

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

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## 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.<sup>1</sup> 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.<sup>2</sup> Although

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<sup>1</sup> Opinion 2/13 of the Court of 18 December 2014: *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](http://www.ceps.eu/node/9942).

<sup>2</sup> 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

the Court of Justice itself has a role in dispute settlement, international fora in which the EU can participate in legal proceedings are rare.<sup>3</sup>

Although there may be a relationship between the existence of IDS mechanisms in international agreements and the effects of international norms in the EU,<sup>4</sup> this chapter will not deal with the more general question of the reception of international law (and international judicial decisions) in the EU legal order,<sup>5</sup> nor with the impact of decisions of international organisations and their status in the EU;<sup>6</sup> rather, it aims at mapping the situations in which the EU has accepted IDS as a full participant as well as situations in which the EU has attempted to participate (section II). This will be followed by an analysis of the principles underlying the conditions defining the ability of the EU to join an IDS system. This chapter will look at EU treaty provisions, namely EU external objectives and competence, with a view to establishing

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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).

<sup>3</sup> 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 Dispute Settlement: Trends and Prospects* (Ardsley NY, Transnational Publishers Inc, 2002) 49; as well as A Rosas, 'International Dispute Settlement – EU Practices and Procedures' (2003) 46 *German Yearbook of International Law* 284; and F Hoffmeister, 'The European Union and the Peaceful Settlement of International Disputes' (2012) 11(1) *Chinese Journal of International Law* 77.

<sup>4</sup> See for example BI Bonafé, 'Direct Effect of International Agreements in the EU Legal Order: Does it Depend on the Existence of an International Dispute Settlement System?' in E Cannizzaro, P Palchetti and RA Wessel (eds), *International Law as Law of the European Union* (Leiden, Martinus Nijhoff Publishers, 2011) 229.

<sup>5</sup> See on the question for instance the various contributions to Cannizzaro et al (n 4); or RA Wessel, *Close Encounters of the Third Kind: The Interface Between the EU and International Law after the Lisbon Treaty* (Stockholm, Sieps Report, 2013).

<sup>6</sup> See for instance RA Wessel and S Blockmans (eds), *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (The Hague, TMC Asser Press/Springer, 2013); or more specifically: RA Wessel and S Blockmans, 'The Legal Status and Influence of Decisions of International Organizations and other Bodies in the European Union', *College of Europe Research Papers in Law*, No 01/2104, 2014. *cf* also B Martenczuk, 'Decisions of Bodies Established by International Agreements and the Community Legal Order' in V Kronenberger (ed), *The European Union and the International Legal Order: Discord or Harmony?* (The Hague, TMC Asser Press, 2001) 141.

the normative and constitutional framework within which the Court is to adjudicate on the issue of participation (section III). Section IV will draw some conclusions.

## **II. The European Union and International Dispute Settlement**

### **A. Participation of the European Union in International Dispute Settlement**

The obvious example of a successful participation of the EU in IDS is the World Trade Organization (WTO),<sup>7</sup> of which the EU is one of the founding members. Given the impact on the EU legal order of the WTO judicial decisions from the various panels and the Appellate Body,<sup>8</sup> and the binding nature of these decisions,<sup>9</sup> it is striking that the system was acceptable to the CJEU. While a real ‘Court’ is lacking in the WTO’s dispute settlement system (‘reports’ are adopted by a dispute settlement ‘body’), there seems to be consensus that the reports have ‘the binding force of a judicial decision’ and are in that sense not so different from, for instance, judgments by the European Court of Human Rights (ECtHR).<sup>10</sup> Indeed,

Dispute settlement ... today is clearly dominated by a legal approach and no longer can be described by the ‘principle of negotiations’ ... Dispute settlement in the WTO today amounts to a system which is different and unique, but on balance fully equivalent to what is traditionally known as legal dispute settlement in international law, both in terms of adjudication and ad hoc arbitration.<sup>11</sup>

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<sup>7</sup> See further Gracia Marin-Duran, ch 12 in this volume.

