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How to Resolve Disputes Arising from Brexit: Comparing International Models

Forthcoming in the International Organizations Law Review

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iCourts - The Danish National Research Foundation's
Centre of Excellence for International Courts

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Abstract:

The question of how disputes arising from Brexit are to be resolved, and by which body, is one of the most sensitive issues in the negotiations on the UK's withdrawal from the European Union and the envisaged future relationship between the UK and the EU. The legal issues related to withdrawal are further magnified in complexity due to the nature of the EU itself, which does not neatly fit into the category of a traditional international organization. The UK has repeatedly stated that it will not accept the continued role of the EU Court of Justice in the UK legal system after withdrawal. Any dispute settlement system must also respect the constitutional requirements of the EU legal order, most notably, by not infringing on the autonomy of EU law. This paper discusses some of the various models from international dispute settlement that could be used to inspire a dispute settlement system in the Brexit context. It discusses dispute settlement in the withdrawal agreement and the role of the Court of Justice during and after a transition period. It then discusses the challenges of designing a dispute settlement system for the future relationship agreement. While aspects of these various models could be replicated, there is no dispute settlement system that is fully appropriate to deal with the various complexities and challenges of Brexit. The paper discusses the possibility of setting up a standing international tribunal to resolve disputes arising from Brexit.

KEYWORDS: Brexit, European Union, Court of Justice of the European Union, Dispute Settlement, Autonomy, Withdrawal Agreement

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Introduction

A state's exit from an international institution is one of the most extreme forms of resistance, or 'backlash', to that institution, and inevitably gives rise to challenges under international and domestic law.¹ In some cases, formal exit does not end the state's relationship with the organization; exit from the International Criminal Court, for example, does not extinguish the Court's jurisdiction with respect to crimes committed before withdrawal took effect.² In other instances, a state may be so closely entwined with the international institution in question, both legally and politically, that it enters into a new form of relationship after withdrawal. In the case of the United Kingdom's withdrawal from the European Union, both issues are at play. The UK is simultaneously disentangling itself from the EU legal order while preparing a new legal relationship with the EU upon exit. The legal issues related to withdrawal are also magnified in complexity in the context of Brexit because the EU does not neatly fit within the category of a traditional international organization.³ Discussing the UK's withdrawal from the EU, Crawford discusses how the 'hybrid character' of EU law, between national and international law, adds to this complexity:

“There is considerable tension within the EU legal order between the underlying international law framework of treaties, and the internal law of the EU, which is not international law in any straightforward sense. But when negotiating within the EU for a situation outside it, the hybrid character of the EU is very much in issue.”⁴

This tension is evident in the discussion of dispute settlement. Of the many complicated political and legal questions facing Brexit negotiators – the future relationship in terms of trade and other fields of cooperation; the financial settlement; the protection of citizens' rights; the Irish border, and others – the issue of how legal disputes will be resolved, and by whom, remains one of the most contentious. This article discusses these legal questions related to dispute settlement in the context of Brexit. It argues that, rather than choosing an existing model of international dispute settlement, Brexit may require a new international body be established, to resolve disputes related to the UK's withdrawal and future relationship. **Section 1** outlines the main legal and political issues facing the UK and the

¹ Another extreme form of backlash would be to dismantle the institution altogether. See Mikael Madsen, Pola Cebulak, and Micha Wiebusch, 'Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts' (2018) *International Journal of Law in Context* 14(2) 197-220; Laurence R. Helfer, 'Introduction to Symposium on Treaty Exit at the Interface of Domestic and International Law' (2018) 111 *AJIL Unbound* 425; Alison L. Young, 'Brexit, Miller, and the Regulation of Treaty Withdrawal: One Step Forward, Two Steps Back?' 111 *AJIL Unbound* 434.

² Pursuant to Article 127(2) of the ICC Rome Statute, the withdrawal of a State shall not "prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective." For example, Burundi's withdrawal from the Rome Statute took effect on 27 October 2017, yet the Court "retains jurisdiction over any crimes falling within its jurisdiction that may have been committed in Burundi or by nationals of Burundi up to and including 26 October 2017." Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp, 25 October 2017, para 24.

³ See Christina Binder and Jane A. Hofbauer, 'The Perception of the EU Legal Order in International Law: An In- and Outside View' (2017) 8 *European Yearbook of International Economic Law* 139-200; Jan Klabbers, 'Sui Generis? The European Union as an International Organization' in Dennis Patterson and Anna Södersten (eds), *A Companion to European Union Law and International Law* (Wiley & Sons, 2016).

⁴ James Crawford, 'The Current Political Discourse Concerning International Law' (2018) 81(1) *Modern Law Review* 1, 16.

EU in designing appropriate dispute settlement mechanisms, including the ‘red lines’ and negotiating positions of the EU and the UK. **Section 2** then turns to dispute settlement in the withdrawal agreement, including the taxing issue of the CJEU’s role during (and after) the transitional period. Many of these issues have been addressed in a Draft Withdrawal Agreement (DWA),⁵ although considerable disagreement remains about the details. **Section 3** then discusses dispute settlement relating to period when the UK becomes a ‘third state’ after its withdrawal from the EU. These issues will be addressed for the most part in a Future Relationship Agreement (FRA). It discusses how a standing international tribunal with jurisdiction over both agreements could potentially resolve these legal and political conundrums.

Designing a dispute settlement system for Brexit is not only legally complex, it is also politically sensitive. To many advocating for the ‘Leave’ campaign, a key reason to depart from the EU was to end the role of the Court of Justice of the European Union (CJEU) in British affairs. The UK has set out its clear position that it will not be subject to the CJEU’s (direct) jurisdiction after it has left the EU, and this remains one of the UK’s non-negotiable ‘red lines’ in Brexit negotiations. On the EU side, the issue of dispute settlement is similarly sensitive. The EU has an interest in ensuring the withdrawal agreement (WA) and FRA are respected and enforced, and that legal disputes are resolved in a way that provides legal certainty. The 27 EU Member States also want to avoid granting the UK any special treatment or allowing ‘cherry picking’ that might tempt other Member States to leave seeking similar conditions.⁶ Most importantly, any new dispute settlement mechanism must comply with the EU’s constitutional requirements; in particular, it must respect the autonomy of the EU legal order.⁷

Of Sovereignty and Autonomy

Both the UK and EU have agreed that the WA and FRA require some form of dispute settlement in order to ensure that these agreements are enforced and supervised. However, there remains disagreement on which body should be responsible for resolving disputes, and which powers such a body should have. The UK government’s Brexit White Paper sets out that that any future agreement with the EU should include some form of dispute settlement mechanism to ensure that the agreement

⁵ European Commission, Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU, *Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community* (19 March 2018) European Commission – Publications < https://ec.europa.eu/commission/publications/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-0_en>. In this article, the term DWA refers to this draft agreement, whereas references to the withdrawal agreement ‘WA’ refer to the proposed agreement in the abstract.

⁶ For example, the European Parliament resolution of 14 March 2018 on the framework of the future EU-UK relationship “[n]otes that a Deep and Comprehensive Free Trade Area requires a binding mechanism for convergence with the EU acquis and a binding role for the CJEU in the interpretation of Union law and does not allow cherry-picking of sectors of the internal market” para. 12.

