• DOI: https://doi.org/10.14324/111.444.ewlj.2017.03.

The EU and international dispute settlement

*Allan Rosas**

This article focuses on recent developments with regard to the mechanisms for international dispute settlement which the EU has accepted or in some instances promoted, or which in any case are of direct relevance for the EU. As a preliminary question, the case law of the European Court of Justice concerning the compatibility of international dispute settlement mechanisms will be analysed. The article then provides an overview of such mechanisms included in multilateral and bilateral agreements concluded by the EU, with a particular emphasis on recent bilateral trade and cooperation agreements. The last parts of the article look at specific institutional problems such as the question of the representation of the EU before international dispute settlement mechanisms, and the special challenges posed by investment disputes and, in this context, investor-to-state dispute settlement (ISDS), including ISDS mechanisms in bilateral investment agreements concluded between the EU Member States.

1. Introduction

As an economic and political union of states, based largely on a 'federative' model, the EU has entered into a number of international agreements and other commitments, including membership in several

* Dr Jur, Dr Jur hc, Dr PolSc hc; Judge at the European Court of Justice (since 2002); Senior Fellow of the University of Turku; Fellow of the Robert Schuman Institute for European Affairs, University of Luxembourg; Visiting Professor, College of Europe and University of Helsinki. Email: Allan.Rosas@curia.europa.eu. The author wishes to thank Mr Samuel Buyoya, LLB (Hons), LLM (Bruges), barrister, former trainee in his Chambers, for his much appreciated assistance.

intergovernmental organizations, and is, according to the Court of Justice (hereinafter ECJ[1]), also bound by general international law.[2] According to Article 3(5) of the Treaty on European Union (hereinafter TEU), the Union shall contribute to the 'strict observance and the development of international law, including respect for the principles of the United Nations Charter'. Similar language is to be found in Article 21(1) TEU.

Given the vast array of international legal obligations incumbent upon the Union, and the important economic and political interests at stake, it is inevitable that the Union be faced with disagreements and disputes with third powers concerning the interpretation and application of these obligations. In order to demonstrate openness towards international law and the third-party settlement of disputes, and to channel the settlement of disputes into predictable fora and procedures, the EU has initiated or at least accepted a certain number of mechanisms involving such third-party settlement.

This was not always the case, however. In the 1980s, the approach of the EU to binding third-party settlement was one of caution and restraint.[3] The exceptional and very few cases of extension of the ECJ's jurisdiction to certain non-Member States,[4] and the powers of the EFTA Court (Court of Justice of the European Free Trade Association States) under the Agreement on a European Economic Area (hereinafter EEA), are no real exceptions in this regard, as these mechanisms are intended to ensure the ECJ's own jurisdiction or, in the case of the EEA Agreement and the EFTA Court, to ensure the application of EU internal market law in the three non-EU EEA States.[5]

In contrast, the EU acceptance of, and one could add, increasingly active support for, the reinforced GATT/World Trade Organization

1 The abbreviation CJEU, which stands for 'Court of Justice of the European Union', refers to both the Court of Justice (ECJ) and the General Court (former Court of First Instance), see Article 19(1) TEU. In the following, reference is made almost exclusively to the ECJ, as the case law discussed emanates from this Court.

2 See, in particular, Case C-286/90 *Poulsen and Diva Navigation* EU:C:1992:453, paras 9–10; Case C-162/96 *Racke* EU:C:1998:293, paras 45–6; Case C-366/10 *The Air Transport Association of America and Others* EU:C:2011:864, para 101. See also, e.g. A Gianelli, 'Customary International Law in the European Union' in E Cannizzaro, P Palchetti and RA Wessels (eds), *International Law as Law of the European Union* (Martinus Nijhoff Publishers 2012) 93.

3 A Rosas, 'International Dispute Settlement: EU Practices and Procedures' (2003) 46 GYIL 284, 288.

4 On such particular cases, including the EC–Turkey Association Agreement of 1963, see Rosas ibid 289–92.

5 The EEA Agreement was concluded by the EU by Council Decision 94/1 ECSC, EC of 13 December 1993 [1994] OJ L/1. On the abortive judicial system provided for in an earlier version of the EEA Agreement and which was rejected by the ECJ in Opinion 1/91 (Draft Agreement on a European Economic Area) EU:C:1991:490, see below, section 2.3.

(hereinafter WTO) dispute settlement mechanism, created in 1994, can be seen as a real game-changer. Adherence to this system has also had important consequences in practice. After having committed itself to this compulsory and binding mechanism, the EU has been involved in 97 cases as a claimant and 82 cases as a respondent.[6] The WTO dispute settlement mechanism is by far the most important system of compulsory binding third-party settlement in which the EU participates. Apart from this system, the EU, in the 1990s, started to accept, and in many instances propose, the insertion of arbitration clauses in bilateral trade and cooperation agreements and also in some multilateral contexts such as the 1994 Energy Charter Treaty.[7]

The Union's adherence to the UN Convention on the Law of the Sea (hereinafter UNCLOS) in 1998, whilst not coupled with acceptance of the compulsory jurisdiction of the International Tribunal for the Law of the Sea (hereinafter ITLOS), implies inherent acceptance of compulsory and binding arbitration, as provided for in Part XV of the Convention and its Annex VII.[8] In *Chile v European Community* (the Swordfish case), which was ultimately settled out of court, the EU and Chile nevertheless submitted the dispute to a chamber of ITLOS.[9] In the Atlanto-Scandian Herring Arbitration, on the other hand, the claimant (Denmark, on behalf of the Faroe Islands) initiated arbitration proceedings against the EU under the auspices of the Permanent Court

6 The compulsory and binding WTO system, which covers a broad range of multilateral WTO agreements, is regulated in the Understanding on Rules and Procedures concerning the Settlement of Disputes (Dispute Settlement Understanding – DSU). The EU concluded the 1994 WTO agreements by Council Decision 94/800/EC of 22 December 1994 [1994] OJ L336/1. See for statistics on disputes by country, https://www.wto.org/english/tratop_edispu_by_country_e.htm. See also, e.g. A Rosas, 'Implementation and Enforcement of WTO Dispute Settlement Findings: An EU Perspective' (2001) 4 JIEL 129; F Hoffmeister and P Ondrusek, 'The European Community in International Litigation' (2008) 61 Rev Hellen Dr Intern 205 at 219–22; F Hoffmeister, 'The European Union and the Peaceful Settlement of Disputes' (2012) 11 Chinese J Intl Law para 5; T Krüger, 'Shaping the WTO's Institutional Evolution: The EU as a Strategic Litigant in the WTO' in D Kochenov and F Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (CUP 2014) 169.

7 The Energy Charter Treaty was concluded in 1997, see Council and Commission Decision 98/182/EC, ECSC, Euratom of 23 September 1997 [1998] OJ L69/1. See also Hoffmeister and Ondrusek (n 6) 223. See more generally on arbitration clauses accepted by the EU during the 1990s, Rosas (n 3) 299–308.

8 Council Decision 98/392/EC of 23 March 1998 [1998] OJ L179/1.

9 ITLOS Case No 7. The EU also brought a partly parallel case against Chile before the WTO dispute settlement mechanism, DS 193 – Chile – Measures Affecting the Transit and Importing of Swordfish. Both disputes were discontinued by an Understanding between the EU and Chile concerning the conservation of swordfish stocks in the South-Eastern Pacific Ocean; see the Agreement on the provisional application of the Understanding, [2010] OJ L155/10. See also Rosas (n 3) 301–2; E Paasivirta, 'The European Union and the United Nations Convention on the Law of the Sea' (2015) 38 Fordham Intl L J 1045, 1056–7.

of Arbitration and thus outside the ITLOS framework.[10] This case, too, was settled out of court.

Since the 2000s, mainly in the context of bilateral trade negotiations and agreements, the Union has continued and even stepped up its support for compulsory and binding arbitration mechanisms. It has become almost commonplace to insert arbitration clauses in agreements concluded or draft agreements still being negotiated. As is well known, however, the compatibility of arbitration mechanisms, especially investor–state dispute settlement procedures (hereinafter ISDS), has more recently provoked a great deal of debate and controversy. Doubts have also been expressed as to their compatibility with the EU legal order.[11] Moreover, the accession of the EU to the European Convention of Human Rights (hereinafter ECHR) has been put on hold by the negative opinion of the ECJ on the compatibility of the draft accession agreement with the EU legal order.[12] These and other more recent developments will be addressed in further detail below.

2. Third-party settlement of disputes and the case law of the ECJ: six opinions

2.1 Introductory observations

The basic treaties, the TEU and the Treaty on the Functioning of the European Union (hereinafter TFEU), contain no provisions that explicitly deal with international dispute settlement. Article 218(9) TFEU does regulate the establishment of 'positions to be adopted on

10 *Re Atlantico-Scandian Herring* (*Denmark in respect of Faroe Islands v EU*), PCA Case 2013-30. See also Paasivirta ibid 1058.

