

The allocation of responsibility between the EU and its Member States under the ECT. Some preliminary observations on two pending arbitrations

Luca Pantaleo^{*}

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1. Introduction

The apportionment of responsibility between the EU and its Member States has been the subject of intense debate in recent years.¹ That debate

^{*} Associate Professor of EU Law, University of Cagliari.

¹ To name but some of the most influential works on the matter, see G. GAJA, *How Does the European Community's International Responsibility Relate to Its Exclusive Competence?*, in *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz*, Napoli, 2004, p. 747; E. CANNIZZARO, *Sulla responsabilità internazionale per condotte di Stati membri dell'Unione europea: in margine al caso Bosphorus*, in *RDI*, 2005, p. 762; E. PAASIVIRTA, P.J. KUIJPER, *Does One Size Fit All? The European Community and the "Codification" of the Responsibility of International Organizations*, in *Netherlands Yearbook of International Law*, 2005, p. 169; 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?*, in *EJIL*, 2010, p. 723; A. NOLLKAEMPER, *Joint Responsibility between the EU and Member States for Non-performance of Obligations under Multilateral Environmental Agreements*, in E. MORGERA (ed.), *The External Environmental Policy of the European Union: EU and International Law Perspectives*, Cambridge, 2012, p. 304; P.J. KUIJPER, E. PAASIVIRTA, *EU International Responsibility and its Attribution: From the Inside Looking Out*, in M.D. EVANS, P. KOUTRAKOS (eds.), *The International Responsibility of the European Union: European and International Perspectives*, Oxford, 2013, p. 35; E. CANNIZZARO, *Beyond the Either/Or: Dual Attribution to the European Union and to the Member State for Breach of the ECHR*, in M.D. EVANS, P. KOUTRAKOS (eds.), cit., p. 295; J. HELISKOSKI, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States*, The Hague, 2001; J. D'ASPREMONT, A

reached its peak during the period in which the International Law Commission (ILC) was working on the responsibility of international organisations, culminating in the adoption of the Articles on the Responsibility of International Organisations (ARIO) in 2011,² ten years after the adoption of the Articles on State Responsibility (ASR).³ Ironically, despite the intensity of the debate, relevant practice was rather scarce at the time. Disputes specifically concerning the attribution of conduct and the distribution of responsibility between the Union and its MS were rare and mostly indirect. As a result, much of the discussion remained largely doctrinal.

The picture has changed recently. On the one hand, the expansion of the Union's competence in the field of the Common Commercial Policy (CCP), brought about by the Lisbon Treaty, began to bear fruit towards the end of the last decade, when post-Lisbon free trade agreements (FTAs), such as CETA and the EU-Singapore FTA, came into force. These agreements all include dispute settlement mechanisms, and disputes are now being brought under them, although so far the EU has acted only as claimant, not as respondent.⁴ In addition, two arbitrations have recently been brought against the Union

European Law of International Responsibility? The Articles on the Responsibility of International Organisations and the EU, in V. KOSTA, N. SKOUTARIS, V. TZEVELEKOS (eds.), *The EU Accession to the ECHR*, Oxford, 2014, p. 75; A. DIMOPOULOS, *The Involvement of the EU in Investor-State Dispute Settlement: A Question of Responsibilities*, in *CMLR*, 2014, p. 1671; A. DELGADO CASTELEIRO, *The International Responsibility of the European Union. From Competence to Normative Control*, Cambridge, 2016; P. PALCHETTI, *The Allocation of International Responsibility in the Context of Investor-State Dispute Settlement Mechanisms Established by EU International Agreements*, in *EBLR*, 2017, p. 185; C. CONTARTESE, *Competence-Based Approach, Normative Control, and the International Responsibility of the EU and Its Member States*, in *International Organizations Law Review*, 2020, p. 339; 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, C. CONTARTESE (eds.), *EU External Action in International Economic Law. Recent Trends and Developments*, The Hague, 2020, p. 281.

² See Report of the International Law Commission on the work of its sixty-third session (23 April-3 June and 4 July-12 August 2011), UN Doc A/66/10 (2011), p. 40 ff., available [here](#).

³ See Report of the International Law Commission on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001), UN Doc A/56/10 (2001), p. 26 ff., available [here](#).