⁷ See Bruno de Witte, ‘European Union Law: How Autonomous is its Legal Order?’ (2010) 65 *Zeitschrift für öffentliches Recht* (2010) 141, 142; René Barents, *The Autonomy of Community Law* (The Hague, Kluwer Law International, 2004); Matthew Parish, ‘International Courts and the European Legal Order’ 23 *European Journal of International Law* (2012) 141, 142; Jed Odermatt, ‘The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?’ in Marise Cremona (ed) *Structural Principles in EU External Relations Law* (Hart Publishing, 2018) 291.

is implemented in a fair and equitable manner, and interpreted and applied in a uniform way.⁸ The UK elaborated on some of these conditions in a paper on dispute settlement.⁹ It discusses possible options that might be pursued, including references to other international dispute settlement bodies, but remains light on detail, and shows no preference for any of the options discussed. The UK is much clearer, however, on what it does *not* want, having repeatedly stressed that it will not accept the continued jurisdiction of the CJEU with regard to the UK upon withdrawal. It has shown some openness to ‘indirect’ jurisdiction, but there is still considerable uncertainty about what this would entail.¹⁰ On the EU side, the remaining 27 Member States have also set out the need for a dispute settlement mechanism to govern the WA and FRA. The Negotiating directives stipulate that the WA should include an “institutional structure” to ensure the enforcement of the Agreement.¹¹ They stress that the agreement should include effective enforcement and dispute settlement mechanisms, and that any such mechanism must fully respect the autonomy of the EU and its legal order, including the role of the CJEU.¹²

While both parties agree on the need for appropriate dispute settlement mechanisms, their starting positions diverge considerably on a number of key points. On the UK side, there is a strong desire to preserve the UK’s sovereignty and to ‘take back control’ from Brussels and Luxembourg. In her speech at Lancaster House on 17 January, 2017, British Prime Minister Theresa May reiterated that ‘taking back control’ of British laws meant ending the jurisdiction of the CJEU in the UK: “Leaving the European Union will mean that our laws will be made in Westminster, Edinburgh, Cardiff and Belfast. And those laws will be interpreted by judges not in Luxembourg but in courts across this

⁸ HM Government, Department for Exiting the European Union, Policy paper, *The United Kingdom’s exit from, and new partnership with, the European Union* (Updated 15 May 2017)

<<https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union--2>>. (“Brexit White Paper”): “2.4 We recognise that ensuring a fair and equitable implementation of our future relationship with the EU requires provision for dispute resolution. [...] 2.5 Dispute resolution mechanisms ensure that all parties share a single understanding of an agreement, both in terms of interpretation and application. These mechanisms can also ensure uniform and fair enforcement of agreements.”

⁹ HM Government, Enforcement and Dispute Resolution: A Future Partnership. (23 August 2017)

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/639609/Enforcement_and_dispute_resolution.pdf>, para. 25: “Establishing a deep and special partnership with the EU will require a new dispute resolution mechanism to address any disagreements between the UK and the EU on interpretation or application. This is distinct from the question of how rights and obligations agreed will be implemented and enforced in the UK and the EU.”

¹⁰ House of Commons European Scrutiny Committee EU Withdrawal, ‘Transitional Provisions and Dispute Resolution, Nineteenth Report of Session 2017–19 (14 March 2018)

<<https://publications.parliament.uk/pa/cm201719/cmselect/cmeuleg/763/763.pdf>> para. 12 : “The question of whether CJEU jurisdiction is direct or indirect is central to the Government’s position on suitable dispute resolution for the EU-UK Withdrawal and Future Relations agreements. However, little certainty has been provided about this distinction and we ask the Government to clarify.”

¹¹ Annex to the Recommendation for a Council Decision authorising the opening of the negotiations for an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, ‘Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union’ (‘Council Negotiation Directives’) COM(2017) 218 final (3 May 2017).para 39.

¹² *Ibid* para. 17.

country.”¹³ Although May’s vision of a ‘hard Brexit’ appears to have softened somewhat, the UK government remains adamant that leaving the CJEU’s jurisdiction is a key Brexit objective. This position appears to rule out any possibility that the CJEU would be responsible for disputes after Brexit, or the end of a transition period. A report from the House of Lords European Union Justice-Sub Committee entitled ‘Dispute Resolution and Enforcement after Brexit’ argues that the CJEU should not be responsible for the interpretation and application of the WA and FRA, since the CJEU is ‘associated’ with the EU side.¹⁴ As the discussion of the DWA and FRA below shows, however, the CJEU will likely to continue to play some role in dispute resolution during the transition period and beyond.

Whereas the UK’s position is concerned with preserving its sovereignty, the EU has concerns over an abstract principle of its own: autonomy. In *Opinion 1/09*, dealing with a proposed European and Community Patents Court (ECPC), the CJEU held that an “international agreement concluded with third countries may confer new judicial powers on the Court provided that in so doing it does not change the *essential character of the function of the Court* as conceived in the EU and FEU Treaties.”¹⁵ This summarized its earlier positions in *Opinion 1/91*¹⁶ and *Opinion 1/92*¹⁷ related to the creation of the European Economic Area. The CJEU has since elaborated upon this principle in a series of judgments dealing with the EU’s establishment of, and participation in international dispute settlement bodies. This culminated in *Opinion 2/13* on the EU’s accession to the European Convention on Human Rights, in which the CJEU held that the EU could only join such a mechanism if the agreement accommodated the ‘specific characteristics’ of the EU and EU law.¹⁸ Most recently, the CJEU applied the principle of autonomy in *Achmea*.¹⁹ The Court held that a bilateral investment treaty between Slovakia and the Netherlands violated EU law since there was a possibility that the tribunal established under the treaty would interpret EU law, without any role for the CJEU. According to this line of judgments, the WA and FRA could include a new dispute settlement mechanism, but it must be designed in such a way that ensures the ‘essential characteristics’ of the EU legal order are preserved. The principle of autonomy has transformed from a rather technical issue that focused on preserving the CJEU’s judicial monopoly to interpret EU law, into a more all-encompassing constitutional principle of EU law, focused on preserving the EU’s essential characteristics.²⁰ For example, a new international tribunal should not be given the power to interpret EU law, even if it does so in an indirect or incidental manner. The precise contours of the principle may be further refined when the CJEU delivers its opinion on whether the provisions of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) regarding the Investment Court

¹³ Theresa May, Prime Minister of the U.K., ‘PM Speech: The Government’s Negotiating Objectives for Exiting the EU’ (Speech delivered at Lancaster House, 17 January, 2017) <<https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>>.

¹⁴ “ It would be problematic to leave the interpretation of the entirety of this agreement to the CJEU, since it is associated with one of the parties to the agreement, and any perception of bias should be avoided.”

<https://publications.parliament.uk/pa/ld201719/ldselect/lddeucom/130/130.pdf>

¹⁵ *Opinion 1/09* [2011] ECR 2011 I-1137, EU:C:2011:123, para. 75 (emphasis added).

¹⁶ *Opinion 1/91* [1991] ECR 1991 I-6079, EU:C:1991:490, paras 59-64.

¹⁷ *Opinion 1/92* [1992] ECR 1992 I- 2821, EU:C:1992:189, paras 32-41.

¹⁸ *Opinion 2/13*, EU:C:2014:2454.

¹⁹ *Slowakische Republik (Slovak Republic) v Achmea BV (C-284/16)* [2018] EU:C:2018:158.

