of competences between the EU and its Member States in relation to this issue allowed them to negotiate on their own behalf. However, they eventually accepted that the European Commission should be involved in a different capacity than as an observer and authorised it to negotiate.⁵³ This shows the existing tension between the EU and its Member States as regards their participation in international negotiations. It could be argued that since the moment that the EU Member States accepted that the Commission should negotiate the agreement, they had reached and settled the discussion. However, the fact that the Member States accepted that there were some competences involved that required the participation of the EU (the EC at that time) does not mean that different interests have coalesced. This can clearly be seen in the statements made by the government of Portugal in the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime. The representative of Portugal, speaking on behalf of the EU Member States, informed the Ad Hoc Committee that 'the representative of the European Commission had been mandated by the Council of the European Union to negotiate certain articles'.⁵⁴ Therefore, the tension between the EU and its Member States remained, regardless of the mandate to the Commission to negotiate the agreement. The statement did not acknowledge the transfer of powers to the EU in the subject matter covered by the agreement. The Member States recognised that the Council (ie, the

⁵² Joint Position 1999/235/JHA of 29 March 1999 defined by the Council on the basis of Article K.3 of the Treaty on European Union, on the proposed United Nations convention against organised crime [1999] OJ L87/1.

⁵³ European Commission, 'Proposal for a Council Decision on the signing, on behalf of the European Community, of the United Nations Convention against transnational organised crime and its Protocols on combating trafficking in persons, especially women and children, and the smuggling of migrants by land, air and sea' COM(2000)760 final.

⁵⁴ Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, Ninth session, Vienna, 5–16 June 2000, A/AC.254/2, para 15.

Member States) had authorised the Commission to negotiate certain provisions. However, this does mean that a transfer of powers to the EU has occurred. There are many instances in which the EU negotiates on behalf of the Member States, even though it does not have the competence to do so. For instance, within the WTO before the entry into force of the Lisbon Treaty, all Member States recognised that the EU should speak with one voice and that the Commission should be the sole negotiator and spokesperson on issues of shared competence like services.⁵⁵ Therefore, Member States might continue to retain the competence over this subject matter, regardless of who is negotiating.

The other negotiating parties saw these diverging views as creating legal uncertainty as to whether the EU and/or its Member States would be able to live up to its obligations under the agreement.⁵⁶ Consequently, the EU, its Member States and the third parties agreed to the mixed nature of the Palermo Convention. However, the mixed formula did not solve any of the issues raised by the negotiations. The Commission continued to claim to have competence, whilst the EU Member States did as well, and the third parties continued to regard the participation of the EU and its Member States as creating legal uncertainty. Mixity created a legal vacuum in which all the different concerns seemed to be taken care of, even though the diverging interest continued to exist and might resurface at the responsibility stage. In other words, the mixed formula takes the pragmatic solution of ignoring the diverging interests by establishing a framework in which all of them seem to have been taken care of.

ii. The Proceduralisation of the EU's Responsibility

Similarly, procedural solutions also seem to alleviate the conflict between the different diverging interests. As Koskenniemi rightly notes, 'proceduralisation ... is a useful means to avoid arguing about binding obligations in a way that might seem to overrule one sovereign will with another'.⁵⁷ The international agreement enshrines a procedural framework to deal with any doubt regarding the compliance of the EU and its Member States. The procedure thus deals with the diverging interests in two ways. First, it postpones the decision on how to deal with those

⁵⁵ Eeckhout (n 8) 10.

⁵⁶ D Kennedy, 'Comment on Rodolf Wiethölter's "Materialization and Proceduralization in Modern Law", and "Proceduralization of the Category of Law"' (2011) 12 *German Law Journal* 478.