⁴ These are the EU-Korea labour dispute, on which see EU-Korea Dispute – Report of the Panel of Experts Constituted Under Article 13.15 of the EU-Korea Free Trade Agreement of 20 January 2021, as well as L. BOISSON DE CHAZOURNES, J. LEE, *The European Union-Korea Free Trade Agreement Sustainable Development Proceeding: Reflections on a Ground-Breaking Dispute*, in *Journal of World Investment and Trade*, 2022, p. 339; and the EU-Ukraine dispute on wood export ban, on which see G. VIDIGAL, *Regional Trade Adjudication and the Rise of Sustainability Disputes: Korea-Labor Commitments and Ukraine-Wood Export Bans*, in *AJIL*, 2022, p. 567.

under the Energy Charter Treaty (ECT): *Nord Stream 2* and *Klesch Group*, both of which are currently pending. As will be shown, these disputes directly and specifically raise questions of attribution and responsibility of the kind widely discussed in the literature and by the ILC.

This article revisits that debate in light of these recent developments and contributes to an already flourishing discussion on foreign investment in the EU legal order, as reflected in the recent wave of publications that have also appeared in this journal.⁵ Although the cases examined in this paper are still pending and the arbitral tribunals seised of the disputes have not yet ruled, the arguments advanced by the parties already provide valuable material for analysis.

The article proceeds as follows. Section 2 sets the scene by providing an overview of the state of the debate and the relevant precedents. Section 3 examines the pending arbitrations. Section 4 assesses the main questions raised by those cases and connects them to the broader debate on the EU's international responsibility. Section 5 offers some concluding remarks.

2. *Setting the scene: the state of the debate*

From an EU law perspective, the crux of the matter has traditionally been the following. Under international law, as codified by the ILC, attribution of the conduct giving rise to the international wrongful act is central to the determination of responsibility. According to the general rule of attribution laid down in Article 4 ASR, the conduct of an organ of a State is to be attributable to that State. Where the conduct thus attributed to a State constitutes a breach of an international obligation binding upon it, that State's international responsibility is engaged. In view of the specific characteristics of the EU legal order, applying this framework to a Member State implementing a binding Union act means that the Member State may incur responsibility for conduct undertaken in fulfilment of its obligations under EU law, while, as we shall see below, responsibility may also be attributed to the Union.

Both ASR and ARIIO contain other rules on attribution, such as Article 6 ASR and Article 7 ARIIO, which concern situations in which an organ of a State is “placed at the disposal” of another State or of an international organisation. However, under Article 6 ASR and 7 ARIIO, attribution requires

⁵ See D. GALLO, *Investimenti esteri diretti e golden power, oggi*, in this *Journal*, 2025, p. 615; C.E. CAZZATO, S. OCCHIPINTI, *Golden power e diritto antitrust: hic sunt leones*, *ivi*, 2026, p. 121; O. BALSAMO, *Sicurezza nazionale e controllo degli investimenti esteri diretti: il ruolo dell'art. 4, par. 2, TUE*, in *ivi*, 2026, p. 19

the controlling entity to exercise factual control over the organ of the State concerned. As the ILC itself explained, factual control presupposes that the organ, when implementing a binding act of the EU, acts «in conjunction with the machinery of that State [or international organisation] and under its exclusive direction and control».⁶ This high threshold does not appear to be met where an organ of a Member State implements EU law. In such circumstances, the EU does not exercise factual control over State organs in the sense of exclusive direction and control.

The EU has long maintained that the allocation of responsibility between the organisation and its Member States should not be based on these rules: responsibility should attach to the entity vested with the normative powers to adopt the act that ultimately gave rise to the internationally wrongful conduct.⁷ The ILC, however, accepted this view only to a limited extent. On the one hand, Article 17 ARIO provides that an international organisation incurs responsibility when it adopts a decision that binds a Member State to commit an act that would be internationally wrongful if committed by the organisation itself. Yet there is a significant difference between the solution adopted by the ILC and that advocated by the EU. Under Article 17 ARIO, Member States are not exonerated from their own responsibility, even where the act in question falls under the Union's exclusive competence. Rather, the provision entails that the organisation may be held jointly responsible.⁸ On the other hand, Article 64 ARIO leaves room for a *lex specialis* governing the responsibility of an international organisation, along the lines supported by the EU. It does so by providing that special rules on the international responsibility

⁶ See Report of the International Law Commission on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001), UN Doc. A/56/10 (2001), p. 44.