²⁰ Odermatt, above n 7, 312.

System (ICS) are compatible with EU law.²¹ Based on this previous case-law on the principle, it is possible that the CJEU would find that the FRA or WA affect the autonomy of the EU legal order, and thus is incompatible with the EU Treaties.²²

The discussion above may appear to equate two very different concepts. The UK's desire to preserve its sovereignty, it could be argued, stems mainly from a *political* concern over the influence of a 'foreign' court in the UK legal order, whereas the issue of EU autonomy is a *legal* concern, that is, a constitutional principle stemming from the nature of the EU legal order. This appears to suggest that the UK could soften its position on sovereignty issues, whereas the EU has no room to maneuver on autonomy. Yet both principles – or 'red lines' – stem from a similar concern, that is, to preserve the independence and integrity of the legal order from external influence. Conceived this way, the UK's desire to protect its sovereignty can be compared broadly to the EU's principle of autonomy. EU autonomy is viewed as a constitutional requirement that must be protected; UK sovereignty is viewed as a political concern stemming from ideological, rather than legal concerns. Discussing the EU's principle of autonomy, Lock points out that "[t]here are no comparable constitutional limits in the UK legal order".²³ Yet both parties have a desire to protect their legal orders from external influences, but this is expressed differently in each legal order. In the UK, the protection of sovereignty is carried out through its political organs, chiefly the Parliament, whereas in the EU, it is a constitutional principle developed by the Court. The UK's Position Paper on Dispute Settlement and Enforcement also presents the two principles as broadly comparable: "Withdrawal from the EU will mean a return to the situation where the UK and the EU have their own autonomous legal orders. The Withdrawal Agreement and the future partnership must respect the autonomy and integrity of *both legal orders*."²⁴ A key challenge in designing dispute settlement in the WA and FRA will be to strike a balance that respects the political and constitutional requirements of both parties.

Withdrawal Agreement and Transition Period

Article 50 TEU sets out that the EU is to negotiate a withdrawal agreement with the leaving Member State, setting out "arrangements for its withdrawal, taking account of the framework for its future relationship with the Union."²⁵ On 19 June 2017, the UK Government and the EU began talks to negotiate the terms of a WA to govern the UK's exit from the EU, and on 19 March 2018, they

²¹ Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU (Opinion 1/17). "Is Chapter Eight ('Investments'), Section F ('Resolution of investment disputes between investors and states') of the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, signed in Brussels on 30 October 2016, compatible with the Treaties, including with fundamental rights."

²² See Cristina Contartese, 'The Autonomy of the EU legal order in the ECJ's external relations case law: From the "essential" to the "specific characteristics" of the Union and back again' (2017) 54 *Common Market Law Review* 6, 1627–1671; Bruno de Witte, 'A Selfish Court? The Court of Justice and the Design of International Dispute Settlement Beyond the European Union' in Marise Cremona and Anne Thies, *The European Court of Justice and External Relations Law: Constitutional Challenges* (Oxford, Hart Publishing, 2014).

²³ Tobias Lock, 'Dispute Resolution after Brexit', on European Futures (25 August, 2017) <<http://www.europeanfutures.ed.ac.uk/article-4908>>.

²⁴ Enforcement and Dispute Resolution, *above* n 9, para. 13 (emphasis added).

²⁵ *Treaty on European Union*, opened for signature 7 February 1992, [2009] OJ C 115/13 (entered into force 1 November 1993), art 50.

presented the DWA.²⁶ The text includes three colours: green is used for agreed terms subject to technical revisions; yellow indicates agreement on the policy objective but where drafting changes are envisaged, and white indicates areas where no agreement has yet been found. The sections on dispute settlement remained almost entirely white, illustrating how this topic remains a contentious issue. The DWA includes a ‘transition period’ during which EU law will continue to apply with respect to the UK after it has left the Union. This leads to two main issues. The first relates to the role of the CJEU regarding ongoing and pending cases at the date of withdrawal, and in interpreting and applying EU law during the transition. The second set of issues relate to the role of the CJEU in the interpretation and application of the WA itself.

As discussed in the introduction, the UK’s withdrawal from the EU is more complex than withdrawal from other treaties or organizations due to the nature of the EU legal order. One of these features is the fact that EU law creates direct rights for individuals, which can be relied upon and enforced in courts at the national and EU levels. One of the pressing issues facing Brexit negotiators has been the status and rights of EU citizens living in the UK and British citizens living in EU Member States. The negotiating directives set out that safeguarding the status and rights of these citizens and their families is “the first priority for the negotiations”.²⁷ The main reason for prioritizing this issue is to provide legal certainty to those citizens who will be affected by the UK’s withdrawal. On 26 July 2017, the UK Government published a Policy Paper, which addressed the Government’s proposal on the position of EU citizens living in the UK and UK nationals residing in the EU.²⁸ The proposal did not go into much detail on the issue of dispute resolution and enforcement, however, merely stating that the UK government is ready to enshrine its commitment in the withdrawal agreement, and as such, to give it the status of international law. However, the Policy Paper also makes it clear that it envisaged no role for the CJEU in interpreting or applying the agreement.²⁹ Leaving the rights of EU citizens to be secured only by the courts in the UK appears to be an inadequate solution for the EU. The European Commission’s position paper on citizens’ rights considers the CJEU as the proper judicial body to ensure the rights of citizens.³⁰ This issue of citizens’ rights thus adds a further layer of complexity to the WA negotiations.

²⁶ European Commission, ‘Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community’ (19 March 2018)

<https://ec.europa.eu/commission/publications/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-0_en>.

²⁷ Council Negotiation Directives, above n 11, para 11.

²⁸ HM Government, Policy Paper, ‘The United Kingdom’s Exit from the European Union: Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU’ (26 June, 2017).

<<https://www.gov.uk/government/publications/safeguarding-the-position-of-eu-citizens-in-the-uk-and-uk-nationals-in-the-eu/the-united-kingdoms-exit-from-the-european-union-safeguarding-the-position-of-eu-citizens-living-in-the-uk-and-uk-nationals-living-in-the-eu>>.

²⁹ Ibid para 58: “The arrangements set out above will be enshrined in UK law and enforceable through the UK judicial system, up to and including the Supreme Court. We are also ready to make commitments in the Withdrawal Agreement which will have the status of international law. The Court of Justice of the European Union (CJEU) will not have jurisdiction in the UK.”

³⁰ European Commission, ‘Position Paper on ‘Essential Principles on Citizens’ Rights’’ (12 June 2017)

<https://ec.europa.eu/commission/sites/beta-political/files/essential-principles-citizens-rights_en_3.pdf>, p. 4. The Commission “should have full powers for the monitoring and the Court of Justice of the European Union should have full jurisdiction corresponding to the duration of the protection of citizen’s rights in the Withdrawal agreement.”