⁵⁷ Koskenniemi (n 45) 32.

interests. According to Kennedy, proceduralisation in more general terms ‘means retreat from the attempt to develop rules of proper conduct ... The question is not “who can do what”, but “according to what procedures will the parties negotiate the division of the relevant pie?”’.⁵⁸ The procedural framework does not provide an ‘ex ante’ rules: it lays down a framework to reach a decision. Second, it contextualises the decision by narrowing down its effects. Since the procedural framework is only triggered in cases of a clear disagreement at the implementation stage, the decision will usually only solve the conflict between diverging interests on that particular issue. It will be an ad hoc solution which would rarely be applied to the bigger conflict between diverging interests.⁵⁹ In addition, the ad hoc nature of the solution entails a greater difficulty (if not impossibility) of advancing normative claims based on those solutions. To what extent would the EU be bound to follow previous ad hoc decisions? Furthermore, given that the behaviour of international actors can create international law, would different ad hoc solutions based on similar procedures meet the standard of virtual uniformity as to constitute custom?⁶⁰

Proceduralisation is one of the most common features of the EU’s treaty-making practice. Whenever there is some kind of disagreement between the diverging interests underpinning an international agreement, the EU and the other parties to the agreement tend to favour the inclusion of a procedural framework. The agreement defers the solution of the conflict between the diverging interests into procedures and future decision making.⁶¹ The functioning of human rights clauses is a good example in this respect. Article 96 of the Cotonou Agreement⁶² provides a procedure for the suspension of the agreement. The design of the procedure includes mechanisms of consultation and dialogue which allow the balancing of the EU’s interests in human rights compliance and the other parties’ interests on sovereignty and freedom to deal with its internal affairs. In a situation in which prima facie an essential element of the agreement has been violated, the different parties must try to reach an agreement through consultations, even in

⁵⁸ Kennedy (n 55) 478.

⁵⁹ *cf* Heliskoski (n 9) 166.

⁶⁰ Kuijper and Paasivirta (n 6) 113 seem to accept that the practice of the EU in this regard has the potential to create custom.

⁶¹ Koskenniemi (n 45) 13. In fact, as Koskenniemi points out proceduralisation is a common trend in international law making and is especially present in Multilateral Environmental Agreements (MEA)

⁶² Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000. [2000] OJ L317/3.

cases of ‘special urgency’.⁶³ Therefore, in terms of responsibility, the breach of human rights obligation may or may not entail a breach of the Cotonou Agreement (even if it is one of its essential elements) depending on the outcome of the consultations. Moreover, it would also be difficult to extract general conclusions of the practice since the outcome will always depend on negotiations and not the application of rules. In other words, similar violations might entail different responsibilities.

These different techniques ranging from pragmatic legal vacuums to the inclusion of procedures are not mutually exclusive. Indeed, pragmatic solutions do not exclude procedural strategies and vice versa. Many mixed agreements (the paradigm of pragmatic solutions in the EU’s treaty-making practice)⁶⁴ envisage procedures designed to deal with these diverging interests. Returning to the example of the Palermo Convention, whereas the mixed nature of the agreement made it possible to postpone any conflict regarding the EU’s powers, the claims for legal certainty were not dealt with satisfactorily. Third parties demanded further assurances.⁶⁵ Thus, in addition to the joint participation of the EU and its Member States with regard to the Convention, third parties also demanded a procedure aiming at dealing with any issue regarding the EU’s power which might arise during the implementation of the agreement.⁶⁶ This feature has become more and more relevant in recent years as the complexity of the procedures gives a certain degree of flexibility to the EU and its Member States to reach a decision.⁶⁷

III. The Management of Responsibility in EU International Responsibility: Some Recent Developments

Moving to the EU’s management of its international responsibility in practice, this section focuses on recent trends. As has been argued, the EU’s organising techniques can be an

⁶³ Article 96 of the Cotonou Agreement provides that: ‘If measures are taken in cases of special urgency, they shall be immediately notified to the other Party and the Council of Ministers. At the request of the Party concerned, consultations may then be called in order to examine the situation thoroughly and, if possible, find solutions.’