⁷ See International Law Commission, Responsibility of International Organizations – Comments and Observations Received from International Organizations, 14 February 2011, UN Doc. A/CN.4/637, where the views of the EU are expressed in full details in the comments submitted by the European Commission to the ILC. In particular, the Commission observed that «[t]he EU member States and their authorities are obliged to carry out binding decisions and policies adopted by the EU according to the EU's internal rules. This requires special rules of attribution and responsibility in cases where EU member States are in fact only implementing a binding rule of the international organization. In other words, the EU exercises normative control of the member States who then act as Union agents rather than on their own account when implementing Union law».

⁸ As aptly observed by Cannizzaro, «Article 17(I) indicates that the use of normative power by an international organisation might engage its international responsibility if it imposes, or even authorises, conduct inconsistent with its international obligations. This provision, however, does not go as far as attributing responsibility to the international organisation for their role in relation to wrongful conduct of the Member State». See E. CANNIZZARO, *Beyond the Either/Or*, cit., p. 299.

of an international organisation may be «contained in the rules of the organization applicable to the relations between an international organization and its members». This goes in the direction of the Union's position.

According to a prominent author, the EU practice suggests that such a special rule for allocating responsibility between the Union and its Member States is in its early stages of development.⁹ This special rule is known as normative control, which presupposes a threshold of control lower than the effective control required under Article 7 ARIO.¹⁰ In its commentary on Article 64, the ILC itself raised the possibility of a special rule of attribution applicable to the EU. It, however, did not take a position on the existence of such a rule. It merely noted the variety of views expressed on the matter, leaving the question unresolved.¹¹

A special treaty regime governing the allocation of responsibility between the EU and its Member States is sometimes expressly established. An obvious example is provided by post-Lisbon investment agreements concluded by the EU, such as CETA.¹² These agreements, with only minor differences, contain mandatory rules that allow the EU to unilaterally designate the respondent in an investment dispute. The respondent thus determined (whether the EU or a Member State) automatically assumes international responsibility for any breach of the investment agreement in question. In this way, questions of attribution and responsibility are internalised, and the general rules of international law on the matter are displaced.¹³ In such cases, therefore, there is no need to discuss how responsibility should be apportioned. This practice indirectly confirms that a rule of normative control has not clearly emerged in international law and is far from having fully crystallised. If such a rule already existed, there would be no need for mechanisms such as that laid down in CETA and comparable agreements.

Against this background, the ECT has become an interesting laboratory.¹⁴ On the one hand, it contains no special rule allocating responsibility between

⁹ A. DELGADO CASTELEIRO, *op. cit.*, p. 229.

¹⁰ *Ivi*, p. 228.

¹¹ See P. PALCHETTI, *The Allocation of International Responsibility*, cit., p. 185.

¹² On the post-Lisbon legal framework, see G. SERRANÒ, *Il diritto degli investimenti dell'Unione europea nel contesto globale*, Turin, 2025, especially p. 393 ff.

¹³ See L. PANTALEO, *The Participation of the EU in International Dispute Settlement. Lessons from EU Investment Agreements*, The Hague, 2019, p. 99-138.

¹⁴ The ECT has proved an interesting laboratory for many different reasons, most of which fall outside the scope of the present article. For an analysis of the intra-EU application of the ECT, see G. LAMPO, *The Relationship between Intra-EU Investment Arbitration under the Energy Charter Treaty and the Lisbon Treaty in Light of Article 41 of the Vienna Convention on the Law of Treaties*, in G. PASCALE, S. TONOLO (eds.), *The Vienna Convention on the*

the Union and its Member States. On the other hand, the EU has submitted a statement to the Secretariat stating that the Union and the Member States are both «internationally responsible for the fulfilment of the obligations contained [in the ECT], in accordance with their respective competences».¹⁵

In *Electrabel/Hungary*, a Belgian investor brought an investment claim against Hungary under the ECT. The dispute concerned Hungary's termination of power purchase agreements (PPAs), which the Commission had found to constitute unlawful state aid in a binding decision addressed to Hungary. In addressing Hungary's responsibility, the arbitral tribunal stated that «[w]here Hungary is required to act in compliance with a legally binding decision of an EU institution, recognized as such under the ECT, it cannot (by itself) entail international responsibility for Hungary». The tribunal added that «[u]nder international law, Hungary can be responsible only for its own wrongful acts. The Tribunal considers that it would be absurd if Hungary could be liable under the ECT for doing precisely that which it was ordered to do by a supranational authority whose decisions the ECT itself recognises as legally binding on Hungary»,¹⁶ pursuant to Article 1(3) ECT. The Tribunal based this finding on an unconvincing application by analogy of Article 6 ASR, rather than on the existence of a special rule of the kind contemplated by Article 64 ARIO. At the same time, while recognising that Hungary could not be held responsible, the tribunal emphasised that this conclusion did not deprive the investor of the protection afforded by the ECT. It observed that its conclusion left «open the responsibility of the European Union under the ECT for decisions of the European Commission which violate the rights of investors under the ECT».¹⁷ For this reason, resting as it does on the wrong legal basis (Article 6 ASR rather than Article 64 ARIO), the tribunal's reasoning provides at best weak support to the existence of a *lex specialis*

