ARTICLES

OPINION 1/17: BETWEEN EUROPEAN AND INTERNATIONAL PERSPECTIVES

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LITIGATING HUMAN RIGHTS DISPUTES AGAINST THE EU AND THE MEMBER STATES: SOME REFLECTIONS IN LIGHT OF OPINION 1/17

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ABSTRACT: The participation of the EU in international dispute settlement has been the subject of a lively academic debate in recent years. This debate was fuelled by some landmark decisions of the CJEU, which has rejected the compatibility with EU law of the Draft Accession Agreement to the ECHR in Opinion 2/13, while giving the green light to the CETA Investment Court System in Opinion 1/17. In light of the Court's main findings in the latter Opinions, this *Article* claims to assess the adaptability of the model dispute settlement developed under CETA to the ECHR.

KEYWORDS: ECHR – human rights – dispute settlement – CETA – investment court system – internalisation model.

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** Research Assistant, Utrecht University, fabienne-ufert@t-online.de. The *Article* reflects the shared opinions of the authors. Nevertheless, Section II should be attributed to Fabienne Ufert, and Section III to Luca Pantaleo. All other sections should be attributed to both authors. Most of the research as well as the writing of this *Article* was carried out when Luca Pantaleo was still working at The Hague University of Applied Sciences, where his research activities were financially supported by the Lectoraat "Multilevel Regulation". For this reason, he wishes to thank the Lectoraat, and particularly Professor Barbara Warwas for her (not only financial) support. Both authors would also like to thank Prof. Paolo Palchetti for his valuable comments on an earlier draft of this *Article*, as well as Prof. Simone Vezzani and Dr. Cristina Contartese who also provided extremely useful comments on the first draft. It goes without saying that the authors bear full responsibility for any mistakes, errors and omissions contained in this *Article*.

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I. Introduction

The participation of the EU in international dispute settlement has often come under the scrutiny of the Court of Justice of the European Union (CJEU), mostly in the context of Opinions issued in accordance with art. 218(11) TFEU.[1] When it comes to the European Convention on Human Rights (ECHR), in particular, the CJEU has rejected the compatibility with EU law of the Draft Accession Agreement in Opinion 2/13. Without going into too much detail, suffice it to say that one of the most contentious points under that agreement was the co-respondent mechanism, which enabled both the EU and the Member States to become a co-respondent in proceedings brought before the other. According to the CJEU, the main problem with such mechanism lied with the fact that the power to ultimately decide on the acquisition of co-respondent status in a dispute was given to the European Court of Human Rights (European Court). This system, so reasoned the CJEU, would empower the European Court to make determinations in relation to "the rules of EU law concerning the division of powers between the EU and its Member States and the criteria governing the attributability of an act or omission that may constitute a violation of the ECHR", which "necessarily presuppose[d] an assessment of EU law".[2] The Court found that this power resulted in an interference with the division of powers between the EU and the Member States as it entailed an assessment on the apportionment of responsibility between the EU and the Member States in instances where the internal division of competence was at stake.[3]

As a reaction to the rejected co-respondent mechanism on the part of the CJEU, the EU has developed a new model – which will be referred to as the "internalisation model" – that has been included in investment agreements such as Comprehensive Economic and Trade Agreement (CETA).[4] Under the internalisation model, it is the EU that determines whether the EU or the Member State is to appear as the respondent in a dispute. As will be further explained below, this model was devised with a view to protecting the autonomy of the EU legal order.

[1] Opinion 1/76 *Accord relatif à l'institution d'un Fonds européen d'immobilisation de la navigation intérieure* ECLI:EU:C:1977:63; Opinion 1/91 *Accord EEE – I* ECLI:EU:C:1991:490; Opinion 1/00 *Accord sur la création d'un espace aérien européen commun* ECLI:EU:C:2002:231; Opinion 1/09 *Accord sur la création d'un système unifié de règlement des litiges en matière de brevets* ECLI:EU:C:2011:123; Opinion 2/13 *Adhésion de l'Union à la CEDH* ECLI:EU:C:2014:2454; Opinion 1/17 *Accord ECG UE-Canada* ECLI:EU:C:2019:341.

[2] Opinion 2/13 cit. para. 221.

[3] *Ibid*. para. 230.

[4] In reality, this model is not entirely new. It is largely inspired by a model which was firstly introduced in the so-called Rhine Conventions (Convention of 19 September 1977 for the protection of the Rhine against chemical pollution), and then extended to some minor treaties adopted by the Council of Europe. On these mechanisms see C Contartese and L Pantaleo, 'Division of Competences, EU Autonomy and the Determination of the Respondent Party: Proceduralisation as a Possible Way-Out?' in E Neframi and M Gatti (eds), *Constitutional Issues of EU External Relations Law* (Nomos 2018) 409; as well as L Pantaleo, *The Participation of the EU in International Dispute Settlement. Lessons from EU Investment Agreements* (Springer 2019) 36 ff.

This *Article* aims to assess the adaptability of this new model to the settlement of disputes under another legal regime, namely the ECHR. Section II will examine the case law developed by the European Court in cases where the responsibility of EU Member States under the ECHR was at stake. Section III will provide an overview of the so-called internalisation model. Section IV will assess the adaptability of the internalisation model under the ECHR and the legal implications thereof, with a special focus on the system of remedies available under the ECHR. Section V will present some conclusions.

II. The case law of the European Court of Human Rights on the responsibility of EU Member States under the European Convention of Human Rights (ECHR)

If a Member State of the EU allegedly violates its obligations under the ECHR, the European Court faces a dilemma because, often, EU Member States may violate their obligations under the ECHR when acting based on an EU measure. Given that the EU itself is not a party to the ECHR, the European Court cannot attribute responsibility to the EU and has thus developed a special system of allocating responsibility between the EU and the Member States. In one of its more recent cases on the matter, *Michaud v France*, the European Court has nicely summarized its approach:

> "The Court reiterates that absolving the Contracting States completely from their Convention responsibility where they were simply complying with their obligations as members of an international organisation to which they had transferred a part of their sovereignty would be incompatible with the purpose and object of the Convention [...].[5] In other words, the States remain responsible under the Convention for the measures they take to comply with their international legal obligations, even when those obligations stem from their membership of an international organisation to which they have transferred part of their sovereignty.[6] It is true, however, that the Court has also held that action taken in compliance with such obligations is justified where the relevant organisation protects fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent – that is to say not identical but "comparable" – to that for which the Convention provides [...].[7] If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.[8] However, a

[5] ECtHR *Michaud v France* App n. 12323/11 [6 December 2012] para. 102; ECtHR *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* App n. 45036/98 [30 June 2005] para. 154.