⁶⁴ *cf* Dashwood (n 1).

⁶⁵ C Rijken and V Kronenberger, ‘The United Nations Convention against Transnational Organised Crime and the European Union’ in V Kronenberger (ed), *The EU and the International Legal Order: Discord or Harmony?* (The Hague, TMC Asser Press, 2001).

⁶⁶ See art 36(4) of the Palermo Convention.

⁶⁷ For an overview of this practice, see A Delgado Casteleiro, ‘EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?’ (2012) 17 *European Foreign Affairs Review* 491.

amalgamation of pragmatic and procedural strategies. As shown above, many mixed agreements include proceduralisation mechanisms designed to deal with the responsibility of the EU and its Member States. This is also the case in the most recent examples. These arrangements not only provide a procedure designed to deal with the different diverging interests but also provide simple pragmatic solutions which apply when the outcome of the procedure could be too cumbersome for any of the parties. This section first analyses how the Commission proposal on financial responsibility in international investment law takes care of the different interests. It then moves on to examine how the responsibility of the EU and its Member States will be managed once the former accedes to the European Convention on Human Rights (ECHR) and cases against the EU or its Member States arising out of incompatibilities between EU law and the ECHR start to reach the European Court of Human Rights (ECtHR). These two mediating strategies show a high degree of sophistication when dealing with the different interests.

A. Responsibility in International Investment Law: Financial Responsibility and Exclusive Competence

As mentioned above, FDI became an exclusive competence of the EU with the entry into force of the Lisbon Treaty.⁶⁸ As a result of the exclusive nature of the investment competence, since 2010 the Commission has been designing a comprehensive policy in this regard. Moreover, it has also been preparing the legal instruments which will develop the new European international investment policy.⁶⁹

Within this new policy, the Commission had to address the issue of international responsibility. The issue of the EU's responsibility had become a relevant topic since the current arrangements had been proven not to deal with the different interests in an effective way. For instance, the transparency declaration annexed to the Energy Charter Treaty provided that:

The Communities and the Member States will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of another Contracting Party.

⁶⁸ Herrmann (n 23).

⁶⁹ European Commission, 'Towards a comprehensive European international Investment policy (Communication)' COM(2010) 343 final.

In such [a] case, upon the request of the Investor, the Communities and the Member States concerned will make such determination within a period of 30 days.⁷⁰

However, this declaration did not stop third parties from bringing cases against EU Member States over issues of EU law.⁷¹

Against this backdrop, the Commission in its policy document mentioned the issue of the EU's responsibility. It stressed that the 'issue of the international responsibility between the EU and the Member States in EU investment agreements needs to be addressed'.⁷² However, the proposal remained silent as to the attribution of wrongful acts or any specific rules which could apply to the EU and/or its Member States. Instead, it addressed the issue through the EU's participation in future investment disputes. According to the Commission Communication, 'Given the exclusive external competence, [the EU] will also be the sole defendant regarding any measure taken by a Member State which affects investments by third country nationals or companies falling within the scope of the agreement concerned'⁷³ and it pointed out that further rules on responsibility would be tackled in future legislation. Overall, the Commission's Communication shows how the issue of responsibility is not going to be approached from a rule-based perspective. Instead, the Commission will propose a procedural framework which would allow it to express its views on how the responsibility should be attributed in a specific case.

The Commission's proposal for a regulation to manage financial responsibility linked to investor-state dispute settlement tribunals⁷⁴ lays down the legal framework in which a solution to the question of responsibility in investment agreements can be agreed. The explanatory memorandum rightly differentiates between the procedures aiming at allowing the EU to participate in an investment dispute from the issue of the allocation of financial responsibility. In other words, the proposed regulation aims to cover the different stages of an investment dispute from the initiation of the proceedings to the payment of the eventual compensation that the arbitrators might establish. The proposal understands that:

⁷⁰ Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Article 26(3)(b)(ii) of the Energy Charter Treaty [1998] OJ L69/115.

