ASSER PRESS

The Participation of the EU in International Dispute Settlement

Lessons from EU Investment Agreements

Luca Pantaleo

Springer

The Participation of the EU in International Dispute Settlement

Luca Pantaleo

The Participation of the EU in International Dispute Settlement

Lessons from EU Investment Agreements

ASSER PRESS

Springer

Luca Pantaleo
BRV [Public Management, Law & Safety]
The Hague University of Applied Sciences
The Hague, The Netherlands

ISBN 978-94-6265-269-9 ISBN 978-94-6265-270-5 (eBook)
https://doi.org/10.1007/978-94-6265-270-5

Library of Congress Control Number: 2018957063

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands www.asserpress.nl
Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag Berlin Heidelberg

This T.M.C. ASSER PRESS imprint is published by the registered company Springer-Verlag GmbH, DE part of Springer Nature
The registered company address is: Heidelberger Platz 3, 14197 Berlin, Germany

Foreword

The present study lies at the intersection between two fascinating and highly topical issues: the contribution of the European Union (EU) to the development of international law in the area of investment dispute settlement and the limitations imposed by the EU's internal 'constitutional' structure to its participation in international dispute settlement. As to the first issue, the EU is a new-comer in the field of investment arbitration. EU investment treaties containing the Investment Court System are still to enter into force. Yet, these treaties have become laboratories for designing a number of highly significant procedural novelties. Some of these novelties, such as the establishment of an appellate tribunal or the participation of non-disputing parties, have been introduced in order to improve the transparency and predictability of investment arbitration. Others, instead, are strictly related to the preservation of the EU's special features in international dispute settlement. Among the latter, the mechanism by which, if the investor intends to initiate arbitration proceedings, it is up to the EU to identify the respondent (i.e. the EU itself or a Member State) features prominently. The purpose of this mechanism is clear: by leaving to the EU the determination of the respondent, it aims to avoid the risk of external interference in the division of responsibility between the EU and Member States. This brings us to the other main issue addressed in this study, namely the challenges posed by the EU's internal structure to its action on the international stage. In particular, the focus is on the difficulty of reconciling the principle of autonomy, as interpreted in the case law of the European Court of Justice (ECJ), with the EU's or Member States' participation in international dispute settlement. The problem is certainly not new, but it has become particularly pressing in recent times, as highlighted by Opinion 2/2013 or, most recently, by the *Achmea* judgment. No doubt the autonomy of the European legal order and the role of the ECJ in preserving such autonomy are central features of the constitutional architecture of the EU. It is therefore inevitable that the need to defend such features plays an important role in shaping the EU's participation in international dispute settlement. However, the strict interpretation of these constitutional principles developed by the ECJ has the effect of rendering such participation extremely complex. This, in turn, has contributed to creating uncertainty

about the characteristics that an international dispute mechanism must present in order to the regarded as being compatible with the EU legal order.

In light of these developments, the identification and assessment of the special features characterising the new dispute settlement mechanism provided by EU investment treaties acquire particular relevance. The question is not simply whether this new mechanism is consistent with the principle of autonomy as developed by the ECJ. More broadly, it can be asked whether there is a case for suggesting that this mechanism should become a standard model to be applied, whenever possible, beyond the area of investment arbitration. This point is of central importance. Indeed, as the recent case law of the ECJ clearly indicates, there is a pressing need to identify procedural solutions that allow the EU to accommodate its special features when participating in international dispute settlement.

The questions just raised lie at the heart of this timely and valuable study by Luca Pantaleo. The answer the author gives to them are two resounding 'yesses': yes, a mechanism that leaves to the 'European bloc' the identification of the proper respondent in international litigations involving the EU is to be regarded as being consistent with the principle of autonomy as developed so far by the ECJ; and yes, this mechanism should become a standard model because it appears capable, more than any other mechanisms, of guaranteeing the participation of the EU in international disputes without risking the prejudicing of the autonomy of the EU legal order. Time will tell whether the 'internalisation model' introduced by EU investment agreements will indeed reflect a more general trend. What can already be said is that this study, for its careful examination of the procedural novelties introduced by the EU investment agreements, for its original systematisation of the different dispute settlement regimes to which the EU and the Member States are parties jointly, and for its systematic analysis of the requirements stemming from the principle of autonomy of the EU legal order, provides a relevant contribution to the literature on the participation of the EU in international dispute settlement.

