

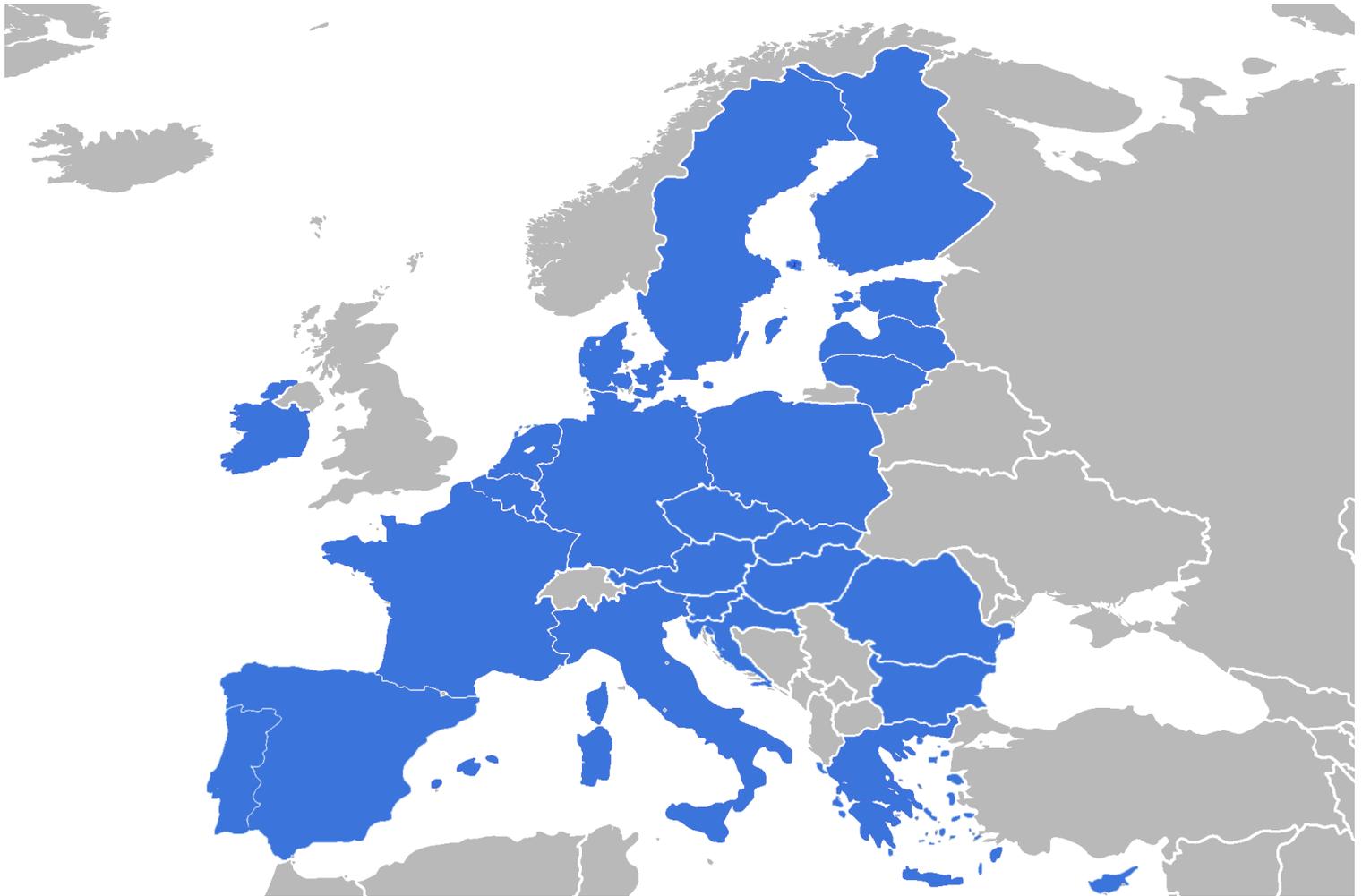


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What are the Judicial options for the future EU/UK agreement?

Selmayr's Appointment : why this Juncker crisis is much more dangerous for the European commission than the Santer crisis



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In partnership with Université de Liège - **ULG**
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What are the Judicial Options for the future EU/UK agreement?

*Pr. Franklin Dehousse*¹
*and Xavier Miny*²

EXECUTIVE SUMMARY

The Brexit negotiation is a quite new experience for the EU, but this certainly does not apply to the definition of the future trade relationships between the two partners. On the contrary, the EU possesses a long experience in this area. Furthermore, since 2012, to compensate the failure of the WTO Doha Round, it has developed a considerable activity in that field, and many innovative agreements have been concluded and implemented.

Curiously, the definition of a dispute settlement system quickly became one of the most contentious Brexit negotiation topics. This has not simplified the debates, since institutional systems only exist to support substantive agreements. It would have been better to discuss substance first, and institutions second. This being said, an inventory of the existing judicial solutions leads to distinguish different models: the EFTA court, the mixed EU/Ukraine system, the CETA panel system, the Asian agreements, the Switzerland and finally the Turkey options. There is little magic in all that. The deepest integration of third States into the single market requires the strongest dispute settlement system, for reasons directly linked to legal security.

It appears that both parties have developed contradictions during the Brexit negotiations. The UK persistently expresses a desire for strong integration and weak institutional constraints, that cannot be accepted by the EU, both for legal and political reasons. The EU has absolutely no global vision of the long term institutional problem. First, from the conclusion of the EU/Ukraine agreement, there has been no impact assessment of the different available solutions. Second, the multiplication of various judicial solutions in various trade agreements could easily become the source of a new legal disorder. The EU presently runs the risk of conceiving an archipelago of scattered judicial solutions without much coherence and efficiency.

The UK will not be considered as an usual neighbourhood partner for the EU. Its economy is much bigger than the other partner countries, it is more developed, and nearer. The legal problems that this implies will be most probably different, more numerous and more litigious. In a nutshell, Brexit should be seen as an additional reason to revisit the system of trade agreements for the whole EU neighbourhood, and it has not until on 29 March 2017, the UK Government served formal notice under Article 50 of the Treaty on European Union to end the UK's membership of the Union. Such notice started a two-year period at the end of which the UK will cease to be a member State. During the upcoming negotiations of a new and necessary trade agreement, the model of dispute settlement is likely to become a bone of contention and one of the most hotly contested issues. Written mainly for operational purposes, this paper examines various solutions, and also tries to determine where the EU's interests lie.

¹ F. Dehousse is professor at the University of Liège, former Special Representative of Belgium in EU negotiations, and former judge at the Court of Justice of the European Union. He has previously taught in various universities (College of Europe, Strasbourg, Paris and Namur). He has worked extensively in the telecommunications and trade business. He has worked in all main EU institutions: Parliament and Commission (as advisor and consultant), Council (as national negotiator), and Court of justice of the EU (as judge). He has followed all EU Treaty negotiations in various capacities since the Single Act in 1985.

² X. Miny is lecturer at the University of Liège and FRESH grantee (National Fund for Scientific Research).



Obviously international rules are far more effective when they are followed in good faith and when they are properly and uniformly applied. Procedures and mechanisms envisaged to settle disputes between the potential partners are precisely among the key elements that could determine the overall credibility and effectivity of any agreement. With well-designed provisions for dispute settlement, the parties are deterred from violating the agreement and from having immediate recourse to retaliation and to countermeasures in the event of disputes.

For trade, as noted by Emerson and Movchan, “in practice the EU very rarely relies on the [Dispute Settlement Mechanisms] in its FTAs to resolve a trade dispute. It prefers to use diplomatic means (e.g. by discussing this bilateral meetings such as the Association Council or in unilateral statements) or, in some cases, the WTO DSU”³. However, in light of the particular circumstances of the Brexit and given the large number of divergent interests, matters and parties involved in this unprecedented process, there exist risks of disagreement on the correct interpretation and application of trading arrangements between the UK and the European countries⁴. Furthermore, a deep cooperation between the EU and UK in other domains may also engender disputes at various levels (in police and justice cooperation, for example).

On the European side, the EU Council’s negotiating mandate about the Brexit withdrawal agreement already mentioned the needs of dispute settlement procedures and requires that this “should be done bearing in mind the Union’s interest to effectively protect its autonomy and its legal order, including the role of the Court of Justice of the European Union”⁵. According to the mandate, the upcoming agreement should include provisions ensuring the settlement of disputes, in particular, when it concerns the continued application of Union law, the citizens’ rights and the application and interpretation of the other provisions of the agreement, such as the financial settlement or measures adopted by the institutional structure to deal with unforeseen situations. The Court of Justice of the European Union (ECJ)’s jurisdiction (and the supervisory role of the Commission) should be maintained.

For the application and interpretation of provisions of the Agreement other than those relating to Union law, an alternative dispute settlement should only be envisaged if it offers equivalent guarantees of independence and impartiality to the ECJ⁶.

³ M. Emerson and V. Movchan (eds), *Deepening EU-Ukrainian Relations: What, Why and How?*, London, Rowman & Littlefield International Ltd., 2016, 235-236; see also C. Chase, A. Yanovich, J. A. Crawford and P. Ugaz, *Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?*, Geneva, World Trade Organization: Economic Research and Statistics Division, 2013, 42.

⁴ Bar Council Brexit Working Group, ‘The Brexit Papers 10: Dispute Resolution and Enforcement Mechanisms post-Brexit’, The Bar Council, June 2017, 2.

⁵ European Council Guidelines of 29 April 2017 and the Negotiating Directives adopted on 22 May 2017, European Council-Council of the European Union, available : <http://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines/>.