⁷¹ *AES Summit Generation Ltd* (n 3); *Electrabel SA v Republic of Hungary* (ICSID) ICSID Case No ARB/07/19.

⁷² European Commission (n 68) 10.

⁷³ *ibid.*

⁷⁴ European Commission (n 14).

[W]here the treatment of which an investor complained originates in the institutions of the Union (including where the measure in question was adopted by a Member State as required by Union law), financial responsibility should be borne by the Union.

Therefore, given the exclusive nature of the investment competence, the explanatory memorandum seems to favour the EU's sole responsibility in this area. In other words, the Commission in the explanatory memorandum tries to make the different interests coalesce (the autonomy of the EU, the autonomy of its Member States and the legal certainty of third parties) by establishing the EU's sole responsibility whenever it exercises its competence. Article 3 of the proposal takes up this idea. Article 3(1) reads as follows:

1. Financial responsibility arising from a dispute under an agreement shall be apportioned according to the following criteria:

- (a) the Union shall bear the financial responsibility arising from treatment afforded by the institutions, bodies or agencies of the Union;
- (b) the Member State concerned shall bear the financial responsibility arising from treatment afforded by that Member State, except where such treatment was required by the law of the Union.

Notwithstanding point (b) of the first subparagraph, where the Member State concerned is required to act pursuant to the law of the Union in order to remedy the inconsistency with the law of the Union of a prior act, that Member State shall be financially responsible unless the adoption of such prior act was required by the law of the Union.

The provision mandates financial responsibility in the framework of investment arbitration. Whenever an EU organ commits a wrongful act, it is for the EU to bear responsibility. Likewise, breaches committed by organs of EU Member States should be attributed to the Member States, unless they were acting under the EU's normative control. Given the exclusive nature of FDI, these rules of attribution respond to the fact that EU Member States would not be allowed to act in the field of FDI unless the EU empowered them to do so.⁷⁵

Moreover, Article 3 also contains another rule of attribution. Article 3 (3) envisages that under certain circumstances, EU Member States might also bear financial responsibility for the treatment afforded to an investor. These circumstances boil down to a single issue: EU Member States will bear financial responsibility if they want to. Therefore, the proposal does not make a clear choice between the EU's sole responsibility and the joint responsibility of the EU and its

⁷⁵ For a more in-depth critique of the provisions, see C Tiejte, E Sipiorsk and G Topfër, *Responsibility in Investor-State-Arbitration in the EU: Managing Financial Responsibility Linked to Investor-State Dispute Settlement Tribunals Established by the EU's International Investment Agreements* (Brussels, European Parliament, 2012) 19.

Member States. Instead, it leaves it to the EU and its Member States to decide who will bear the responsibility on a case by case basis.

Furthermore, the proposed regulation enshrines a series of rules dealing with the EU's participation in any investment dispute. Articles 8–21 provide different kinds of procedures which range from the procedure to follow for an EU Member State to act as respondents in the dispute (Article 8) to the procedure for the payment of the arbitral award (Article 16).

The proposed regulation is a perfect example on the recent trend in the proceduralisation of the responsibility of the EU. On the one hand, it creates a legal vacuum in relation to responsibility. Even though the proposal lays down rules as to the allocation of responsibility, the proposal also allows the EU and its Member States to override these rules and modify the allocation of responsibility depending on the specific case. Thus, the Member States and the EU can leave the exact scope of the EU's competence on FDI unsettled.⁷⁶ On the other hand, the uncertainty that the variable responsibility would entail is diminished to a certain extent by the different procedures enshrined in the regulation. The regulation assumes that by laying down procedural rules on participation, the legal certainty of third parties is safeguarded. Transparency in how the decisions as to the participation of the EU and its Member States are taken should satisfy the concerns of third parties. This is especially clear in Article 17, which provides for a procedure which would allow the third party to get its award even when there is no agreement between the EU and its Member States as to who bears the financial responsibility for this. In spite of this procedure, the legal certainty of other third parties is not completely safeguarded with these procedural strategies. Since each case can be approached in very different ways, depending on how the EU and its Member States decide to approach the dispute, third parties will have difficulties in trying to predict how their dispute will turn out.