<sup>8</sup> See for instance PJ Kuijper and F Hoffmeister, ‘WTO Influence on EU Law: Too Close for Comfort?’ in Cannizzaro et al (n 4) 131–58. See in general G de Búrca and J Scott (eds), ‘The EU and the WTO: Legal and Constitutional Issues’ (Oxford, Hart Publishing, 2001).

<sup>9</sup> *cf* Art 17.14 of the WTO Dispute Settlement Understanding: ‘An Appellate Body Report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute ...’

<sup>10</sup> See C Eckes, ‘The European Court of Justice and (Quasi-) Judicial Bodies’ in Cannizzaro et al (n 4) 85.

<sup>11</sup> Th Cottier, ‘Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European Union’ (1998) *CML Rev* 325, 335.

In its Opinion 1/94<sup>12</sup> on the competence of the EU to join the WTO, the Court did not address the questions related to the dispute settlement mechanism. Despite the fact that the WTO Agreement is a mixed agreement, practice reveals that the EU has taken the lead, even in procedures against the Member States. This implies that the European Commission represents both the Union and the Member States in all WTO litigation.<sup>13</sup> While theoretical complexities related to the division of competences were bound to occur, Hoffmeister argued that:

It has never happened in the history of WTO that the EU would try to argue itself out of a responsibility under WTO agreements by pointing a finger to a Member State and argue that that Member State is responsible. On the contrary, when protesting against the inclusion of the Member States in the dispute, the EU maintained the view that it is the correct respondent. In some instances, the EU even took full responsibility for a measure that was adopted by a Member State without being firmly based in EU law.<sup>14</sup>

To date the Union (including its predecessors) has been involved in a large number of WTO disputes: 97 times as a complainant, 82 times as a respondent and 158 times as a third party.<sup>15</sup>

Another example is provided by the UN Convention on the Law of the Sea (UNCLOS). As a party to UNCLOS, the EU is subject to the dispute settlement mechanism laid down therein and it may become a plaintiff or defendant before the International Tribunal for the Law of the Sea (ITLOS) or in arbitration initiated under UNCLOS.<sup>16</sup> The mechanism established by the Convention provides for four alternative means for the settlement of disputes: the ITLOS (Annex VI to the Convention); an arbitral tribunal constituted in accordance with Annex VII to the Convention; a special arbitral tribunal constituted in accordance with Annex VIII to the Convention; and the International Court of Justice (ICJ).<sup>17</sup> While the latter option is excluded for the EU because the ICJ deals with inter-state disputes only (Article 34(1) ICJ Statute),<sup>18</sup> the

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<sup>12</sup> Opinion 1/94, Opinion of the Court of 15 November 1994, ECLI:EU:C:1994:384, [1994] ECR I-5267.

<sup>13</sup> *ibid* 92–93.

<sup>14</sup> Hoffmeister (n 3) 90.

<sup>15</sup> See *The European Union and the WTO*:

[www.wto.org/english/thewto\\_e/countries\\_e/european\\_communities\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm).

<sup>16</sup> The EU has accepted this under Art 287(3) UNCLOS.

<sup>17</sup> 1982 United Nations Convention on the Law of the Sea, [www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf).

<sup>18</sup> Yet, Art 43(2) of the Rules of the Court allows any international organisation that is party to a Convention invoked in a contentious case between two states to express its views on the matter arising under the Convention.

EU has participated in UNCLOS dispute settlement. In the conflict between Ireland and the United Kingdom about the building and operation of the MOX Plant at Sellafield, Ireland commenced dispute settlement proceedings under both the UNCLOS and the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention). Furthermore, it also applied to the ITLOS for provisional measures to prevent the UK from commissioning the plant. The ITLOS ordered the parties to cooperate and to engage in consultations, including the exchange of information, without further delay. While the EU itself was not a party to the dispute, EU law played a role (see below).<sup>19</sup>

