



The European Union and International Dispute Settlement

Edited by
Marise Cremona, Anne Thies
and Ramses A Wessel

B L O O M S B U R Y

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THE EUROPEAN UNION AND INTERNATIONAL DISPUTE SETTLEMENT

This monograph explores the connections between the European Union and international dispute settlement. It highlights the legal challenges faced by the principal players in the field: namely the EU as a political actor and the Court of Justice of the EU as an international and domestic judiciary. In addition, it places the subject in its broader context of international dispute settlement, and the participation of the EU and its Member States in international disputes. It focuses on horizontal and cross-cutting themes, bringing together insights from the different sectors of trade, investment and human rights, and offering a variety of perspectives from academics, policymakers and practitioners.

PREFACE

This book is a timely collection of contributions on the international and EU law challenges the European Union faces as a party to international dispute settlement. While the Union's activities as a global actor increasingly lead to a need to participate in international dispute settlement, the Court of Justice of the European Union imposes constitutional barriers to allowing the involvement of other courts and tribunals in the interpretation and application of EU law. This book reveals the tension between the Union's global ambitions and the preservation of its autonomous legal order.

This tension was also visible in Opinion 2/15, delivered by the Court of Justice on 16 May 2017, on the competence of the Union to conclude the Free Trade Agreement with Singapore (the first of the so-called new generation FTAs). This Opinion came too late to be included in the contributions in this Volume. For the topic of this book it is important to note that the Court held that the provisions on Investor-State Dispute Settlement (ISDS) in the Agreement were not covered by the EU's exclusive competences. While the Court was only asked to assess the (exclusive) competence of the EU to conclude the Agreement—and not the compatibility of the provisions with EU law—it did acknowledge the competence of the Member States in the area of ISDS as well as the possible effects of ISDS on the Union's judicial system. Upcoming cases (such as the one announced by Belgium on CETA) may shed a new light on the compatibility of ISDS with the Union's legal order.

After an initial exchange of ideas on the different facets of issues like these during a meeting held at the European University Institute in Florence in February 2015—organized jointly by the EUI's Academy of European Law together with the Centre for the Law of EU External Relations (CLEER) and the ESIL Interest Group on the EU as a Global Actor—the contributors produced and discussed draft chapters with the editors. The end result has been brought together in the present volume.

The Editors wish to thank the contributors for their willingness to share their insights, both during the initial meeting and afterwards. We also express our gratitude to Anny Bremner and Ceri Warner for their invaluable work in getting the manuscript ready for publication.

We hope you will enjoy reading the book as much as we did preparing it.

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June 2017

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LIST OF ABBREVIATIONS

ACCC	Aarhus Convention Compliance Committee
ADA	Anti-Dumping Agreement
AFSJ	Area of Freedom, Security and Justice
ARIO	Articles on the Responsibility of International Organizations
ASR	Articles on the Responsibility of States for Internationally Wrongful Acts
BIT	Bilateral Investment Protection Treaty
CAC	Collective Action Clauses
CCP	Common Commercial Policy
CETA	Comprehensive Economic Trade Agreement
CFR	Charter of Fundamental Rights
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
DSU	Dispute Settlement Understanding
EA Treaty/ EURATOM	Treaty establishing the European Atomic Energy Community
EC	European Community
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EEA	European Economic Area
EEC	European Economic Community
EEZ	Exclusive Economic Zone
EFSS	European Financial Stability Facility
EFTA	European Free Trade Association
EPC	European Patent Convention
EPO	European Patent Organisation
EPUE	European Union Patent with Unitary Effect
ERTA	European Agreement on Road Transport
ESM	European Stability Mechanism
EU	European Union
EUCFR	EU Charter of Fundamental Rights
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services

GATT	General Agreement on Tariffs and Trade
GFCC	German Federal Constitutional Court
HRL	Human Rights Law
ICES	International Council for the Exploration of the Seas
ICJ	International Court of Justice
ICS	Investment Court System
ICSID	International Centre for Settlement of Investment Disputes
IDS	International Dispute Settlement
IGC	Inter-Governmental Conference
ILC	International Law Commission
IMF	International Monetary Fund
IMO	International Maritime Organization
IO	International Organisation
ISDS	Investor-State Dispute Settlement
ITA	Information Technology Agreement
ITLOS	International Tribunal for the Law of the Sea
LOSC	Law of the Sea Convention
MoU	Memorandum of Understanding
MS	Member States
NAFO	North Atlantic Fisheries Organization
NGO	Non-Governmental Organisation
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PG	Public Goods
PSI	Private Sector Involvement
REIO	Regional Economic Integration Organisation
SCM	Subsidies and Countervailing Measures
SME	Small and Medium-sized Enterprises
TAC	Total Allowable Catch
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRIPS	Trade-Related Aspects of Intellectual Property
TTIP	Transatlantic Trade and Investment Partnership
UN	United Nations
UNC	United Nations Charter
UNCLOS	UN Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UPA	Unión de Pequeños Agricultores
UPC	Unified Patent Court
US	United States
VCLT	Vienna Convention on the Law of Treaties 1969
VCLTIO	Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations 1986
WTO	World Trade Organization