Law of Treaties. The Role of the Treaty on Treaties in Contemporary International Law, Naples, 2022, p. 313; EA., *L'arbitrato in materia di investimenti intra-UE sulla base del trattato sulla carta dell'energia: alcune considerazioni sul lodo Green Power c. Spagna*, in *Quaderni di SIDIBlog*, 2022, p. 319; L. MAROTTI, *L'Unione Europea e le strategie di "disconnessione" dall'Energy Charter Treaty*, in *RDI*, 2023, p. 155; for a comprehensive analysis of the complex relations between the ECT and the EU legal order in general see L. RICCARDI, *L'Unione Europea e il Trattato sulla Carta dell'Energia. Tra obblighi internazionali e sfide poste dalla transizione verde*, Pisa, 2024.

¹⁵ See Statement submitted to the Energy Charter Treaty (ECT) Secretariat pursuant to Article 26(3)(b)(ii) of the ECT replacing the statement made on 17 November 1997 on behalf of the European Communities.

¹⁶ See *Electrabel S.A./Republic of Hungary*, ICSID Case No. ARB/07/19, Final Award, para. 6.72.

¹⁷ *Ivi*, paras 4.169–4.170.

concerning the attribution of international responsibility under the ECT.¹⁸ Not to mention that later ECT case law on this point «reached precisely the opposite conclusion»,¹⁹ further weakening the case for a *lex specialis* under the ECT.

Having set out the state of the debate, we can now turn to the two pending arbitrations, in which the allocation of responsibility between the EU and the Member States is a central issue.

3. *The Nord Stream 2 and Klesch Group arbitrations: back to square one?*

Against this backdrop, the two pending arbitrations have revived the debate on a question that has so far remained unsettled. In the next two subsections, we will first deal with *Nord Stream 2*, then turn to *Klesch*.

3.1. *Nord Stream 2/European Union*

Nord Stream 2/European Union is the first arbitration claim ever brought against the EU. It concerns a Swiss investor, controlled by the Russian energy company Gazprom, which initiated proceedings against the Union alleging that Directive 2019/692 breached its rights under the ECT. Both parties addressed the attribution of responsibility at length in their submissions on jurisdiction, and both appear to have proceeded on a basis that departs from the classical international law framework, as codified in ASR and ARIO.

The European Union was the first to raise the issue. It argued that it could not be held internationally responsible for any alleged breaches of the ECT «because the alleged breaches [carried out by a Member State] would not be required by EU Law».²⁰ According to the Union, the Member State concerned by the *Nord Stream 2* investment, namely Germany, enjoyed a wide margin of discretion in implementing the relevant Directive, and any breaches of the ECT therefore stemmed from those national, discretionary measures. Here, the Union refers to a test for attribution developed primarily under the European Convention on Human Rights (ECHR). This approach, which is «conceptually very simple, is to consider the binding effect of the measures

¹⁸ This is also the opinion of P.T. STEGMANN, *Responsibility of the EU and the Member States under EU International Investment Protection Agreements*, The Hague, 2019, 127.

¹⁹ See VEZZANI, *op. cit.*, p. 298.

²⁰ See *Nord Stream 2 AG v European Union*, PCA Case No 2020–07, Respondent Memorial on Jurisdiction and Request for Bifurcation (15 September 2020) 123 (emphasis added).

taken by the EU and the degree of discretion which the Member State has as regards its implementation».²¹

In response, the investor advanced a similar argument but turned the Union's reasoning on its head. It contended that Germany had no discretion whatsoever and argued that «where a Member State breaches the ECT by doing something required by EU law, international responsibility lies with the EU».²²