Nevertheless, an appearance by the EU in UNCLOS dispute settlement remains rare.<sup>20</sup> One example is the so-called ‘swordfish dispute’ covering both access for EU fishing vessels to Chilean ports and bilateral and multilateral scientific and technical cooperation on conservation of swordfish stocks.<sup>21</sup> The dispute was meant to be dealt with both by a WTO Panel and by the ITLOS, but in the end was solved on the basis of an amicable settlement between the two parties in 2001.<sup>22</sup> In 2000, on the basis of Article 287(3) UNCLOS, Chile started proceedings against the (at that time) European Community by instituting an arbitral tribunal. During the process the parties agreed to ask the ITLOS, instead of the arbitral tribunal, to set up a special chamber to deal with the case. The Community—inter alia—claimed that Chile had violated the right to fish on the high seas. In return, Chile argued—inter alia—that the commencement of the WTO dispute settlement proceedings was a breach of UNCLOS.<sup>23</sup>

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This allows for the EU to act as a sort of *amicus curiae* to the ICJ on certain interpretative questions arising in litigation between others. *cf* also Art 34(2) of the Statute and Art 69 of the Rules of the Court on the possibility of supplying information in pending cases. See also Hoffmeister (n 3).

<sup>19</sup> Case C-459/03 *Commission v Ireland (MOX Plant)*, ECLI:EU:C:2006:345, [2006] ECR I-4635.

<sup>20</sup> *cf* also Esa Paasivirtaa, ch 3 in this volume.

<sup>21</sup> Case No 7, concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union), 2000–2009.

<sup>22</sup> See ‘EU and Chile reach an amicable settlement to end WTO/ ITLOS swordfish dispute’, European Commission Press Release IP/01/116, Brussels, 25 January 2001; [http://europa.eu/rapid/press-release\\_IP-01-116\\_en.htm](http://europa.eu/rapid/press-release_IP-01-116_en.htm).

<sup>23</sup> See P-T Stoll and S Vdneky, ‘The Swordfish Case: Law of the Sea v Trade’ (2002) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 21.

The case is interesting as it reveals that the question on the appropriate forum for dispute settlement may involve more than two international regimes. As indicated by Stoll and Vdneky:

Two obstacles could be brought in the way of the legal power of ITLOS: the first is that the case was already pending at the WTO, when it was brought before the tribunal; the second is that the core question of the case, the lawfulness of the prohibition on unloading swordfish, is covered by GATT rights and obligations.<sup>24</sup>

In this case no questions of EU law came up. Yet, for the purpose of the present discussion it is important to note that in general Article 287(7) UNCLOS would imply that there is no reason to halt cases brought before the ITLOS once they are also brought before another tribunal. In addition, and in relation to other agreements in general, Article 311(2) UNCLOS provides:

This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

This would imply that the (older) EU obligations would have priority also on this basis; as long as it can be argued that those rights and obligations are ‘compatible’ with UNCLOS. Indeed, as the Tribunal argued in its own *MOX Plant* judgment ‘the rights and obligations of other agreements have a separate existence from those under the Convention’ and that ‘since the dispute before the tribunal concerns the interpretation or application of the Convention and no other agreement, only the dispute settlement procedures under the Convention are relevant to that dispute’.<sup>25</sup> In other words: other procedures seem to be allowed as long as they are compatible with UNCLOS. As we will see below, this starting point comes close to that maintained by the CJEU in relation to the EU legal order.

More recently, the EU was a party in another UNCLOS dispute as proceedings were brought against it by the Faeroe Islands before the Permanent Court of Arbitration.<sup>26</sup> Again, the case was also subjected to WTO dispute settlement.<sup>27</sup> And, again, the parties succeeded in

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<sup>24</sup> *ibid* 26.

<sup>25</sup> Order of the International Tribunal of the Law of the Sea (ITLOS) in the *MOX Plant* case (*Ireland v United Kingdom*), 13 November 2002, paras 50–52.

<sup>26</sup> *Atlantico-Scandian Herring Arbitration (Denmark in respect of the Faroe Island v the European Union)*, PCA Case No 2103-30 (see [www.pca-cpa.org](http://www.pca-cpa.org)). Note that the Faroe Islands (despite belonging to Denmark) are not part of the EU.