[6] *Michaud v France* cit. para. 102; *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* cit. para. 15.

[7] *Michaud v France* cit. para. 103.

[8] *Ibid*.

> State will be fully responsible under the Convention for all acts falling outside its strict international legal obligations, notably where it has exercised State discretion.[9] In addition, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient".[10]

Based on this premise, the European Court has developed two lines of case law on the responsibility of EU Member States under the ECHR: *1)* The Member State bears full responsibility under the ECHR because it is acting based on an EU measure which leaves room for discretion on the part of the Member State. *2)* The Member State of the EU is acting based on an EU measure which leaves no room for discretion on part of the Member State. In this case, the European Court has consistently applied the doctrine of equivalent protection. This jurisprudence of the European Court highlights a fundamental aspect: regardless of the discretionary space of the Member State, its conduct is always attributed to the State and never to the EU. This might trigger issues of EU law autonomy, hence, debates surrounding the EU's accession to the ECHR have not lost their relevance. The following two paragraphs shall examine the two lines of case law briefly.

Falling within the first line of case law, in *Matthews v UK*, the European Court held that EU Member States remain responsible under the ECHR not only when they are acting based on a secondary EU measure which leaves room for discretion but also when it comes to EU law with treaty status.[11] The European Court found that, due to the primary law status of the act in question, the act could be challenged before the CJEU and thus, the CJEU was not in a position to guarantee an equivalent protection of fundamental rights.[12] Consequently, it was the EU Member State that was required to secure the rights under the ECHR.[13] In *M.S.S. v Belgium and Greece*, the European Court held that the Member State in question remains responsible under the ECHR even when acting on the basis of an EU Regulation which, despite being generally and directly applicable, contains a so-called derogation clause which gives the concerned Member State some room for manoeuvre in applying the Regulation.[14] In *Cantoni v France*, the European Court found that the fact that national law provisions are based almost *verbatim* on an EU Directive does not exonerate the Member State from its obligations under the ECHR.[15] Lastly, in *Michaud v France*, the European Court held that if an EU Member State acts on the basis of an EU Directive which leaves room for discretion, the presumption of equivalent protection can be triggered if the Member State makes a preliminary reference to the CJEU within its margin of discretion.[16] This is because

[9] *Ibid*.; ECtHR *M.S.S. v Belgium and Greece* App n. 30696/09 [21 January 2011] para. 338.
[10] *Michaud v France* cit. para. 103.
[11] ECtHR *Matthews v The United Kingdom* App n. 24833/94 [18 February 1999].
[12] *Ibid*. para. 33.
[13] *Ibid*. para. 34.
[14] *M.S.S. v Belgium and Greece* cit.
[15] ECtHR *Cantoni v France* App n. 17862/91 [11 November 1996] para. 30.
[16] *Michaud v France* cit. paras 114-115.

it is the CJEU that can guarantee an equivalent protection of human rights in the EU to the ECHR because making use of a preliminary reference would deploy the full potential of the human rights supervisory mechanism provided for under EU law.[17] Interestingly, despite the fact that France made no preliminary reference to the CJEU, although the CJEU had never examined the Convention rights at issue, and thus the equivalent protection doctrine did not apply, the European Court found no violations due to the specific circumstances of the case.[18] In summary, the preceding cases demonstrate that an EU Member State bears full responsibility under the ECHR when acting based on EU primary law or EU Regulations which contain so-called derogation clauses that leave room for discretion. Additionally, when acting based on EU Directives which, by their nature, leave room for discretion on part of the Member State. Especially if the Member State did not request a preliminary ruling within that margin of discretion so as to deploy the full potential of the fundamental rights supervisory mechanism provided for under EU law.

In the second line of case law, the most famous judgment is probably the *Bosphorus* judgment in which the European Court clearly established the equivalent protection doctrine.[19] When examining the situation in the case, the European Court found that the protection of fundamental rights by Community law can be considered as equivalent to the protection by the ECHR system and thus the presumption arose that Ireland did not depart from its requirements of the ECHR when it implemented legal obligations flowing from its membership of the European Community.[20] Whereas *Bosphorus* was the case in which the European Court thoroughly analysed the level of fundamental rights protection in the EU and then came to the conclusion that it was generally equivalent to the ECHR, the European Court had basically applied the presumption of equivalent protection in previous cases already, for example, in *M & Co v Germany*.[21] In *Kokkelvisserij*, the European Court made clear that the equivalent protection doctrine does not only apply to actions but also to procedures followed within the EU, such as the CJEU's refusal to allow the applicant to respond to the opinion of the Advocate General during the preliminary proceedings before the CJEU before the case was brought to the European Court.[22] The European Court stated that it was prevented from examining the procedure before the CJEU in light of the ECHR directly.[23] In *Avotins v Latvia*, the European Court further extended the application of the equivalent protection doctrine to the principle of mutual trust in

[17] *Ibid*. para. 115.

[18] *Ibid*. paras 115, 132-133.

[19] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* cit. paras 155-156.

[20] *Ibid*. paras 155-156.

[21] *Ibid*. paras 155-156; European Commission on Human Rights *M. & Co. v The Federal Republic of Germany* App n. 13258/87 [9 February 1990].

[22] ECtHR *Cooperatieve Producentenorganisatie Van De Nederlandse Kokkelvisserij U.A. v The Netherlands* App n. 13645/05 [20 January 2009], admissibility decision, 6, 8, 16.

[23] *Cooperatieve Producentenorganisatie Van De Nederlandse Kokkelvisserij U.A. v The Netherlands* cit. 17.

EU law because it did not find discretion on part of the Member State.[24] Further, the European Court observed that the Latvian Supreme Court had not submitted a preliminary reference to the CJEU but also held that whether the fact that no preliminary ruling was requested hinders the application of the equivalent protection doctrine must be determined on a case-by-case assessment.[25] In the present case, the European Court found the second condition to be satisfied and did not find a manifest deficiency of equivalent protection either.[26] This is notable because this case happened after the CJEU issued its Opinion 2/13 on the EU's accession to the ECHR in which the CJEU stated that the accession posed such a big threat to the principle of mutual trust and would thus upset the underlying balance of the EU and undermine the autonomy of EU law.[27] In summary, the European Court applies the presumption of equivalent protection in cases in which EU Member States act on the basis of EU Regulations which, by their nature, usually do not leave room for discretion on part of the Member State. The European Court also applies the equivalent protection doctrine to procedures followed within the EU, as well as to the EU principle of mutual trust.