⁶ Council of 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*, 22 May 2017, available: <https://www.consilium.europa.eu/media/21766/directives-for-the-negotiation-xt21016-ad01re02en17.pdf>.



A later position paper certainly nuanced this position⁷, and complex solutions were found in the draft Withdrawal Agreement⁸. The guidelines on the framework for the future EU-UK relationship have remained quite general⁹. They only declare that “the role of the Court of Justice of the European Union will also be fully respected”.

In the United Kingdom, the picture is quite different. According to chapter 2 of the Government’s White Paper of February 2017, “ensuring a fair and equitable implementation of our future relationship with the EU requires provision for dispute resolution”¹⁰. However, they “will bring to an end the jurisdiction of the CJEU in the UK”, it adds. So the UK’s position can be summed by the recognition of the need for a dispute resolution mechanism or mechanisms without assigning any function to the ECJ. As proof, the Prime Minister Theresa May declared at the Conservative Party conference in October 2016: “We are not leaving [the EU] only to return to the jurisdiction of the European Court of Justice. That is not going to happen”. More recently, the Government said that it will end the ‘direct’ jurisdiction of the ECJ¹¹ and that the UK will ‘seek to agree a new approach to interpretation and dispute resolution with the EU’ with the intention of respecting UK sovereignty, protecting the role of national courts and maximising legal certainty¹².

In other words, politically, the ECJ’s role *after* 2019 has become one of the most controversial items of the post-Brexit negotiation. Legally, keeping a cooperation between the EU and the UK, and especially a strong one in trade, will require some mechanisms to settle inevitable disputes. From the legal point of view, the question remains very sensitive because the ECJ has shown itself extremely jealous of its supremacy regarding dispute settlement mechanisms in the EU external agreements. This was first expressed in Opinion 1/91¹³ on the European Economic Area Agreement (EEA) and its system of judicial review.

⁷ European Commission, Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU, Position paper transmitted to EU27 on Governance, 28 June 2017, available: https://ec.europa.eu/commission/sites/beta-political/files/essential_principles_governance.pdf.

⁸ See the 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, available : 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.

⁹ European Council (Art. 50) guidelines on the framework for the future EU-UK relationship, 23 March 2018, available : <http://www.consilium.europa.eu/en/press/press-releases/2018/03/23/european-council-art-50-guidelines-on-the-framework-for-the-future-eu-uk-relationship-23-march-2018/>.

¹⁰ HM Government, The United Kingdom’s exit from and new partnership with the European Union, CM 9417, Presented to Parliament by the Prime Minister, February 2017, available: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf.

¹¹ Department for Exiting the European Union, Enforcement and dispute resolution - a future partnership paper, Gov.uk, 23 August 2017, available: <https://www.gov.uk/government/publications/enforcement-and-dispute-resolution-a-future-partnership-paper>.

¹² Department for Exiting the European Union, The United Kingdom’s exit from and new partnership with the European Union White Paper, 2 February 2017, available: www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper.

¹³ ECJ, Opinion 1/91, [1991] ECR I, 6079.



This was repeated in Opinion 1/09¹⁴ on the draft agreement for a unified patent litigation system, described at the time as the expression of “scepticism and distrust on part of the ECJ when it comes to the European Union’s international co-operation, especially its participation in international frameworks for dispute settlement.”¹⁵ In that Opinion, for instance, the ECJ was opposed to the establishment of the European and Community Patent Court because

*“the envisaged agreement, by conferring on an international court which is outside the institutional and judicial framework of the European Union an exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of the Community patent and to interpret and apply European Union law in that field, would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts and, consequently, would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law.”*¹⁶

Finally, it was also heavily emphasized in Opinion 2/13 which concerns the EU accession of the European Convention on Human Rights. The ECJ’s reluctance was so strong that Peers commented : “in short, the Court is seeking to protect the basic elements of EU law by disregarding the fundamental values upon which the Union was founded.”¹⁷ One disabused former ECtHR judge even described the cultural difference (and the supremacy debate) between the two courts in the following way : “the judges from Luxembourg each travel with their individual car and driver provided by the ECJ; the judges from Strasbourg go by bus.”¹⁸ Such a background must be remembered. This creates a huge difference between already existing “off-the-shelf” solutions, and new ones.

Even if a preliminary deal was reached in December 2017 concerning ECJ role in the Brexit withdrawal agreement¹⁹, the crucial point remains the dispute settlement mechanism for the future relationship. If the UK intends to maintain a strong relationship with the EU, and particularly in trade, there are not many possible solutions. They have already been contemplated in EU negotiations with numerous third States. The EU will not be eager to modify them strongly, not at all in the intention of punishing the UK, but because this would run the (very huge) risk of destabilizing its relations with other partners, or creating difficult precedents for the future. It is thus important to review them, and to understand the context of their creation.

¹⁴ ECJ, Opinion 1/09, [2011] OJ C211/28. See also ECJ, Opinion 1/00, [2002] ECR I, 3493.

¹⁵ T. Stock, ‘Taking National Courts More Seriously? Comment on Opinion 1/09’, *European Law Review*, 36, 2011, 576.

¹⁶ Par. 89.

¹⁷ S. Peers, Opinion 2/13, ‘The EU’s Accession to the ECHR: The Dream Becomes a Nightmare’, *German Law Journal*, 2015, 213. See also N. Petit et J. Pilorge-Vrancken, ‘Avis 2/13 de la CJUE : l’obsession du contrôle ?’, *Revue des affaires européennes*, 2014, 815.

¹⁸ L. Besselink, ‘Should the European Union Ratify the European Convention for Human Rights? Some Remarks on the Relations between the European Court of Human Rights and the European Court of Justice’, in A. Føllesdal, G. Ulfstein and B. Peters (eds.), *Constituting Europe: the European Court of Human Rights in a National, European and Global Context*. Cambridge Studies on Human Rights Conventions, Cambridge University, 2013, 306.

¹⁹ F. Dehousse, ‘The Brexit preliminary agreement is not what most people think (especially on the european court of justice)’, *Linkedin*, 11 december 2017, available: <https://www.linkedin.com/pulse/brexit-preliminary-agreement-what-most-people-think-court-dehousse>.



1. THE EEA SYSTEM

The first option is the EEA system, based on the EFTA court (EFTAC). Three States (Iceland, Liechtenstein, and Norway) remain, with Switzerland, in the European Free Trade Association (EFTA) created in the 1950s. Together with the EU and its Member States, these three States have formed the European Economic Area (EEA). This agreement establishes an Internal Market enabling goods, services, capital, and persons to move largely freely. The two EU and EEA system thus “form two separate legal orders, but are largely identical in substance”²⁰. So basically, the EEA agreement is interpreted in the EU by the ECJ and, in the EFTA countries, by the EFTAC.

During the negotiations, the mechanisms for dispute settlement were also among ones of the most sensitive and debated issues. The negotiators wanted to establish a judicial system which would have provided legal security while ensuring at the same time a uniform interpretation and application of the EEA rules. They had “to take into account the political sensitivity of the judicial system both in the EFTA States and in the Community, insofar as political factors may affect both the sovereignty of the Contracting Parties and the independence of their courts”²¹.

On 14 May 1991, the EFTA and EC negotiators reached a first compromise in which it was agreed to create an independent EEA Court. This brand new Court would have been composed of five judges from the ECJ and three judges from the EFTA countries and would have been competent to give rulings concerning dispute settlements at the request of the EEA Joint Committee or the Contracting Parties, concerning disputes between the EFTA Surveillance Authority and an EFTA State and cases brought by enterprises or States against decisions of the EFTA structure in matter of competition. Moreover, during the parallel Ministerial Meetings in Luxemburg on 21-22 October 1991, it was agreed to add the power of giving optional preliminary rulings to these competences.

After the EC Commission had requested the ECJ’s opinion under Article 228 EEC Treaty on the compatibility with it of the system of judicial supervision proposed under the EEA Agreement, the ECJ criticized the draft in its famous and “very severe”²² Opinion 1/91. At first, the Court held that an international agreement providing for a disputes settlement mechanism between the contracting parties and for an international court to interpret such agreement is compatible with the EU law. Then it added that, since the agreement replicates EU law, any court charged with the interpretation of that agreement would by definition interpret EU law in a sense. Therefore, these interpretations would be internally binding on the ECJ and would interfere with the ECJ’s exclusive jurisdiction. Consequently, the conclusion was blunt: the agreement could not be concluded.

²⁰ C. Baudenbacher and M. Clifton, ‘Courts of regional economic and political integration agreements’, in C. Romano, K.J. Alter and Y. Shany, (ed.), *The Oxford Handbook of International Adjudication*, Oxford University Press, 2014, 257.

²¹ L. Sevón, ‘EEA Judicial System and the Supreme Courts of the EFTA States’, *European Journal of International Law* 329, 1992, 329-340.

²² T. Blanchet, R. Piipponen, and M. Westman-Clément, *The Agreement on the European Economic Area (EEA): A Guide to the Free Movement of Goods and Competition Rules*, Oxford, Clarendon Press, 1994, 3.