Important developments occurred after that exchange. First, the claimant won the first round at the EU level by obtaining indirect confirmation of its argument from the ECJ. In an action for annulment brought under Article 263 TFEU, the claimant sought, on EU law grounds, the annulment of Directive (EU) 2019/692, the same measure that gave rise to the arbitration. On appeal from the General Court, the ECJ held that the directive left the Member State concerned with no discretion, at least as far as the applicant was concerned.²³ Admittedly, the ECJ's analysis was concerned with whether the claimant satisfied the procedural requirements under EU law for bringing an action for annulment.²⁴ In subsequent submissions to the arbitral tribunal, however, the investor relied on the ECJ's ruling to argue that the EU's status as respondent was no longer open to question.²⁵ The Union replied that the ECJ's finding concerned a procedural issue of EU law, not the international responsibility of the EU, nor the merits of Nord Stream 2's claims.²⁶

In the meantime, however, the claimant has lost the second round at the EU level. On remittal from the ECJ, the General Court delivered its judgment on the merits of the claimant's arguments. It dismissed the action in its entirety, holding that the Union had not infringed the rules invoked by Nord Stream 2, such as the principle of legal certainty, the principle of equal treatment, and

²¹ See E. CANNIZZARO, *Beyond the Either/Or*, cit., p. 301.

²² See *Nord Stream 2 AG/European Union*, PCA Case No 2020–07, Respondent Rejoinder on Merits & Reply on Jurisdiction (22 February 2022) 987.

²³ See Judgment of the Court of Justice of 12 July 2022, Case C-348/20 P, *Nord Stream 2/Parliament and Council*, paras 94 ff.

²⁴ On these aspects, see the thoughtful comments made by M. HAAG, *Directives, Direct Concern, and Direct Access to the CJEU: Case C-348/20 P Nord Stream 2 v Parliament and Council*, in *European Law Blog*, 19 September 2022 www.europeanlawblog.eu/pub/directives-direct-concern-and-direct-access-to-the-cjeu-case-c-348-20-p-nord-stream-2-v-parliament-and-council/release/1.

²⁵ See *Nord Stream 2 AG/European Union*, PCA Case No 2020–07, Claimant's Supplementary Memorial on Jurisdiction and Merits (27 February 2024) paras 116 ff.

²⁶ See *Nord Stream 2 AG/European Union*, PCA Case No 2020–07, Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits (4 July 2024) paras 185 ff.

so forth.²⁷ Following that judgment, the exchange between Nord Stream 2 and the EU has shifted to the merits of the case. The arbitral tribunal, however, will first have to address questions of jurisdiction and admissibility, and that discussion already appears promising. Subsequent procedural developments, however, have made *Nord Stream 2* a less reliable vehicle for the near-term clarification of these issues. In particular, the arbitral proceedings have been suspended following concerns arising from Article 5af of Regulation 833/2014, as amended by Regulation 2025/1494.²⁸ This development does not directly affect the questions of attribution and responsibility examined here, but it reinforces the need to turn to *Klesch Group*, where the allocation of responsibility between the Union and its Member States is raised more directly.

3.2. *Klesch Group/European Union*

The *Klesch Group* arbitration appears even more promising. As noted above, this is the second ECT-based arbitration brought against the EU, as well as (separately) against Denmark and Germany by the Klesch Group. In essence, the dispute concerns Council Regulation (EU) 2022/1854, which introduced a temporary solidarity contribution on surplus profits generated by businesses in the fossil fuel sector. The investor alleges that the combined effect of the EU measure and the implementing national measures infringed its rights under the ECT.²⁹ At the time of writing, little is publicly known about the case. The publicly available documents consist only of a small number of procedural orders, none of which is directly relevant to the present purposes. The analysis that follows is therefore based on the only substantively useful document available: a brief decision on bifurcation issued on 8 April 2025.³⁰

As a preliminary point, bifurcation is a procedural decision by which an arbitral tribunal separates the determination of preliminary objections, most commonly jurisdictional objections, from the merits, hearing and deciding

²⁷ See Judgment of the General Court of 17 January 2025, Case T-526/19 RENV, *Nord Stream 2/Parliament and Council*.

²⁸ See *Nord Stream 2 AG/European Union*, PCA Case No 2020–07, Procedural Order no. 18 (22 October 2022).

²⁹ See L. BOHMER, *Refinery Group Lodges Trio of ECT Cases Against the European Union, Denmark, and Germany*, in *IAReporter*, 25 October 2023 www.iareporter.com/articles/refinery-group-lodges-trio-of-ect-cases-against-the-european-union-denmark-and-germany/.