Role of the CJEU

The DWA includes a number of sections relating to dispute settlement. Article 4 of the DWA refers to methods and principles relating to the effect, implementation and application of the agreement. Notably, this is the only article of the common provisions that remains white (no agreement). This provision relates to the way in which the WA is to be interpreted. It sets out that where the DWA includes concepts or provisions of EU law, these are to be interpreted and applied as they would under EU law,³¹ including the case law of the CJEU as it stood before the start of the transition period.³² “Union law” is understood broadly in Article 2 DWA, and includes *inter alia* the EU Treaties (including the Euratom Treaty), the EU Charter of Fundamental Rights, general principles of EU law, as well as international agreements to which the Union is party and those concluded by the Member States acting on behalf of the Union. “Union law” is also understood to mean the law (including repeals and amendments) as it stood on the last day of the transition period.³³ The DWA further sets out that the UK judicial and administrative authorities “shall have due regard to relevant case law” of the CJEU handed down after the end of the transition period.³⁴

Some of the most detailed provisions in the DWA are the “separation provisions” found in Part Three. These provisions set out how various EU laws will cease to apply with respect to the UK upon withdrawal. Articles 82-87 DWA, which deal with judicial procedures, are still not agreed upon. According to these draft provisions, the CJEU will continue to have jurisdiction over disputes involving the UK as a party initiated before the start of the transition period.³⁵ The CJEU will also continue to have jurisdiction to receive preliminary references from the courts in the UK until the end of the transition period.³⁶

The DWA would also allow new cases involving the UK to come before the CJEU under two circumstances. The first is where the European Commission or a Member State considers that the UK has failed to fulfil its obligations under the EU Treaties or Part 4 of the Withdrawal Agreement (relating to the Transition). In this case, they may initiate proceedings against the UK in accordance with the procedural rules for infringement proceedings set out in Article 258 and Article 259 TFEU. The second avenue for new cases is where national courts in the UK refer questions to the CJEU on the interpretation of the EU Treaties, or on the interpretation and validity of acts of the EU institutions, bodies, offices and agencies.³⁷ This means that the procedure under Article 267 TFEU will continue to apply, but only when the case relates to “facts that occurred before the end of the transition period”.³⁸ This could potentially give rise to questions about whether the relevant facts in the case took place before the end of the transition period.

Article 151 of the DWA provides that the CJEU will have jurisdiction over EU citizens’ rights for a period of 8 years after the end of the transition period. During this period, when a question is raised concerning the interpretation of Part Two of the Agreement (on citizen’s rights), a court of tribunal

³¹ Draft Withdrawal Agreement, above n 5, art 4(3).

³² Draft Withdrawal Agreement, above n 5, art 4(4).

³³ Draft Withdrawal Agreement, above n 5, art 5.

³⁴ Draft Withdrawal Agreement, above n 5, art 4(5)

³⁵ Draft Withdrawal Agreement above n 5, art 82(1).

³⁶ Draft Withdrawal Agreement, above n 5, art 82(2).

³⁷ Draft Withdrawal Agreement above n 5, art 83(2).

³⁸ Draft Withdrawal Agreement above n 5, art 83(2).

may refer the question to the CJEU to give a preliminary ruling. The legal effects of such preliminary rulings will be the same as in the Union and the Member States, under Article 267 TFEU.

Article 153 DWA provides that the CJEU will have jurisdiction over the separation provisions (in Part Three) and the aspects of the financial settlement relating to EU law after the transition period.³⁹ The CJEU will have jurisdiction over these matters mainly because they relate to issues involving the interpretation of EU law. The ‘separation provisions’ set out rules relating to the UK’s disconnection from different areas of the EU law, such as goods placed on the market before the end of the transition, which require the application of EU law principles. These procedures will come into force and apply at the end of the transition period.⁴⁰

A related issue is the effect of CJEU judgments after withdrawal. In the two types of proceedings discussed above, CJEU judgments will continue to have binding force within the UK, and the EU Treaty articles on the enforcement of judgments and orders will apply in the UK.⁴¹ Article 260 TFEU, which sets out the procedures applicable when the CJEU finds that a Member State has failed to fulfil an obligation under the Treaties, will also apply with respect to the UK. This means that the UK could face financial penalties for failing to fulfil obligations under the EU Treaties and WA.

During this period, the UK will continue to enjoy many of the rights of an EU Member State, including the right to submit observations and intervene in proceedings in the same manner as other EU Member States.⁴² Lawyers who are authorised to practise before the courts of the UK may also continue to represent parties before the end of the transition period.⁴³ This applies to both pending cases (arising under Article 82 DWA) and new cases (arising under Article 83 DWA).

Supervision and Enforcement of the Withdrawal Agreement

The DWA also foresees a role for the CJEU with respect to the supervision and enforcement of the WA. Article 126 DWA sets out that during the transition period, the EU institutions shall continue to exercise their powers under Union law with respect to the UK: “the Court of Justice of the European Union shall have jurisdiction as provided for in the Treaties.”⁴⁴ It further states that this will apply during the transition period regarding the interpretation and application of the WA.⁴⁵

As discussed above, of the key issues in the DWA is the protection of citizens’ rights. The implementation and application of the parts relating to citizens’ rights is to be monitored by an ‘independent authority’ in the UK, established under British law, which will have powers similar to that of the European Commission with respect to the monitoring and enforcement of EU law. This Authority will be capable of, *inter alia*, hearing complaints regarding citizens’ rights and bringing cases before the judicial authorities in the UK.⁴⁶ The Authority may be shut down after 8 years.

The DWA would also allow for the participation of the European Commission in cases pending in the UK, where this is required for the consistent interpretation and application of the provisions on

³⁹ Draft Withdrawal Agreement above n 5, art 153.

⁴⁰ Draft Withdrawal Agreement, above n 5, art168, Title I of Part Six shall apply from the end of the transition period.

⁴¹ Draft Withdrawal Agreement above n 5, art 85(2). Articles 280 and 299 TFEU.

⁴² Draft Withdrawal Agreement, above n 5, article 85(2).

⁴³ Draft Withdrawal Agreement, above n 5, article 87.

⁴⁴ Draft Withdrawal Agreement, above n 5, article 126.

⁴⁵ Draft Withdrawal Agreement, above n 5, article 126, para 2.

⁴⁶ Draft Withdrawal Agreement, above n 5, article 151(1).

citizens' rights. With the permission of the relevant UK court or tribunal, the Commission could also make oral observations. This provision will take effect from the end of the transition period. This is novel, and the EU's right to participate in the national court proceedings of a non-EU state is not included in any other agreements. Conversely, the UK will continue to be able to intervene in certain CJEU cases after the end of the transition period.⁴⁷ When a court or tribunal of a Member State refers a question to the CJEU involving the WA (not just citizens' rights issues), the UK will have the right to participate in the same manner as an EU Member State. As the provision currently stands, the UK would have the ability to participate in a narrow range of cases. Since CJEU cases in a number of fields could potentially affect the UK after the end of the transition, it would be in the interests of the UK to be able to participate and submit observations in a broader range of cases in proceedings beyond the end of the transition.

It will be important for the courts in the UK to be versed in developments within the CJEU (and *vice versa*) in order to promote the consistent interpretation of the WA.⁴⁸ In this vein, Article 156 DWA encourages regular 'dialogue' between the CJEU and the UK's highest courts, "analogous to the one which the Court of Justice of the European Union pursues with the highest courts of the Member State". This need for dialogue was set out in the Joint Report on citizens' rights, as a measure to allow for the consistent interpretation of these rights.⁴⁹ The issue of 'dialogue' between courts has received quite some attention in recent years, and has been put forward as a way to prevent conflicts between international, regional and domestic courts.⁵⁰ The difference here is that the drafters have included the need for dialogue in the agreement itself. Such dialogue may entail, for example, regular meetings between judges and their staff of the courts and exchange of relevant case-law.