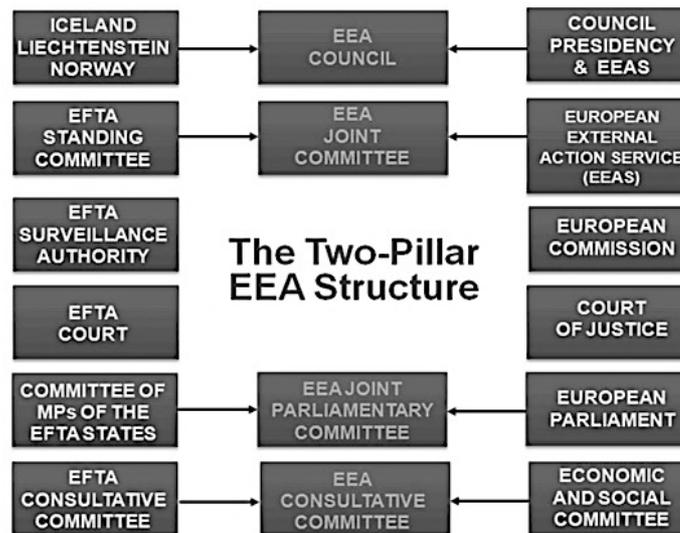
The outcome of the renegotiation was subsequently submitted to the ECJ for a new opinion. In Opinion 1/92 delivered on 10 April 1992, the ECJ stated that the texts, in their new draft, were compatible with the EEC Treaty²³. At the judicial level disputes may, depending on the parties to the dispute and the issue at stake, be brought before ECJ, the EFTAC, national courts and *ad hoc* arbitration tribunals.

Firstly, under Article 111 of the EEA Agreement, the EEA Joint Committee, which brings together representatives of the EU and EFTA, may settle disputes which concern the interpretation or the application of the agreement. It shall make an in-depth examination of the situation giving rise to the dispute, in order to find all possibilities for preserving the good functioning of the Agreement. In the absence of a settlement or agreement, a party may adopt safeguard measures, or it could also result in the partial suspension of the Agreement. This procedure has never had to be resorted to. The EEA Joint Committee follows permanently the evolution of the case law in both ECJ and EFTAC (Article 105 EEA). When a divergence arises, if the Joint Committee does not find a solution and if it concerns disagreements on the interpretation of provisions of the Agreement, which are identical in substance to corresponding rules of the EEC Treaty or the ECSC Treaty (sometimes referred to as ‘mirror legislation’), the parties to the dispute “may agree to request the Court of Justice of the European Communities to give a ruling on the interpretation of the relevant rules” (Article 111 § 3 EEA). If no solution has been found after six months, the parties are as well entitled to take safeguard measures according to Article 102. Consequently, at the end, the States’ formal sovereignty is protected. The ECJ intervention cannot be imposed to a third State.

The result of Opinion 1/91 is the dispute settlement arrangement based on two pillars that we now find in the (revised) EEA Agreement. The ECJ interprets its rules in binding form for the EU-side and the EFTAC – formed as a reaction to Opinion 1/91 – interprets its rules for the remaining three non-EU members of the EEA. In other words, compliance by the EU member States with the EEA Agreement is ensured by EU institutions, the European Commission and the ECJ; while compliance by the three EFTA States belonging to the EEA – Norway, Iceland and Liechtenstein – is ensured by *ad hoc* institutions, the EFTA Surveillance Authority (ESA) (Article 108(1) EEA Agreement) and the EFTAC (Article 108(2) EEA Agreement). The EFTAC is composed in a similar way to the ECJ. The bench consists of three judges, one nominated by each of the EEA-EFTA States for a renewable term of six years. The two main types of cases before the EFTAC are the direct actions and the preliminary references – or advisory opinions. Direct Actions are initiated with an application lodged directly at the Court by an EFTA State, the EFTA Surveillance Authority or an individual or an economic operator. In this case, the judgments are final and binding for the parties. In addition, preliminary references are submitted to the Court by EEA-EFTA States’ national courts for the interpretation of EEA rules – in the same way the ECJ takes cognizance of references from EU member States’ national courts – and form part of their cases. However, the judgments are not formally binding on the referring national court. Nonetheless there is a duty of loyalty.

²³ ECJ, Opinion 1/92 [1992] ECR I-252.





The left pillar shows the institutions that concerns EEA EFTA States while the right pillar shows the EU side.

The joint EEA bodies are in the middle.

Source: “The Basic Features of the EEA Agreement”, [efta.int](http://www.efta.int), available on: <http://www.efta.int/eea/eea-agreement/eea-basic-features>.

For simplicity sake, the EEA system is often described as under the ECJ’s control. This description simplifies reality. Clearly the Contracting Parties intended to ensure a uniform interpretation and application of the EEA Agreement (15th recital to preamble). According to Article 6 EEA, all provisions of the Agreement, *in so far as they are identical in substance to corresponding EC rules*, are in their implementation and application to be interpreted in conformity with the relevant rulings of the ECJ given prior to 1992. Moreover, according to Article 3 (2) ESA/EFTA Court Agreement, for the ECJ case law after the signing of the EEA Agreement, the EFTAC gives due consideration to its principles which concern the interpretation of the EEA Agreement or such rules of Community law which are identical in substance to the EEA Agreement, the provisions of Protocol 1 to 4 to the ESA/EFTA Court Agreement and the provisions of the acts corresponding to those listed in various Annexes. These texts concern essentially the four freedoms of movement and competition, which are the hard core of the EEA agreement. In a nutshell, the EFTAC follows the relevant case-law of the ECJ when provisions are identical, when judgments are available and as far as the facts are identical²⁴. However, simultaneously, when the EFTAC is the first to deal with a particular case and when a similar issue comes before the ECJ afterwards, the ECJ is often on the same wavelength than the EFTAC²⁵.

²⁴ See C. Baudenbacher, ‘The Relationship Between the EFTA Court and the Court of Justice of the European Union’, in C. Baudenbacher (eds), *The Handbook of EEA Law*, Heidelberg, Springer, 2015, pp 179-194.

²⁵ M. J. Clifton, ‘The Other Side of the Street: the EFTA Court’s Role in the EEA’, *European Law Reporter*, 2014, pp.7–8 and pp 216–219.

At this point, there are three different options for the UK. It may either become a member State of the EEA as an EEA-EFTA State, either use the EFTA institutions without joining the EEA and the EFTA – such option is called the ‘docking scenario’ –, or also replicate the two-pillar structure and create an EFTAC clone.

In the first case, the UK would be present in the EFTA Surveillance Authority, the EFTAC and the EEA institutions. This option would be difficult to negotiate for the UK government, even if it is said that the Norwegian model is studied by Brussels as temporary plan B²⁶. UK Prime Minister Theresa May has indicated that the UK will not seek membership of the EEA and is more focused on a broad new partnership with the EU including a comprehensive Free Trade Agreement. Several reasons are conjectured as to why this decision was taken. For the UK Government, as for the Lords’ committee, being out of the EU but a member of the EEA would mean complying with the European law, without having a seat at the decision-making table. Being an EEA member would mean accepting a role for the European Court of Justice and “It would also mean not having control over immigration”²⁷. Moreover, there can be no assurance that this solution would get the support of the EU27 and the three EEA-EFTA States because it could disrupt the complex balance of powers. In the words of the Norwegian foreign minister, EFTA is indeed ‘the only international organisation where Norway is a superpower’²⁸. The *classic* Norwegian model has therefore been repeatedly dismissed by the UK government, either as a transition arrangement or as basis for a new trading relationship²⁹.

Advocates of the Norwegian model maintain that the EFTA model could meet some of the UK’s requirements in one way or another. According to the President of the EFTAC, Carl Baudenbacher³⁰, the UK could ‘dock’ to the court and adopt some of its principles on a long-term basis. Baudenbacher, who has headed the EFTAC for over 14 years, said the ‘docking’ theory with the EFTAC (sitting in this case with a UK judge) would not be, strictly speaking, new and, notably, was mentioned in Swiss government reports during 2013 negotiations, before being eventually ruled out by Confederation itself. EFTA, he said, could be the “natural home for the UK post-Brexit”³¹. In this peculiar situation, this arrangement implies that the EFTA institutions would interpret the agreement between the EU and the UK and that those institutions would get a role in resolving disputes over that agreement.

²⁶ S. Marks and H. Von Der Burchard, ‘Brussels’ Brexit plan: Treat the UK like Norway - Copying EU’s deal with Oslo would keep Britain in single market during the transition’, Politico, 13 April 2016, available: <http://www.politico.eu/article/eu-brussels-suggests-norway-model-for-uk-after-brexit-talks-negotiations/>.

²⁷ Department for Exiting the European Union and Department for International Trade, ‘Brexit - The options for trade’, 28 February 2017, available: <http://www.parliament.uk/documents/lords-committees/eu-external-affairs-subcommittee/Future-trade-EU-UK-Government-Response-and-Annex%20A.pdf>.

²⁸ P. Walker, ‘Norway tells Britain: no Brexit “silver bullet” over single market access’, The Guardian, 5 December 2016, available: <https://www.theguardian.com/politics/2016/dec/05/no-brexit-silver-bullet-single-market-access-norway-tells-britain>.

²⁹ A. Payne, ‘Theresa May is under pressure to embrace the Norway Brexit Model - here's what that means’, Business Insider, 7 April 2018, available : <http://www.businessinsider.fr/us/what-is-the-norway-model-brexit-2018-4>.

³⁰ ‘Keynote address by EFTA Court President Carl Baudenbacher’, Institute for Government, 5 December 2017, available : <https://www.instituteforgovernment.org.uk/Carl-Baudenbacher>.

³¹ C. Whelan, ‘The answer to Brexit turmoil is staring us in the face’, the guardian, 24 August 2017, available: <https://www.theguardian.com/commentisfree/2017/aug/24/brexit-ecb-britain-efta>.