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Introduction

MARISE CREMONA, ANNE THIES AND RAMSES A WESSEL

As an international actor the European Union (EU) faces two types of challenge, each derived from the fact that the EU and its Member States operate internationally both independently and in tandem. The first is external: the challenge to be accepted as an autonomous player on the international stage with an identity and legal personality distinct from its Member States, while at the same time achieving recognition that 'the EU is, under international law, precluded by its very nature from being considered a State',¹ thereby raising legal questions which may require bespoke answers over its participation in treaty regimes, dispute settlement systems and international responsibility. The second challenge, presenting to some degree the reverse of this coin, is internal: the construction of a constitutional framework which allows the EU to participate in international law-making and its attendant need for international dispute settlement, while at the same time safeguarding the EU-law-mediated relationship between the EU and its Member States. The Court of Justice of the European Union (CJEU) is certainly itself an international court but it is also in a real sense a 'domestic' court for the EU's own legal order; in both roles it may find itself in competition with other international courts and tribunals.

The essays brought together in this book, in focusing on the participation of the EU and its Member States in international disputes (as claimant, respondent and third party), reflect the constitutional challenges facing the EU as a political actor and the CJEU as both an international and a domestic judiciary, from these two European and international law perspectives. On the one hand, the contributions show ways in which the EU has been participating in international dispute settlement (IDS) as a political actor, by contributing to the development of international dispute settlement through treaty-making, and in its capacity as claimant, respondent or third party in international cases. In this way the book presents the EU's contribution to the development of international dispute settlement under international law, including the establishment of additional institutions and the position of individuals under EU and international law. On the other hand, the contributions highlight the insistence of the EU judiciary on the autonomy of

¹ Opinion 2/13, EU:C:2014:2454, para 156.

the EU legal order and its role as 'gatekeeper' when dealing with the reception of international rulings and interaction with other international courts and tribunals. The collection demonstrates that as a result of the constitutional structure of the EU and the significance of the EU's external legal commitments, the role of the Court of Justice has been more central than that which a national court might have in establishing the conditions for the involvement of a nation-state in IDS. And, of course, its decisions may nonetheless be highly political.

The questions addressed in this book are of practical as well as theoretical interest. There is a proliferation of international courts and tribunals under international law; the participation of the EU in international treaty-making and the work of international organisations which provide, *inter alia*, means for the settlement of international disputes is increasing, together with the consequent risks of fragmentation. Given this increased involvement of the EU, what are the implications for its Member States, as parties to state-state and investor-state disputes? How do developments in international dispute settlement affect private parties? What are the effects of international rulings within the European legal order, and how does the CJEU see its 'gatekeeper' role? The cross-policy nature of much EU external action (from trade to human rights, from investment protection to environmental matters) has given rise to an increasing number of vertical and horizontal competence disputes, affecting the standing of the EU and/or its Member States in international disputes. The allocation and categorisation of competence under the Lisbon Treaty² in turn affects the approach of the CJEU towards its own role and its interaction with other international courts and tribunals (for example in the area of human rights and investment protection) with which it engages in dialogue, and even competition. The EU's own practice, and its engagement with international dispute settlement, shapes the development of international law, for example as regards standing, jurisdiction and responsibility, and (most controversially) the role of arbitration in investor-state dispute settlement.

Each chapter reflects on the way in which the EU, as a unique, non-state actor, participates in international dispute settlement and the extent to which international dispute settlement fora, as well as the EU's own rules, are adequate to deal with the EU as a party. While we recognise that traditional international dispute settlement under public international law concerns state-state disputes (and possibly state-international organisation disputes), when editing this collection we decided also to include analysis of issues related to investment arbitration, the EU and the European Convention of Human Rights, the Unified Patent Court, and the effects of international rulings in the EU legal order, including the position of individuals. We see this broader approach as justified

² Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C 306/01.

both by the importance of the position of natural and legal persons under public international law and European law, and by current significant developments in the areas just mentioned.