<sup>27</sup> WT/DS 469/1 G/L/1058, 7 November 2013.

reaching an agreement which led to a termination of the cases in 2014. An intervention of the EU took place in another ITLOS case—a request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)—in which the EU (represented by the European Commission) participated in the hearings and presented a written statement.<sup>28</sup> These activities flowed from the fact that the subject matter of the requested opinion fell within the exclusive competence of the EU (fisheries policies) as recognised by the Tribunal.<sup>29</sup> This is not to say that internal EU battles no longer occur. Case C-73/14 before the CJEU dealt with the question of whether the Commission could actually submit observations to ITLOS in the case mentioned above.<sup>30</sup> The Commission had failed to submit the content of the written statement presented on behalf of the EU to the Council for prior approval. The Court held that the Commission could represent the EU on the basis of Article 335 of the Treaty on the Functioning of the European Union (TFEU).<sup>31</sup> In addition, it did not follow the Council’s argument that Article 218(9) TFEU<sup>32</sup> on the need for a Council decision on the positions to be adopted on the Union’s

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<sup>28</sup> ITLOS Case No 21, Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC): [www.itlos.org/en/cases/list-of-cases/case-no-21/](http://www.itlos.org/en/cases/list-of-cases/case-no-21/). The Advisory Opinion was delivered on 2 April 2015.

<sup>29</sup> See para 64 of the Advisory Opinion. While beyond the scope of this chapter, it is interesting to note the views of the EU and ITLOS on possible EU responsibility for ‘flag state’ obligations: ‘The Tribunal holds that in cases where an international organization, in the exercise of its exclusive competence in fisheries matters, concludes a fisheries access agreement with an SRFC Member State, which provides for access by vessels flying the flag of its member States to fish in the exclusive economic zone of that State, the obligations of the flag State become the obligations of the international organization’ (para 172).

<sup>30</sup> Case C-73/14 *Council v Commission (ITLOS)*, ECLI:EU:C:2015:663. See also more extensively Esa Paasivirtaa, ch 3 in this volume.

<sup>31</sup> Art 335 TFEU: ‘In each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Union shall be represented by the Commission. However, the Union shall be represented by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation.’

<sup>32</sup> Art 218(9) TFEU: ‘The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union’s behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.’

behalf was applicable. In that case the EU had been invited to present its views as a party to the Convention, whereas in the view of the Court, Article 218(9) addresses a situation which

concerns the positions to be adopted on behalf of the European Union in the context of its participation, through its institutions or, as the case may be, through its Member States acting jointly in its interests, in the adoption of such acts within the international body concerned.<sup>33</sup>

As, furthermore, the purpose of the statement was not to formulate a policy in relation to fishing—see the second sentence of Article 16(1) of the Treaty on European Union (TEU)<sup>34</sup>—but to present to ITLOS an analysis of the provisions of international and EU law relevant to that subject, the Commission did not encroach upon the prerogatives of the Council.

The division of competences between the EU and its Member States often complicates international dispute settlement procedures. This was recently exemplified by an ITLOS Advisory Opinion. While a declaration of competences in this case was helpful to decide on the EU's exclusive competences with regard to a certain matter (in this case 'the conservation and management of sea fishing resources'), in matters dealing with 'territorial' questions (which often appear in law of the sea disputes) it remains difficult for third parties to simply replace a state by the EU as the entire system of 'flag states' etc is state-based. According to the ITLOS judges, the third states should thus always be allowed to

request an international organization or its member States which are parties to the Convention for information as to who has responsibility in respect of any specific matter. The organization and the member States concerned must provide this information. Failure to do so within a reasonable time or the provision of contradictory information results in joint and several liability of the international organization and the member States concerned.<sup>35</sup>

Apart from the WTO and UNCLOS, occasionally the existence of international dispute settlement mechanisms in other international agreements has been relevant in relation to EU law. IDS has played a role in the Court's case law, albeit mostly in relation to the establishment

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<sup>33</sup> *Council v Commission* (n 30) para 63.