Having explained the European Court's system of allocating responsibility between the EU and its Member States, let us reflect on why the co-respondent mechanism was problematic in light of the case law of the European Court. Under the co-respondent mechanism, the European Court had the final word on whether to accept the co-respondency or not. This could be the problem where the EU requested to intervene as a co-respondent and the European Court rejected this on the basis of discretion on part of the Member State. It is exactly to avoid such a situation that the internalisation model was devised.

III. Overview of the internalisation model

The dilemma outlined in the previous section has been tackled by the framers of EU investment agreements, who have devised a set of tailor-made rules whose main purpose is, in the very essence, to attribute responsibility to the EU and the Member States in a manner that is compatible with the indications given by the CJEU in the relevant case law. The compatibility of that set of rules with EU law has now been confirmed by the Court in Opinion 1/17. One may wonder, therefore, whether the same set of rules could be included in a potentially revised future Accession Agreement to the ECHR. The aim of this section is therefore to provide a brief overview of those rules, of the principles underpinning the choices made by the framers, and of the Court's assessment of this. Before getting underway with such analysis, one methodological clarification seems necessary. The

[24] ECtHR *Avotins v Latvia* App n. 17502/07 [23 May 2016].
[25] *Ibid*. paras 109, 111.
[26] *Ibid*. paras 111-112, 121-125.
[27] Opinion 2/13 cit. para. 194.

analysis of the rules laid out in EU investment agreements, which has been termed 'internalisation model' in a monographic work published in recent times by one of the authors of this *Article*,[28] will be conducted based on the rules of the EU-Canada Comprehensive Economic and Trade Agreement (CETA). Such agreement can, in fact, be considered a sort of model EU investment agreement. All other similar agreements concluded or negotiated by the Union include largely comparable if not identical rules.[29] Therefore, only the rules included in CETA will be examined. All references to CETA are to be intended as applicable to all other EU investment agreements unless otherwise indicated in the text.

To begin with, CETA does not contain any rules concerning the allocation of responsibility between the EU and its Member States. Reference to responsibility is entirely omitted. However, one can infer indications concerning issues of responsibility by analysing the rules relating to the submission of a claim against the EU and its Member States by an investor of the other party to the agreement. In particular, CETA contains a mechanism aimed at identifying the respondent to such disputes. Art. 8.21 CETA mandates investors to request the EU (and the EU only) to determine who is to appear as the respondent in a dispute, whether the EU or the Member States. The provision stipulates that the investor must specify the measure that allegedly constitutes a breach of its rights. The EU has to inform the claimant within 60 days as to whether the EU itself or a Member State shall be the respondent in the dispute. The determination thus made cannot be objected by the investor and the arbitral tribunal. However, art. 8.21 CETA does not clarify what are the criteria that will be followed by the EU in order to identify the respondent party.

It is interesting to point out a textual difference between CETA and the EU-Singapore Investment Protection Agreement (EUSA). While CETA does not lay down any other rule concerning the determination of the respondent party and avoids to elaborate on the criteria relied upon by the EU to determine who is going to act as the respondent; EUSA contains a provision according to which in the event that the investor has not been informed on time (that is, a respondent has not been identified),

a) if the measures identified in the notice are *exclusively* measures of a Member State of the EU, the Member State shall be the respondent,

b) if the measures identified in the notice *include* measures of the European Union, the European Union shall be the respondent.[30]

This provision will provide some guidance on how to determine the respondent in case the EU fails to deliver a response within the prescribed time limit. Although the language employed by this provision contains some degree of ambiguity, it seems safe to affirm that the Member State will be the respondent *only* when the claim challenges measures that

[28] L Pantaleo, *The Participation of the EU in International Dispute Settlement. Lessons from EU Investment Agreements* cit. 99 ff.

[29] See e.g. the Investment Protection Agreement of 19 October 2018 between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part in particular art. 3.5.

[30] See e.g. ch. 8, art. 21(4) CETA.

were taken *exclusively* by that Member State. In other words, this provision seems to refer to acts taken by the Member State not in execution of EU law obligations and most probably in matters that fall completely outside the scope of EU law. The EU would be the respondent in all other cases. Notably, including where the claim identifies *a)* measures that are partly attributable to the EU and partly to the Member State – in other words, in cases of potential joint responsibility (which is ruled out by CETA and the likes), or *b)* measures taken by the Member State in order to implement EU law obligations.

All in all, the rationale behind the rules concerning the determination of the respondent analysed above seems to be that of avoiding that both the investor and the tribunal pass judgements on issues of EU law. A fictional example will help in illustrating this concept. Suppose that an investor is confronted with a situation in which a Member State has repealed business incentives that the Union has found to be incompatible with its state aid law.[31] If the choice as to the proper respondent was left to the investor, the latter would have to apply the rules of general international law. According to the provisions of the Articles on State Responsibility (ASR) and on the Responsibility of International Organisations (ARIO), the investor could sue the Member State as the entity to which, under the rules of ASR, the wrongful act – in our example, the repealing of business incentives – is attributable. On the other hand, it could also invoke the (shared) responsibility of the EU under art. 17 ARIO for adopting a binding decision – such as a decision of the Commission or a ruling of the CJEU – that eventually led the Member State to breach the investor's rights. This could happen in the same or in a separate dispute. The international dispute settlement before which such a question is put would most likely have to make determinations concerning the division of powers under EU Treaties.

Without going into too much detail, the Court's case law concerning the participation of the EU in a number of international dispute settlement mechanisms has brought to the fore one main point.[32] Namely, that an international tribunal that is able to interpret and apply EU law is at variance with the principle of autonomy.[33] Such a mechanism is

[31] This is not such a fictional scenario after all. As is well known, this is precisely the situation that materialised in the *Micula* case, where Romania was ordered by an arbitral tribunal to pay compensation to a foreign investor for discontinuing business incentives that were considered illegal state aid under EU law. For an analysis of the case and its implications see C Tietje and C Wackernagel, 'Enforcement of Intra-EU ICSID Awards: Multilevel Governance, Investment Tribunals and the Lost Opportunity of the *Micula* Arbitration' (2015) The Journal of World Investment and Trade 205.

[32] An in-depth analysis of the case law prior to Opinion 1/17 is carried out in L Pantaleo, *The Participation of the EU in International Dispute Settlement. Lessons from EU Investment Agreements* cit. 43 ff.