Macerata, Italy
September 2018

Paolo Palchetti

Acknowledgements

There are many people to whom I am indebted for different reasons and to various degrees. Without them, this monograph would have never been completed. To begin with, I am very grateful to all those colleagues, friends and students with whom I have had the pleasure and luck of discussing different aspects of the book, or with whom I have simply shared some of my sorrows during the darkest hours of the writing process. For in the course of a long-term project there are always dark hours. Those talks, small and serious alike, as well as those smiles and words of encouragement, have certainly made a big difference.

I am immensely indebted to Paolo Palchetti, my lifetime academic mentor. Without his continuous guidance, this monograph would not have come into existence. More fundamentally, I would not be in the place where I am today had I not come across him as a young law student back in 2006.

I am also grateful to a number of colleagues and friends who have either commented on earlier drafts of the book (or parts thereof), or simply discussed my ideas over a coffee or a beer. They are, in alphabetical order, Ajatshatru Bhattacharya (who has also helped with the language revision), Alina Carrozzini, Andrea Caligiuri, Cristina Contartese, Eugenia Bartoloni, Joris Larik, Loris Marotti, and Mads Andenas. Furthermore, two students of The Hague University of Applied Sciences, Federica Velli and Plamena Markova (also listed in alphabetical order) provided me with fundamental research support. Additionally, a special thank you goes also to the staff at T.M.C. Asser Press, in particular to Frank Bakker for the patience demonstrated while coping with me.

Finally, I would like to express my gratitude to those members of my family whose presence has been fundamental throughout my life. I am grateful to my parents, Fiore and Rosa, who, among many other things, have made it possible for me to access higher education despite having at times some trouble in making ends meet. To my grandfather, Antonio, to whom I owe my passion for the EU and the European integration process. I have grown up listening to the recollections of his experiences as an Italian migrant worker in Europe prior to the creation of the EU. His tales are for me a powerful reminder of how far we have come and how much

we have achieved in Europe in the last 60 years or so. Last but not least, the three most important and most valuable people have been my wife, Raquel, whose patience, dedication and support have made this book possible, as well as my son, Eduardo, and my daughter, Giovanna, who kept me going and constantly helped me to put things into the right perspective. I am immeasurably grateful to them.

The Hague, The Netherlands Luca Pantaleo

Contents

Abbreviations

AB	Appellate Body
ARIO	Articles on the Responsibility of International Organizations
ASR	Articles on Responsibility of States for Internationally Wrongful Acts
BIT	Bilateral Investment Treaty
CCP	Common Commercial Policy
CETA	Comprehensive Economic and Trade Agreement
CFSP	Common Foreign and Security Policy
CIP	Common Investment Policy
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EEA	European Economic Area
EFTA	European Free Trade Association
EU	European Union
FET	Fair and Equitable Treatment
FITR	Fork-in-the-Road
FTA	Free Trade Agreement
FTC	NAFTA Free Trade Commission
ICS	Investment Court System
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
ISDS	Investor-to-State Dispute Settlement
ITLOS	International Tribunal on the Law of the Sea
MIC	Multilateral Investment Court
NAFTA	North American Free Trade Agreement

NGO	Non-governmental Organisation
OSPAR	Convention for the Protection of the Marine Environment of the North-East Atlantic
PCA	Permanent Court of Arbitration
REIO	Regional Economic Integration Organisation
SCM	Agreement on Subsidies and Countervailing Measures
TAC	Total Allowable Catch
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

Chapter 1
Introduction

Contents

Abstract This chapter will introduce the topic of the book and the broader implications that it has on the understanding of some current issues of contemporary international and EU law.

Keywords settlement of disputes · EU autonomy · international organisations · international law · EU law

1.1 The Participation of a State-Like Subject of International Law to the Settlement of International Disputes

Owing to its broad treaty-making power and its far-reaching international agenda, the European Union (EU) has concluded a large number of international agreements, jointly with, or independently of, its Member States. Since its creation, the EU has been very active on the international plane. Inevitably, being a party to a vast array of international agreements with third parties entails the possibility that disputes arise. Hence, the ability to enter into international legal relationship should go hand in hand with the existence of a parallel ability to utilise the means offered by international law to settle disputes. For political rather than legal reasons, the Union's approach to international dispute settlement was initially characterised by "caution and restraint".[1] However, those times are long gone, and the EU is

[1] See Rosas 2017, p. 2.