Overall, the proposed regulation is a mixture of pragmatism and proceduralisation aimed at safeguarding the legal certainty of third parties while at the same time taking into account the complexities underpinning the division of competences and the autonomy of EU law. However, would not a clear rule of attribution like the one contained in Article 3(1) of the proposed regulation have tackled the problems in a similar fashion while adding even more legal certainty?

⁷⁶ *cf* Dimopoulos (n 23).

The proposal shows how the EU is moving away from strict procedures based on the division of competences to more flexible procedures. Even though these new procedures take into account the division of competences from a practical perspective, this practical nature added to the flexibility in the participation of the EU Member States in disputes might create problems as regards the constitutional identity of the EU legal order. Given the exclusive nature of the FDI, how can a Member State incur responsibility if in principle it is not allowed to act in this area unless the EU has authorised it to do so?

B. The EU's Accession to the ECHR

The EU's accession to the ECHR will open a new era on the protection of fundamental rights in Europe. Furthermore, its accession poses plenty of challenges to both legal orders. Questions on the relations between the courts, the autonomous nature of the EU's legal order or the impact of the ECtHR decisions on EU law are just some of the issues which are attracting scholarly attention.⁷⁷ In addition, the issue of the responsibility within the ECtHR poses very interesting questions.⁷⁸ In a similar vein to the proposed regulation in the field of FDI, the draft accession agreement⁷⁹ and its explanatory report⁸⁰ try to give an appearance of consensus between the different interests. Protocol 8 of the Lisbon Treaty already identified the different interests. It tackled the issue of the EU's autonomy as well as legal certainty in Article 1, which provides that:

⁷⁷ For an overview, see T Lock, 'End of an Epic? The Draft Agreement on the EU's Accession to the ECHR' (2011) 31 *Yearbook of European Law* 162; C Eckes, 'EU External Representation in Context: Accession to the ECHR as the Final Step Towards Mutual Recognition' in S Blockmans and RA Wessel (eds), *Principles and Practices of EU External Representation* (2012) CLEER Working Paper 2012/5; JM Cortés Martín, 'Adhesión al CEDH y Autonomía del Derecho de la Unión: Legitimación pasiva de la Unión y sus miembros y compatibilidad material' (2010) 22 *Revista General de Derecho Europeo* 53.

⁷⁸ For a brief overview, see G Gaja, 'The "Co-Respondent Mechanisms" According to the Draft Agreement for the Accession of the EU to the ECHR' (2013) 2 *ESIL Reflections*, Available at: http://www.esil-sedi.eu/sites/default/files/ESIL%20Reflections%20-%20Gaja_0.pdf (Last accessed 25/09/2013)

⁷⁹ Draft Revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. The last version can be found in the Council of Europe document 47+1 (2012) R03. Third Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights.

⁸⁰ Draft Explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. The last version can be found in Steering Committee for Human Rights (CDDH) Report to the Committee of Ministers on the elaboration of legal instruments for the accession of the European Union to the European Convention on Human Rights: CDDH (2011) 009.

The agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the 'European Convention') provided for in Article 6(2) of the Treaty on European Union shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to: ... (b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.

The EU considers that insofar as its specific characteristics are preserved, the legal certainty of third parties would also be preserved. The protocol and, by extension, EU Member States are concerned that the mixed character of the ECHR can lead to the incorrect targeting of the EU or its Member States. The mechanism should give the subject bringing the claim the certainty that somebody will be held responsible for the violation of the ECHR. At the same time, it should also give EU Member States the certainty that they will not be held liable for acts which fall outside their competence. Furthermore, in order to safeguard the autonomy of the EU Member States, the same protocol enshrines in its Article 2 that: 'The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions.' Therefore, the accession agreement should take all these different interests into account when drafting its responsibility rules.