The EU's negotiating Guidelines set out that the WA "should set up an institutional structure to ensure an effective enforcement of the commitments under the Agreement". One of the tasks of such body would include the adoption of necessary measures to deal with unforeseen situations and for the incorporation of amendments to EU law in the Agreement. *Title II on Institutional Provisions* introduces new procedures for dispute resolution with regard to the DWA itself. Rather than putting all dispute settlement in the hands of the CJEU, the DWA would establish a 'Joint Committee' composed of members from the UK and the EU. The UK and EU will be able to refer issues on the interpretation, application and implementation of the WA to the Joint Committee.⁵¹ Of the many tasks assigned to the Joint Committee, it is responsible for developing ways to avoid problems arising under the WA and resolving disputes that may arise regarding its application and interpretation.⁵² The EU and UK are to resolve disputes arising from the WA primarily through cooperation and consultations.⁵³ Disputes are therefore to be resolved first through diplomatic means before resort to judicial mechanisms.

⁴⁷ Draft Withdrawal Agreement, above n 5, article 154.

⁴⁸ Draft Withdrawal Agreement, above n 5, article 156.

⁴⁹ Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union (8 December 2017) <https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf> , para 39.

⁵⁰ See Juliane Kokott and Daniel Dittert, 'European Courts in Dialogue' in The EFTA Court (ed), *The EEA and the EFTA Court* (Oxford 2014) 43-52.

⁵¹ Draft Withdrawal Agreement, above n 5, art 157(3).

⁵² Draft Withdrawal Agreement, above n 5, art 157 (4)(c).

⁵³ Draft Withdrawal Agreement, above n 5, art 160.

The DWA also sets out that the provisions on dispute settlement shall be *exclusive*, meaning that the UK and EU will not have recourse to any procedures outside those set out in the WA.⁵⁴ This would mean, for example, that the UK or EU would be prevented from bringing a dispute under the WA to a court in the UK or EU, or to another international court or tribunal. There had been some discussions about whether the dispute over the UK's financial settlement could be taken to the International Court of Justice if no agreement could be reached.⁵⁵ This provision only applies to disputes concerning the WA, and so there may be a possibility of Brexit-related disputes still finding their way before other courts and tribunals. Based on the CJEU's previous case law regarding Article 344 TFEU, however, the CJEU may interpret this provision in a way that prevents the EU and UK from having recourse to such international bodies.

The DWA outlines a process for resolving disputes relating the interpretation and application of the WA. One of the parties would first bring a dispute to the Joint Committee. This procedure is 'without prejudice' to Article 153 of the DWA concerning the jurisdiction of the CJEU over certain parts of the Agreement, including the separation provisions. The Joint Committee is to resolve the dispute by way of recommendation, taking into account the information before it and with a view to the 'good functioning' of the Agreement.⁵⁶ The Joint Committee may decide to submit the dispute to the CJEU, whose ruling will be binding upon the parties. If the Joint Committee has not settled the dispute after three months, and it has not decided to submit the dispute to the CJEU, then either the UK or the EU may decide to submit the dispute to the CJEU. Article 163 DWA deals with the issue of non-compliance with the CJEU's decisions under these abovementioned procedures. In the case where the EU or UK believe the other side has failed to implement a judgment of the Court, then they may, after having given the other side the opportunity to submit its observations, bring a case to the CJEU.⁵⁷

This leaves the possibility that neither the Joint Committee, the EU, nor the UK decide to submit a dispute to the CJEU. In this case, the WA would allow the EU or the UK to suspend parts of the Agreement, with the exception of the provisions on citizens' rights. The parties may alternatively decide to suspend provisions of an agreement between the EU and the UK, in accordance with the provisions of that agreement.⁵⁸ The DWA stresses that any such suspension is to be proportionate to the alleged breach, and is to be subject to judicial review by the CJEU. The DWA includes few procedural obligations – the party imposing countermeasures must inform the other party and provide 20 days for it to remedy the situation before any suspension takes effect.

The Dispute Settlement provisions also include a possibility of suspending certain benefits for the UK from participation in the internal market during the transition period. Article 165(1) DWA sets out a procedure for where the EU considers the UK to have not fulfilled an obligation under EU law, as a result of non-compliance with a judgment under Article 258 TFEU, and "where the functioning of the internal market, of the customs union, or the financial stability of the Union or its Member States would be jeopardised as a result". In this case, the EU may impose sanctions on the UK by

⁵⁴ Draft Withdrawal Agreement above n 5, 161.

⁵⁵ Rob Merrick, 'Brexit: EU will take UK to International Court if it refuses to pay £50bn divorce bill, 'leaked document' says', *The Independent* (online), 21 March 2017, <<https://www.independent.co.uk/news/uk/politics/brexit-latest-divorce-bill-eu-take-uk-court-leaked-strategy-documents-a7641406.html>>.

⁵⁶ Draft Withdrawal Agreement, above n 5, art 161(2).

⁵⁷ Draft Withdrawal Agreement, above n 5, art 163(1).

⁵⁸ Draft Withdrawal Agreement, above n 5, 163 (2)(b).

suspending certain benefits of the internal market. As is the case with suspension of the WA discussed above, the EU's suspension measures are to be proportionate to the alleged breach. There is likewise a 20-day notice period. Sanctions may last up to 3 months, but can be renewed indefinitely. This part differs somewhat from the suspension provisions in Article 163, discussed above. First, they do not come after a period of negotiation between the parties, but after a decision on non-compliance by the CJEU. The Commission Position Paper on 'Transitional Arrangements in the Withdrawal Agreement' proposed such a mechanism for suspending certain benefits "where it considers that referring the matter to the Court of Justice of the European Union would not bring in appropriate time the necessary remedies."⁵⁹ One of the rationales for this provision appears to be that enforcement procedures through the CJEU would take too long, and that the EU should have the power to suspend benefits to ensure the integrity of the single market and ensure financial stability in the Union.

The provisions on suspension appear out of place in an agreement that otherwise favours settlement through judicial and diplomatic procedures. Moreover, the absence of inter-state countermeasures has been a defining feature of the EU becoming a 'new legal order', one where the states did not resort to inter-state countermeasures to enforce a treaty.⁶⁰ In *Commission v. Luxembourg & Belgium*⁶¹ the CJEU held that the principle of *exceptio non adimpleti contractus* (enforcement of an obligation may be withheld if the other party has itself failed to perform the same or related obligation) could not be applied in the EU legal order. Such suspension clauses clearly demonstrate the UK's status as a 'third state' during the transition period, while at the same time maintaining that it is subject to the CJEU's jurisdiction. The provision does not specify that it is subject to judicial review, as is the case in relation to Article 163 DWA. However, the CJEU may still allow judicial review of unilateral sanctions imposed by the EU, especially given the case-law in which the Court stresses that effective judicial review "is of the essence of the rule of law".⁶²

The provisions of the DWA point to a tension that pervades the issue of dispute settlement in the Brexit context. On the one hand, Union law requires the CJEU to be the ultimate arbiter of the EU Treaties and EU law. To the extent that the provisions of Union law will continue to apply after the UK's exit, then the CJEU has a place in ensuring the consistent application of EU law. At the same time, the UK wishes to restrict the role the CJEU – this is one of the UK's red lines – as it will no longer be an EU Member State when the WA enters into force. One possible solution would be to establish a standing international dispute settlement body responsible for the governance of the WA. First, this would take the interpretation of the agreement out of the hands of the CJEU alone, limiting the role of the CJEU to the interpretation of EU law. Second, it would mean that the WA would be interpreted by an independent judicial body that is not associated with one of the parties, rather than a Joint Committee. The design of such a dispute settlement body, including how it could respect the autonomy of the EU legal order, are discussed further in the following sections.