L. Pantaleo, *The Participation of the EU in International Dispute Settlement*,
https://doi.org/10.1007/978-94-6265-270-5_1

nowadays a party to a large number of agreements that feature a dispute settlement mechanism.

Yet, as this book will show, the involvement of the EU in the settlement of international disputes has not been a success story, so to speak. In a nutshell, the EU has faced the paradox of being a non-State subject, yet State-like actor, operating in a largely (still) State-centric international law. As far as the settlement of disputes is concerned, the problems connected with litigating against such State-like subject have emerged in particular in the context of agreements concluded by the EU and the Member States jointly (so-called mixed agreements). The main such challenge can be summarised as follows: when a mixed agreement is breached, what is the party that should be sued by the victim of the wrongful act? What is the entity against which a claim should be brought in order to settle a dispute? Is it the EU, the Member States or both?

In theory, there is a seemingly simple answer to these questions. Namely, a dispute should logically be initiated against the party that has committed the international wrong that is at its origins. That is to say, the party that is responsible as a matter of international law. After all, if a claim is brought against a party that does not bear responsibility, the claimant will certainly lose. That will occur either on the merits, or even at the preliminary stage of a dispute if an inadmissibility objection is raised. In the event that the dispute settlement mechanism seized of the dispute has the power to verify *ex officio* the admissibility of a claim—like, for example, the European Court of Human Rights (ECtHR)—an objection raised by the other party is not even necessary to declare the claim inadmissible. Hence, third parties claiming to be victims of a violation of an agreement concluded by the EU and the Member States should simply bring a dispute against the party that appears *prima facie* responsible. Therein, however, lies the rub.

As is well known, the responsibility of States and international organisations is among the most debated issues of international law, so much so that the rules of international law governing this matter have been studied by the International Law Commission (ILC) for more than 40 years.[2] The results of that study have recently been codified by the ILC.[3] However, there has been a lively debate concerning the suitability of such rules to a composite legal subject such as the EU.[4] Traditionally, the EU has advocated the adoption of special rules that would accommodate the special features of the Union and modulate the application of the general rules on responsibility. In particular, it has maintained that the allocation of responsibility between a regional economic international organisation (REIO)—which essentially

[2] See the summary provided by James Crawford in the entry 'State Responsibility' on the online Max Planck Encyclopedia of Public International Law, paras 3–5.

[3] See Articles on Responsibility of States for Internationally Wrongful Acts (ASR), and on the Responsibility of International Organizations (ARIO), of which the UN General Assembly has taken note. See, respectively, Resolution 56/83 adopted by the General Assembly on 12 December 2001, A/RES/56/83, and Resolution 66/100 adopted by the General Assembly on 9 December 2011, A/RES/66/100.

[4] This debate will be more thoroughly analysed below, see Sect. 5.2.

means the EU—and its Member States should take into account the internal rules of the organisation. According to this view, the allocation of responsibility should be strictly dependent on the division of competences between the organisation and the Member States: it should be the entity that is vested with the competence to adopt the act that eventually led to an international wrong that should be held responsible.[5] However, as will be seen more thoroughly in Chap. 5, the ILC has endorsed the existence of special rules only to a limited extent. As a result of a combined reading of the rules codified in ASR and ARIO, therefore, international responsibility for breaches of agreements to which both the EU and the Member States are a party may be apportioned independently of the internal rules of the Union.

As far as disputes are concerned this state of play has an inevitable consequence. An international court seized of a dispute based on a mixed agreement will have to determine who is the responsible party. From an EU law perspective, such determination entails an assessment concerning the division of powers and responsibilities between the EU and the Member States as fixed by the Treaties. In other words, determining what is the party that is responsible to discharge an international obligation stemming from a mixed agreement—which is a logically precedent step to apportioning responsibility and settling a dispute—amounts to a determination of who, whether the EU or the Member States, has the power to take action under EU law. A fictional scenario will help clarify this point. Suppose the EU and the Member States enter into a free trade agreement featuring an arbitral tribunal with State A. Suppose the EU adopts a directive imposing the Member States to prohibit the sale of goods containing a number of chemicals. Suppose Member State B adopts the necessary implementing legislation, as a result of which an exporter of State A gets its goods containing prohibited chemicals denied entrance into Member State B. Suppose State A believes that the agreement is being breached and brings proceedings against Member State B but not against the EU. What will the arbitral tribunal do in such (rather simplified) case?