11 Of the already quite extensive literature on this subject suffice it to mention in this context SW Schill, 'Luxembourg Limits: Conditions for Investor-State Dispute Settlement under Future EU Investment Agreements' in M Bungenberg, A Reinisch and C Tietje (eds), *EU and Investment Agreements: Open Questions and Remaining Challenges* (Nomos Verlagsgesellschft 2013); C Eckes, 'International Rulings and the EU Legal Order: Autonomy as Legitimacy?' CLEER Papers 2016/2 (Centre for the Law of EU External Relations) 22–6; F Hoffmeister, 'Of Transferred Competence, Institutional Balance and Judicial Autonomy: Constitutional Developments in EU Trade Policy Five Years after Lisbon' in J Czuczai and F Naert (eds), *The EU as a Global Actor: Bridging Legal Practice and Theory at the Turn of the 21st Century – Liber Amicorum Ricardo Gosalbo Bono* (Brill – Nijhoff, forthcoming 2017). Moreover, a pending request for an Opinion (Opinion 2/15) on a new trade agreement to be concluded with Singapore raises the question of competence, in other words whether the exclusive competence for direct investment which follows from Article 207 TFEU also covers the part of the agreement which establishes an ISDS system covering disputes between private investors, on the one hand, and the EU and its Member States, on the other.

12 Opinion 2/13 EU:C:2014:2454.

the Union's behalf' in bodies set up by international agreements when these bodies are called upon to 'adopt acts having legal effects'. That this provision, however, is not applicable to international judicial bodies has recently been confirmed by the ECJ. The Court noted that Article 218(9) concerns the positions to be adopted on behalf of the EU in the context of its participation 'in' the adoption of legal acts and not positions expressed by the EU 'before' an international court, the latter acting independently of the parties (including the EU).[13]

Instead, some guidance may be gleaned from the provisions relating to the EU's own judicial system and the jurisdiction of the CJEU (such as Article 19 TEU and Article 344 TFEU), on the one hand, and the need to ensure respect for international law (Articles 3(5) and 21(1) TEU referred to above) and the conclusion of international agreements (notably Articles 216–219 TFEU), on the other. That said, it is ultimately a matter of interpretation as to what extent, and under what conditions, the EU may engage in international dispute settlement without encroaching upon what is commonly referred to as the autonomy of its legal order and the specific characteristics of its judicial system.

This question has come before the ECJ mainly in the form of requests, under Article 218(11) TFEU, for an opinion of the Court 'as to whether an agreement envisaged is compatible with the Treaties'.[14] Before embarking on a more detailed discussion of six such opinions, as a preliminary, it should be noted that apart from these opinions, the Court has in several judgments dealt with situations that have involved in some form or another the use by the EU of third-party dispute settlement procedures. These cases, however, did not specifically concern the compatibility of such procedures with the EU legal order as such but rather addressed questions such as the consequences of the use of these procedures for the direct effect of agreements or the non-contractual liability of the EU[15] and the question of the representation of the EU before third-party settlement bodies.[16]

---

13 Case C-73/14 *Council v Commission* EU:C:2015:663, paras 62–7.

14 On this procedure in general, see S Adam, *La procedure d'avis devant la Cour de justice de l'Union européenne* (Bruylant 2011). As noted (n 11), a pending request for an Opinion on a new trade agreement to be concluded with Singapore raises the question of competence rather than compatibility, in other words whether the exclusive competence for direct investment which follows from Article 207 TFEU also covers the part of the agreement which establishes an ISDS system.

15 Case C-377/02 *Van Parys* EU:C:2005:121; Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others v Council and Commission* EU:C:2008:476. These two cases concerned the WTO dispute settlement system.

16 Case C-73/14 *Council v Commission* (n 13). This case will be discussed below, section 4.1.

It should be noted that most of the opinions of the ECJ discussed below relate to mixed agreements, that is, agreements concluded not only by the EU but also by its Member States. As the Member States are contracting parties to such agreements, there is a potential for disputes not only between the EU and its Member States, on the one hand, and a third state, on the other, but also between the Member States (intra-EU disputes). Article 344 TFEU, according to which the Member States undertake not to submit a dispute concerning the interpretation or application of Union law to any other method of settlement than those provided for in the treaties, may constitute an obstacle to submitting disputes between the Member States to other than the ECJ; Opinion 2/13 (accession to the ECHR), which will be considered in section 2.6 below, demonstrates that despite the existence of Article 344, the potential of intra-EU disputes may raise concerns about the compatibility of an agreement envisaged with Union law unless the agreement itself explicitly excludes the possibility of such disputes.

2.2 Opinion 1/76

Whilst the CJEU has not had occasion to rule on all relevant aspects of the question of the compatibility of dispute settlement mechanisms with the Union legal order, the very idea of third-party settlement has consistently been endorsed by the ECJ. The first pronouncement to this effect can be found already in Opinion 1/76 relating to a draft agreement establishing a European laying-up fund for inland waterway vessels, in other words at a time when, as noted above, the EU's approach to binding third-party settlement was still one of caution and restraint.[17]

In this Opinion, the ECJ first, more generally and without specifically addressing the common judicial organ (Fund Tribunal) provided for in the draft agreement, observed that the then Community was not only entitled to enter into contractual relations with a third country (in this case Switzerland) but also had the power, 'while observing the provisions of the Treaty, to cooperate with that country in setting up an appropriate organism' and in 'giving the organs of such an institution appropriate powers of decision and for the purpose of defining, in a manner appropriate to the objectives pursued, the nature, elaboration, implementation and effects of the provisions to be adopted within such a framework'.[18]

17 Opinion 1/76 EU:C:1977:63.
18 ibid para 5.

Secondly, turning to the issue of the common judicial organ more specifically, the Court did not depart from this general statement. It did, however, express reservations about the way in which the judicial organ was intended to function, including the ambiguity found in the draft agreement as to whether the right of national courts to request preliminary rulings from the Fund Tribunal was intended to replace, or complement, the corresponding powers of the ECJ. With respect to the latter interpretation, that is, a situation of complementarity, the Court categorically ruled out the possibility, foreseen in the draft agreement, of six members of the Court sitting on the Fund Tribunal. For the Court, this solution could have compromised their impartiality and duties as ECJ judges when questions came up before the ECJ that had already been decided by the Fund Tribunal.[19]

2.3 Opinions 1/91 and 1/92

In Opinion 1/91, which concerned the draft agreement establishing the EEA, the Court had occasion to elaborate upon the limits which the EU legal order imposes for the establishment of third-party mechanisms. It found that the envisaged EEA judicial system – consisting of an EEA Court and an EEA Court of First Instance and involving judges from both the non-EU Contracting Parties and the CJEU – provided for in an initial version of the draft agreement posed a threat to the autonomy of the Community legal order and was incompatible with the Treaty establishing the European Economic Community.

The Court reached this conclusion, *inter alia*, because the jurisdiction conferred on the EEA Court to interpret the expression 'contracting party' in order to determine whether it meant the Community, the Community and its Member States or the Member States was likely to adversely affect the allocation of responsibilities defined in the Community Treaty.[20] Moreover, the Court considered that the EEA Court, in interpreting the EEA Agreement, could determine not only the interpretation of the provisions of that agreement but also the interpretation of the corresponding rules of Community law, given that the EEA Agreement took over an essential part of the rules of the Community legal order.[21] Further, in line with what the Court had said in Opinion 1/76, it objected to the fact that the draft agreement provided for

19 ibid paras 17–22.
20 Opinion 1/91 (n 5) paras 31–6. See also, e.g. T Lock, *The European Court of Justice and International Courts* (OUP 2015) 78–80.
21 Opinion 1/91 (n 5) paras 36–46.

organic links between it and the EEA Court envisaged, as judges of the former were supposed to sit in cases dealt with by the latter.[22] Finally, the draft agreement did not guarantee that the rulings that the ECJ could be requested by the EEA Court to give on the interpretation of EEA provisions which were identical to Community rules were legally binding.[23]

Despite the negative conclusion reached with respect to the judicial system provided for in the initial EEA draft agreement, the Court stated at a general level that an international agreement providing for its own system of courts, including a court with jurisdiction to settle disputes between the contracting parties (and thus between the EU and third states party to the agreement), 'is in principle compatible with Community law'.[24]

Indeed a year later, in Opinion 1/92, the ECJ accepted a new version of the EEA Agreement, *inter alia*, because there were sufficient guarantees to ensure that the new EFTA Court, now clearly separated from the CJEU, could not, by interpreting the EEA Agreement, determine the interpretation of identical Community rules, and that the EEA Joint Committee could not disregard rulings of the CJEU.[25] Moreover, the ECJ did not find a problem of compatibility with the Community legal order of the arbitration procedure provided for in the new version of the EEA Agreement. For the Court, it was sufficient to observe that this mechanism could not interpret the provisions of the EEA Agreement that were identical to provisions of Community law.[26]

2.4 Opinion 1/00

Somewhat similar but not identical questions arose in Opinion 1/00 relating to a proposed agreement between the then-Community and certain non-Member States on the establishment of a European Common Aviation Area.[27] In concluding that this draft agreement did not affect the autonomy of, and was thus compatible with, the EU legal order, the ECJ found (1) that it did not alter the 'essential character of the powers

22 ibid paras 47–53.
23 ibid paras 54–65.
24 ibid paras 39–40, 70 (quotation from para 40).
25 Opinion 1/92 EU:C:1992:189, paras 17–35. These differences between the first and the second versions of the EEA Agreement were also underlined in Opinion 1/00 relating to a proposed agreement between the then Community and non-Member States on the establishment of a common aviation area, EU:C:2002:231, para 6.
26 Opinion 1/92 (n 25) para 36.
27 Opinion 1/00 (n 25).

of the Community and its institutions' nor did it (2), in the context of the need to ensure uniform interpretation, have the effect of 'binding the Community and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of Community law referred to in that agreement' (paras 12–13).