⁵⁹ European Commission, 'Position paper "Transitional Arrangements in the Withdrawal Agreement' (7 February 2018) <<https://ec.europa.eu/commission/sites/beta-political/files/transition.pdf>>.

⁶⁰ See Joseph Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403, 2422.

⁶¹ *Commission v. Luxembourg & Belgium*, Joined cases 90/63 and 91/63 [1964] EU:C:1964:80, 631.

⁶² In *Rosneft* the CJEU stated that "... the very existence of effective judicial review designed to ensure compliance with provisions of EU law is of the essence of the rule of law". *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* (C-72/15) [2017] EU:C:2017:236, para. 73. See Article 2 TEU and Case 294/83 *Les Verts v. Parliament* [1986] ECR 1339, para. 23.

The Future Relationship Agreement

Article 50 TEU does not provide detail on what is required in a future relationship agreement, only stating that the WA must take account of “the framework for its future relationship with the Union.”⁶³ Whereas the WA deals with issues relating to the UK’s immediate departure from the Union and the transition period, the FRA is aimed at establishing the UK’s relationship with the EU as a third state outside the Union. While this agreement is likely to deal with securing free trade between the EU and the UK, it will also include issues related to the continued partnership in areas such as security, or the UK’s participation in some EU programmes. Whereas the WA is concerned with removing the UK from the EU legal order, the FRA is concerned with retaining a close economic relationship between the EU and UK. While the UK’s position on its future relationship with the EU remains vague, many of its policy documents foresee the FRA as replicating existing free trade agreements between the EU and third states, such as the EU-Canada Comprehensive Economic and Trade Agreement (CETA), including its dispute settlement provisions.⁶⁴ The FRA must also take into account issues of EU autonomy, especially since the agreement may be subject to an opinion of the Court in accordance with Article 218(11) TFEU.

The Council Guidelines state that there should be appropriate dispute settlement mechanisms relating to the FRA, stressing that any such mechanism must not affect the EU’s autonomy or decision-making procedures.⁶⁵ The UK government’s Brexit White Paper sets out that that any future agreement with the EU should include some form of dispute settlement mechanism to ensure that the agreement is implemented in a fair and equitable manner.⁶⁶ The UK prefers that any dispute settlement body in the FRA should only focus on bilateral disputes between the EU and UK regarding the FRA’s interpretation and application.⁶⁷ While the UK accepts that EU law sets limits on the design of dispute settlement bodies, it rejects the idea that this requires a role for the CJEU in resolving disputes in the partnership phase:

“it does not follow that the CJEU must be given the power to enforce and interpret international agreements between the EU and third countries, even where they utilise terms or concepts found in EU law. Nor is it a required means of resolving disputes between the EU and third countries on the interpretation or implementation of an agreement. The EU is able to (and does) agree to a wide range of approaches to dispute resolution under international agreements, including by political negotiation and binding third party arbitration.”⁶⁸

On the face of it, this appears logical and fair – if the UK is no longer an EU Member State, it should no longer be subject to its Court’s jurisdiction. However, the possible role of the CJEU in any future

⁶³ TEU, above n 25, art 50(2).

⁶⁴ CETA Reference.

⁶⁵ European Council, ‘European Council (Art. 50) guidelines following the United Kingdom’s notification under Article 50 TEU’, point 23: “The future partnership must include appropriate enforcement and dispute settlement mechanisms that do not affect the Union’s autonomy, in particular its decision-making procedures.”

<<http://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines/>>.

⁶⁶ *Brexit White Paper*, above n 8, point 2.4: “We recognise that ensuring a fair and equitable implementation of our future relationship with the EU requires provision for dispute resolution.”

⁶⁷ Enforcement and Dispute Resolution, above n 9, para. 25: “Establishing a deep and special partnership with the EU will require a new dispute resolution mechanism to address any disagreements between the UK and the EU on interpretation or application. This is distinct from the question of how rights and obligations agreed will be implemented and enforced in the UK and the EU.”

⁶⁸ *Ibid* para. 19.

relationship depends on the type of relationship the EU and the UK seek to establish after the end of the transition period. If the EU and UK seek to have a high degree of convergence, then there is a greater need for supervisory mechanisms, along the lines of the European Free Trade Association (EFTA) Surveillance Authority and EFTA Court. This may also include some form of ‘oversight’ by the CJEU. If the future relationship is a looser free trade agreement, in the model of the CETA, then a system involving a joint committee and ad hoc arbitration may be more appropriate, in which case there may be little or no role for the CJEU.

What types of disputes would arise under the FRA? Whereas the DWA deals with the continued jurisdiction of the CJEU and the supervision of the WA, the FRA will need to include provisions to ensure that the agreement is applied in the jurisdictions of the EU and UK and to resolve disputes arising from the interpretation of the agreement. The first type of dispute that is envisaged relates to implementation, for instance, in cases where the EU or UK fail to take appropriate measures to implement the FRA in their domestic legal systems. The second type of dispute would arise where one of the parties takes certain action, such as domestic legislation or other measures, that violates the terms of the FRA. A third possible dispute would relate to the possible divergences in the way that the FRA is applied in respective legal systems.

There are a number of examples of dispute settlement mechanisms in international agreements to which the EU is a party. These can broadly be categorized in terms of how ‘close’ the state is to the EU. One study analyses the EU’s agreements with third countries in terms of their geographical remoteness, discussing a ‘distant area model’ and a ‘close area model’.⁶⁹ The UK Government’s paper on dispute settlement lists examples of various dispute settlement bodies, ranging from the mechanisms under the CETA to the WTO. There is a clear difference between these various models and the FRA. Free trade agreements, Association Agreements, and membership of the European Economic Area (EEA) tend to deal with establishing closer ties with the EU and creating common rules, but stop short of the country becoming an EU Member State. The FRA, however, deals with a former EU Member State *leaving* that common legal space.

EFTA Court

One proposal has been to use the European Free Trade Association Court (EFTA Court) as an ‘off-the-shelf’ solution.⁷⁰ The EFTA Court has jurisdiction with regard to EFTA States who are parties to the European Economic Area (EEA) Agreement, and in many ways resembles the procedures of the CJEU. The EFTA Court is responsible for hearing infringement proceedings brought by the EFTA Surveillance Authority, which monitors compliance with EEA rules in Iceland, Liechtenstein and Norway. Importantly, since the EFTA Court’s decisions are not binding upon the EU, it does not pose

⁶⁹ Antonio Francisco Fernández Tomás, ‘The Settlement of Disputes Arising from the United Kingdom’s Withdrawal From the European Union’, Study requested by the European Parliament’s Committee on Constitutional Affairs and published by the Policy Department for Citizens’ Rights and Constitutional Affairs (November 2017)

<[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596819/IPOL_STU\(2017\)596819_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596819/IPOL_STU(2017)596819_EN.pdf)>.p 40.