To deal with all these diverging concerns, the draft legal agreement on the EU's accession to the ECHR establishes a new model of the proceduralisation of EU participation in international agreements. The draft agreement enshrines the so-called co-respondent mechanism which provides a procedure designed to allow the EU or its Member State to intervene so as to 'ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union'. In this regard, Article 36(4) ECHR as modified by the draft legal instrument provides that:

The European Union or a Member State of the European Union may become a co-respondent to proceedings by decision of the Court in the circumstances set out in the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. A co-respondent is a party to the case. The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings.

This provision enshrines a procedure by which the EU and its Member States will jointly participate in the proceedings brought against any of them. The aim of this procedure, as already mentioned, is to balance between the *sui generis* nature of the EU and the legal certainty of the other parties to the proceedings. As the explanatory report shows, the co-respondent mechanism

is ‘a way to avoid gaps in participation, accountability and enforceability in the Convention system’. In other words, the mixed participation of the EU and its Member States summed up with the complex nature of the EU’s legal system y could create to gaps in terms of responsibility, which in this context means gaps in the protection of fundamental rights in Europe. Consequently, the co-respondent mechanism establishes that the EU or its Member States will take part in the proceedings whenever the compatibility between an EU law instrument and a provision of the ECHR is called into question.⁸¹ Moreover, though the article does not establish any rule on attribution or responsibility, it appears that the responsibility of the EU and its Member States will be joint in this respect.⁸²

The co-respondent mechanism establishes two different procedures depending on whether the breach stems from an EU primary norm or from a secondary norm. The rationale behind the co-respondent is to lay down a procedure to involve those ECHR contracting parties that are necessary to put an end to the human rights violation. By allowing the EU and/or its Member States to act as co-respondents, the draft agreement tries to ensure, as was pointed out above, that there will not be gaps in responsibility. However, a closer look at the co-responding mechanism will show that certain gaps in accountability will still remain after the EU’s accession to the ECHR. The main criticisms are aimed towards the voluntary nature of the co-respondent mechanism. Like Article 3(2) of the proposed regulation in the field of FDI, Article 3(2) and 3(3) of the draft agreement is worded in such a way that the procedure dealing with the EU’s responsibility does not establish a clear obligation on the EU and its Member States to intervene. Instead, both provisions provide that the ‘the European Union Member States may become co-respondents’ as regards violations of the ECHR stemming from an EU primary rule and that ‘the European Union may become a co-respondent’ as regards violations stemming from EU secondary legislation. The wording of all these provisions gives the idea that the EU and its Member States have the last word as to becoming co-respondents. Regardless of whether they actually bear responsibility over the violation, the EU and/or its Member States can avoid being held responsible by simply not joining the proceedings. This is confirmed by the explanatory report, which clearly states that:

⁸¹ Draft Revised Agreement (n 78) 17.

⁸² *ibid* 18. However, see comment 4 on p 2 of the same document.

No High Contracting Party may be compelled against its will to become a co-respondent. This reflects the fact that the initial application was not addressed against the potential co-respondent, and that no High Contracting Party can be forced to become a party to a case where it was not named in the original application.⁸³

While this might be seen as a pragmatic solution designed to postpone and contextualise any decision regarding the division of competences, the voluntary nature of the co-respondent mechanism might be seen as problematic in terms of the effective protection of human rights in Europe. Regardless of the fact that it preserves the autonomy of the EU's legal order,⁸⁴ the voluntary nature can potentially create uncertainty as to who is going to intervene in the proceedings. Allowing the EU and its Member States to decide whether to join a specific case can create inconsistencies as regards their expected intervention. They might decide that in a specific case it is better not to intervene, whereas in another case with very similar facts, they might decide the contrary and join the proceedings as co-respondents. Inasmuch as the co-respondent mechanism allows the EU and its Member States to decide whether or not to join proceedings against the other, that decision would always have to be approached as an ad hoc decision which cannot be generalized. This case by case approach to the issue of responsibility could create uncertainty as to whether in similar situations the application of the co-respondent mechanism would have been the same.