There has been some criticism of that particular option. Following his comments, Baudenbacher was asked during a radio interview with the BBC if he was trying to increasing the bloc's standing against the ECJ. "There are those", said the host, "who would say 'look, the reason you're so keen for the UK to join is because at the moment with you're three judges and you have a judges from the different countries, you're outgunned by the European Court of Justice'"³². If the statement lacks nuance and if the President insisted he merely wanted the court to "flourish", Baudenbacher agrees that "it is clear that with a British judge, the EFTA court could further strengthen its profile without giving up the overall goal of realising a homogeneous European Economic Area"³³. In any event, there has been little comment from the UK on this "docking" idea. That being said, it is true that the EFTAC may represent, in the spirit of Brexiters, another *foreign* court with *foreign* judges from Norway, Iceland and Liechtenstein.

As we have noted, the third option would be to create a UK-only version of the EFTAC and a 'UK Surveillance Authority'. Such replication of the EFTA system would involve creating a new court composed of British judges and tasked only with the interpretation and application of the UK-EU agreement in the UK while all disputes that arose in the EU would be handled by the EU institutions. Logically, there would be a joint committee similar to that which exists in the EEA system.

In its paper on "enforcement and dispute resolution", the Department for Exiting the European Union sets out options for its proposed "deep" future UK-EU relationship. In examining the precedent set by the EFTAC, the paper seems to consider the EFTA model as a judicious starting point for building a new post-Brexit judicial regime. According to Charles Grant, the EU would be "quite prepared to live with a dispute settlement mechanism modelled on the EFTA court"³⁴. It would be difficult to see how the ECJ could not accept this solution, even if such tailor-made approaches may cause alarm among EU partners.

To conclude, "the EFTA Court and the Surveillance Authority are the only mechanisms able to apply legislation similar to EU law outside the EU in a way that the CJEU has considered compatible with the Treaties. This system does not create any problems with the uniform interpretation of EU law, because the Joint Committee, indirectly, ensures that the EFTA Court interpretation of the EU rules transposed into EFTA law will be and continue being the same as that of the CJEU for the original EU rules. Such a mechanism also respects the autonomy of EU law, because any occasional divergent interpretation of the rules by the EFTA Court cannot be imposed on the CJEU, because there is no organic integration between the two courts.

³² A. Nair, 'OUTGUNNED by ECJ?' Radio host roasts EFTA Court president over calls for UK to join bloc', Sunday Express, 13 September 2017, available: <https://www.express.co.uk/news/uk/853479/Brexit-EFTA-ecj-european-court-justice-BBC-radio-4-today-Carl-Baudenbacher-uk-video>.

³³ C. Baudenbacher, 'Could the UK use the EFTA Court to resolve disputes following Brexit?', LSE's European Institute, 31 August 2017, available: <http://blogs.lse.ac.uk/euoppblog/2017/08/31/could-the-uk-use-the-efta-court-to-resolve-disputes-following-brexit/>.

³⁴ G. Parker, 'Davis proposes post-Brexit dispute mechanism on EU relations', Financial Times, 21 August 2017, available : <https://www.ft.com/content/7234155a-8599-11e7-8bb1-5ba57d47eff7>.



Finally, there is no problem with the relationship between the national courts of EEA member States and the EFTA Court, because this system creates a parallel provision similar to the preliminary request, which allows the EFTA Court to solve questions of interpretation in a binding manner.”³⁵

Main mechanisms	<p>Two pillars system: the ECJ interprets its rules in binding form for the EU-side and the EFTA Court determines disputes for EFTA States</p> <p>If a dispute concerns the interpretation of provisions of this Agreement, which are identical in substance to European Treaties and to acts adopted in application of these Treaties and if the dispute has not been settled within three months after it has been brought before the EEA Joint Committee, the Contracting Parties to the dispute may agree to request the ECJ to give a ruling on the interpretation of the relevant rules.</p> <p>There is, in general, a presumption of alignment of the EFTA Court on the ECJ concerning these matters.</p>
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³⁵ F. Fernandez Tomas, The settlement of disputes arising From the United Kingdom’s Withdrawal from the European Union, European Parliament Think Tank, 2017, 45.



2. THE EU/UKRAINE ASSOCIATION AGREEMENT – THE EU/GEORGIA ASSOCIATION AGREEMENT – THE EU/MOLDOVA ASSOCIATION AGREEMENT

The EU-Ukraine Association Agreement³⁶ has been presented as “the most ambitious agreement the European Union has ever offered to a non-Member State”³⁷. It provides for different dispute settlement mechanisms, covering sometimes the general aspects of the association and sometimes the *Deep and Comprehensive Free Trade Area* (DCFTA), which contains its core economic provisions. This last part of the Association Agreement has been provisionally applied since 1 January 2016. All the agreement came into force on 1 September 2017.

Two other Association agreements, with Georgia³⁸ and Moldova³⁹, follow the same logic and belong to this new generation of treaties which contain a great number of provisions on the promotion of political, economic and trade co-operation. These two agreements fully came into force on 1 July 2016.

Firstly, for disputes relating to the interpretation or application of provisions of the Agreement apart from the DCFTA, Articles 476 to 478⁴⁰ of the EU-Ukraine Agreement lay down a diplomatic procedure by way of consultations within the Association Council, the Association Committee or some more specialised body, as appropriate. The procedure is initiated by one party sending a formal request to the other party and to the Association Council. If consultations result in an agreed settlement, this will be enshrined in a binding decision of the Association Council. According to Article 478, if no agreement can be reached within three months of the date of notification of the formal request for dispute settlement, the complaining party may take “appropriate measures”, such as the suspension of part of the Agreement, though not of the DCFTA. In the selection of appropriate measures, Article 478 provides that priority shall be given to those which least disturb the functioning of the Agreement.

³⁶ OJ 2014 L161/3.

³⁷ Remarks by President of the European Council Herman Van Rompuy at the press conference of the Eastern Partnership summit in Vilnius. European Council. The President. Vilnius, 29 November 2013. EUCO 254/13, available: <http://data.consilium.europa.eu/doc/document/ST-254-2013-INIT/en/pdf>.

³⁸ OJ 2014, L. 261.

³⁹ OJ 2014, L. 260.

⁴⁰ Articles 420 to 422 of the EU/Georgia agreement and Articles 453 to 455 of the EU/Moldova agreement.



Secondly, the mechanism provided for the settlement of disputes regarding the DCFTA is far more innovative and is set out in Chapter 14 of Title IV of the EU/Ukraine Agreement, at Articles 303 to 323⁴¹. By developing and modernising the model of dispute settlement which has been inserted in free trade agreements of the EU since 2000 (EU-Mexico FTA at first) and which is largely based on the WTO Dispute Settlement Understanding (DSU), this new mechanism widely differs from the other diplomatic ones which are essentially based on consultations and negotiations in order to solve trade disputes⁴². According to Article 305⁴³, the parties are required, in the first instance, to endeavour to resolve their dispute by entering into consultations in good faith with the aim of reaching a mutually agreed solution.

If the parties have failed, the complaining Party may request the establishment of an arbitration panel of three arbitrators. The parties have ten days to agree on its composition, otherwise either Party may request the chair of the Trade Committee, or the chair's delegate, to select all three members by lot from a pre-established list, one among the individuals proposed by the complaining Party, one among the individuals proposed by the Party complained against and one among the individuals selected by the Parties to act as chairperson.

The arbitration panel must notify its ruling to the Parties within 120 days of its establishment. If the panel considers that it can't meet this deadline, the period may be extended, but in no case beyond a total of 150 days. In the light of the recent gas-conflicts between Russia and Ukraine and its impact of several eastern EU Member States, a special procedure and tighter time limits apply in cases of urgency.

The rulings of arbitration panels are binding on the Parties but do not create any rights or obligations for natural or legal persons since it is provided that the «[t]he arbitration panel rulings] shall not create any rights or obligations for natural or legal persons» (Article 321⁴⁴). Each Party is required to take any measures necessary to comply in good faith with the ruling of the panel and they must try to agree on the time to be taken over compliance. If the Party complained against fails to take such measures without offering a temporary compensation, the other Party is entitled to suspend obligations arising from any provision contained in the DCFTA “at a level equivalent to the nullification or impairment caused by the violation”.

Thirdly, a separate mediation mechanism is provided that allows the Parties to seek mutually agreed solutions through a comprehensive and expeditious procedure concerning market access issues concerning national treatment and market access for goods under Chapter 1 of Title 4 (Article 327⁴⁵). The purpose of the mediation procedure is not to review the legality of a measure, but rather to find a prompt and effective solution to a particular market access issue without recourse to litigation. This involves the appointment of a single mediator to assist the Parties in finding a mutually agreed solution. If mediation fails, the possibility of recourse to dispute settlement by way of arbitration remains open.

⁴¹ Articles 244 to 270 of the EU/Georgia agreement and Articles 380 to 406 of the EU/Moldova agreement.

⁴² I.G. Bercero, ‘Dispute settlement in European Union Free Trade Agreements: Lessons Learned?’ in L. Bartels, F. Ortino (eds), *Regional Trade Agreements and the WTO Legal System*, Oxford, Oxford University press, 2006, 383.

⁴³ Article 246 of the EU/Georgia agreement and Article 382 of the EU/Moldova agreement.

⁴⁴ Article 266 of the EU/Georgia agreement and Article 402 of the EU/Moldova agreement.

⁴⁵ ANNEX XIX of the EU/Georgia agreement and ANNEXE XXXII of the EU/Moldova agreement. These two annexes seem to have a broader application than Article 327.