[33] This raises the question of the very nature and purpose of the principle of autonomy. As is well known, the EU is not the only sub-system of international law that has made claims of autonomy. On the contrary, such claims are more common than one may think at first sight. From an international law perspective, the (supposed) autonomy of a sub-system (and especially of international organisations) from the general rules of international law is not an entirely novel question. Actually, it is at the basis of the debate concerning the so-called self-contained regimes. In this sense, there are essentially two aspects of the principle of autonomy. On the one hand, there is the 'internal autonomy', which has to be understood as the

therefore more likely to survive the Court's scrutiny if the EU legal order does not come (directly or indirectly) within its jurisdiction. The two (largely interrelated) points of contention have proved to be the following: *a)* the need to prevent a dispute settlement system from issuing binding interpretations of EU law, and *b)* the need to ensure that it does not make determinations that affect the internal division of powers as fixed by the Treaties. It is clear that the application of the rules of general international law concerning international responsibility, or of any other rule that does not prevent the international dispute settlement in question from making this kind of determinations, is potentially in conflict with the principle of autonomy as interpreted by the CJEU. Unsurprisingly, this is exactly what the CJEU has stated in Opinion 1/09 and in Opinion 2/13, where the co-respondent mechanism was scrutinized. And it is against this background that the set of rules included in CETA was drafted.

In a nutshell, the rules concerning the identification of the respondent included in CETA – despite being procedural in nature – are aimed to circumvent the difficult process of attributing responsibility to a composite entity such as the EU and the Member States.[34] By internalising the choice of the respondent party (hence the expression "internalisation model"), the rules in question are intended to prevent the relevant tribunal from making determinations concerning responsibility and attribution, and, through this process, the division of competence as organized by the Treaties.[35] In this sense, they should be viewed as an attempt to incorporate the indications given by the CJEU in Opinion 1/09 and Opinion 2/13 in relation to the already mentioned co-respondent mechanism.[36] By depriving the investor of the right to choose the respondent, and the tribunal

ability of international organisations to operate independently of their Member States. In the EU legal order, primacy and direct effects can be seen as prime examples of such internal autonomy. On the other hand, the idea of 'external autonomy' refers to the ability of an international organization to function on the basis of its own special rules in derogation of, or integration to, the general rules of international law. The case law of the CJEU examined in this *Article* can perhaps be considered a textbook illustration of the external dimension of autonomy. For more details on this issue, see J Odermatt, 'The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?' in M Cremona (ed), *Structural Principles in EU External Relations Law* (Hart 2018) 291.

[34] L Pantaleo, *The Participation of the EU in International Dispute Settlement. Lessons from EU Investment Agreements* cit. 108.

[35] But see H Lenk, 'Issues of Attribution: Responsibility of the EU in Investment Disputes under CETA' (2016) Transnational Dispute Management 20-21, who has argued that these rules only have a procedural value and may therefore be set aside by the Investment Court System (ICS) should it come to the conclusion that (international) responsibility should be attributed to a party different than the respondent based on the relevant rules of general international law.

[36] It bears noting that the co-respondent mechanism was not the only instrument devised under the DAA. It was accompanied, at least in cases where the EU was the co-respondent, by a rule allowing the so-called prior involvement of the ECJ. See the considerations made by R Baratta, 'Accession of the EU to the ECHR: the Rationale for the ECJ's prior involvement mechanism' (2013) CMLRev 1305, 1305. It should be emphasized, however, that co-respondency (and, consequently, shared responsibility) is excluded under CETA.

of the power to review such choice, CETA intends to protect the autonomy of the EU legal order from external interference.[37]

As already mentioned, the CJEU has given its green light to the internalisation model. In fairness, the Court has devoted little attention to it in Opinion 1/17. In a rather cursory assessment of the rules in question, the Court found that these rules: *a)* confirmed that the dispute settlement mechanism established under CETA does not have the power to interpret EU law, and *b)* that the "exclusive jurisdiction of the Court to give rulings on the division of powers between the Union and its Member States was adequately preserved, in contrast to the situation scrutinized in 'the draft agreement that was the subject of Opinion 2/13".[38] Irrespective of its succinct nature, it seems fair to consider this finding an endorsement of the internalisation model. The question therefore becomes whether such a model can be exported to other agreements, or if, on the contrary, the peculiar nature of investment disputes makes this model unfit for litigation under other agreements. The purpose of the following section is to assess the adaptability of the internalisation model to the ECHR system.

IV. Adaptability of the internalisation model to human rights litigation

From the analysis carried out above, two main takeaways can be identified. First and foremost, in cases brought against EU Member States where EU law measures were at stake, the European Court has clearly tended to allocate responsibility to the Member States insofar as they enjoyed a margin of discretion. Otherwise, the responsibility would be attributed to the EU, to which the equivalent protection doctrine would apply. When both the EU and the Member States will be a party to the ECHR, only the first line of cases will be problematic from the perspective of the EU legal order. This is so because in those cases, in the absence of tailor-made rules, the European Court would continue to adopt its analysis of the margin of discretion, which may entail an assessment of the division of powers as fixed by the Treaties, and more generally an interpretation of EU law. The second main takeaway from the preceding analysis is that under the internalisation model, not only the EU is the party that designates the respondent, but it is also the default respondent by definition. As seen above, the Member States play a sort of fall-back, residual role. In this section, we will assume for the sake of argument that the (future revised) Accession Agreement

[37] See N Lavranos, 'Is an International Investor-State Arbitration System under the Auspices of the ECJ Possible?' in N Jansen Calamita, D Earnest and M Burgstaller (eds), *The Future of ICSID and the Place of Investment Treaties in International Law* (British Institute of International and Comparative Law 2013) 129; SW Schill, 'Luxembourg Limits: Conditions for Investor-State Dispute Settlement under Future EU Investment Agreements' in M Bungenberg, A Reinisch, and C Tietje, *EU and Investment Agreements: Open Questions and Remaining Challenges* (Nomos and Dike 2013) 37.

[38] Opinion 2/13 cit. para. 132.

will lay down an internalisation model that replicates CETA's provisions. Based on this assumption, we will deal with two main issues. First of all, we will examine how the internalisation model will affect the apportionment of responsibility in the problematic cases referred to above, that is cases where EU law measures are at stake, but it is somewhat unclear if and to what extent the Member States enjoyed a margin of discretion (i.e. the problem lies with EU law, or with the Member States' implementation of it). Secondly, we will turn to the question concerning the remedies. Namely, we will analyse if and to what extent the internalisation model in the context of the ECHR will affect the restoration of the victims of human rights violations. In both cases, we will use practical examples taken from Section 2 in order to make the discussion less hypothetical and less theoretical.

