Luca Pantaleo

# The Participation of the EU in International Dispute Settlement

## Lessons from EU Investment Agreements

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# 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.

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Paolo Palchetti

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