⁷⁰ House of Commons, Exiting the European Union Committee, ‘The future UK-EU relationship’ Fourth Report of Session 2017–19 (29 March 2018), para 108: “Docking with the EFTA Court would provide the UK with a ready “off-the-shelf” arbitration mechanism for the ongoing UK-EU relationship”

<<https://publications.parliament.uk/pa/cm201719/cmselect/cmexeu/935/935.pdf>>.

See Steven Blockmans and Guillaume Van der Loo, ‘Brexit: Towards an ‘EFTA-like’ dispute settlement mechanism’, Centre for European Policy Studies, CEPS Policy Paper (31 August 2017) <<https://www.ceps.eu/publications/brexit-towards-efta-dispute-settlement-mechanism>>.

problems in terms of violating EU autonomy. The EEA Agreement does require that provisions that are identical to EU law should be applied in conformity with pre-EEA case law, and that the Court and Surveillance Authority “shall pay due account” to case-law after the date of signature of the EEA Agreement.⁷¹ The judgments of the EFTA Court are not formally binding on the referring court of the member state. It has been suggested that a bilateral treaty between the EU and the UK could come under the jurisdiction of the EFTA Court, although such participation would require the consent of the other EFTA EEA countries. Former President of the EFTA Court, Professor Baudenbacher, has stated that such participation could be a model for dispute settlement in the Brexit context.⁷² While the Report of the House of Commons Exiting the European Union Committee has discussed the possibility of utilising the EFTA Court, the UK Government’s policy papers do not explicitly refer to such an option; rather, they discuss various *elements* of that system that might be applied to new dispute resolution system. Using the EFTA Court may also not be politically palatable within the UK, since it may be viewed as simply replacing the CJEU with another ‘European’ court.

Quasi-Judicial Model

The more common approach in recent trade agreements is to follow the ‘quasi-judicial’ model of dispute settlement, which combines elements of traditional negotiation and diplomacy with elements of adjudication.⁷³ These have been inspired by the WTO model. Many FTAs establish a Joint Committee responsible for the overall functioning of the agreement. The Joint Committee has the primary role for resolving disputes, and does so initially through the exchange of information between the parties. For example, the EU-Singapore FTA establishes a Trade Committee (Article 17.1) and Specialised Committees (17.2). The powers of the Trade Committee:

“The Trade Committee shall: (a) ensure that this Agreement operates properly; (b) supervise and facilitate the implementation and application of this Agreement, and further its general aims; (c) supervise the work of all specialised committees, working groups and other bodies established under this Agreement; (d) consider ways to further enhance trade relations between the Parties; (e) without prejudice to Chapter Nine (Investment), Chapter Fifteen (Dispute Settlement) and Chapter Sixteen (Mediation Mechanism), seek to solve problems which might arise in areas covered by this Agreement, or resolve disputes that may arise regarding the interpretation or application of this Agreement; and (f) consider any other matter of interest relating to an area covered by this Agreement.”

The Joint Committee usually has a role with respect to dispute settlement. For instance, it will be responsible for drawing up the list of individuals who are willing and able to serve as arbitrators.

Many international agreements follow a typical model for dispute settlement. For example, under the EU-Singapore FTA, disputes are to be first resolved through consultations of the parties in good faith.⁷⁴ If this fails to resolve the dispute, then a party may request the establishment of an arbitration panel.⁷⁵ The panel consists of three arbitrators chosen by the parties. The arbitration panel then issues

⁷¹ Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement), art 3(2).

⁷² The future UK-EU relationship, above n 70, para 88.

⁷³ Ignacio Garcia Bercero, ‘Dispute Settlement in European Union Free Trade Agreements: Lessons Learned?’ in Lorand Bartels and Federico Ortino (eds) *Regional Trade Agreements and the WTO Legal System* (Oxford University Press, 2006) 383.

⁷⁴ EU-Singapore FTA, art 15.3.

⁷⁵ EU-Singapore FTA, above n 74, art 15.4.

its interim report and a ruling to the parties and the Trade Committee.⁷⁶ In the case of non-compliance with a ruling of an arbitration panel, the parties are first to enter into negotiations “with a view to developing mutually acceptable agreement on compensation.”⁷⁷ There is also a possibility of suspending obligations under the agreement to the extent required to nullify the damage caused by the violation.

The UK Government also showed interest in following the FTA model of dispute settlement, and has referred in particular to CETA as a model.⁷⁸ CETA establishes arbitration as the main method of dispute settlement. This also follows the model of mediation and consultation to resolve disputes, followed by the referral to an arbitration panel, whose decisions are binding on the parties. The use of this method of dispute settlement in CETA is without prejudice to other methods of dispute settlement, such as the WTO.⁷⁹ This allows the parties to make use of other forums to resolve the dispute.

Some FTAs allow bodies to refer questions to the CJEU under certain conditions. This is included, for example, in the Deep and Comprehensive Free Trade Area (DCFTA) between the EU and Ukraine, which includes provisions on ‘Dispute settlement relating to regulatory approximation’. This sets out a procedure for disputes involving regulatory approximation in areas such as technical barriers to trade, customs and trade facilitation, competition and other parts that impose obligations defined by a reference to EU law.⁸⁰ In such cases, the arbitration panel is not to decide the question, but to refer it to the CJEU, which is binding upon the panel.⁸¹ Article 403 of the EU-Moldova Association Agreement has a similar provision for “referrals to the Court of Justice of the European Union”.⁸² These provisions allow the CJEU to have supervision over parts of the agreements that replicate EU law and require convergence. The UK’s dispute resolution paper refers to this procedure, but reveals no opinion on whether this would be an appropriate mechanism for the UK’s post-Brexit relationship.⁸³

Another issue relates to the legal effect of the decisions of these panels. The UK Government White Paper stresses that the decisions of the dispute resolution body would not have direct effect in the UK.⁸⁴ The EU Singapore FTA, for instance, clarifies that the Agreement does not confer rights upon individuals”.⁸⁵ Moreover, CETA sets out that its provisions cannot be “directly invoked in the domestic legal systems of the parties”.⁸⁶ A dispute resolution mechanism under an FTA could

⁷⁶ EU-Singapore FTA, above n 74, art 15.8.

⁷⁷ EU-Singapore FTA, above n 74, art 15.12.

⁷⁸ Enforcement and Dispute Resolution, *above* n 9, para 20.

⁷⁹ CETA, art 29.3.

⁸⁰ CETA, above n 79, art 322 (1).

⁸¹ CETA, above n 79, art 322 (2).

⁸² Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part [2014], OJ L 260/4, arts 403 (1)-(2).

⁸³ Enforcement and dispute resolution, above n 9, paras 55-58.

⁸⁴ *Brexit White Paper*, above n 8, 2.8.

⁸⁵ EU-Singapore FTA, above n 74, art 11.15: “for greater certainty, nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons, other than those created between the Parties under public international law.”

⁸⁶ CETA, above n 79, article 30 (6) (1). DCFTA, art 321 (2): “any ruling of the arbitration panel shall be binding on the Parties and shall not create any rights or obligations for natural or legal persons”.

similarly state that its provisions do not create rights that can be invoked by individuals in the legal systems of the UK and the EU.