As to the first requirement, the agreement would not affect the allocation of powers between the Community and its Member States, since it was conceived as a Community-only agreement which did not involve the direct participation of the Member States. Moreover, the agreement would not affect the essential character of the powers of the Commission and the Court, as the latter would have preserved its exclusive task of reviewing the legality of Community acts, and its rulings, also in the context of the aviation area, would always have been binding.[28]

As to the second requirement, the Court noted the various safeguards provided for in the proposed agreement to ensure that any of its provisions that were identical in substance to provisions of Community law be interpreted in conformity with Community law, including decisions of the Commission and rulings of the CJEU. In particular, the decisions of the Joint Committee, when acting as a dispute settlement body, would not affect the case law of the Court and the requirement of unanimity would ensure that the Community's representatives on the Joint Committee could block decisions that would conflict with Community law.[29]

2.5 Opinion 1/09

As can be deduced from the discussion above, the ECJ has paid considerable attention to the content and nature of the rules contained in the respective agreement envisaged and has asserted that if these rules are in 'substance identical' to the corresponding rules of EU law, care should be taken to avoid that the interpretations arrived at with regard to the rules of the agreement determine the interpretation of the internal Union rules. In the context of Opinion 1/09 relating to a draft agreement on the creation of a unified patent litigation system, the Court was faced with a system that would have gone further in entailing the direct application of Union rules by an international court.[30] Moreover, this patent court would have replaced the national courts

28 ibid paras 14–26.
29 ibid paras 27–45.
30 Opinion 1/09 EU:C:2011:123.

of the EU Member States and deprived them of their right to request preliminary rulings from the ECJ under Article 267 TFEU.

Given the primordial importance of national courts for the EU judicial system,[31] it should have come as no surprise that the ECJ found the draft agreement incompatible with the Union legal order. The Court did, however, recall its earlier dicta to the effect that mechanisms for third-party dispute settlement in international agreements concluded by the EU are not, in principle, incompatible with Union law[32] and that an international agreement may even affect the powers of the Court itself provided that there are guarantees safeguarding the essential character of those powers.[33]

2.6 Opinion 2/13

In its fairly recent Opinion 2/13, the ECJ famously (for some, infamously) concluded that a draft agreement designed to implement the first sentence of Article 6(2) TEU ('The Union shall accede to the [ECHR]') and Protocol No 8 relating to Article 6(2) TEU was not compatible with Union law.[34] For brevity, it is not possible here to enter into a detailed discussion of Opinion 2/13, given the complexity and particular nature of the constitutional issues involved and the number of problems the Court saw in the draft agreement as it resulted from negotiations between the Commission, on the one hand, and the 47 Member States of the Council of Europe, on the other. What follows are four brief observations that seem particularly relevant in the context of international third-party dispute settlement and its compatibility with the Union legal order.

First, in its Opinion the ECJ reaffirmed its earlier dicta to the effect that acceptance of third-party dispute settlement is not, in principle, incompatible with EU law and that the decisions of international courts may become binding on the Union, including the ECJ. On the other

31 A Rosas, 'The National Judge as EU Judge: Opinion 1/09' in P Cardonnel, A Rosas and N Wahl (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart Publishing 2012) 105; A Rosas, 'The National Judge as EU Judge: Some Constitutional Observations' (2014) 67 SMU L Rev 717.

32 Opinion 1/09 (n 30) para 74. The Court here referred to Opinion 1/91 (n 5).

33 Opinion 1/09 (30) para 76. The Court here referred to Opinion 1/00 (n 25).

34 Opinion 2/13 (n 12). There is an abundance of legal writings on Opinion 2/13. Suffice it to mention here D Halberstam, '"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) 432 Public Law and Legal Theory Research Paper Series, Michigan Law, University of Michigan; P Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?' (2015) 38 Fordham Intl L J 955.

hand, the powers of the ECJ may not in such a case be affected if the 'essential character of those powers' is not safeguarded.[35]

Secondly, it should be noted that there is a close link between the ECHR and Union law concerning fundamental rights, in particular the EU Charter of Fundamental Rights. It is in fact stated in Article 52(3) of the Charter that in so far as the Charter contains rights which 'correspond to' rights guaranteed by the ECHR, 'the meaning and scope of those rights shall be the same as those laid down by the said Convention'. Moreover, accession to the ECHR would make the ECHR itself an integral part of Union law. Many of the more specific problems the ECJ saw in the draft accession agreement has to be seen against this background, and the Opinion, in line with previous case law, observed that any action by the ECHR bodies should not have the effect of binding the EU and its institutions, 'in the exercise of their internal powers' to a particular interpretation of the rules of EU law, including the Charter.[36] In this context, the Court mentioned three specific problems, of which the most important one seems to be the risk that, without appropriate safeguards in the accession agreement, the ECHR case law could interfere with the obligation of Member States, by virtue of the principle of mutual recognition, to presume that fundamental rights have been observed by the other Member States.[37]

Thirdly, the question of mutual recognition is a specific example of a more general concern expressed by the ECJ, namely that the draft accession agreement failed to adequately address the fact that the EU is not a state like the other contracting parties, including its own Member States, but constitutes a distinct supranational order which prevails over the law of its Member States. As the ECHR would require the EU and its Member States to be considered contracting parties not only in their relations with third states but also in their relations with each other, the Convention could, contrary to Union law relating to mutual recognition and mutual trust, require that a Member State check that another Member State has observed fundamental rights to an extent which

35 Opinion 2/13 (n 12) paras 182–3.

36 ibid paras 184–6 (citation from para 184).

37 ibid paras 191–5. The two other problems mentioned were the need to clarify the relationship between Article 53 of the ECHR and Article 53 of the Charter (both are 'without prejudice' clauses relating to other human rights obligations than those contained in the two respective instruments) and Protocol No 16 to the ECHR which may give national courts of EU Member States the right to submit preliminary rulings requests to the ECHR and thus provides for a kind of alternative preliminary ruling procedure, as compared with Article 267 TFEU (which is a 'keystone' of the EU judicial system, ibid para 176), ibid paras 187–90 and 196–9, respectively.

would go beyond what is permissible under Union law.[38] In fact, all but one of the other problems the Court saw in the draft agreement stem from the fact that under the accession arrangements as envisaged, the Member States would remain contracting parties alongside the Union itself. These other problems relate to the allocation of powers between the Union and the Member States and according to the Court, sufficient safeguards were not provided for to exclude the possibility that ECHR bodies could determine, for instance, the allocation of powers between the Union and its Member States.[39]

Fourthly, the only question raised in Opinion 2/13 that did not appear to stem specifically – or at least not exclusively – from the participation of the EU Member States in the ECHR system concerns the powers of the European Court of Human Rights to review the compatibility of EU common foreign and security policy (hereinafter CFSP) matters with the ECHR notwithstanding the fact that the jurisdiction of the CJEU over at least 'certain' acts adopted within the CFSP context is excluded.[40] Citing Opinion 1/09, the ECJ observed that such powers 'cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU'.[41]

3. Recent developments

3.1 State-to-state arbitration

As noted above, the 1990s saw an increased emphasis on third-party dispute settlement mechanisms, notably compulsory and binding arbitration, in the treaty-making policies of the EU. This trend is even more apparent in the 2000s, when so-called state-to-state arbitration clauses started to pop up almost systematically in bilateral trade and

38 ibid e.g. paras 155–8, 192–4. For a recent judgment concerning the right and obligation of the sending Member State to verify that the transfer of a person not interfere with his rights under Article 4 (inhuman and degrading treatment) of the Charter of Fundamental Rights see, e.g. Joined Cases C-404/15 and C-659/15 *Aranyosi and Caldararu* EU:C:2016:198.