Fourthly, the DCFTA also provides a specific dispute settlement mechanism provisions relating to regulatory approximation (Article 322⁴⁶). Under the EU-Ukraine AA, Ukraine has undertaken to apply, implement or incorporate in its domestic legislation a pre-determined set of EU laws. In case a dispute arises concerning the interpretation or application of provisions of EU law brought into play as a result of the process of approximation of legislation under the Agreement, the arbitration panel shall not decide the question, but request the Court of Justice of the EU to give a ruling, suspending its proceedings in the meantime.

This concerns the following Chapters of the Agreement: Chapter 1 (Technical Barriers to Trade), Chapter 4 (Sanitary and phytosanitary Measures), Chapter 5 (Customs and Trade Facilitation), Chapter 6 (Establishment, Trade and Services and Electronic Commerce), Chapter 8 (public Procurement) and Chapter 10 (Competition). This ruling will be binding on the arbitration panel.

The preliminary ruling procedure is intended to ensure homogeneous interpretation of the incorporated EU *acquis*⁴⁷. Many chapters contain a provision concerning Ukraine's regulatory approximation with the EU rules⁴⁸. The scope of such obligation is defined in numerous annexes.

Fifthly, the option of using the WTO dispute settlement system remains available. It cannot however be used simultaneously with the arbitration option (Article 324⁴⁹). Finally, as we said, Article 477 offers a residual procedure to settle disputes, when other procedures are not available⁵⁰. This last solution relies essentially on the Association Council.

In sum, this agreement offers a consultation process (Article 305), a mediation procedure (Article 327) and an arbitration procedure (Article 306 to 311), with a subsequent option in some cases for the European Court of Justice, and a residual procedure (Article 477). Again, the formal sovereignty of the parties is largely protected, except for the important exception of regulatory approximation. This is interesting considering the agreement's strong ambitions. It aims to remove import duties on most products currently traded between the EU and Ukraine, align Ukrainian legislation with EU standards, and apply rights and protections to enterprises.

Dispute resolution in the EU's agreement with the Ukraine is the fruit of a carefully crafted compromise. For some, "the "Ukraine Model" corresponds to the British objectives in that it contains substantial market access but does not require the application of EU law or compliance with the case law of the ECJ, nor does it provide for free movement but it does allow free trade agreements with third countries.

⁴⁶ Article 267 of the EU/Georgia agreement and Article 403 of the EU/Moldova agreement.

⁴⁷ Article 19 TEU. For analysis, see I. Govaere, 'Beware of the Trojan Horse: Dispute Settlement in (Mixed) Agreements and the autonomy of the EU Legal Order', in C. Hillion and P. Koutrakos (Eds.), *Mixed Agreements Revisited: The EU and its Member States in the World*, Oxford, Hart Publishing, 2010, 192-199.

⁴⁸ See for example Article 124 about electronic communications services and Article 133 about financial services.

⁴⁹ Article 269 of the EU/Georgia agreement and Article 405 of the EU/Moldova agreement.

⁵⁰ Article 421 of the EU/Georgia agreement and Article 454 of the EU/Moldova agreement.



Thus the United Kingdom's four key requirements are met⁵¹. One must however observe that approximation of legislation covers a broad scope of topics, where the ECJ's competence is more important.

Main mechanisms	<p>For disputes relating to the interpretation or application of provisions of the Agreement apart from the DCFTA, the Agreement provides a diplomatic procedure by way of consultations within the Association Council, the Association Committee or some more specialised body, as appropriate.</p> <p>For the DCFTA part, another binding trade specific Dispute Settlement Mechanism is set out in form of a dedicated protocol. This trade specific mechanism is inspired by traditional WTO dispute settlement mechanism.</p> <p>For these and in the specific context of dispute settlement, Article 322(2) provides that, where a dispute raises a question of interpretation of a provision of specific EU law, the arbitration panel shall not decide the question, but request the Court of Justice of the European Union to give a ruling on the question. In such cases, the deadlines applying to the rulings of the arbitration panel shall be suspended until the Court of Justice of the European Union has given its ruling. The ruling of the Court of Justice of the European Union shall be binding on the arbitration panel.</p>
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⁵¹U. Pöttsch and B. Van Roosebeke, "Ukraine Plus" as a model for Brexit', Centre for European Policy, Freiburg, 24 January 2017, available :

http://www.cep.eu/fileadmin/user_upload/cep.eu/Studien/cepAdhoc_Brexit/cepAdhoc_Ukraine_Plus_as_a_model_for_Brexit.pdf; see also A. Duff, After Brexit: learning to be good neighbours, EPC, 2016, available : http://www.epc.eu/pub_details.php?pub_id=7194



3. THE COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (UE/CANADA AGREEMENT)

The Comprehensive Economic and Trade Agreement (CETA) is a free trade agreement concluded in 2016 between the EU and Canada⁵². It has provisionally entered into force on 21 September 2017. The CETA provides for different tailored dispute settlement mechanisms depending on the identity of the parties or the subject matter of the dispute.

Chapter twenty-nine contains provisions for dispute settlement between the Parties to the Agreement. The agreement provides for arbitration as the main dispute resolution procedure, prioritising amicable solutions at first. One must notice that a special dispute settlement regime has been established for resolution of investment disputes between investors and States (Articles 8.18 to 8.43) in establishing an ‘Investment Court System’ (ICS). This development contrasts with the EU-Singapore FTA.

In the first instance, a Party may request in writing confidential consultations with the other Party (Article 29.4). The Parties may also have recourse to mediation with regard to a measure if the measure adversely affects trade and investment between the Parties (Article 29.5).

If this fails, the requesting Party may refer the matter to an arbitration panel, the ruling of which will be binding (Article 29.6). The composition of the arbitration panel is to be agreed between the Parties. If the Parties cannot agree on the exact composition of a panel, either Party may request the Chair of the CETA Joint Committee, or the Chair’s delegate, to draw by lot the arbitrators from a pre-agreed list of at least fifteen arbitrators, “chosen on the basis of objectivity, reliability and sound judgment” (Article 29.8). Five of whom will be Canadian nationals, five who will be nationals of the EU and five who will be nationals of third countries.

After a first confidential interim report that shall contain both findings of fact and determinations as to whether there have been any violations of CETA, the panel will then issue its final report to the CETA Joint Committee and to the Parties. The responding Party shall take any measure necessary to comply with the final panel report (Article 29.12). If the ‘losing’ Party fails to comply, the ‘winning’ Party shall be entitled to either temporarily suspend obligations or receive compensation. Parties can choose to resolve their disputes by agreeing to disagree, and impose interim sanctions to ward off any perceived economic disadvantages caused by the violation of the Agreement.

The UK White Book on Exiting the EU explicitly cites the recent Comprehensive Economic and Trade Agreement with Canada (CETA) as a model on how best to avoid ECJ jurisdiction. Adopting a similar approach to CETA in the future UK-EU agreement could allow the UK to ensure the consistent application of the terms of the agreement and effective recourse to enforcement mechanisms in the event of a potential breach, without requiring the UK to submit to the jurisdiction of a permanent supranational court.

⁵² OJ 2017 L 11.

The Investment Court System is intended to provide foreign investors with an alternative to domestic courts to resolve disputes between them and their host governments if they claim to be victim of an infringement of several rights contained in CETA. Under the ICS, it shall be established to hear claims a permanent Tribunal of fifteen Members who will be appointed by the EU and Canada. Divisions of this Tribunal composed of three Members will hear each particular case. In addition to this, an Appellate Tribunal shall be created (Article 8.28). The Appellate Tribunal may uphold, modify or reverse a Tribunal's award based on errors in the application or interpretation of applicable law; manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law; and the grounds set out in Article 52(1) (a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b) (in other words: if the Tribunal was not properly constituted; if the Tribunal has manifestly exceeded its powers; if there was corruption on the part of a member of the Tribunal; if there has been a serious departure from a fundamental rule of procedure or if the award has failed to state the reasons on which it is based) .

Although the ICS can only be used if the dispute in question cannot be resolved through consultations, there is no requirement to exhaust local remedies to mobilize the ICS. Moreover, it requires the investors to discontinue domestic legal proceedings in order to use the mechanism. This does not allow to invalidate EU legislation. Furthermore, CETA offers a number of safeguards in order to preserve the autonomy of the EU legal order. According to Article 8.31(2),

“the Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the disputing Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of the disputing 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”.

However, there is no provision that requires any prior intervention by the ECJ if the dispute involves EU law. The question still remains over whether these safeguards are sufficient. Possibly, such a mechanism could be seen as an alteration of the judicial architecture of the European Union and a threat to the powers of the national and European courts. Following its Opinions 2/13 and 1/09, the ECJ may find that CETA's ICS unacceptably overlaps with its exclusive competence to interpret European law⁵³.

⁵³ For instance, in its amicus curiae submission in *Achmea v. Slovakia*, the Commission's legal service argued in the past that an arbitration tribunal should decline jurisdiction because “an investor–State arbitral mechanism [...] conflict[s] with EU law on the exclusive competence of the EU court for claims which involve EU law, even for claims where EU law would only partially be affected” (*Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (award on jurisdiction 7 December 2012), para 193). In the same vein, the Commission's legal service said in *EURAM v. Slovakia* that “[t]he arbitral tribunal is not a court or tribunal of an EU Member State but a parallel dispute settlement mechanism entirely outside the institutional and judicial framework of the European Union. Such mechanism deprives courts of the Member States of their powers in relation to the interpretation and application of EU rules imposing obligations on EU Member States”(European Commission, Amicus Curiae submission in *European American Investment Bank AG (EURAM) v. Slovak Republic* (13 October 2011) SJ.i.dir [2011], 1154556).