<sup>34</sup> Art 16(1) TEU: 'The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties.'

<sup>35</sup> Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), ITLOS Advisory Opinion No 21, 2 April 2015, para 174.

of internal effects of international agreements.<sup>36</sup> Thus, in *Chiquita*,<sup>37</sup> the fact that the Fourth EEC-ACP Convention (the 1989 Lomé Convention) ‘lays down a special procedure for settling disputes between the contracting parties’<sup>38</sup> was mentioned as not affecting the direct effect of the Convention. Similar references to international dispute settlement mechanisms may be found in trade law cases such as *Portugal v Council*,<sup>39</sup> or in *Omega Air*,<sup>40</sup> to settle the effects of WTO provisions in the EU domestic legal order.

The Court of the European Free Trade Area (EFTA Court) forms a special case as it has jurisdiction with regard to EFTA states which are parties to the European Economic Area (EEA) Agreement only (at present Iceland, Liechtenstein and Norway). The Court is mainly competent to deal with infringement actions brought by the EFTA Surveillance Authority against an EFTA state with regard to the implementation, application or interpretation of EEA law rules, for giving advisory opinions to courts in EFTA states on the interpretation of EEA rules and for appeals concerning decisions taken by the EFTA Surveillance Authority. (See also Opinion 1/91 discussed below.)

Furthermore, EU Member States may appear in IDS on issues related to EU law, either on their own or as agents of the EU. The division of powers between the EU and its Member States in this context will be dealt with in other chapters of this volume.<sup>41</sup> Here, it suffices to note that—apart from the WTO context described above—Member States continue to appear in international arbitration under international law (including diplomatic means). Examples include the areas of international investment, environmental cooperation or the law of the sea. Given the Court’s claim to exclusive jurisdiction could this affect the rights Member States have under international law? Or, to make it concrete in Francis Jacob’s words, if a Member State is legally and constitutionally limited on the basis of EU law ‘is the effect to deprive the

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<sup>36</sup> See more extensively Bonafé (n 4).

<sup>37</sup> Case C-469/93 *Amministrazione della Finanze dello Stato v Chiquita Italia SpA*, ECLI:EU:C:1995:435, [1995] ECR I-4533.

<sup>38</sup> *ibid* para 36.

<sup>39</sup> Case C-149/96 *Portugal v Council*, ECLI:EU:C:1999:574, [1999] ECR I-8395, paras 34–47.

<sup>40</sup> Case C-27/00 *R v Secretary of State for the Environment, Transport and the Regions, ex parte Omega Air Limited*, ECLI:EU:C:2002:161, [2002] ECR I-2569.

<sup>41</sup> See in particular Tobias Lock (ch 7), Anne Thies (ch 8) and Gracia Marin-Duran (ch 12).

International Court of Justice of jurisdiction?’<sup>42</sup> In a case between Belgium and Switzerland before the ICJ on—inter alia—the interpretation of the Lugano Convention,<sup>43</sup> the Swiss raised the question of whether Belgium was allowed to bring this matter before the ICJ, given the link with EU law. Indeed, the duty of sincere cooperation (Article 4(3) TEU, see below) might require EU Member States to refrain from instituting proceedings (in this case concerning the Lugano Convention) before the ICJ.<sup>44</sup>

A number of other multilateral agreements to which the EU is a party also foresee dispute settlement mechanisms. An example is formed by the Energy Charter Treaty (ECT), which contains a comprehensive system for settling disputes on matters covered by the treaty. These forms include binding dispute settlement in cases of state–state arbitration and investor–state arbitration for investment disputes. While the EU (as well as Euratom) is a party to the ECT, it has not been part of any of the dispute settlement mechanisms foreseen by the treaty. In a special Statement the Union and its Member States seem to have addressed their joint and several responsibility.<sup>45</sup> The CJEU is expressly mentioned in the ECT as ‘a court or administrative tribunal’ within the meaning of Article 26(2)a ECT and the Statement adds: ‘Given that the Communities’ legal system provides for means of such action, the European Communities have not given their unconditional consent to the submission of a dispute to international arbitration or conciliation.’ Yet, it is well known that individuals only enjoy limited rights to start proceedings before the Court.