39 Opinion 2/13 (n 12) paras 201–14 (on Article 344 TFEU, which excludes litigation between the Member States on matters of EU law), 215–34 (co-respondent mechanism) and 236–48 (so-called prior involvement of the ECJ on matters pertaining to EU law referred to the European Court of Human Rights on which the ECJ has not previously ruled).

40 See ibid para 252. The borderline between 'pure' CFSP matters excluded from the CJEU's jurisdiction and other matters is open to interpretation, however; see, e.g. Case C-439/13 P *Elitaliana v Eulex Kosovo* EU:C:2015:753; Case C-455/14 P *H v Council, Commission and European Union Police Mission (EUPM) in Bosnia and Herzegovina* EU:C:2016:569.

41 Opinion 2/13 (n 12) para 256. On Opinion 1/09 (n 30), see section 2.5 above.

cooperation agreements concluded by the EU, in most cases together with its Member States, of the one part, and a third state, of the other part. It is true that so far, there does not seem to be a single case where these arbitration mechanisms have been actually used in practice. Thus, as far as the EU is concerned, the case law on trade and trade-related matters continues to emanate more or less exclusively from the WTO dispute settlement system. On the other hand, most of the arbitration rules in question have only been in force for a short time or are not yet in force and, in any case, such rules may be of some importance even if disagreements do not actually lead to the establishment of an arbitration panel.[42]

As many of the agreements regulate dispute settlement mechanisms, and arbitration in particular, in quite some detail, including possible annexes on rules of procedure and codes of conduct for members of arbitration panels, it is not possible here to provide an in-depth analysis of all the agreements and the differences that exist between them.[43] However, some general trends, starting with state-to-state arbitration mechanisms concluded by the EU, deserve particular mention.

As to agreements concluded by the EU with European countries, the agreements concluded from 2010 onwards with Balkan countries contain, as far as some of their trade and commercial provisions are concerned, clauses on compulsory and binding state-to-state arbitration, with fairly detailed rules on procedures and compliance. The arbitration panel is to be composed of three arbitrators, who, in the event that the parties are unable to agree, are to be selected by lot from lists established in advance.[44] Arguably to take into account the case law of the ECJ referred to above (the six Opinions), the arbitration

42 Hoffmeister (n 11) mentions that the Commission in one instance considered the possibility of triggering the mediation mechanism under Chapter 14 of the EU–Korea free trade agreement (on this agreement see below at n 54) but this was not pursued after an amicable settlement had been reached.

43 Some comparisons between dispute settlement procedures under regional trade agreements worldwide (and thus not limited to agreements concluded by the EU) can be found in the WTO document 'Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?', Staff Working Paper ERSD-2013/07 of 10 June 2013.

44 Stabilisation and Association Agreements with Montenegro, Council and Commission Decision 2010/224/EU, Euratom of 29 March 2010 [2010] OJ L108/1, Article 130(4) and Protocol No 7; Serbia, Council and Commission Decision 2013/490/EU of 22 July 2013 [2013] OJ L278/1, Article 130(4) and Protocol No 7; Bosnia and Herzegovina, Council and Commission Decision (EU, Euratom) 2015/998 of 21 April 2015 [2015] OJ L164/548, Article 126(4) and Protocol No 6; Kosovo, Article 137(4) and Protocol No 5. Compare the Stabilisation and Association Agreements concluded with Macedonia, Council and Commission Decision 2044/239/EC, Euratom of 23 February 2004 [2004] OJ L84/1, Article 111; Albania, Council and Commission Decision 2009/332/EC, Euratom of 26 February 2009 [2009] OJ L107/165, Article 119, which provide for the submission of disputes to the joint Stabilisation and Association Council.

panels are instructed to apply and interpret the respective agreement in accordance with customary rules of interpretation of public international law while they are prohibited from interpreting the EU *acquis* or from giving decisive weight to the fact that a provision in the agreement is 'identical in substance' to an (internal) EU law provision.[45]

To take a recent example of an agreement with Eastern European countries, the association agreement concluded with Ukraine contains arbitration provisions similar to the one to be found in the above Balkan agreements but with some modifications, such as rules of interpretation instructing the arbitration panel, where an obligation under the agreement is identical with an WTO obligation, to adopt an interpretation which is consistent with interpretations established in rulings of the WTO Dispute Settlement Body.[46] Moreover, this agreement also contains provisions on conciliation (concerning urgent energy disputes), mediation (on certain trade matters) and submission of disputes other than trade and trade-related matters to the joint Association Council.[47] Arguably again to avoid problems of compatibility with EU law as raised by the ECJ, the agreement provides that in the event of regulatory approximation by reference to provisions of EU law, such disputes raising a question of interpretation of EU law shall not be decided by an arbitration panel but the panel shall instead request that the CJEU give a ruling. This provision was considered necessary in view of the close links between EU single market law and the agreement, which, in providing market access to the EU's market, is based on the idea of regulatory approximation.[48]

The association agreements with some Mediterranean countries form another group of agreements involving third-party settlement for the settlement of trade disputes. While the principal agreements contain a brief clause on submitting any disputes to the joint Association Council, and in the event of the Council not being able to settle the dispute via arbitration, the Commission in 2006 was authorized to negotiate additional instruments specifically dealing with the settlement of trade disputes. These instruments, which in most cases take the form of protocols, contain fairly detailed rules on mediation and arbitration.

45 See, e.g. Article 13 of Protocol No 6 to the agreement concluded with Kosovo (n 44).
46 Council Decision 2014/295/EU of 17 March 2014 on the signing and partial provisional application of the Ukraine Association Agreement [2014] OJ L161/1, notably Articles 306–13, 318–26. See also the agreements with Georgia and Moldova, [2014] OJ L261/4 and L260/4, respectively.
47 See notably Articles 309, 327–36, 477. See also Article 301 on the use of a group of experts to recommend solutions in matters of trade and sustainable development.
48 Article 322. See E Paasivirta, 'European Union and Dispute Settlement: Managing Proliferation and Fragmentation' in M Cremona, A Thies and RA Wessel (eds), *The European Union and International Dispute Settlement* (Hart Publishing, forthcoming 2017).

In the case of the latter, both the arbitration procedure and the provisions on compliance are similar if not identical to the ones to be found in European agreements discussed above and are supplemented by annexes on Rules of Procedure and Code of Conduct for arbitrators and mediators.[49] Arbitration panels are instructed to interpret the trade provisions in accordance with customary rules of interpretation of public international law.[50] Express wording that the panel is precluded from interpreting (internal) EU law is not included but has apparently been considered inherent in the nature of the association agreements.

In the same vein, agreements with some Latin American countries contain, with respect to trade and trade-related parts of the respective agreement, rules primarily on arbitration. While they are not very different from the arbitration procedures described above, they are somewhat more heterogenous;[51] at least one agreement instructs the arbitration panel not only to interpret the agreement in accordance with customary rules of public international law but also, where provision of the trade part is identical to a WTO provision, to adopt an interpretation that is consistent with interpretations established by the WTO Dispute Settlement Body.[52] The dispute settlement provisions, and arbitration rules in particular, contained in recent agreements concluded or about to be concluded with different groups of African, Caribbean and Pacific countries (partly replacing the Cotonou Agreement of 2000), form a somewhat more homogenous category but follow by and large the general pattern described above.[53]

Additionally, the dispute settlement provisions of the Free Trade Agreement with the Republic of Korea, which entered into force in 2015, provide for third-party settlement mechanisms and arbitration in

49 Protocols with Tunisia, [2010] OJ L40/76; Lebanon, [2010] OJ L328/21; Egypt, [2011] OJ L138/3; Jordan, [2011] OJ L177/3; Agreement with Morocco, [2011] OJ L176/1. See also Articles 61–80 of the Partnership and Cooperation Agreement with Iraq, [2012] OJ L204/20.

50 Article 17 in each instrument.

51 Decision No 2/2001 of the EU–Mexico Joint Council of 27 February 2001 implementing, *inter alia*, Article 50 (dispute settlement) of the Economic Partnership, Political Coordination and Cooperation Agreement, [2001] OJ L70/7, Articles 37–43; Association Agreement with Chile, [2002] OJ L352/3, Articles 181–9; Association Agreement with Central America, [2012] OJ L346/1, Articles 308–37 (containing also detailed rules on mediation for non-tariff measures); Trade Agreement with Colombia and Peru, [2012] OJ L354/1, Articles 298–323.