Absent any rule in the agreement, the tribunal will be confronted with a number of options. First of all, it could apply Article 4 ASR and attribute the conduct that

[5] See, among others, UN doc. A/CN.4/556, where the views of the EU are expressed in full details. See, in particular, pp. 31–32, where the Commission gave the following example: "[t]he European Community is the bearer of many international obligations (especially because it has concluded many treaties). However, sometimes not only the behaviour of its own organs, but also organs of its member States, may breach such obligations. Such behaviour would therefore be *prima facie* attributable to those member States. This is an example of this situation: the European Community has contracted a certain tariff treatment with third States through an agreement or within the framework of WTO. The third States concerned find that this agreement is being breached, but by whom? Not by the European Community's organs, but by the member States' customs authorities that are charged with implementing Community law. Hence their natural reaction is to blame the member States concerned. In short, there is separation between responsibility and attribution: the responsibility trail leads to the European Community, but the attribution trail leads to one or more member States. This example illustrates why the European Commission feels that there is a need to address the special situation of the Community within the framework of the draft articles" (emphasis in the original).

led to the violation of the agreement (i.e. the approval of the implementing legislation) to Member State B. On this basis, it will assess whether the legislation constitutes a breach of the agreement and will hold Member State B responsible in case it will come to a positive determination. Alternatively, it could apply a normative control doctrine and exonerate Member State B from its responsibility.[6] In that case, State A would have to initiate another claim against a different respondent, namely the EU. State A could also sue the Union and Member State B at the same time. In such case, the tribunal could hold both parties jointly responsible, or again exonerate Member State B and attribute responsibility to the EU exclusively on the basis of a normative control analysis.

Be that as it may, this is clearly a case where Member State B will have no responsibility and no power to take action as a matter of EU law. It will be bound by an EU law obligation to comply with the directive. If the arbitral tribunal will order Member State B to bring its legislation in conformity with the agreement, Member State B will be legally unable to comply with this order without infringing EU law. Moreover, trade in goods is a matter falling within the exclusive competence of the EU pursuant to Article 207 of the Treaty on the Functioning of the European Union (TFEU). Technically speaking, on the international plane the EU is exclusively responsible of discharging the substantive obligations stemming from the agreement concerning the import of goods originating in State A, including goods containing chemical X whose access to Member State B has been denied. This means that by simply assuming respondent status in the dispute brought by State A, Member State B may be violating the EU exclusive competence under Article 207 TFEU.[7]

This point has repeatedly been emphasised by the European Court of Justice (ECJ)[8] in its case law concerning the participation of the EU and the Member States in international dispute settlement. As will be seen more comprehensively in Chap. 3, the Court has clearly stated that issues of international responsibility are closely yet inevitably interwoven with the internal division of competence. The ECJ has made this point in virtually all the relevant decisions that will be examined in this book. The paradigmatic example of this line of case law is probably para 230 of

[6] According to this doctrine, the Member States of the EU should not be held responsible as a matter of international law when they act under the normative control of the EU. While this doctrine has not been endorsed by the ILC, the existence—better: the emergence—of a special rule of international law concerning normative control has been maintained by Delgado Casteleiro in his leading study in the field. See Delgado Casteleiro 2016, as well as the considerations made in Chap. 5 of the present book.

[7] Needless to say, this is clearly a fictional scenario loosely based on a real WTO case brought by the US against the EU. See, in particular, European Communities—Certain Measures Affecting Poultry Meat and Poultry Meat Products from the United States (case suspended) WT/DS389. The WTO dispute settlement system will be comprehensively examined in Chap. 2.

[8] Throughout this book, the abbreviation CJEU, which stands for 'Court of Justice of the European Union', will not be used. Such abbreviation refers in fact to the whole institution consisting of both the Court of Justice (ECJ) and the General Court. Since reference is made exclusively to the ECJ's case law, the use of the acronym CJEU would be misleading.