Suppose the internalisation model is in place when Mr. Joe Bloggs initiates a dispute in a case similar to *Cantoni v France* mentioned above. After seeing himself convicted by a French criminal court on the basis of what he deems to be an imprecise legal definition, he decides to bring a dispute under art. 7 ECHR. Suppose that unlike in *Cantoni v France*, the French definition includes some minor but potentially decisive differences with respect to the definition contained in the EU directive. Suppose that because of such differences, the French legislation appears to be at variance with the directive, at least *prima facie*. Under the internalisation model, Mr. Joe Bloggs would have to request the EU to identify whether the EU itself or France should be the respondent party. In such a scenario, it is fair to assume that the EU will designate itself as respondent and therefore assume responsibility on behalf of the whole bloc, if only because it would be unclear when the dispute is raised whether the problem lies with the directive or with the French transposition of it. Suppose that during the dispute it becomes apparent that the problem actually lies with French law rather than EU law. Would the fact that the EU rather than France will be found responsible for breaching the ECHR constitute a problem from the perspective of the ECHR, the EU or both?

From the perspective of the ECHR, it seems reasonable to affirm that the main issue would concern the remedial dimension. That is to say, a problem could arise if the European Court were to order a remedy – such as a change in the law – that the EU would not be in a position to execute, at least not directly. This issue, however, will be analysed below. From the perspective of the EU legal order, the potential problem could essentially be that the Union would find itself in violation of its international obligations because of the wrong implementation of EU law on the part of one of its Member States. In reality, however, this would not be such an exceptionally absurd situation. In reality, the readiness of the EU to accept international responsibility that potentially derives from measures adopted by the Member States is rather common in the World Trade Organisation (WTO) regime.[39] In some cases, the Union has even battled with the other party to

[39] It bears noting that the comparison with the WTO should be handled with extreme care. There are significant differences between the two systems that should not be underestimated. To name but the most

the dispute and with the panel in order to affirm such readiness.[40] The most remarkable examples of these battles are possibly the *LAN* case,[41] and the *Airbus* case.[42]

There are multiple legal reasons that can justify the preference for a system whereby the Union appears on behalf of the whole bloc irrespective of the attributability of the specific conduct that gives rise to a dispute, at least from an EU law perspective. First and foremost, in situations where there is no strict correspondence between the external competence at stake (i.e. the competence to act on the international plane) and the internal competence necessary to discharge of the international obligations on the internal plane (i.e. the competence to implement internally a given international obligation), having the EU appearing as the sole respondent might be the only way to preserve the integrity of the division of competence and safeguarding it from any external interferences.[43] This is of particular importance whereas EU external exclusive competences are affected. Secondly, and consequently, when the division of competence is in question the sole respondency on the part of the EU might be the only option compatible with the established case law of the CJEU, which has repeatedly stated that an international dispute settlement cannot determine the division of powers as fixed by the Treaties.[44] Thirdly, and apart from the requirements of the CJEU, there seem to be also some practical considerations militating in favour of involving the EU only in cases where there is a genuine lack of clarity on the internal division of competence. For an international judgment rendered against the EU would be binding on the Member States as a matter of EU law, as it would benefit of the status of

fundamental, the substantive scope of the entire WTO comes under the external exclusive competence of the EU, which makes it quite logical, at least from an EU law perspective, that the Union is the sole actor on the international level and therefore assumes full responsibility of international law. This situation would obviously not be replicated under the ECHR. The argument made in our analysis, however, remains valid. Irrespective of the internal EU law differences in terms of the competence divide, the WTO regime remains an example of a system under which the Union has assumed responsibility for the conducts of the Member States, and this state of affairs has seldom been challenged by third countries. See on these aspects the thoughtful examination of A Delgado Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press 2016) 161 ff.

[40] See the thoughtful examination of A Delgado Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* cit. 178-193.

[41] See WTO DSB, Panel Report, *United States v The European Communities European Communities, EC – Customs Classification of Certain Computer Equipment* case n. ds62 [22 June 1998].

[42] See WTO DSB, Panel Report, *United States v The European Communities and Certain member States – Measures Affecting Trade in Large Civil Aircraft* case n. ds316 [30 June 2010]. In this case, it bears noting that the DSB did not endorse the sole responsibility of the Union and apportioned joint responsibility also to the Member States concerned.

[43] For a discussion of how an international dispute settlement body may struggle with the understanding of the division of competences between the EU and the Member States, and with the differentiation between categories such as external and internal competences, see A Delgado Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* cit. 183 ff.

[44] A comprehensive discussion of this case law can be found in L Pantaleo, *The Participation of the EU in International Dispute Settlement. Lessons from EU Investment Agreements* cit. 48-54.

intermediate source that international law generally enjoys in the EU legal order.[45] The opposite would not be true. Fourthly and finally, the assumption of international responsibility on the part of the EU on behalf of the regional bloc – without prejudice to the repercussions that this may have internally on the Member States under EU law – is reminiscent of a federal paradigm.[46] These considerations seem to be equally applicable under WTO rules, investment agreements or the ECHR interchangeably. It seems therefore safe to conclude that the extension of the internalisation model to the ECHR would constitute an acceptable solution as far as the attribution of responsibility – through the determination of the respondent – is concerned, from both an ECHR and an EU law perspective.

The second potentially problematic issue that could arise from the extension of the internalisation model to the ECHR concerns the perspective of the victims of human rights violations. In essence, the problem is as follows. As already clarified, under the internalisation model the EU will be the default respondent. This means that in most cases the judgment of the European Court will be addressed to the Union. It will be the EU that will have to provide the victims with the remedies that the European Court will order. In light of the different types of remedies that the European Court can award, one may wonder whether the fact that the individuals concerned will essentially be deprived – save in residual cases – of the possibility to sue the Member States – with all the consequences therefrom in terms of the decision-making process and structural features of an international organisation as opposed to a State – may give rise to gaps in the system of protection of human right as established by the ECHR.

First and foremost, it seems apposite to briefly recall what are the remedies that can be ordered by the European Court. Under art. 41 of the ECHR, the European Court can award remedies of just satisfaction.[47] This is a form of reparation which can be awarded only if applied for by the applicant on time, if the internal law of the High Contracting Party concerned only allows partial reparations to be made, and only if necessary.[48] The European Court may award three types of just satisfaction, namely pecuniary damages, non-pecuniary damages, and costs and expenses.[49] Specifically, pecuniary damages can be compensation for both loss actually suffered and loss or diminished gain to be expected in the future.[50] Non-pecuniary damages constitute financial compensation for non-material harm, for example, mental or physical suffering.[51] Moreover, the European Court can order

[45] See B Van Vooren and R Wessel, *EU External Relations Law, Text, Cases and Materials* (Cambridge University Press 2014) 228-231.