52 Article 322(2) of the Association Agreement with Central America (n 51).

53 Economic Partnership Agreements with CARIFORUM States, [2008] OJ L289/3, Articles 202–23; SADC EPA States, [2016] OJ L250/3, Articles 75–96; Interim Agreements with the Pacific States, [2009] OJ L272/1, Articles 47–67; Central African Party (Cameroon), [2009] OJ L57/2, Articles 66–88; Commission Proposals for Economic Partnership Agreements with West African, ECOWAS and the UEMOA, COM(2014) 576

particular, with respect to any dispute between the parties concerning the application of the agreement.[54] The arbitration rules are broadly similar to the general pattern. In line with what is provided for in the agreements with Ukraine and Central America mentioned above, the Korean agreement instructs the three-member arbitration panel to adopt, in the event of an obligation under the agreement being 'identical' to a WTO obligation, an interpretation 'which is consistent' with any relevant interpretation established by the WTO Dispute Settlement Body.[55]

While the above arbitration mechanisms have been provided for in bilateral agreements, and have in most cases been limited to trade and trade-related matters, the EU may also become party to disputes under third-party settlement mechanisms to be found in multilateral agreements as well as non-trade bilateral agreements. The WTO, Energy Charter Treaty and UNCLOS dispute settlement regimes have already been referred to above. While it is not possible here to provide a comprehensive picture of other, more recent agreements, it should be mentioned that the Air Transport Agreement, signed by the EU and its Member States, of the one part, and the USA, of the other part, in 2007, provides an example of a bilateral arbitration procedure. This 'Open Skies' Agreement provides for the possibility of submitting to compulsory arbitration disputes which have not been settled by the Joint Committee set up under the agreement.[56] At the time of writing, the European Commission has decided to submit a dispute concerning the access of Norwegian Air to the US market to arbitration.[57]

---

final, Articles 62–86; East African Community Partner States, COM(2016) 64 final, Articles 109–27. Whilst these agreements, in line with the general pattern, provide, in the case of disagreement, for the selection of arbitrators by lot, the Interim Agreement with Eastern and Southern Africa States, which contains a much more succinct arbitration clause, provides that in case of disagreement the arbitrator(s) shall be appointed by the Secretary General of the Permanent Court of Arbitration, [2012] OJ L111/2, Article 55.

54 Council Decision 2011/265/EU of 16 September 2010 on the signing and provisional application of the agreement, [2011] OJ L127/1, Articles 14.1–14.20. The full agreement entered into force in December 2015, [2015] OJ L307/1. See also Decision No 2 of the EU–Korea Trade Committee of 23 December 2011 on the establishment of a list of arbitrators, [2011] OJ L58/13 (as with most other agreements, there are 15 persons on the list as potential arbitrators, five each proposed by the two parties and five agreed as potential chairpersons).

55 ibid Article 14.16.

56 See Article 19 of the Air Transport Agreement between the European [Union] and its Member States, on the one hand, and the USA, on the other hand, [2007] OJ L134/4, which contains some basic provisions concerning the composition (as a rule, three arbitrators) of the tribunal, procedures and enforcement but leaving considerable room for the parties to agree otherwise.

57 Letter from Commissioner Violeta Bulc to Transport Secretary Anthony Foxx of 22 July 2016, JS/ARES(016) 3906721. J Posaner, 'Norwegian Airline Clouds Open Skies', *Politico* 31 August 2016 http://www.politico.eu/article/norwegian-airline-nai-ireland-us-open-skies.

3.2 Investor-to-state arbitration

While state-to-state arbitration and judicial settlement constitute well-established third-party mechanisms to settle disputes under public international law, it is more exceptional that private parties are given standing as parties before such bodies. Apart from some regional human rights courts such as the European Court of Human Rights (to which the EU is not a contracting party), one such instance is the right, provided for in numerous bilateral investment treaties (hereinafter BITs) and some other agreements dealing with investment protection, of private investors to initiate arbitration procedures against a state that has allegedly violated the agreement in question.[58] Such ISDS procedures may also be grounded in contracts and the applicable law is not necessarily confined to public international law.[59]

While ISDS mechanisms began to have practical importance already in the 1960s, and came to concern also the EU as the Union concluded the Energy Charter Treaty in 1994, and while a considerable number of BITs providing for ISDS have been concluded by EU Member States, this form of dispute settlement has only recently become an important issue for the Union as such.[60] This development should be seen against the background that the Treaty of Lisbon of 2007, which entered into force in 2009, added 'foreign direct investment' to the provision of the TFEU (Article 207) which deals with the common commercial policy, an area in which, according to Article 3(1) TFEU, the Union has exclusive competence.[61]

In 2010, the European Commission issued a Communication advocating the use of ISDS and on the proposal of the Commission,

58 According to M Bungenberg et al, 'Chapter I: General Introduction to International Investment Law' in M Bungenberg et al (eds), *International Investment Law: A Handbook* (Nomos Verlagsgesellschaft 2015) 1, there are 'by now 3,200 bi- and multilateral investment treaties as well as free trade agreements which have investment chapters' (at 1) while 'the total number of arbitrations based on investment treaties has exceeded 600' (at 4).

59 ibid 2, 5.

60 See, e.g. Bungenberg, Reinisch and Tietje (n 11), notably articles by C Brown and I Naglis (at 17) and F Hoffmeister and G Ünüvar (57, 75–80); Bungenberg et al (n 58), notably contributions by J Griebel (at 304), M Bungenberg and S Hobe (1602) and A Reinisch (1884); M Burkstaller, 'Investor–State Arbitration in EU International Investment Agreements with Third States' (2012) 39 LIEI 207; A Reinisch, 'The European Union and Investor–State Dispute Settlement: From Investor–State Arbitration to a Permanent Investment Court', Centre for International Governance Innovation (CIGI), Investor–State Arbitration Series, Paper No 2 (March 2016).

61 These developments have also called into question the legality of the existing BITs concluded by EU Member States with third countries and in some cases, Member States have been condemned for maintaining provisions in such agreements found to be incompatible with Union law, Cases C-205/06 *Commission v Austria* EU:C:2009:118; C-249/06 *Commission v Sweden* EU:C:2009:119; *Commission v Finland* EU:C:2009:715.

the European Parliament and the Council in 2014 adopted a regulation establishing a framework for managing financial responsibility and the allocation of responsibilities for the conduct of disputes between the Union and its Member States.[62] In line with these developments, the Commission has pursued the inclusion of a chapter on investment, including ISDS mechanisms, in new trade agreements negotiated with Canada, India, Japan, Singapore, Vietnam and the USA. The agreement with Canada (Comprehensive Economic and Trade Agreement – hereinafter CETA) has already advanced to Council decisions on signature and provisional application.[63] As there is disagreement between the Council and the Commission as to whether the agreement with Singapore should be a Union only or a mixed agreement, the draft agreement, as far as the question of competence (exclusive or not) is concerned, has been submitted by the Commission to the ECJ for an Opinion.[64]

As the Commission accepted that CETA be concluded as a mixed agreement, it was so decided and thus its conclusion requires the separate participation of the Member States (and for Belgium, also its regions and communities). This requirement already affected the signature and provisional application of the agreement, which could only be secured after the German Constitutional Court had rejected a request for provisional measures to bar German participation,[65] the Walloon region, after difficult negotiations, had given a conditional consent to Belgian participation and a joint interpretative instrument

---

A Regulation of 2012 has introduced some transitional arrangements which provide that Member States may, under certain conditions, be authorized to maintain, and even to conclude, investment agreements; see below (n 97). On the common commercial policy as an exclusive competence see, generally, A Rosas, 'EU External Relations: Exclusive Competence Revisited' (2015) 38 Fordham Intl L J 1073, 1079–83.

62 Communication from the Commission, COM(2010) 343 final 'Towards a Comprehensive European International Investment Policy'; Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014, [2014] OJ L257/121.

63 See the Commission proposals COM(2016) 470 final of 5 July 2016; COM(2016) 443 final of 5 July 2016. Signature took place on 30 October 2016. On the Canada Agreement more generally, see, e.g. C Deblock, J Lebullenger and S Paquin (eds), *Un nouveau point sur l'Atlantique. L'accord économique et commercial global entre l'Union européenne et le Canada* (Presses de l'Université du Québec 2015).

64 Opinion 2/15. The oral hearing took place on 12–13 September 2016. The request for an Opinion is limited to the question of competence (should the agreement be concluded by the Union alone or also by the Member States?) and in the context of this Opinion, one of the issues is whether the Union exclusive competence under Article 207 TFEU covers also the part of the investment chapter establishing an ISDS mechanism. See also above (n 11 and n 14).