On September 6 2017 Belgium submitted a request to the Court of Justice of the European Union for an opinion regarding the compatibility of the ICS with the exclusive competence of the ECJ to provide the definitive interpretation of European Union law, among others things. Consistent with Opinions 2/13 and 1/09, the ECJ could find that CETA's ICS infringes upon its exclusive jurisdiction to interpret EU law and conclude that the ICS interfere with the autonomy of the EU legal order.

Finally, more prudence seems required since the ECJ Achmea judgment⁵⁴. On March 6 2018, the ECJ ruled that the investor-State dispute mechanism contained in the bilateral investment agreement between Slovakia and the Netherlands "has an adverse effect on the autonomy of EU law, and is therefore incompatible with EU law". As D. Thym concluded,

“the general principles of the Achmea judgment are based on the rigorous defence of autonomy. The position of the ECJ on the bilateral Slovak-Dutch investment treaty (BIT) are similarly general in nature (paras 39-59), thereby indicating that the ruling is more than a decision on intra-European investment protection schemes. Its reasoning can be extended to agreements with third States as a matter of principle, also considering that the ECJ refers to several previous rulings that had considered such treaties to be in violation of the EU Treaties. Indeed, it seems that the arguments put forward in Achmea can be extended to extra-European investment protection regimes”⁵⁵.

Main mechanisms	<p>In the first instance, disputes are to be resolved by consultation and voluntary mediation for conciliatory settlement between parties. If this fails, the dispute can be referred to an arbitration panel, the ruling of which will be binding.</p> <p>CETA establishes an Investment Court System with a permanent Tribunal of fifteen Members which will be competent to hear the foreign investors' claims for violation of the investment protection standards established in the agreement. Appellate Tribunal shall be established.</p>
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⁵⁴ ECJ, *Slowakische Republik v Achmea*, C-284/16 [2018], 6 March 2018.

⁵⁵ D. Thym, 'The CJEU ruling in Achmea: Death Sentence for Autonomous Investment Protection Tribunals', EU Law analysis, 9 March 2018.

4. THE EU/SOUTH KOREA AGREEMENT – THE EU/SINGAPORE AGREEMENT – THE EU/VIETNAM AGREEMENT

The dispute settlement mechanism provided by the EU/South Korea agreement, which entered into force on 1 July 2011⁵⁶, the EU/Singapore agreement⁵⁷ and the EU/Vietnam agreement⁵⁸ are pretty close to the arbitration system set up in the DCFTA. In both cases, it is based on *ad hoc* arbitration with a new panel of arbitrators to settle each dispute and, more broadly, the WTO Dispute Settlement Understanding model, but its procedures are much faster.

Essentially, the first step is a consultation between the parties⁵⁹. If they do not reach an agreement the dispute is referred to an arbitration panel⁶⁰. The panel is composed of three experts that are chosen by the parties, or selected by the chair of the trade committee from a list agreed in advance⁶¹. The panel receives submissions from the parties, and will hold a hearing that will be open to the public. The panel shall issue an interim report to the Parties⁶² which may comment.

Interested persons or companies will be allowed to inform the panel of their views by sending *amicus curiae* submissions. After a further specified period of time, the arbitration panel shall issue its ruling to the Parties and the relevant joint committee⁶³. The panel's ruling is binding on the parties. After that, the party in breach of the FTA will have a reasonable period of time to bring itself into compliance with the ruling⁶⁴. This period is agreed between the parties or decided by an arbitrator.

⁵⁶ OJ 2011, L 127, 1-1425.

⁵⁷ Text not yet published in OJ, but available: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>

⁵⁸ Text not yet published in OJ, but available: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>

⁵⁹ Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, Chapter 14, Article 14.3(1); EU-Vietnam Free Trade Agreement: Agreed text as of January 2016, Chapter 15 Article 15.3(1). EU-Vietnam Free Trade Agreement: Agreed text as of January 2016, Chapter (13) on Dispute Settlement, Section 2, Article 3(1).

⁶⁰ Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, Chapter 14, Article 14.4(1); EU-Singapore FTA, Chapter 15, Article 15.4(1). EU-Vietnam FTA, Section 3, Article 5(1)-(2).

⁶¹ Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, Chapter 14, Article 14.5(3); EU-Singapore FTA, Chapter 15, Article 15.5(1)-(2). EU-Vietnam FTA, Section 3, Article 7(2)-(3).

⁶² Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, Chapter 14, Article 14.6(1); EU-Singapore FTA, Chapter 15, Article 15.7(1). EU-Vietnam FTA, Section 3, Article 10.

⁶³ Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, Chapter 14, Article 14.7(1); EU-Singapore FTA, Chapter 15, Article 15.8(1). EU-Vietnam FTA, Section 3, Article 11(1).

⁶⁴ Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, Chapter 14, Article 14.9(1); EU-Singapore FTA, Chapter 15, Article 15.10. EU-Vietnam FTA, Section 3, Article 13.



By the end of the period for compliance, the party that was found in breach of the agreement must have remedied the situation. If the complaining party considers that the defending party is still in breach of the FTA, it can refer the issue back to the panel. If the panel confirms that the defending party is still in breach of the FTA, the complainant is entitled to impose proportionate sanctions. All time-limits of the arbitration procedure are reduced in cases of urgency. The parties shall ‘enter into negotiations [...] with a view to developing a mutually acceptable agreement on compensation’ and temporary measure⁶⁵. If this is not possible, the complained-against party may ‘suspend obligations [...] at a level equivalent to the nullification or impairment caused by the violation’⁶⁶. Special rules have been established for financial services.

The FTA also contains a mediation mechanism that the parties can use to tackle market access problems due to non-tariff measures. The aim of this mechanism is not to review the legality of a measure, but rather to find a quick and effective solution to a market access problem.

Under the mediation mechanism, the parties will be assisted by a mediator that they have jointly agreed, or that has been selected by lot from a list agreed in advance. The mediator meets with parties and will deliver an advisory opinion and propose a solution within 60 days of its nomination. The opinion and the proposal of the mediator are not binding: the parties are free to accept them, or use them as a basis for a solution. The mediation mechanism does not exclude the possibility to have recourse to dispute settlement, during or after the mediation procedure.

The EU/Singapore Agreement presents the particularity of including an *Investor-State Dispute Settlement*⁶⁷, which gives foreign investors special rights in conflicts with governments. In 2015, the European Commission requested the opinion of the ECJ on the competence for conclusion of the EU-Singapore Free Trade Agreement. In its Opinion 2/15⁶⁸, the ECJ concluded on 16 May 2017 that a very large part of the agreement does fall under exclusive EU competence, but did acknowledge that portfolio investment and dispute settlement between investors and the State could not be established without member State consent. In its current form, therefore, the agreement is ‘mixed’.

One also cannot ignore that, because of the growing debate on this particular mechanism of dispute resolution, the European Commission declared in a fact sheet published on 1 July 2017 that “for the EU ISDS is dead”⁶⁹. Furthermore, as emphasized repeatedly by the ECJ in its opinion 2/15, this procedure “does not relate to the question whether the provisions of the envisaged agreement are compatible with EU law”⁷⁰. Uncertainties thus remain.

⁶⁵ Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, Chapter 14, Article 14.11(1); EU-Singapore FTA, Chapter 15, Article 15.12(1). EU-Vietnam FTA, Section 3, Article 15(1).

⁶⁶ Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, Chapter 14, Article 14.11(2); EU-Singapore FTA, Chapter 15, Article 15.12(2). EU-Vietnam FTA, Section 3, Article 15(1)-(2).

⁶⁷ EU-Singapore FTA, Chapter 9, Articles 9.11 to 9.29.

⁶⁸ ECJ, Opinion 2/15, [2017], 16 May 2017, JO C 239, 3.

⁶⁹ European Commission, ‘EU-Japan Economic partnership agreement’, 1 July 2017, available: http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155684.PDF

⁷⁰ Pts 30, 290 and 300.



While such an arms-length FTA would be politically easier for the British government than a Norway-type agreement, it would deny British (and EU) companies the economic benefits of a large free trade deal embedded in the EEA/EFTA structure. Moreover, the future EU/UK trade agreement, as envisaged, should concern a wide range of legal areas, which will likely contain many provisions that replicate EU law. More than for the EU/Ukraine agreement, caution is required: the ECJ could strike down this type of *ad hoc* arbitration mechanism without any special provisions to guarantee its supremacy in interpreting EU law for EU actors.

Main mechanisms	Inter-State Dispute Resolution with consultation between the parties. If the parties do not reach an agreement the dispute is referred to an arbitration panel.
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5. THE EU/ SWITZERLAND BILATERAL AND SECTORIAL AGREEMENTS

While Switzerland has chosen not to become a member of the EU or of the EEA, close economic integration between these two parties is apparent. Switzerland and the EU have negotiated a series of bilateral treaties on free trade, insurance, customs since 1972 with a further series of sectorial agreements concluded – as consequence of the Swiss no vote for the EEA agreement in 1993 – on free movement of persons, technical trade barriers, public procurement and specific industry sectors in 1999 and 2004. The EU accepted to conclude comprehensive sets of bilateral sectorial agreements, insisting however on a balanced approach and a link between the sectorial agreements by a so-called *guillotine clause*, which refers to the fact that all agreements come in force at the same time and that if one of them is terminated, then so will the others.