[46] See L Pantaleo, *The Participation of the EU in International Dispute Settlement. Lessons from EU Investment Agreements* cit. 161-162.

[47] Art. 41 ECHR.

[48] *Ibid*.; ECtHR Rules of Court of 1 January 2020, rule 60.

[49] Practice direction issued by the President of the ECtHR in accordance with Rule 32 of the Rules of Court on 28 March 2007, 64.

[50] *Ibid*.

[51] *Ibid*.

the reimbursement of costs and expenses that the applicant has incurred – at the domestic level and subsequently in the proceedings before the Court itself – in trying to prevent the violation from occurring or in trying to obtain redress therefor.[52] Such costs and expenses typically include costs of legal assistance, court registration fees, travel and subsistence expenses and so on.[53] Art. 46 of the ECHR lays down the binding force and execution of judgments which can be understood as compliance by the state or better, *restitutio in integrum* being the first remedy under the ECHR.[54] It must, however, be noted that, usually, the European Court's award is in the form of a sum of money – evidently based on the three types of just satisfaction damages – and it is only in rare cases that the Court considers a consequential order aimed at putting an end to or remedying the violation in question.[55] One exemption is the pilot-judgment procedure where the European Court usually orders remedies of *restitutio in integrum*.[56] The pilot-judgment procedure covers joined cases where the facts of these cases reveal in the Contracting Party concerned the existence of a structural or systematic problem or another similar dysfunction which has given rise or may give rise to similar applications.[57] In such circumstances, it is in the interest of the European Court to make a consequential order, including clear indications to the respondent government on how to remedy the situation, instead of merely awarding monetary compensation. However, the European Court generally avoids imposing non-monetary remedies (*restitutio in integrum*), either out of respect for the states' discretion regarding the implementation of the Court's judgments or due to concerns of non-compliance.[58] Thus, just satisfaction often means monetary compensation.

The problem concerning the emergence of a possible reparation gap raises different concerns depending on the remedy ordered by the European Court. As far as monetary compensation is concerned, an order to pay a given sum of money made to the Union does not seem to raise any particular issue from the perspective of the victim. The EU can certainly pay compensation as a result of an international dispute. In some systems

[52] *Ibid*. 65.

[53] *Ibid*.

[54] Art. 46 ECHR; PJ Kuijper, 'Attribution – Responsibility – Remedy. Some Comments on the EU in Different International Regimes' (2013) Revue Belge de Droit International, 57.

[55] Practice direction cit. 65; V Fikfak, 'Changing State Behaviour: Damages before the European Court of Human Rights' (2018) The European Journal of International Law 1091, 1099 ff.

[56] D Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* (Martinus Nijhoff 2013) 43-44.

[57] ECtHR, Rules of Court (2020) cit. Rule. 61(1).

[58] In certain cases, the European Court has argued that specifying a remedy goes beyond the role of the Court – for example: "It is not for the Court to prescribe specific procedures for domestic courts to follow". ECtHR *Fitt v The United Kingdom* App n. 29777/96 [16 February 2000] para. 24. And: "[I]t is not for the Court to indicate how any new trial is to proceed and what form it is to take". ECtHR *Sejdovic v Italy* App n. 56581/00 [1 March 2006] para. 127; ECtHR *Burmych and Others v Ukraine* App n. 46852/13 [12 October 2017] para. 182; V Fikfak, 'Changing State Behaviour: Damages before the European Court of Human Rights' cit. 1100, 1102-1103.

to which the Union has subscribed – such as EU investment agreements – this is the only remedy that can be ordered.[59] From the perspective of the EU legal order, some concerns may arise in cases where the EU has appeared as the respondent, but the violation of the ECHR is essentially generated by an act or conduct of a Member State. The same issue may arise under EU investment agreements. In that context, it has been resolved (better: addressed) with the parallel adoption of a system of (internal) rules that will govern the allocation of financial responsibility deriving from investment disputes to which the EU or the Member States are a party.[60] Without going into too much detail, the idea is that the international and internal dimensions of the disputes are separated and run on parallel tracks. The international responsibility will be borne by the party that has been designated the as the respondent by the Union. If monetary compensation is awarded, the respondent will be ordered to make the payment. This is, however, without prejudice to the allocation of the financial implications of the dispute that will be done at the domestic level based on the application of the said rules. For example, if the Union acting as the respondent will be ordered to pay monetary compensation to a foreign investor for a violation that is ultimately caused by the wrong implementation of EU law on the part of a Member State, the EU will retain the possibility to recover the sums thus paid from the Member State in question. This state of affairs, albeit imperfect, should eliminate or at least minimise the risk of a "moral hazard", that is the Member States hiding behind the Union to get away scot-free for their wrongdoings.[61] It is true, as pointed out by Kuijper, that "a Member State may be a much surer provider of funds than the EU, at least in the eyes of the other, non-EU, contracting parties to the ECHR",[62] and possibly also in the eyes of individual claimants. However, this does not seem to be such a massive issue. In view of the relatively negligible sums awarded by the European Court as compensation, especially if compared with the often-astounding amounts that are usually claimed and obtained in investment cases,[63] it seems safe to affirm that the victims of human rights violations perpetrated by the EU can be told to rest easy.

[59] See art. 8.39(1) CETA.

[60] See Regulation (EU) 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, commented on by L Pantaleo, *The Participation of the EU in International Dispute Settlement. Lessons from EU Investment Agreements* cit. 112-121.

[61] In particular, see the concerns expressed by A Dimopoulos, 'The Involvement of the EU in Investor-State Dispute Settlement: A Question of Responsibilities' (2014) CMLRev 1671, 1676 ff.

[62] PJ Kuijper, 'Attribution – Responsibility – Remedy. Some Comments on the EU in Different International Regimes' cit. 75.

[63] As the most striking example of this, one can immediately think of the *Yukos* case, where an UNCITRAL Arbitral Tribunal has awarded an astonishing US$ 50 billion for damages. See Permanent Court of Arbitration (PCA) final award of 18 July 2014 *Yukos Universal Limited (Isle of Man) v The Russian Federation* case n. 2005-04/AA227.

The situation could be slightly more problematic in cases where the European Court does not only order the payment of monetary compensation. In particular, the problem will arise where the European Court identifies individual measures to remedy the situation that gave rise to a violation of the ECHR (such as *restitutio in integrum*) or even general measures such as a change in law.[64] In order not to be excessively hypothetical in our analysis, we will try to explain these problematic cases by means of references to practical cases.