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<sup>42</sup> FG Jacobs, ‘Member States or the European Union before the International Court of Justice’ in I Govaere, E Lannon, P Van Elsuwege and S Adam (eds), *The European Union in the World: Essays in Honour of Marc Maresceau* (Leiden, Martinus Nijhoff Publishers, 2013) 245.

<sup>43</sup> *Jurisdiction and enforcement of judgments in civil and commercial matters (Belgium v Switzerland)* [2009], available at [www.icj-cij.org](http://www.icj-cij.org).

<sup>44</sup> Jacobs (n 42) 253.

<sup>45</sup> ‘The European Union and their Member States have both concluded the Energy Charter Treaty and are thus internationally responsible for the fulfilment of the obligations contained therein, in accordance with their respective competences.’ See Statement submitted by the European Communities to the Secretariat of the Energy Charter Treaty pursuant to Art 26(3)(b)(ii) of the Energy Charter Treaty (1994) OJ L 336/115. See also M Burgstaller, ‘The Energy Charter Treaty as a Mixed Agreement: A Model for Future European Investment Treaties?’ in G Coop (ed), *Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty* (Huntington NY, Juris, 2011) 125, 147–48.

Finally, the emergence of the EU as a global investment actor also triggered its involvement in Investor–State Dispute Settlement (ISDS) forms. Note that the EU could not become a party to the 1965 Convention for the Settlement of Investment Disputes between States and Nationals of Other States (‘the ICSID Convention’). Yet, the current inclusion of foreign direct investment in the EU’s competences (Article 207(1) TFEU) may call for an accession of the EU to ICSID (after a modification of that Convention to allow for that). As argued by Dimopoulos, the role of the EU in ISDS varies and depends on the situation: ISDS may occur under an international investment agreement concluded by the EU, the EU and its Member States together, or its Member States alone; the dispute may concern a measure adopted by the EU, a Member State acting within the scope of EU law, or a Member State acting on its own; and it may concern a dispute where third countries or their nationals or only EU Member States and their nationals are involved.<sup>46</sup> An important step to overcoming these complexities and to allow for a solution in ongoing negotiations (see below) was taken with the recent adoption of Regulation 912/2014 (the so-called ‘Financial Responsibility Regulation’),<sup>47</sup> that deals with the allocation of financial responsibility between the EU and its Member States. While there may be doubts as to whether the Regulation will not be able to affect the Union’s famous autonomy,<sup>48</sup> it has also been argued that it is questionable whether the Regulation is in conformity with international law, given—again—the specific nature and demands of the EU.<sup>49</sup> For the present chapter it suffices to note that the EU can have a separate standing in ISDS.

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<sup>46</sup> A Dimopoulos, ‘The Involvement of the EU in Investor-State Dispute Settlement: A Question of Responsibilities’ (2014) *CML Rev* 1671.

<sup>47</sup> Reg 912/2014 of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party [2014] OJ L 257/121.

<sup>48</sup> See of the vast literature on the concept of autonomy, eg T Molnár, ‘The Concept of Autonomy of EU Law from the Comparative Perspective of International Law and the Legal Systems of Member States’ (2015) 3 *Hungarian Yearbook of International Law and European Law* 433; JW van Rossem, ‘The Autonomy of EU Law: More is Less?’ in RA Wessel and S Blockmans (eds), *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (New York, Springer, 2013) 213; as well as Christina Eckes, ch 9 in this volume.

<sup>49</sup> Dimopoulos (n 46).