Opinion 2/13 concerning the participation of the EU to the dispute settlement system put in place by the European Convention on Human Rights (ECHR). In particular, the Court stated that:

> A decision on the apportionment as between the EU and its Member States of responsibility for an act or omission constituting a violation of the ECHR established by the ECtHR is also one that is based on an assessment of the rules of EU law governing the division of powers between the EU and its Member States and the attributability of that act or omission.[9]

Given that a decision on the attribution of responsibility is inherent in any decisions taken by an international court to which the EU and the Member States may subscribe, one may wonder how it is possible to reconcile their participation in international dispute settlement with the need preserve the internal division of roles as fixed by the Treaties. A straightforward solution to this problem is to prevent the international dispute settlement to which the EU and the Member States are parties from apportioning responsibility between the EU and the Member States, thus avoiding any assessments concerning the internal division of competence and responsibilities under EU law. This is easier said than done though. How is it possible to settle a dispute involving the EU and the Member States without apportioning responsibility in a manner that is at variance with EU law?

The aim of this book is precisely to solve this dilemma. The analysis that follows will show that the EU has employed a number of techniques in the different treaty regimes to which it is a party in order to make sure that potential disputes are brought against the respondent that, under EU law, is the one responsible of discharging the substantive obligation that has admittedly been breached. The analysis will cover (virtually) all regimes featuring a dispute settlement system to which the EU has subscribed. Yet, it will focus on the most recently created, namely the Investment Court System (ICS) established by EU investment agreements, due to its potential ability to constitute a possible paradigm for the settlement of disputes against the EU.

1.2 The Importance of the Topic

In 2002, in the context of its works concerning the responsibility of international organisations, the ILC's relevant Working Group took note of "the widely perceived need to improve methods for settling … disputes" concerning the responsibility of international organisations.[10] The concerns expressed by the ILC have recently materialised in the proposal made by Sir Michael Wood to include on its

[9] Court of Justice, *Draft Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Opinion of 18 December 2014, Opinion 2/13, ECLI:EU:C:2014:2454, para 230.

[10] See *Yearbook of the International Law Commission*, 2002, vol. II (Part Two), p. 96, para 486.

long-term programme the topic 'The settlement of international disputes to which international organizations are parties'.[11] This move is reflective of an ever expanding role of international organisations, which are nowadays involved in almost all fields of human cooperation.[12] The EU can certainly be considered the prime example of this growing prominence. While it is true that more and more international organisations are gradually gaining importance, the EU's unique position is still largely unquestionable. Yet, precisely because of the EU's sophisticated constitutional architecture that is at the very heart of its uniqueness, a generally accepted method to settle disputes involving the Union has proved particularly difficult to developed. As this book will show, the EU treaty practice on the matter is unsettled. The case law of the ECJ has added to the already existing difficulties. The need to develop a model dispute settlement capable of accommodating the special features of the EU, while at the same time being legally sound from an international law perspective, seems therefore to be of pivotal importance. After all, as rightly pointed out by Inge Govaere,

> It is hard to contest that if the EU wants to be a credible (and important) actor on the international scene then it should be able to play according to the international public law rules and obey international law principles too, if not especially so, in relation to dispute settlement. If the EU is to assume and enforce international rights and obligations effectively, it is imperative for it to be able to set up or adhere to international systems of dispute settlement which will be binding on both the [EU] and third countries alike.[13]

Ultimately, and consequently, the need to shed light on the participation of the EU and the Member States in the settlement of international disputes should be seen as a contribution to the general understanding of the role and the status of international organisations. As noted by August Reinisch,

> the ability to be sued may form the ultimate proof of the role of international organizations on the international level. As the old saying goes 'the proof of the pudding is in the eating'; it may well be that the proof of the status of international organizations lies in the fact that they are not only subject to international law and may incur responsibility for violating it, but also that such responsibility can be effectively invoked through dispute settlement.[14]

This study represents an attempt to systematise issues relating to dispute settlement in a coherent framework as far as the EU is concerned, and develop a possible model for the EU and the Member States so that their *responsibility can be effectively invoked*, to borrow from August Reinisch. It sets out to contribute to a debate that will only gain in importance in the years to come.

[11] See Wood 2016.

[12] See Brölmann 2007, p. 1.

[13] See Govaere 2010, p. 190.

[14] See Reinisch 2018, pp. 6–7.