Autonomy Issues

As discussed in Section 1, any new dispute settlement mechanism under the FRA will have to ensure that does not violate the autonomy of the EU legal order. If the FRA includes concepts that replicate EU law, and provides a dispute settlement body to interpret those provisions (which is binding on the EU and UK), then the CJEU would render a negative opinion when asked to review the legality of the FRA. How, then, can the FRA respect the autonomy of the EU legal order?

One approach to this issue is to ensure that the dispute settlement body approaches the interpretation of EU law as a ‘factual’ issue. This is the approach taken in CETA. Article 8.31 relates to ‘Applicable law and interpretation’ and stresses that it is not the role of the Tribunal to interpret the domestic law of the parties.

“ [..] For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party *as a matter of fact*. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.”⁸⁷

This appears to be a clever way to dodge the autonomy issue – by treating EU law as a matter of fact, the dispute settlement body is not called upon to interpret those provisions, and its findings are not binding upon the domestic courts of the party. This may not be enough to satisfy the autonomy concerns. In *Opinion 2/13*, the CJEU faced a similar provision with regard to the prior involvement procedure. The European Court of Human Rights (ECtHR) would have been given the power to determine, for purely procedural reasons, whether the CJEU had already given a ruling on the same question of law as that at issue in the proceedings before the ECtHR. This does not appear to be an intrusion into the CJEU’s prerogatives but a procedural issue. Yet the CJEU found that this procedure “would be tantamount to conferring on it jurisdiction to interpret the case-law of the Court of Justice.”⁸⁸ It appears from this case law that the CJEU would find even indirect interpretation to be problematic. The CJEU has not yet decided whether such provision is compatible with the EU Treaties, but will be given the chance now that Belgium has requested an opinion pursuant to article 218(11) TFEU.

Another option would be to allow references to the CJEU, in a similar manner to the DCFTA discussed above. Such a procedure must be designed in a way that does not infringe upon the EU’s autonomy. For example, the ECPC would have been capable of referring EU law questions to the CJEU in order to allow the consistent application and interpretation of EU law. This, however, gave rise to further problems, since the CJEU found that the preliminary ruling mechanism in the draft agreement would essentially deprive the national courts of one of their essential functions, that is, the ability to refer questions to the CJEU.⁸⁹ It is also unclear whether such a procedure would cross the

⁸⁷ CETA, above n 79, art 8.31 9 (emphasis added).

⁸⁸ See *Opinion 2/13*, EU:C:2014:2454, paras 238-9.

⁸⁹ *Opinion 1/09*, EU:C:2011:123, para 81: “The draft agreement provides for a preliminary ruling mechanism which reserves, within the scope of that agreement, the power to refer questions for a preliminary ruling to the PC while removing that power from the national courts.”

UK's red line. It has indicated that it seeks to end the "direct jurisdiction" of the CJEU,⁹⁰ which may leave open the possibility for CJEU referrals. The role of the CJEU in non-EU jurisdiction is a controversial subject. Switzerland, for instance, has only recently softened its stance on whether to allow the CJEU to rule on some issues in disputes.⁹¹ Lastly, it should be stressed that such procedural safeguards to preserve EU autonomy may not themselves be sufficient. The agreement as a whole must be designed in a way that ensures that the essential characteristics of Union law are not altered.

Standing Tribunal

Another option that has been seldom discussed is the creation of a standing tribunal with jurisdiction regarding Brexit-related matters. Such a tribunal could be established to deal with Brexit-related issues under both the WA and the FRA. Rather than using existing bodies (EFTA Court/CJEU) or establishing *ad hoc* arbitration under an FTA, the EU and UK could establish a standing tribunal that focuses on Brexit disputes. The WA could establish an independent Brexit tribunal and it give powers to interpret that bilateral agreement. The tribunal would then be given jurisdiction under the FRA when it enters into force. One of the benefits of such a tribunal would be to take the interpretation of the agreement out of the hands of one of the parties, that is, the CJEU. The CJEU would be limited to resolving certain disputes during the transition period and deciding references on EU law issues from the Brexit tribunal. Another benefit would be that the tribunal would develop expertise in Brexit-related matters, and build up a coherent body of Brexit jurisprudence.

A standing tribunal could act quickly in order to address conflicts as they arise, rather than establishing a process of *ad hoc* arbitration, or 'docking' with the EFTA Court. Brexit is likely to give rise to many unforeseen and complicated legal issues beyond issues of trade, including legal questions touching on public international law, EU law, and the UK legal system.⁹² A standing tribunal could consist of members with expertise in these fields. Moreover, the tribunal could avoid the appearance of 'bias' towards one of the parties by the appointment of members that provides equal representation to the EU, the UK and third states. This would follow the model of the Iran-United States Claims Tribunal and arbitration practice that involves the appointment of a third arbitrator. A new tribunal may also be viewed less as a 'European' court in the vein of the CJEU and EFTA court, and more of a truly international tribunal, focused on Brexit issues. This may satisfy those who have qualms with 'foreign' courts having a role in the British legal system after its withdrawal. Of course, the establishment of such a new tribunal gives rise to a collection of new challenges, including issues of appointment, funding, jurisdiction, location, relationship with other courts, and so on. Yet developing a tribunal focused on Brexit disputes could potentially address the many challenges discussed in this article.

Conclusion

While the UK is on course to withdraw from EU, the discussion about dispute settlement demonstrates the complexity and difficulty associated with fully removing a state from the EU legal

⁹⁰ Enforcement and Dispute Resolution, above n 9, para. 67.

⁹¹ Ralph Atkins and Alex Barker, 'Swiss soften line on foreign judges in bid to bolster EU ties' *Financial Times* (online), 5 March 2018, <<https://www.ft.com/content/17d840b6-209b-11e8-a895-1ba1f72c2c11>>.

⁹² Duncan Robinson and Alex Barker, 'Many ways' Brexit may go to EU courts, top ECJ judge says', *Financial Times* (online), 21 November, 2016 <<https://www.ft.com/content/6609025a-adbc-11e6-ba7d-76378e4fef24>>.

order. One reason is the hybrid nature of EU law and the EU legal order. Another reason is that the UK seeks to have a legal relationship of some sort with the EU after withdrawal, any such agreement must respect the autonomy of the EU legal order. Depending on the nature of the relationship, this may require at least some involvement of the CJEU after the UK's withdrawal.

The House of Lords European Union Justice-Sub Committee report on dispute resolution concludes, "there is no 'one size fits all' dispute resolution model that could deal with all the issues caused by Brexit."⁹³ Indeed, international adjudication offers a number of 'models' for dispute settlement, including the WTO model, various quasi-judicial systems, the EFTA Court, and others. Yet none appear to be fully appropriate to the Brexit context. A standing Brexit dispute settlement body, combining elements of the EFTA Court system and the more traditional inter-state model used in FTAs, could potentially address the legal and political concerns of both the EU and the UK. Such a proposal reflects the unique nature of Brexit, which involves the exceptional situation of a state departing an international institution while at the same time establishing a new relationship with it.

⁹³ House of Lords, European Union Committee, 15th Report of Session 2017–19, *Dispute resolution and enforcement after Brexit*, (3 May 2018) 3. <<https://publications.parliament.uk/pa/ld201719/ldselect/ldcom/130/130.pdf>>

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