³⁰ See *Klesch Group Holdings Limited & others/European Union*, ICSID Case No. ARB(AF)/23/1, Decision on Bifurcation (8 April 2025).

them in distinct phases.³¹ Decisions of this kind do not prejudice the tribunal's final determinations on any factual or legal issues concerning jurisdiction or the merits. They merely determine whether such issues should be addressed separately or together. With this caveat in mind, some preliminary observations may nonetheless be made on the basis of the tribunal's statements at this stage.

The present case is, to my knowledge, the first in which the so-called Regulation on Financial Responsibility linked to investor-to-state dispute settlement tribunals (hereinafter: RFR) has been applied.³² In other words, it is the first occasion on which the mechanism for determining financial responsibility between the Union and the Member States in investment disputes, and, indirectly, for identifying the proper respondent, has been put to the test. Nord Stream 2 brought proceedings only against the EU, thereby avoiding the need for any determination under the RFR. As I have argued elsewhere, the RFR does not lay down rules on attribution, nor does it allocate international responsibility for breaches of EU investment agreements between the Union and its Member States. It concerns only the allocation of financial responsibility under EU law.³³ However, since the ECT contains no provision comparable to Article 8.21 CETA on the determination of the respondent in investment disputes, a determination under the RFR, if accepted by the arbitral tribunal, would have the effect of elevating the entity designated as financially responsible under EU law into the entity that is also responsible under international law. In the present case, the designated respondent is the EU.³⁴ The designation appears to be based on Article 9(1)(b) RFR,³⁵ which concerns cases in which the contested treatment has been afforded, in whole or in part, by a Member State, but the Member State concerned has agreed with the Commission not to act as respondent. Accordingly, Germany and Denmark carried out conduct connected with the dispute (namely, the national measures implementing the solidarity contribution) but agreed with

³¹ *Ivi*, para. 7 ff.

³² See Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, on which see the considerations made by H. LENK, *Issues of Attribution: Responsibility of the EU in Investment Disputes under CETA*, in *Transnational Dispute Management*, 2016, p. 1 ff.

³³ See L. PANTALEO, *The Participation of the EU*, cit., p. 112.

³⁴ See *Klesch Group Holdings Limited & others/European Union*, ICSID Case No. ARB(AF)/23/1, Decision on Bifurcation (8 April 2025), para. 13.

³⁵ *Ivi*, para. 33.

the EU that, for the purpose of the investment dispute, the Union would appear as respondent and bear any financial, but also international, responsibility arising from the dispute.

In the decision under discussion, however, there is reason to think that the arbitral tribunal did not regard itself as bound by that determination. To begin with, the tribunal emphasised that «Regulation (EU) No 912/2014 on which Denmark and Germany rely *appears to deal only with* the allocation of “financial responsibility” between the EU and its Member States».³⁶ The phrase *appears to deal only with* is not neutral. Had the tribunal considered the determination binding, for example, as a *lex specialis* governing the allocation of international responsibility under the ECT, it would presumably have used different language and accorded it greater weight. Secondly, the tribunal stated that, «in determining whether Denmark, Germany or the EU ought to be the proper respondent, the Tribunal would be required to consider the EU’s arrangements with its Member States and how those arrangements could relate to which entity is (or entities are) the proper respondents in an ICSID arbitration».³⁷ This suggests that the tribunal regarded those rules as internal EU arrangements *vis-à-vis* the Member States, or, put differently, as *res inter alios*, rather than as rules governing the attribution of international responsibility under the ECT. The fact that, at this stage, the tribunal did not exclude the possibility that more than one entity might be responsible under the ECT, rather than only the entity designated by the EU, further supports this reading. Thirdly, the tribunal noted that «[n]one of the Parties have referred the Tribunal to an ICSID decision dealing directly with these issues».³⁸ The tribunal’s search for guidance in ICSID case law and its observation that no directly relevant authority had been identified suggest that it considered the issue to be governed by international law rather than by the internal EU arrangements mentioned above.

In short, while the tribunal’s observations in the decision on bifurcation are without prejudice to its final determinations on jurisdiction or the merits, it seems fair to say that the *Klesch Group* tribunal has not given particularly encouraging indications as to the existence of a *lex specialis* under the ECT. The next section returns to this issue.

³⁶ *Ivi*, para. 40 (emphasis added).

³⁷ *Ivi*, para. 38.

³⁸ *Ibidem*.

4. *An Appraisal*

If one were to assess whether these two pending arbitrations strengthen or weaken the case for the emergence of a *lex specialis*, it would probably be fair to say that such a rule may draw the first round but lose the second.