As a textbook illustration of the first type of cases, one can think of the *Assanidze v Georgia* judgment.[65] In this case, the claimant alleged a violation of his right to liberty for being detained despite having obtained an acquittal and even a presidential pardon. The European Court observed that the circumstances of the case "did not leave a real choice to the respondent State but to arrange the immediate release of the applicant".[66] As a logical consequence of this finding, the European Court ordered the respondent State to secure the applicant's release at the earliest possible date.[67] Even though the *Assanidze* case, and more generally all cases relating to the enforcement and execution of criminal law, concerns a matter that falls outside the remit of EU law, it constitutes a meaningful example of how specific can be the remedies ordered by the European Court in some cases. Under the internalisation model, this scenario would be problematic whereby the Union has been designated as the respondent but the power to execute the individual remedy ordered by the European Court lies with a Member State. To what extent would this situation affect the victim of the human rights violation in question?

First and foremost, it seems reasonable to assume that this scenario will not occur frequently. As stated above, in the ECHR regime compensation is the standard remedy which is awarded in the vast majority of cases. An individualised remedial measure remains rare. However, in those instances where the European Court does order such a measure, it seems safe to observe that the EU legal system does not offer sufficient guarantee that in the situation described above the Member State will execute the judgment

[64] It is worth noting that the power of the European Court to order remedies other than monetary compensation is not immune from criticism. In particular, it has been suggested that this case law seems to be at variance, or at least in tension, with the role attributed to the Committee of Ministers pursuant to Art. 46, as well as with the margin of appreciation that is generally recognised to the Contracting Parties in complying with the obligations deriving from the ECHR. See in this sense G Bartolini, 'Art. 41: Equa Soddisfazione' in S Bartole, P De Sena, and V Zagrebelsky (eds), *Commentario Breve alla Convenzione Europea per la Salvaguardia dei Diritti dell'Uomo e delle Libertà Fondamentali* (CEDAM 2012) 703, 728-729. But see FM Palombino, 'La "procedura di sentenza pilota" nella giurisprudenza della Corte europea dei diritti dell'uomo' (2008) Rivista di diritto internazionale privato e processuale 91, 101, who suggested that this case law should be understood in light of the principle of acquiescence of the States that have been addressees of the relevant judgments. It goes without saying that this discussion, however fascinating, goes well beyond the scope of this *Article*. The reader is therefore referred to the literature mentioned.

[65] ECtHR *Assanidze v Georgia* App n. 71503/01 [8 April 2004].

[66] See D Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* cit. 22.

[67] *Assanidze v Georgia* cit. 14th operative provision.

in an effective and timely manner. The only legal instrument available to compel a Member State would be the infringement procedure. In fact, the Member States will be under an EU law obligation to comply with an order of the European Court in a case where the EU is the respondent party. Non-compliance with said order will result in a failure to fulfil its obligations under the EU Treaties pursuant to arts 258 and 259 TFEU, which is a remedy that is not available to natural and legal persons.

The second type of cases is exemplified by the pilot-judgment procedure. Without going into too much detail, this is a special procedure that applies if there are repetitive or similar applications arising in a Contracting Party because of a systemic or structural problem resulting in a breach of the ECHR.[68] The excessive slowness of the Italian judicial system is the textbook illustration. In such cases, the European Court rather than ordering individualised remedial measures – or sometimes in addition to them – imposes the adoption of general legislative measures that are deemed appropriate to repair the structural deficiencies that have given rise to repetitive applications.[69] To name but a few notable examples, the European Court has ordered a State to amend its property law so as to achieve a better balance between the competing interests at stake,[70] or to introduce changes in the electoral system so as to allow individuals serving a prison sentence to vote in national and European elections.[71] Sometimes the European Court requires States to install domestic remedies to avoid the submission of repetitive applications that would overload its docket.[72] As an illustration of an *ad hoc* internal remedy, one can think again of the Italian example, where a special, fast-track procedure to claim monetary compensation has been made available to those who have suffered a violation of their right to a fair trial under art. 6 ECHR in case of excessive length of domestic proceedings.[73]

As far as the internalisation model is concerned, it seems that more or less the same reasoning developed in relation to individual remedial measures can be applied to general measures ordered by the European Court in disputes where the respondent is the Union, but the violation is the consequence of a Member State's conduct. The Member State in question would be under an EU law obligation to take the appropriate legislative measures to comply with the order of the European Court, and the EU could resort to the infringement procedure to compel the Member State. Again, this would not be an ideal solution from the perspective of the victims. In fairness, it seems that in such case the

[68] For a thoughtful overview of the constitutive elements of the pilot-judgment procedure See D Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* cit. 35 ff.

[69] *Ibid*. 86 ff.

[70] See ECtHR *Hutten-Czapska v Poland* App n. 35014/97 [19 June 2006], more specifically the fourth operative provision.

[71] See ECtHR *Greens and M.T. v The United Kingdom* App n. 60041/08 and 60054/08 [23 November 2010], especially the sixth operative provision.

[72] See the analysis provided by D Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* cit. 91 ff.

[73] This is the so-called Pinto Law, that is Law n. 89 of 24 March 2001.

Union would have an additional instrument at its disposal in order to mandate the adoption of general measures in the legal order of a Member State. The EU would be able to adopt a decision or even an *ad hoc* directive, which can be addressed to one Member State only in accordance with art. 288 TFEU.[74] While this possibility alone would not be a particularly effective remedy, things might be different if combined with an effective system of sanctions that could be introduced in secondary legislation, similar to the system of rules that governs financial responsibility under EU investment agreements.

To conclude this section, it seems reasonable to affirm that the extension of the internalisation model to the ECHR in a hypothetical, future EU Accession Agreement could indeed give rise to some gaps in the protection of victims of human rights violations. This conclusion does not apply to cases where only monetary compensation is awarded. However, where other remedial measures are ordered by the European Court, whether individual or general, the victims may in some cases be in an unfavourable situation, if only because they may be confronted with a double level of governance in order to obtain the required redress. However, the existing practice under the ECHR regime seems to be encouraging. States that have been the addressees of decisions of the European Court ordering individual or general measures have demonstrated an overall acquiescence with the content of such decisions, generally taking the required action in order to comply with them more or less in a timely and effective manner.[75] From this perspective, it appears reasonable to assume that the EU will do everything in its power to ensure that victims of human rights violations will obtain the adequate redress for the losses suffered even where it does not have the power to directly take action in the relevant field.