65 On 13 October, the German Constitutional Court rejected a request for provisional measures which would have prevented the German representatives in the EU Council from voting in favour of a Council decision on the signature and provisional application of the Agreement, judgment of 13 October 2016, 2 BvE 3/16.

and a number of statements had been added to accompany signature and provisional application.[66]

As a response to the public criticism of ISDS mechanisms, *inter alia*, for lack of sufficient guarantees of impartiality and transparency, the Commission, in 2014–15, launched the idea of a more permanent mechanism with sufficient guarantees, including the possibility of appeal.[67] Whilst the draft Singapore agreement is based on a more classic arbitration mechanism, CETA now envisages the creation of a permanent investment tribunal, with a possibility for appeal to an appellate tribunal,[68] a solution also proposed by the Commission for the Transatlantic Trade and Investment Partnership (hereinafter TTIP) negotiated with the USA.[69]

Without going into the details concerning the constitution and functioning of the tribunal and the appellate tribunal, it should be noted that CETA envisages a tribunal consisting of 15 members appointed by the CETA Joint Committee (and thus the investors who submit claims would be excluded) for five- or six-year terms. Whilst the tribunal would not have exclusive jurisdiction, an investor could only submit a claim if any existing proceedings before domestic or international courts are withdrawn or discontinued and a right to initiate new such proceedings waived.

Various provisions have been designed with the obvious intent of avoiding the problems raised in the ECJ Opinions referred to in section 2 above. The tribunal would thus be required to apply and interpret the agreement in accordance with international law, would not have jurisdiction to determine the legality of a measure under domestic law (including Union law) and would be instructed to follow the prevailing interpretation given to domestic law by the relevant domestic courts while any meaning given to domestic law by the tribunal would not be binding on a domestic court (including the CJEU). Moreover, an investor who intends to initiate a claim against the EU or a Member

66 See, e.g. Centre for European Policy Studies (CEPS), 'CETA's Signature: 38 Statements, a Joint Interpretative Instrument and an Uncertain Future', 31 October 2016 www.cepts.eu/publications, consulted on 4 November 2016.

67 See, e.g. Commission Concept Paper of 7 May 2015 http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

68 See Section F of the investment part (Articles 8.18 and following) of the Agreement.

69 See e.g. L Pantaleo, W Douma and T Takács (eds), 'Tiptoeing to TTIP: What Kind of Agreement for What Kind of Partnership?', CLEER Papers 1/2016 (Centre for the Law of EU External Relations 2016); European Federation for Investment Law and Arbitration (EFILA), Task Force Paper regarding the proposed International Court System (ICS) (Brussels 2016); Inge Govaere, 'TTIP and Dispute Settlement: Potential Consequences for the Autonomous EU Legal Order', College of Europe, Department of European Legal Studies, Research Paper 01/2016.

State must first deliver a notice requesting a determination by the EU of the proper respondent. It should be mentioned that the latter requirement is also expressed in a Statement that the then–European Community submitted to the Energy Charter Secretariat inviting investors wishing to initiate investor-to-state proceedings under the Energy Charter Treaty to seek clarification from the Community and its Member States as to who among them should be the proper respondent party.[70] It remains to be seen whether these safeguards are sufficient to exclude the problems dealt with in the earlier Opinions of the Court, such as the risk that an international body could at least indirectly take a position on the allocation of competence between the Union and its Member States.

As is well known, the debate about the political feasibility as well as the compatibility of ISDS mechanisms with the EU legal order continues and the possibility of an investment court system has not put the question to rest.[71] The Council decision on provisional application of CETA excludes its ISDS mechanism from provisional application and this mechanism will only enter into force if CETA will be finally concluded by the Union and ratified by the Member States.[72] Instead, whilst at the time of writing, the European Parliament has rejected a proposal to request an Opinion from the ECJ, Belgium, at the insistence of the Walloon region, will probably be requesting the Court to give an Opinion on the compatibility of the CETA ISDS mechanism with the Treaties. And as noted above, the ISDS mechanism provided for in the agreement with Singapore is already, in terms of competence, considered in Opinion 2/15 pending before the Court.

4. Issues of representation, responsibility and competence

4.1 Agreements concluded by the EU

The above discussion has concerned the involvement of the EU in international dispute settlement procedures in its capacity of a subject of

70 See, e.g. Schill (n 11) 49–50.

71 Schill (n 11) 54, seems to think that ad hoc arbitration tribunals pose less of a risk than permanent courts for the autonomy of the EU legal order as permanent bodies tend to pursue 'an institutionally backed power strategy that could be in opposition to the CJEU's role as the EU's constitutional court'. See also Govaere (n 69) 7 ('opting for a public Court system instead of private arbitration is not, in itself, a guarantee of compatibility with the autonomous EU legal order'); Eckes (n 11) 26–31.

72 For the text of the Council decision see Council document 10974/16 of 5 October 2016.

international law, without considering the question of which organ of the Union should represent it before dispute settlement bodies or what is the role, if any, of EU Member States in this regard. To start with the question of *representation*, it has, at times, been a source of controversy between the Commission and the Council, the latter insisting that the EU position to be presented before dispute settlement bodies be approved by the Council, in a way comparable to the conclusion of international agreements.

The ECJ has in its earlier case law touched upon some aspects of this question without having had to face the problem head on. First of all, the Court, faced with a challenge to the Commission's right to commence legal proceedings before a national court of a third state, held that Article 335 TFEU (ex-Article 282 TEC), which provides that in each of the Member States, the Union may, *inter alia*, be a party to legal proceedings and be '[t]o this end' represented by the Commission, is, despite being restricted to Member States on its wording, 'the expression of a general principle'.[73] Second, the Court, in the context of an infringement case brought against a Member State, observed that the Commission 'is responsible for ensuring application of the Treaty and, accordingly, compliance with international agreements concluded by the Community'.[74] Third, with respect to the Commission's duty to ensure the correct implementation of an international agreement in relation to third states (in that case the Association Agreement with Turkey), the Court has observed that 'it follows from Article [17 TEU] that the Commission, as guardian of the [TFEU] and the agreements concluded under it, must ensure the correct implementation by a third country of the obligations it has assumed under an agreement concluded with the [Union], using the means provided for by the agreement or by the decisions taken pursuant thereto'.[75]

Fourthly, and more recently, the Court held that the Commission could, without obtaining the prior approval of the Council, submit a written statement on behalf of the EU to the ITLOS on the request for an advisory opinion made by a sub-regional fisheries commission.[76]

73 Case C-131/03 *Reynolds Tobacco and Others v Commission* EU:C:2006:541, para 94.
74 Case C-61/94 *Commission v Germany* EU:C:1996:313, para 15.
75 Case C-204/07 *PCAS v Commission* EU:C:2008:446, para 95. See also Joined Cases T-186/97 et al *Kaufring AG and Others v Commission* EU:T:2001:133, paras 270–1, in which the then Court of First Instance (now the General Court) held that the Commission has a duty to ensure the correct implementation by a third country of the obligations it has contracted to fulfil under an agreement concluded by the Union, 'using the means provided for by the agreement or by the decisions taken pursuant to it'. See also Rosas (n 3) 317–20.
76 Case C-73/14 *Council v Commission* (n 13). See also Paasivirta (n 9) 1058–60, who describes the relevant advisory opinion case before ITLOS (Case No 21) and (n 91) below.

Whilst the Council and the Member States argued that Article 335 TFEU concerns proceedings before national courts only, the Court repeated its earlier statement that this provision, despite its wording, expresses a general principle and that it provides a basis for the Commission to represent the Union before ITLOS.

As to the argument that the matter was covered by Article 218(9) TFEU concerning positions to be adopted on the Union's behalf in bodies set up by international agreements (which requires a decision of the Council), the Court held that this procedure was not applicable to the determination of a position to be expressed on behalf of the Union before an international judicial body requested to give an advisory opinion, 'the adoption of which falls solely within the remit and responsibility of the members of that body, acting, to that end, wholly independently of the parties'.[77] As regards, finally, the argument that the Commission was prevented from doing what it did because of Article 16(1) TEU, which refers to the task of the Council to 'carry out policy-making … functions as laid down in the Treaties', the Court considered that the purpose of the statement submitted to the tribunal 'was … not to formulate a policy' in relation to fishing, but, on the basis of an analysis of the relevant provisions of international and EU law, to present 'a set of legal observations' aimed at enabling the tribunal to give an informed advisory opinion on the questions put to it.[78]

In the light of this judgment, and the earlier case law referred to above, it would seem that Article 218 TFEU is about *norm-creation*, be it in the form of concluding international agreements or establishing a Union position on decisions to be taken by international bodies, not about the interpretation and application of existing norms.[79] The latter function is part of the Commission's prerogatives, as stated in Article 17(1) TEU (the Commission 'shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them', 'shall oversee the application of Union law under the control of the Court of Justice' and shall, as a general rule, 'ensure the Union's external representation') and Article 335 TFEU. Actual practice seems generally to be in line with this approach, as it is the Commission that represents the EU for example before the WTO dispute settlement