Round 1 is the *Nord Stream 2* arbitration. In that context, both the investor and the EU have argued that responsibility for a breach of the ECT should attach to the entity exercising discretion. This is not, strictly speaking, a normative control standard, nor is it a competence-based approach *stricto sensu*. More precisely, the discussion turns on whether the Member State enjoyed discretion in implementation. Nord Stream 2 maintains that Germany had no such discretion. The EU, by contrast, argues that Germany enjoyed a wide margin of discretion and therefore exercised full control over its regulatory action. Either way, responsibility is not framed under the ordinary rules of customary international law, which would likely point towards joint responsibility. Admittedly, there is no guarantee that the arbitral tribunal will endorse this construction. It could, in theory, reject the parties' submissions on this point and allocate responsibility under general international law. In that scenario, it might find that the Union, as the sole respondent, is responsible under Article 17 ARIO, while Germany, albeit potentially also responsible under Article 4 ASR, would get off scot-free because it is not a party to the dispute. However, it seems more likely that the arbitral tribunal will not disregard the parties' agreement on the principled question of the applicable standard for allocating responsibility. Rather, it is likely to focus on the Union's conduct and the extent to which that conduct may have engaged its international responsibility. If so, responsibility in *Nord Stream 2* will be determined by reference to an attribution paradigm centred on implementing discretion, which may be understood as an implicit invocation of a *lex specialis* that departs from customary international law. However, *Nord Stream 2* is structurally ill-suited to directly test the existence of such a *lex specialis*, if only because the Member State is not a party to the dispute. At most, therefore, it may provide indirect support for its existence.

Round 2 is the *Klesch Group* arbitration, where matters are likely to take a different turn. On the basis of the decision on bifurcation, the arbitral tribunal appears likely to treat the internal arrangements between the EU and the Member States as facts, rather than as the law governing the apportionment of international responsibility. That question will instead be determined by reference to the ECT and general international law. As noted above, the ECT

gives contradictory indications. While it contains no special rule allocating responsibility between the Union and its Member States, the Union's statement on the matter, together with inconclusive case law, provides no clear guidance to the *Klesch Group* tribunal. This does not clearly support the existence of a *lex specialis*, but it does not entirely exclude it either. By contrast, customary international law most likely points towards shared responsibility among the Union, Germany, and Denmark: the Union on the basis of Article 17 ARIO, the Member States under Article 4 ASR.³⁹ The tribunal already appears at least inclined to take that direction. If so, *Klesch Group* would represent the round 2 defeat mentioned above: a step backwards in the emergence of a *lex specialis* under the ECT.

More precisely, the dispute on the merits will probably revolve around the solidarity contribution provided for in Articles 14 ff. of Regulation (EU) 2022/1854. The Regulation leaves Member States no discretion as to the introduction of that contribution, which is mandatory unless they had already adopted equivalent national measures before the Regulation came into force. However, Member States appear to retain some discretion as to how the contribution is structured. The Regulation sets a minimum threshold, but Member States may exceed it. They also enjoy some discretion over the use of the proceeds from the contribution. If the *Nord Stream 2* debate were transposed to the *Klesch Group*, and assuming the tribunal rejects the EU's claim to be the sole respondent together with the corresponding exoneration of the Member States, the discussion at the merits stage could focus on the extent of the Member States' discretion. Such a discussion could be framed by the tribunal in terms of a *lex specialis*. More likely, however, it could be treated as a means of assessing whether Article 17 ARIO applies alongside Article 4 ASR, thereby bringing the analysis back within the framework of general international law and towards a possible finding of shared responsibility.

To be fair, the picture would be entirely different if the arbitral tribunal were to accept the Union's unilateral determination of the respondent and follow the path leading to the Union's international responsibility, or if it were to treat the implementing discretion as an autonomous standard displacing the general rules. In either case, it would come close to a full endorsement of a *lex specialis* governing responsibility under the ECT. However, on the basis of the bifurcation decision, the more plausible scenario appears to be one of joint

³⁹ See A. NOLLKAEMPER, D. JACOBS, *Shared Responsibility in International Law: A Conceptual Framework*, in *Michigan Journal of International Law*, 2013, p. 374.

responsibility grounded in ASR and ARIO, which would militate against the emergence of a *lex specialis* under the ECT.

5. Concluding remarks

The attribution of international responsibility between the Union and the Member States has become a classic problem in EU external relations law. It has been the subject of intense debate for years, but the practice available so far has remained limited. The recent wave of litigation under the ECT promises to provide the first genuine stress test for rules and arguments that have, until now, largely been discussed in theory.