V. Conclusions

The analysis carried out above has demonstrated that the extension to the ECHR of the internalisation model adopted under EU investment agreements for the purpose of settling disputes with a composite legal entity such as the Union and its Member States may give rise to some critical issues. This conclusion holds true, in particular, in relation to cases where the European Court orders individual or general measures and not just monetary compensation. In these cases, the fact that under the internalisation model the respondent party may not have the power to take the required measures could lead to potential gaps in the protection of the victims of human rights violations. While this might be true, cases where States are required to afford individual remedies other than compensation, or to take legislative action, are in practice not so recurrent. In addition, it can be reasonably presumed that the EU will be willing to maintain a clean human rights record, so to speak.

[74] This of course presupposes that the EU has the competence to legislate in the relevant field.

[75] See the considerations made by FM Palombino, 'La "procedura di sentenza pilota" nella giurisprudenza della Corte europea dei diritti dell'uomo' cit. 101 ff.

As a consequence, one can assume that the Union will use all the hard and soft law instruments, as well as political instruments, to exercise pressure on the non-compliant Member State in order for individuals to obtain an adequate redress. From this perspective, the ability of the EU to effectively use its leeway against the MS to prompt improvement and preserve the image and reputation of the whole regional bloc should not be underestimated. Therefore, the extension of the internalisation model to the ECHR, while not being immune from critical aspects, appears to be a safe avenue to be followed also in the field of human rights litigation – at least from an EU law perspective.

The most contentious point relating to the participation of the EU in the settlement of disputes under the ECHR when it comes to remedies seems to be connected with a different aspect. In fact, based on the established case law of the CJEU, it appears doubtful whether the possibility for the European Court to order primary remedies is compatible with the principle of autonomy of the EU legal order. It should be recalled that the tribunal created under EU investment agreements can only award monetary compensation.[76] This aspect has been emphasised by the CJEU in Opinion 1/17, where it referred to the fact that the tribunal will be prevented from annulling a measure of a disputing party or require it to change its law so as to render it compatible with the relevant investment agreement.[77] Although the CJEU did not say it explicitly, it seemed to indirectly suggest that the power to order remedies other than monetary compensation would have been at variance with the principle of autonomy. In particular, with the CJEU's exclusive power to interpret and assess the validity of EU law in accordance with the Treaties. However, this obstacle could perhaps be overcome by means of a provision of the future Accession Agreement that replicates the clause included in EU investment agreements concerning remedies.[78] Furthermore, under the ECHR system, limiting the power of the European Court to award only monetary compensation could perhaps also be grounded on the wording of art. 41 ECHR, which makes reference to the existence of obstacles of internal law.[79]

Both scenarios, however, seem too unrealistic. Regarding the first, it is difficult to imagine that third countries will agree on the inclusion of such a special rule only to accommodate the requests of the EU. As for the second, it appears equally unlikely that the

[76] See art. 8.39(1) CETA cit.

[77] See Opinion 1/17 cit. para. 144.

[78] A solution which, however, would be far from being an ideal one.

[79] It bears noting that according to an early thesis supported by some scholars, art. 41 ECHR constitutes a norm by means of which the Contracting Parties have intended to curtail the applicability of the *restitutio in integrum* principle. The thesis is grounded on the combination of the following two elements. One the one hand, judgments of the ECtHR are inherently declaratory. On the other hand, the reference to the domestic legal order of a Party included in that provision – more specifically, the sentence "if the internal law of the High Contracting Party concerned allows only partial reparation" – supposedly suggests that the existence of legal obstacles of domestic law should be taken into account. Therefore, according to this thesis, under the ECHR there is supposedly a full correspondence between compensation (just satisfaction) and restitution. For an account of this debate see G Bartolini, 'Art. 41: Equa Soddisfazione' cit. 704-705.

European Court would adopt an *ad hoc* interpretation of a provision of the ECHR only to the benefit of the Union. As a result, this issue remains outstanding.

Finally, it seems safe to affirm that extending the internalisation model to the ECHR could be quite problematic from a political and policy perspective. In the previous pages, we have attempted to demonstrate that such an extension is indeed possible and workable from a strictly EU legal viewpoint. However, it bears noting that the context in which the internalisation model would operate is a very different one. In the field of investment, one cannot realistically expect more than a handful of cases a year being submitted by investors to the dispute settlement mechanism established under EU investment agreements. Conversely, under the ECHR there are thousands of new applications submitted on a monthly basis. For example, according to the latest official statistics in 2019 more than 40,000 new cases were brought to the European Court.[80] Even though the vast majority of them (more than 38,000) have been struck out mostly due to inadmissibility, litigation under the ECHR remains quite intense.[81] Therefore, it seems reasonable to assume that for the Member States it will be difficult to fully accept the idea of almost entirely giving up their role under the ECHR save for those matters coming under their exclusive competence. Moreover, it is equally difficult to imagine that the EU could lightheartedly bear the brunt of human rights litigation originating under the ECHR. Not to mention that third countries might not be willing to accept a set of rules that would be heavily inspired (almost exclusively) by the need to accommodate the so-called EU exceptionalism.[82] Moreover, it might be politically (and perhaps also legally) undesirable to introduce such radical novelties to a system that, for better or worse, has been working more or less properly in the last few decades.

All these problematic aspects will soon be clarified. In fact, negotiations concerning the EU accession to the ECHR have recently resumed based on the Council of the European Union's decision to approve supplementary negotiating directives in October 2019.[83] Since then, a number of meetings have been held and it appears that some limited progress has been made, including in relation to the issues discussed in this *Article*.[84]

[80] See the annual statistical report published by the Council of Europe: 'Analysis of Statistics 2019' (January 2020) European Court of Human Rights www.echr.coe.int, 4.

[81] *Ibid*.

[82] On this see the thoughtful examination made by S Vezzani, 'The International Responsibility of the European Union and of Its Member States for Breaches of Obligations Arising from Investment Agreements: *Lex Specialis* or European Exceptionalism?' in M Andenas, L Pantaleo, M Happold and C Contartese (eds), *EU External Action in International Economic Law. Recent Trends and Developments* (Springer 2020) 281.

[83] See the Provisional Agenda of 7 and 8 October 2019 from the Council of the European Union, Justice and Home Affairs Council of 3 October 2019, www.consilium.europa.eu.

[84] See the overview of the negotiations and related documents available on the relevant webpage of the Council of Europe: EU Accession to the ECHR, www.coe.int, where it clearly appears that some of the issues discussed in this *Article* have been thoroughly discussed and are at the epicentre of the negotiations.