77 Case C-73/14 (n 13) para 66.
78 ibid para 71.
79 In ibid para 70, the Court observed that the Commission statement 'consisted in suggesting answers to the questions raised … by setting out the manner in which the [EU] envisaged the interpretation and application' of three agreements relating to fishing, including the UN Convention on the Law of the Sea.

mechanism and also before other dispute settlement bodies such as ITLOS.[80] It is, on the other hand, customary that the Commission consults with, or at least informs, the Member States before initiating and conducting dispute settlement procedures and there seems to be a legal obligation to engage, at least as a general rule, in such practices.[81]

The situation is more complicated in the case of a *mixed* agreement involving also some or all Member States as contracting parties. At the level of representation, it is often possible to ensure a certain unity of representation through the Commission. To mention some examples, in the WTO dispute settlement context the Commission is always in the lead, even in cases brought initially by a third state against one or more EU Member States.[82] This was also practice before the Treaty of Lisbon, when there was also in the WTO context more room for areas of shared competence. With Article 207 TFEU, the situation has become more straightforwardly one of the Union being the sole proper respondent.[83] In a recent Regulation laying down Union procedures in the field of the common commercial policy it is provided that where the Union, as a result of complaints or requests submitted to it pursuant to the Regulation, follows international consultation or dispute settlement procedures, 'decisions relating to the initiation, conduct or termination of such procedures shall be taken by the Commission' (but the Commission shall keep Member States informed).[84]

---

80 See, e.g. Rosas (n 3) 315–20; F Hoffmeister, 'Of Presidents, High Representatives and European Commissioners: The External Representation of the European Union Seven Years after Lisbon' (2017) 1 *Europe and the World – A Law Review,* forthcoming.

81 See, e.g., Case C-73/14 *Council v Commission* (n 13) paras 86–8, where the Court stated that in view of the obligation of loyal cooperation, the Commission must, before presenting a position in the name of the Union before an international court, consult the Council. Compare Article 14(1) of Regulation (EU) 2015/1843; see (n 84) below.

82 Some cases have been initially brought only against one or more Member States (such as DS83 – *Denmark* and DS86 – *Sweden – Measures Affecting the Enforcement of Intellectual Property Rights*; DS125 – *Greece – Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*) while some cases have been brought either against both the EU and its Member States or only against the EU but citing measures taken by Member States (e.g. DS174 – *EC – Trademarks and Geographical Indications*; DS 316 – *EC and Certain Member States – Large Civil Aircraft*; DS347 – *EC and Certain Member States – Large Civil Aircraft (2nd Complaint)*.

83 On EU practice in this respect see, e.g. Rosas (n 3) 297–9; Hoffmeister and Ondrusek (n 6) 219–22; Hoffmeister (n 6) paras 465–540. See, however, the panel report of 30 June 2010 in DS316 – *EC and Certain Member States – Large Civil Aircraft*, at paras 7.169–7.177, where the EC exceptionally requested – and was denied – an explicit ruling on it being the sole proper respondent.

84 Article 14(1) of Regulation (EU) 2015/1843 of the European Parliament and of the Council of 6 October 2015 laying down Union procedures in the field of the common commercial policy in order to ensure the exercise of the Union's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, [2015] OJ L272/1. See also Brown and Naglis, in Bungenberg, Reinish and Tietje (n 11) 24.

In some other instances too, there are explicit provisions in secondary law on EU representation. In the Council decision concluding the 1995 Convention on Straddling Fish Stocks, which is a mixed agreement, it is stated that where the Union initiates a dispute settlement procedure as provided for by the agreement, 'it shall be represented by the Commission', which, however, before it takes any action shall consult the Member States (but taking into account binding procedural time limits).[85] In the same vein, the decision concluding the Air Transport Agreement between the EU and its Member States, on the one hand, and the USA, on the other hand, of 2007 provides that 'the Commission shall represent the [Union] and the Member States in arbitration proceedings' under the agreement.[86]

Another example is provided by the above-mentioned new Regulation establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement, which includes fairly detailed rules on not only the apportionment of financial responsibility between the Union and a Member State but also the conduct and settlement of disputes.[87] If the dispute concerns treatment afforded by the Union institutions, bodies, offices or agencies, the Union shall act as sole respondent (arguably as represented by the Commission). If, on the other hand, the dispute concerns treatment afforded by a Member State, that Member State shall act as a respondent except where the Commission, in certain situations, has decided that the Union is to act as a respondent. With regard to the latter category of disputes, there are rules on cooperation between the Commission and the Member State concerned, including the possibility of joint delegations to the proceedings.[88]

As this Regulation demonstrates, there is a close link between respondent status and *responsibility* – and, one may add, between responsibility and *competence*.[89] This link has also been made explicit

85 Council Decision 98/404/EC of 8 June 1999, [1999] OJ L189/14.

86 Decision of the Council and the Representatives of the Member States of the European Union, meeting within the Council of 27 April 2007 on the signature and provisional application of the agreement, [2007] OJ L134/1, Article 4(1), referring to Article 19 of the agreement (arbitration) (see also n 56 above).

87 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, [2014] OJ L257/121. On the preparatory work leading up to this Regulation see Brown and Naglis, in Bungenberg, Reinish and Tietje (n 11) 29–34.

88 See Articles 4–12 of Regulation 912/2014.

89 On the apportionment of financial responsibility under Regulation 912/2014 see also E Paasivirta, 'The Responsibility of Member States of International Organizations: A Special

in Annex IX to UNCLOS, which contains rules on declarations, notifications and communications of information relating to the apportionment of competence between an international organization and its Member States and the implications of such apportionment for responsibility and liability, including a rule that failure to respond to requests for information may lead to joint and several liability of the EU and a Member State.[90] In the above-mentioned Advisory Opinion of ITLOS relating to flag state responsibility for fishing activities conducted in the exclusive economic zone of states other than the flag state, the tribunal held, *inter alia*, that in cases where an international organization (read the EU), in the exercise of its exclusive competence, has concluded a fisheries access agreement with a third state, which provides for access by vessels flying the flag of one of its Member States to fish in the exclusive economic zone of the third state, 'the obligations of the flag State become the obligations of the international organization'.[91]

4.2 Agreements concluded by the Member States

The above considerations have concerned dispute settlement procedures in the context of international agreements to which the EU, or the EU and its Member States, are contracting parties, and with regard to disputes between them and third states. It remains to say a few words about agreements concluded by EU Member States to which the Union itself is not a party but which trigger disputes raising issues of Union law or Union competence.

Despite the broad treaty-making powers of the Union (see Article 216 TFEU), there are a number of important agreements, including those establishing international organizations, to which it is not a party, often because these agreements and organizations are open to states only.[92] When disputes relating to such agreements arise which

Case for the European Union' (2015) 12 Intl Org L Rev 448, 459–60. On responsibility with respect to mixed agreements more generally see, e.g. PJ Kuijper, 'International Responsibility for EU Mixed Agreements' in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited: The EU and Its Member States in the World* (Hart Publishing 2010) 208; J Heliskoski, 'EU Declarations of Competence and International Responsibility' in M Evans and P Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart Publishing 2013) 189.

90 Articles 4–7 of Annex IX (Participation by International Organizations) to UNCLOS. See also Paasivirta (n 9) 1048–51.

91 Case No 21, Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, 2 April 2015 www.itlos.org/en/cases/list-of-cases, case-no-21/, para 172. See also Paasivirta (n 9) 1058–60; Paasivirta (n 89) 457–9, and (n 76) above.

92 See, generally, A Rosas, 'The Status in EU Law of International Agreements Concluded by EU Member States' (2011) 34 Fordham Intl L J 1304.

are of relevance for Union law, there may be an interest for the Union to participate, in accordance with available mechanisms. This is why the Commission has, for instance, presented *amicus curiae* briefs to the European Court of Human Rights;[93] such a possibility is nowadays also open with respect to the International Court of Justice although the Commission has, so far, never submitted any brief to this Court.[94] Especially in areas of exclusive EU competence, the participation of a Member State in dispute settlement for instance before the International Court of Justice may raise issues of compatibility with Union law.[95] Also the mere existence of Member States' agreements with third states may in the case of exclusive Union competence be incompatible with Union law but such agreements may, under certain conditions, be 'saved' by Article 351 TFEU if they have been concluded before the Member State in question became a member of the EU.[96]

As to BITs concluded by Member States with third states, a Regulation provides for transitional arrangements which allow, under certain conditions, the Member States to maintain, and even to conclude, such investment agreements but imposes, on the other hand, obligations relating, *inter alia*, to dispute settlement.[97] A Member State shall inform the Commission of any request for dispute settlement lodged under the auspices of the BIT and shall seek the agreement of the Commission before activating any dispute settlement mechanism; in both cases, there should be cooperation between the Member State and the Commission and this may include the participation in the procedure by the Commission.[98]

Finally, as already noted in section 2.1 above, the question of *intra-EU disputes* between Member States raises, especially in the context of mixed agreements, a host of problems which cannot be analysed here