IV. Conclusions

To deal with different interests, the EU in its treaty-making practice has included different kinds of mechanisms. The creation of legal vacuums (eg, mixed agreements) or proceduralisation of the participation and responsibility within international agreements are just some general examples of this trend. Nevertheless, these mediating strategies provide a simulacrum of consensus. The different interests do not meet; instead, through ad hoc solutions and procedures, the strategies favour certain interests over others in specific situations. Therefore, any solution to the conflict between the different interests or principles will be contextualised, meaning that the solution would be an ad hoc solution which might not be extrapolated to similar situations.

⁸³ CDDH (2011) 0009 (n 79) para 47.

⁸⁴ S Vezzani, 'L'Unione europea e i suoi Stati membri davanti ai giudici di Strasburgo: una valutazione critica del meccanismo del co-respondent' (2012) 8. Available at: www.sidi-isil.org/wp-content/uploads/2010/02/Conforti-Ladh%C3%A9sion-de-l'UE-%C3%A0-la-CEDH.pdf.

Moreover, this chapter has shown how through a detailed analysis of the two new mediating strategies, the tension between the different interests remains, and in some cases these techniques do not create a consensus between the different principles. By examining the proposed regulation on financial responsibility and the co-respondent mechanism in the draft agreement on the EU's accession to the ECHR, the chapter has aimed to highlight two issues concerning the EU's managerial approach towards its international responsibility. First, by examining two of the most recent examples on the EU's organising techniques, the chapter has identified how these arrangements have become more complex over the years. Both proposals try to identify any possible scenario in which the EU's responsibility may arise and lay down different procedures which in those situations will allow the different interests to coexist. Furthermore, it also shows how beyond the procedures, there is some room for manoeuvre. Both proposals take into account when establishing responsibility whether the EU and its Member States may want to bear the responsibility. Second, the complexity of these procedures combined with the voluntary element enshrined in it has the potential to undermine legal certainty. For instance, the EU may not decide to intervene in a case in the ECtHR and may then intervene in a similar one afterwards. Nothing in the procedure makes the EU's intervention compulsory.

Given the complexities surrounding the different organising techniques, it is submitted that the EU should try to advance other ways of managing its international responsibility. The inclusion of specific responsibility rules would not only give legal certainty to third parties but also would settle to a certain extent some of the conflicts between the EU and its Member States. In this regard, it is advanced that a similar rule to that enshrined in Article 3(1) of the proposed regulation on financial responsibility⁸⁵ would serve this purpose in an effective way. By establishing the EU's responsibility when its organs have acted and when its Member States have acted by implementing EU law, the EU question of the division of competences and the autonomy of the EU should be settled. Since the EU could act and it did so, it should also bear the responsibility. Whereas in other areas of the life-cycle of an international agreement it is possible to leave the question of the division of competences unresolved (eg, the conclusion of the agreement), when speaking about responsibility, it is much more difficult, if not impossible. Given that someone must have committed a wrongful act for the responsibility to arise and that

⁸⁵ Above n 62.

the EU can only act if it has powers conferred upon it, any issue of responsibility for actions committed by EU Member States when implementing EU law must logically entail the responsibility of the EU. Moreover, having a clear responsibility rule based on the EU's actions would not only safeguard the autonomy of the EU and its Member States but would also increase the legal certainty of third parties. A clear rule which would apply in the same manner in all scenarios provides much more legal certainty than any procedure.