As discussed throughout the preceding pages, the position may be summarised as follows. On the one hand, the rules of general international law are based on the attribution of conduct, from which responsibility then follows. Those rules are largely neutral as to the internal arrangements of an international organisation concerning the division of competence with its members, including the rules governing the EU and its Member States. On the other hand, the Union and its Member States have long maintained that those general rules should be adapted to more accurately capture the complex allocation of powers within the EU legal order. To that end, they have devised different solutions: some internal in nature, though of undeniable potential external relevance, such as the RFR; others external in character, such as the Statement submitted pursuant to Article 26(3)(b)(ii) ECT. *Nord Stream 2* and, even more so, *Klesch Group* are the first arbitrations in which these rules and arguments will be tested in concrete disputes, and they may finally provide clearer guidance on these matters.

The main conclusion reached in this article is that the more likely outcome will not be a clear affirmation of the *lex specialis* advocated by the EU and the Member States for years. The pending ECT arbitrations expose the instability of treating EU competence, financial responsibility, respondent designation and attribution of conduct as interchangeable techniques for allocating responsibility. *Nord Stream 2* appears more compatible with a discretion-based model, largely because the Member States are not parties to that dispute. By contrast, *Klesch* appears to suggest that arbitral tribunals may treat EU internal arrangements as relevant facts rather than dispositive rules of international responsibility. Yet both cases may still have surprises in store and could take unexpected turns. If one were to bet on the emergence of a *lex specialis* under

the ECT, however, *Nord Stream 2* and *Klesch Group* would probably not be the safest cases on which to place that bet.

ABSTRACT (ita)

L'allocazione della responsabilità internazionale tra l'Unione europea e i suoi Stati membri costituisce da tempo una questione controversa, essendo stata oggetto di intenso dibattito nel diritto delle relazioni esterne dell'Unione. Tale dibattito si è concentrato, in particolare, sulla possibilità che le specifiche caratteristiche dell'ordinamento dell'Unione giustifichino l'applicazione di regole speciali, fondate sulla competenza o sul c.d. controllo normativo, in deroga alle regole generali sull'attribuzione della condotta elaborate dalla Commissione del diritto internazionale. L'articolo riesamina tale dibattito alla luce di due procedimenti arbitrali attualmente pendenti, entrambi ai sensi del Trattato sulla Carta dell'Energia: *Nord Stream 2/Unione europea* e *Klesch Group/Unione europea*. Pur essendo ancora in una fase preliminare, i procedimenti offrono indicazioni utili sul possibile riconoscimento di una *lex specialis* in materia di allocazione della responsabilità tra l'Unione e gli Stati membri. L'analisi evidenzia, in particolare, l'instabilità derivante dalla sovrapposizione tra categorie molto eterogenee, quali competenza, responsabilità finanziaria, individuazione del convenuto e attribuzione della condotta. Mentre *Nord Stream 2* è apparentemente compatibile con un criterio attributivo fondato sul margine di discrezionalità lasciato agli Stati membri, *Klesch* sembrerebbe suggerire che le norme interne dell'ordinamento dell'Unione possano essere considerate dal tribunale arbitrale adito elementi senz'altro rilevanti, ma non giuridicamente determinanti ai fini dell'allocazione della responsabilità internazionale.

ABSTRACT (eng)

The allocation of international responsibility between the European Union and its Member States has long been a controversial issue and the subject of intense debate in EU external relations law. That debate has focused, in particular, on whether the specific characteristics of the EU legal order could justify the application of special rules based on competence or the so-called normative control, departing from the general rules on attribution of conduct and developed by the International Law Commission. This article revisits that debate in light of two arbitral proceedings currently pending under the Energy Charter Treaty: *Nord Stream 2/European Union* and *Klesch Group/European Union*. Although both proceedings are still at a preliminary stage, they provide some useful indications as to the possible recognition of a

lex specialis governing the allocation of responsibility between the Union and its Member States. The analysis highlights, in particular, the instability arising from the overlap among highly heterogeneous categories, such as competence, financial responsibility, respondent designation, and attribution of conduct. While *Nord Stream 2* appears prima facie compatible with an attribution criterion based on the degree of discretion left to Member States, *Klesch* seems to suggest that rules internal to the EU legal order may be regarded by the arbitral tribunal as undoubtedly relevant, but not legally conclusive for the allocation of international responsibility.