Usually⁷¹, each sectorial agreement is managed by a Joint or Mixed committee comprising representatives of the parties to the agreement in question. Initially, an effort must be made to resolve any dispute related to the agreements by means of political and diplomatic consultations. Of course, there is scope for prevarication and political deal-making. If such consultations fail to produce a solution, the more developed mechanisms provide for the dispute to be referred to an arbitration panel, which may be empowered to make binding rulings⁷². Such mechanisms are however generally quite old. The sanction for failure by the “losing” party to comply with such a ruling may be to give the other party a right to suspend obligations under the agreement, or to offer compensation. There is neither surveillance authority watching over the implementation and the effectivity of the agreements, nor international court acting as last resort to settle potential long-lasting disputes and that guarantees unified interpretation of the agreements.

The enforcement and dispute resolution mechanism provided for by those agreements have been the subject of criticism. In favouring the joint committees charged with achieving a political settlement through consultations, this option is a purely political mechanism under which, if attempts to reach a diplomatic solution fail, a Party can only adopt political sanctions or denounce the agreement. Furthermore, this kind of diplomatic mechanism provides access only to governments with the aim of resolving their disagreements, thereby excluding firms and private individuals.

The absence of overarching institutional arrangements has come to be regarded as problematic by both sides. Indeed, the Council of the EU has stated that the conclusion of an institutional agreement is now a pre-condition for any further agreements with Switzerland on market access.

⁷¹ There are some exceptions. For example, a certain role for a supranational court is provided by the Air Transport Agreement (even the ECJ may be in charge).

⁷² See for example Cooperation Agreement between the European Atomic Energy Community and the Swiss Confederation in the field of controlled thermonuclear fusion and plasma physics (OJ 1978 L 242) ; Agreement between the European Economic Community and the Swiss Confederation on direct insurance other than life assurance (OJ 1991, L 205).

The EU is seeking to persuade Switzerland to accept a judicial dispute settlement mechanism. The 2010 Council's conclusions, for example, state:

“In full respect of the Swiss sovereignty and choices, the Council has come to the conclusion that while the present system of bilateral agreements has worked well in the past, the key challenge for the coming years will be to go beyond that system, which has become complex and unwieldy to manage and has clearly reached its limits. As a consequence, horizontal issues related to the dynamic adaptation of agreements to the evolving *acquis*, the homogeneous interpretation of the agreements, an independent surveillance and judicial enforcement mechanisms and a dispute settlement mechanism need to be reflected in EU-Switzerland agreements.

In addition to making the existing agreements more efficient and solving the outstanding problems in their implementation, the Council recognises that cooperation should be developed in certain areas of mutual interest. However, as regards agreements providing for Switzerland's participation in individual sectors of the internal market and policies of the EU (a status normally only granted to members of the European Economic Area (EEA)), the Council recalls its conclusions of 2008, that the requirement of a homogeneous and simultaneous application and interpretation of the evolving *acquis* - an indispensable prerequisite for a functioning internal market - has to be ensured as well as supervision, enforcement and conflict resolution mechanisms. In this context, the Council welcomes the setting-up of an informal Working Group of the Commission and Swiss authorities”⁷³.

It appears now clear that a reform towards an institutional framework of dispute resolution has emerged as a precondition of further negotiation⁷⁴. Interestingly, the perspective of Brexit seems to have strengthened this EU position. With negotiations on this topic having been deadlocked for so long, Switzerland seems nowadays to reconsider its opposition to accepting the rule of arbitration courts to help settle disputes with the European Union under a new treaty⁷⁵.

⁷³ Council conclusions on EU relations with EFTA countries 3060th, GENERAL AFFAIRS, Council meeting, Brussels, 14 December 2010, paragraphs 48 and 49.

⁷⁴ Council Conclusions on a homogeneous extended single market and EU relations with Non-EU Western European countries, 16 December 2014, available : http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/146315.pdf

⁷⁵ ‘Swiss soften line on foreign judges in bid to bolster EU ties’, Financial Times, 6 March 2018, available : <https://www.ft.com/content/17d840b6-209b-11e8-a895-1ba1f72c2c11>



Leaving aside this new dynamic, some have argued that the UK could exploit the ‘classic’ Swiss example, that is to say without foreign judges. According to the Institute for the Study of Civil Society, Civitas:

“Switzerland has a much smaller market to offer than Britain but has been able to secure advantageous terms in trade deals with economies much larger than its own. This is borne out well by close examination of its 2009 trade deal with Japan, from which Swiss exports have benefited significantly. Swiss exports of chocolate, cereal, cheese and watches to Japan all face lower tariffs now. UK trade would have much to gain if Britain took a similar approach to Switzerland, whose achievement has been considerable given Japan’s historically protectionist approach, especially over food”.⁷⁶

While on paper it provides a high level of sovereignty and legal autonomy for Switzerland, and so could be privileged by the United Kingdom during the Brexit negotiations, experience over the last few years suggests that this “Swiss model” does not provide efficient mechanisms to resolve disputes. This view seems to be supported by the United Kingdom⁷⁷. The UK Government itself noted that both the EU and Switzerland have called the viability of this model into question and that such arrangements were unlikely to be appropriate or desirable for the UK. According to one expert cited in a report presented by the House of Lords in December 2016, the practice over the last ten years has shown that it was almost impossible for Swiss officials to talk their EU counterparts into changing their position⁷⁸, because the EU officials felt legally bound by any definitive judgment of the ECJ. Sectoral bilateral agreements are not just more static in nature than the EEA Agreement, but can also create never-ending political deadlock.

Main mechanisms	Inter-State Dispute Resolution to a Joint Committee: each sectorial agreement is managed by a Joint or Mixed committee comprising representatives of the parties to the agreement in question, within which, initially at least, an effort must be made to resolve any dispute related to the agreements by means of political and diplomatic consultations.
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⁷⁶ J. Lindsell, 'Lessons from Switzerland: How might Britain go about business outside the EU?' Civitas, October 2015.

⁷⁷ HM Government, Alternatives to membership: possible models for the United Kingdom outside the European Union, March 2016, para 3.43.

⁷⁸ House of Lords: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-external-affairs-subcommittee/brexit-future-trade-between-the-uk-and-the-eu/oral/37865.html>



6. THE EU/TURKEY CUSTOM UNION SYSTEM

The general basis of the dispute settlement is established by Article 25 of the 1963 Ankara Agreement. Any dispute may be submitted to the Association Council EU/Turkey which consist of representatives of the Parties (Article 25). The Council may submit the dispute to the ECJ or any existing court or tribunal. When the dispute cannot be settled so, the Association Council shall determine the detailed rules for arbitration or for any other judicial procedure to which the Contracting Parties may resort during the transitional and final stages of this Agreement.

After the Ankara Agreement and its Additional Protocol of 23 November 1970⁷⁹, the final phase of the customs union is defined in Decision 1/95 of the Association Council of 22 December 1995⁸⁰. This Decision has added one possibility, related to various safeguard or compensatory measures. According to Article 61, after six months, either Party may refer the dispute to arbitration under the procedures laid down in Article 62. This provision defines only a few principles covering the arbitrators' appointment. In addition to Article 61, another way to use arbitration is regulated under Article 39/4 and is related to the aids granted by Turkey.

Again, in this system, the formal sovereignty of the parties is clearly protected. Revealingly, none of these mechanisms has been used until now. They are very far from the priorities in the daily functioning of the EU/Turkey custom union. "In conclusion, the entitlement of the Association Council as the main authority for dispute settlement indicates that the preferred procedures are political rather than legal"⁸¹.

One must also bear in mind that there are different versions of custom union, and none of them is identical to the EU one. So, for starters, the EU/Turkey union does not cover agricultural, as well as coal and steel products. An extension to agricultural products would certainly engender new regulatory problems between the EU and Turkey, even if it remains uncertain whether this would require another dispute settlement system.

Main mechanisms	Submission to the Association Council any dispute relating to the application or interpretation of the agreement. The Council of Association may settle the dispute by decision, which will be binding for both parties. The Council may submit the dispute to the ECJ or any existing court or tribunal. In the event that it fails to do so within six months, either party can refer the dispute to an arbitration tribunal
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⁷⁹ OJ L 293, 29.12.1972.

⁸⁰ OJ L 35, 13.02.1996, See. S. Peers, 'Living in Sin: legal integration under the EC-Turkey Customs Union', *Eur J. Int Law*, 7, 1996, 411-430.

⁸¹ A. Asli Bilgin, 'The Dispute Settlement Procedures in the Ankara Agreement - Decision No. 1/95 and the Jurisdiction of the European Court of Justice', in A. Belgin, A. Sebnem (eds), *Turkey's integration into the European Union: legal dimension*, Lexington, Lanham, 2013, 88.



CONCLUSIONS

(A) An inventory of the existing judicial solutions leads to distinguish different categories: the EEA system and EFTA court, the mixed EU/Ukraine system, the CETA panel system, the Asian agreements, the Switzerland and finally the Turkey options. It reveals clearly that the deepest integration of third States into the single market requires the strongest dispute settlement system, for reasons directly linked to legal security.

The EU single market is probably the most complete regional integration project that exists in the world. It relies on the four freedoms of movement, on a strong competition regime and on a very strong regulatory activity. Such an extremely developed legal system requires strong mechanisms to guarantee legal security. The Commission's surveillance and ECJ's judicial control are therefore crucial. It is impossible to grant access to third States' products and services without protecting them.