93 See, e.g. Hoffmeister (n 6) at para 22.
94 ibid at paras 13–15.
95 Hoffmeister, ibid para 16, refers to a case initiated in 2009 by Belgium against Switzerland on the interpretation and application of the Lugano Convention of 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters, a convention which the ECJ in 2006 had found to fall under EU exclusive competence (Opinion 1/03 EU:C:2006:81). Belgium, 'in concert with the Commission of the European Union', later withdrew the case, ICJ, Order of 5 April 2011.
96 For an example of an agreement concluded by a Member State which according to the ECJ it could continue to invoke despite its possible incompatibility with Union law see Case C-264/09 *Commission v Slovakia* EU:C:2011:580. On Article 351 TFEU more generally and relevant case law see Rosas (n 92) 1321–4.
97 Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, [2012] OJ L351/40. See also F Hoffmeister and G Ünüvar, 'From BITS and Pieces towards European Investment Agreements' in Bungenberg, Reinisch and Tietje (n 11) 57, 80–3 and (n 61) above.
98 Article 13 of Regulation 1219/2012.

in detail. Suffice it to note that Article 344 TFEU, according to which the Member States undertake not to submit a dispute concerning the interpretation or application of Union law to any other method of settlement than those provided for in the Treaties, may constitute an obstacle to submitting disputes between the Member States relating to mixed agreements to mechanisms set up under these agreements, in so far as the dispute relates to provisions where there is a Union competence.[99]

This question has become particularly important with respect to intra-EU investor-to-state disputes relating not only to the Energy Charter Treaty (a mixed agreement) but also to BITs concluded between Member States. As the EU has not been a party to these disputes, and as the arbitration tribunals have not considered themselves in a position to request preliminary rulings from the ECJ,[100] the Commission has had to settle for the presentation of *amicus curiae* briefs arguing, *inter alia*, that the arbitration tribunal concerned should have declared that it lacked jurisdiction. While these tribunals have not been convinced by such arguments,[101] the Commission has also initiated infringement actions against Member States for failure to terminate intra-EU BITs.[102] Moreover, in the *Micula* case, now pending before the EU General

99 The leading case with respect to mixed agreements is, of course, Case C-459/03 *Commission v Ireland* ('*Mox Plant*') EU:C:2006:345, in which Ireland was condemned for having initiated an arbitration procedure against the United Kingdom on matters partly falling under UNCLOS.

100 In most cases, arbitration tribunals have not been recognized as 'courts or tribunals' under Article 267 TFEU; see, e.g. Case 102/81 *Nordsee* EU:C:1982:107, paras 10–12; Case C-126/97 *Eco Swiss* EU:C:1999:269, para 34. There is an ongoing discussion, however, as to whether investment tribunals, in particular, could not be viewed differently. Suffice it to mention here the Opinion of 17 March 2016 of Wathelet AG, para 59 fn 34, in Case C-567/14 *Genentech* EU:C:2016:526, who, in referring to J Basedow, 'EU Law in International Arbitration: Referrals to the European Court of Justice' (2015) 32 J Intl Arb 367, states that the arbitral tribunals acting under the International Centre for Settlement of Investment Disputes (ICSID) 'could be regarded' as being able to refer questions to the ECJ for a preliminary ruling, and P Paschalidis, 'Arbitral Tribunals and Preliminary References to the EU Court of Justice' (2016) 32 Arbitration International (Advance Access published 31 July 2016), doi: 10.1093/arbint/aiw026.

101 An example is provided by the *Eureko v Slovak Republic* Arbitration, Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010, PCA Case No 2008-13. This case, under the changed name of *Achnea v Slovak Republic*, was subsequently reviewed by a German court, which ultimately submitted the conformity of the arbitration award with EU law to the ECJ; see below (n 104). In some cases, the Commission participation may have influenced the substantive outcome of the case; see Hoffmeister and Ünüvar (n 97) 60.

102 See, e.g. Paasivirta (n 48) paras 9–12. See also Commission Press Release of 18 June 2015: 'Commission asks Member States to terminate their intra-EU bilateral investment treaties'. See, more generally, e.g. A Dimopoulos, 'The Validity and Applicability of International Investment Agreements between EU Member States under EU and International Law' (2011) 48 CML Rev 63; S Hindelang, 'Circumventing Primacy of EU Law and the CJEU's Monopoly by Resorting to Dispute Settlement Mechanisms Provided for Inter-se Treaties?: The Case of Intra-EU Investment Arbitration' (2012) 39 LIEI 179; S Miron, 'The Last Bite of BITs: Supremacy of EU Law versus Investment Treaty Arbitration' (2014) 20 ELJ 332.

Court, the Commission adopted a decision prohibiting Romania from complying with an arbitral award rendered under a Swedish–Romanian BIT, holding that paying compensation to the private investors would amount to state aid incompatible with the internal market.[103]

At the time of writing, there is also a request for a preliminary ruling from a German court pending before the ECJ and concerning the enforcement of an arbitral award rendered by an arbitration tribunal constituted under a Dutch–Slovakian BIT.[104] The national court asks whether the application of an investor-to-state arbitration provision in an intra-EU BIT would be contrary to Articles 344, 267 or 18 TFEU.

5. Concluding remarks

As an article on EU and international dispute settlement published by the present author in 2003 demonstrated, the 1990s saw a heightened interest of the EU in international mechanisms for the third-party settlement of disputes.[105] These developments should no doubt be seen against the background of an increased awareness of the EU as a global player and an active subject of international law. Subsequently, this tendency has continued and even been strengthened, and the Union is today party to a number of international agreements providing for compulsory and binding arbitration. This development is especially noteworthy in the case of bilateral trade agreements concluded by the EU with European, Middle East, Latin American and African third countries in particular.

It is true that the latter arbitration mechanisms have, so far, not been used in practice. The submission of trade disputes to the WTO system continues unabated, however, and the Union has also become involved in some dispute settlement procedures under UNCLOS and has recently, *inter alia*, initiated an arbitration procedure against the United States for alleged failure to respect the 'Open Skies' Agreement. The case law of the ECJ has confirmed that in international dispute settlement, the Union is represented by the Commission. As there are a

103 Commission Decision (EU) 2015/1470 of 30 March 2015, [2015] OJ L232/43, in particular paras 102–4. The arbitral award, *Micula v Romania*, was rendered on 11 December 2013. While a legal challenge before the EU General Court against a Commission decision to issue a suspension injunction of 26 May 2014 was later discontinued, Case T-646/14, Order of 29 February 2016, two actions of annulment against the final Commission decision, Cases T-694/15 *V Micula and Others v Commission* and T-704/15 *I Micula v Commission*, are pending.
104 Case C-28 4/16 *Achmea*.
105 Rosas (n 3).

number of agreements and international organizations to which the EU is not a party, the Union, as represented by the Commission, has in many instances had to settle for *amicus curiae* briefs and/or action taken against Member States for failure to respect Union competence.

While the ECJ, mainly in a string of Opinions given on the compatibility of international agreements envisaged with Union law, has accepted that the Union, as a subject of international law, may engage in third-party settlement, the Court has also spelled out some conditions and caveats in this respect and has turned down some arrangements as intruding excessively on the EU constitutional order (notably the first versions of the EEA Agreement, of the agreement on a unified patent litigation system and of the agreement providing for the accession of the EU to the ECHR). In the light of these Opinions, particularly sensitive problem areas are the possible repercussions of a certain interpretation of an international agreement for the interpretation of EU internal rules which have inspired the drafting of the agreement, the possible implications for the powers of the CJEU and national EU courts of the dispute settlement mechanism as provided for in the agreement and, in the context of mixed agreements, the question of the determination of the proper respondent (EU or Member State, or both).

The ISDS mechanisms contemplated for investment agreements negotiated between the EU and third countries have, particularly in the context of the CETA Agreement with Canada and the TTIP negotiations with the United States, triggered a vivid debate about both the political expediency of such mechanisms and their compatibility with the EU legal order. The ECJ will probably shortly be seized by a Belgian request for an Opinion on whether the ISDS mechanism of CETA is EU-law compatible. A Commission request for an Opinion (2/15) on whether an agreement with Singapore should be concluded as a Union only or as a mixed agreement is already in an advanced stage of adjudication before the ECJ. This Opinion also raises the question of the ISDS mechanism provided for in the agreement, albeit in terms of competence (exclusive or shared?). In addition, cases relating to the compatibility of intra-EU ISDS mechanisms with EU law are currently pending before the General Court and the ECJ, respectively.

Once again, the Luxembourg courts are faced with difficult and delicate questions relating to the external relations of the EU, and the judicial decisions to be taken will hopefully bring further clarification on some important issues surrounding the use, in an EU context, of mechanisms for third-party settlement of international disputes.