In putting together this collection we decided, rather than taking a sectoral approach, to identify a number of horizontal themes which would allow us to bring together insights from different sectors (such as trade, investment, patents and human rights). First, Part I examines some general trends in IDS, the overall approach of the CJEU to external mechanisms of dispute settlement, and the ways in which the EU as a global actor involved in international treaty-making may contribute to the management of fragmentation and proliferation. This gives a framework within which we can focus on more specific issues.

Next, Part II turns to the international principle of free choice of means (of dispute settlement), and how this principle interacts with the unity of the EU legal order and the exclusive jurisdiction of the CJEU regarding the interpretation and application of EU law. EU international agreements become an integral part of EU law and thus fall within the exclusive jurisdiction of the CJEU. The link forged by the Court between its exclusive jurisdiction and the autonomy of the EU legal order makes it difficult to reconcile its position as the constitutional court of the EU with the jurisdiction of other international courts and tribunals and the need to ensure consistency between the interpretation given by an external (non-EU) court or tribunal, and that of the CJEU.

The theme of Part III relates to the effects of international rulings within the EU legal order, the interaction between the CJEU and international courts and tribunals and their rulings, and the ways in which these interactions affect individuals, their rights and the non-EU courts and tribunals (such as the Unified Patent Court or investment tribunals) dealing with such rights. The CJEU has taken a protective approach to the existence of other courts and tribunals (for example in Opinion 1/09 on the Unified Patent Court)³ and the capacity of international courts to review EU measures (most recently in Opinion 2/13 on the EU's accession to the ECHR).⁴ There is a tension between the principles invoked by the Court to support its approach to EU participation in IDS—including the autonomy of the EU legal order—and other principles which underpin the EU's external action, including effectiveness, openness to international law, and the EU's commitment to, and role within, the international legal order. Does the Court's approach reflect the treaty-based ambitions and powers vested in the EU?

And, finally, Part IV turns to the conditions under which the EU may be involved in the settlement of international disputes as a party: the EU has international legal personality (Article 47 of the Treaty on European Union), but what other conditions need to be met under EU or international law to bring cases, or to be

³ Opinion 1/09 ECLI:EU:C:2011:123, [2011] ECR I-1137.

⁴ Opinion 2/13 (n 1).

a defendant in international proceedings, and what effect does this have on the position of the EU Member States?

Our hope is that the chapters offered here will not only illuminate current debates and specific angles of this intricate relation between the EU and international dispute settlement, but that taken together they will also encourage reflection on the underlying tensions within the interlocking constitutional, European and international legal systems.

Part I

The European Union and International Dispute Settlement: Setting the Scene, Inside Out and Outside In

The European Union and International Dispute Settlement: Mapping Principles and Conditions

CHRISTOPHE HILLION AND RAMSES A WESSEL

I. Introduction

In Opinion 2/13, the Court of Justice of the European Union (CJEU) confirmed the complexities related to the EU's submission to external judicial scrutiny.¹ In answering the question of whether the Union could join the European Convention on Human Rights (ECHR), the Court pointed to a number of (classic) principles and conditions inherent to the nature of EU law, which in effect encapsulate the difficulties of a combination of EU law and international dispute settlement (IDS).

Rightfully distinguishing between different roles of international courts and tribunals (ranging from enforcement and administrative and constitutional review to dispute settlement), a recent study counted 17 international courts with a competence to settle disputes.² Although the Court of Justice itself has a role in dispute settlement, international fora in which the EU can participate in legal proceedings are rare.³

¹ Opinion 2/13 *Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:2014:2454. See also View of Advocate General Kokott, ECLI:EU:C:2014:2475. For an academic appraisal see, inter alia, A Łazowski and RA Wessel, 'When Caveats turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR' (2015) 16(1) *German Law Journal* 179; as well as A Łazowski and RA Wessel, *The European Court of Justice Blocks the EU's Accession to the ECHR*, CEPS Commentary, 8 January 2015; www.ceps.eu/node/9942.

² KJ Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton NJ, Princeton University Press, 2014) ch 5. See in general JG Merrills, *International Dispute Settlement* (Cambridge, Cambridge University Press, 2011). See on different forms of IDS also L Boisson de Chazournes, MG Kohen and JE Vinuales (eds), *Diplomatic and Judicial Means of Dispute Settlement* (Leiden, Martinus Nijhoff Publishers, 2013).

³ See also A Rosas, 'The European Union and International Dispute Settlement' in L Boisson de Chazournes, C Romano and R Mackenzie (eds), *International Organizations and International*