Additionally, though this goes beyond the scope of the present report, judicial procedures take much time and money. Consequently, dispute prevention is also extremely important. In that framework, both parties of Brexit negotiation should ensure that "there are forums for regular negotiation, consultation and discussion, such as joint committees, and by building and maintaining trust"⁸².

(B) The definition of a proper settlement of dispute system in the framework of Brexit is a quite complex problem, for various reasons. Some of them have been insufficiently perceived until now.

First of all, this debate arises in an important transition period for the EU. The EU has undertaken to develop a new generation of trade agreements. They reflect both the world explosion of regional agreements after the failure of the WTO Doha Development Round, and the rise of new trade barriers. In that context, many new systems have not been implemented yet, nor submitted to the ECJ. This legal uncertainty is compounded by the existence of new provisions adopted by the Lisbon Treaty about the common trade policy.

Second, there is a need to reassess the old existing dispute settlement systems, where difficulties have sometimes arisen. The role of the ECJ has become a source of tension in the relationship between the EU and Switzerland. The project to deepen the trade relationship between EU and Turkey has encountered some obstacles linked to the weakness of the present dispute settlement system. Finally, even in the framework of the EFTA Court, some limited problems have emerged.

Third, there is a global need for the EU to redefine its neighbourhood policy, especially in the matter of trade. There are various and substantial problems in the relations with Ukraine, Turkey, and the Mediterranean third countries. Brexit has increased that need, since the UK is bound to become a very important neighbour in the next years. The definition of a new EU/UK relationship, and especially a trade one, must enter into that framework.

⁸² R. Hogarth, *Dispute resolution after Brexit*, Institute for government, 2017, 4.

The question of the dispute settlement system in the EU external agreements has always been a complex one, from the difficult debates about the EEA. Now it has become more complex, as a matter of fact, because Brexit is not happening in a stable environment at all. On the contrary, many things are simultaneously changing in the field of EU external relations simultaneously. This is a source of complication, and also of instability.

Furthermore, during the negotiations, both parties to the negotiation failed to develop a strategic vision. On one side, the UK government has made getting out of the ECJ's jurisdiction one of the "red lines" of its Brexit strategy. This obviously complicates the definition of a new system. It is also a paradoxical strategy. Institutions exist not for their own sake, but to support a project. They exist to implement international agreements. It would thus be more logical to define first an agreement, and later a dispute settlement system. It looks counterproductive to have defined a position on the judicial level before the substantial. Additionally, this connection with a substantial project would have provided a better vision of the possible negotiation trade-offs.

On the other side, the EU seems unable to integrate Brexit in a global long term vision of Article 50 TEU, and also of its new neighbourhood policy, especially for trade. As far as Article 50 is concerned, it is essential to guarantee a correct functioning of the procedure. Both parties (but especially the EU) must thus not impose conditions that will compromise it. For the Neighbourhood policy, between Switzerland, the EEA, Ukraine, Turkey, and now the UK, the EU needs to find a global design rather than relying each time on *ad hoc* uncoordinated initiatives.

(C) Because of all these problems, it is necessary to make an impact assessment of the available solutions, which does not seem to have been made until now. Dispute resolution mechanisms can be judicial, quasi-judicial (with an arbitration system) and political/diplomatic. There are many aspects which need to be taken into consideration for a serious impact assessment.

First, the institutions. Since the EEA, the ECJ has placed huge constraints on the creation of dispute settlement systems in external agreements. The level of these constraints parallels the level of desired cooperation. For all partners which contemplate a strong connexion with the single market, there is a strong need of judicial coherence.

In that context, though most of the attention has been concentrated now on the requirements of trade cooperation, it is important to remember that other forms of cooperation are contemplated in the Brexit negotiations. They comprehend for example the UK participation to EU agencies, to some budgetary programs (like research), or the EU/UK cooperation in fields of police and justice. Some of these will also require judicial solutions. It must be noted, however, that even in the field of deep police and justice cooperation, for example, the EU has concluded external agreements without any major difficulty. However, again, the judicial arrangements depend on the depth of the desired cooperation.

Second, the EU Neighbourhood policy. After Brexit, the UK will become the most important neighbourhood partner of the EU. Any solution will certainly provoke some kind of imitation/contagion effect in other partners. This is important since, as indicated before, the Neighbourhood policy is in a huge transition phase.



Third, the individuals. Access to justice differs in each model. The vast majority of them, especially the diplomatic processes, grant standing only to governments. As noted by Raphael Hogarth, “[i]f the decision as to whether to initiate a dispute falls to governments, they must weigh the potential benefits of winning the dispute against other foreign policy objectives”. There is a second implication: “Bigger businesses”, he added, “will do better than small and medium-sized enterprises (SMEs) from a State-to-State mechanism, for two reasons. First, their government will have a stronger economic interest in taking up the infraction if the case could be worth a lot of money. This is more likely if it affects big businesses. Second, big businesses often have a slicker lobbying operation and more access to government than SMEs”. On the other side, a system open to any individual is bound to be slower and costlier. Panels based on diplomatic settlement and compensation also require less involvement from the ECJ.

Fourth, the efficiency of justice. Productivity, quality, delays and costs have to be taken into consideration. Revealingly, more or less nothing has been said about all this until now. Additionally, the creation of a new, probably special, dispute settlement system is bound to have an impact on the EU judicial system. More or less nothing about that, too. As before, the EU institutions seem largely unable to define the smallest management analysis when justice is concerned.

(D) The comparison between the different existing and new models reveals that, for reasons of legal coherence and also regulatory security, the EU has always made a link between the depth of trade cooperation and the depth of the ECJ’s control in its external agreements. The EEA provides a strong access to the single market, and possesses a strong judicial control, with a strong link to the ECJ. The new Ukraine or Moldova agreements open potentially a strong access to the single market, with a substantial judicial control, and a partial link to the ECJ, and so on. This is clear, understandable, and there are absolutely no reasons to expect such a position to change (especially since this risks provoking a contagion effect with other trade partners). There is thus a strong contradiction in the UK government’s position between expecting a “deep and complete” trade cooperation with the EU and no role for the ECJ. This will not fly.

The UK interests, as defined by the present government, are not the same than the EU’s ones. If the UK was giving priority to a deep trade relationship, it should privilege the EEA model. However, taking into consideration its present position, the EU/Ukraine mechanism could in theory provide the best solution in the context.

The EEA model is the most complete one, but it is also the most cumbersome one. Obligations of regulatory alignment are heavy, and the four freedoms apply (including for people). In judicial matters, the ECJ’s weight is quite substantial. This model has also begun recently to provoke new problems in a noteworthy way, since they concern the alignment on EU financial regulations. If this path is taken, the EU negotiators will have to take this into consideration, possibly to change the model. It could be said that, in the Brexit framework, the EEA model is the best one for the long term economic interests of the UK. Both main parties, however, have excluded it.



The EU/Turkey model is the lightest, but also the least complete one. It does not cover some products. It has also begun to reveal its limits in a noteworthy way since both parties seem eager to develop free trade in services. However, for the British government, this could offer the freedom to negotiate freely trade agreements about services.

The EU/Ukraine model probably offers to the UK the best balance between regulatory cooperation and judicial commitments. It is quite advanced for trade in goods. For trade in services, it provides a framework within which the regulatory equivalence may be negotiated, sector by sector. The arbitration procedure is also quite flexible. Many actual or potential conflicts lay already be settled through negotiation. In case this is not enough, the arbitration panel system also offers different benefits, including speed, reduced costs, and procedural flexibility. This means however that for some areas a direct role of the European Court of Justice will have to be conceded. Furthermore, the regulatory equivalence for many services will require long negotiations.

(E) However, for various reasons, the bilateral Ukrainian model does not serve in fact the long term interests of the EU. The EU would need a serious long term strategy for this question.

First, it must be emphasized that it has not been used yet. As a matter of fact, the ECJ has not been consulted about the Ukrainian model. As emphasized strongly in Opinion 1/15, it has not expressed itself broadly on such a topic yet. Second, *a fortiori* the consequences of its multiplication in various external agreements can hardly be foreseen. The simultaneous application of this model to various bilateral partners of the EU could easily run into serious difficulties. Judicially, the EU could also suffer from the spaghetti soup of preferential trade agreements, that could also turn into a judicial soup. One other indirect consequence could be that this system, if generalized, increases more the ECJ workload (because the EFTA Court does not function as a buffer).

Third, in many aspects, the EEA system appears in the long term a more efficient solution. (1) It has already been tested, whereas most of others have not. (2) It grants a greater role to the individuals. (3) It is preferable to the multiplication of various dispute settlement systems, with various scopes, mandates, competences and procedures will most likely make the protection of the jurisprudence coherence more difficult. (4) Institutionally, it is simpler, otherwise, various administrative decisions must be taken in each different system. The UK will not be a usual neighbourhood partner for the EU. Its economy is much bigger than the other partner countries, it is more developed, and nearer. The legal problems that this implies will be most probably different, more numerous and more litigious.

Strong integration of third States into the single market requires strong judicial instruments. This is the logic of an integrated market, but also of the very restrictive position of the ECJ. It is however very different to do this in a dedicated integrated court, like the EFTA court, or in various bilateral courts. When some recommend (for very understandable political reasons) an *ad hoc* system for Brexit, which could more or less duplicate the EEA one, they tend to forget that the first solution will be much more complicated for the EU than the second one. One fails to see the need of reinventing the (judicial) wheel each time the EU concludes a deep trade agreement with a neighbour country. This long term challenge deserves much more attention from the EU institutions and the national governments.