In addition, bilateral agreements, such as association or cooperation agreements, but also for instance investment agreements (BITs) may provide for dispute settlement mechanisms. While many of these may contain judicial IDS, some also contain options for non-judicial or ‘political’ IDS. The most telling examples can perhaps be found in some trade and investment agreements that have recently been negotiated between the EU and third states as these agreements include an ‘Investment Court’. Both the EU–Vietnam Free FTA and the Comprehensive Economic Trade Agreement (CETA)<sup>50</sup> between the EU and Canada contain a so-called investment court system (ICS) to deal with ISDS.<sup>51</sup> Furthermore, ICS is part of the negotiations on the (infamous) Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US.<sup>52</sup> It goes beyond the scope of this chapter to go into detail as to the ins and outs of ICS. It is important to note, however, that—despite several safeguards—infringements by the Investment Court regarding the interpretation of EU law are not to be excluded (for example where the determination of a respondent or the attribution of responsibility is concerned). At the same time it has been argued that the ICS may violate the principle of autonomy as the possibility for prior involvement of the CJEU is absent.<sup>53</sup>

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<sup>50</sup> See for the currently available texts respectively <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> and [http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc\\_154329.pdf](http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf).

<sup>51</sup> H Lenk, ‘An Investment Court System for the New Generation of EU Trade and Investment Agreements: A Discussion of the Free Trade Agreement with Vietnam and the Comprehensive Economic and Trade Agreement with Canada’, *European Papers*, European Forum, 14 August 2016, 1–13; See also C Titi, ‘The European Union’s Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead’ (2017) *Transnational Dispute Management* ([www.transnational-dispute-management.com/article.asp?key=2427](http://www.transnational-dispute-management.com/article.asp?key=2427)); as well as ch 5 in this volume.

<sup>52</sup> L Pantaleo, ‘Light and Shadows of the TTIP Investment Court System’ in L Pantaleo, W Douma and T Takács (eds), *Tiptoeing to TTIP: What Kind of Agreement for What Kind of Partnership?*, CLEER Papers, 2016/1, 77–92.

<sup>53</sup> See Lenk (n 51) 10.

## **B. Unsuccessful Attempts by the EU to Participate in IDS**

Indeed, the principle of autonomy and the exclusive jurisdiction of the CJEU as to the application and interpretation of EU law has blocked (and may indeed continue to block) attempts by the EU (or its Member States<sup>54</sup>) to participate in IDS. With a view to the main goal of this chapter of mapping certain principles and conditions, this section will analyse a few failed attempts.

### **i. The European Convention on Human Rights**

Opinion 2/13 on the Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>55</sup> contains quite extensive arguments regarding the problems indicated by the CJEU in relation to the effects of external judicial scrutiny. First, while Article 6 TEU contains an obligation for the EU to accede to the ECHR, it also provides that the accession to the ECHR ‘shall not affect the Union’s competences as defined in the Treaties’. This is not surprising, bearing in mind how much attention the Member States pay to the doctrine of attributed powers that underpins the EU legal order. Article 1 of Protocol No 8 clarifies further that the Accession Agreement will ‘make provision for preserving the specific characteristics of the Union and Union law’. This, in particular, should include a *modus operandi* for division of liability for breaches of the ECHR between the EU and its Member States. Article 2 of the Protocol emphasises again that the accession will affect neither competences of the EU nor powers of its institutions. Article 2 of the Protocol further clarifies that accession to ECHR does not affect

the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof.

Last but not least, Article 3 of the Protocol aims at guaranteeing the immunity of Article 344 TFEU (*infra*) to participation in ECHR. Finally, Declaration No 2 on Article 6(2) TEU, annexed to the Final Act of the Inter-Governmental Conference (IGC) that prepared the Treaty of

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<sup>54</sup> See further on Member State restrictions the contributions by Tobia Lock (ch 7) and Anne Thies (ch 8) in this volume.

<sup>55</sup> See n 1 above. Parts of this section are based on Łazowski and Wessel, ‘When Caveats turn into Locks’ (n 1). Credits are due to Adam Łazowski; yet the usual disclaimer applies.

Lisbon, reiterates that accession to ECHR should ‘preserve the specific features of Union law’ and the need for reinforced dialogue between the CJEU in Luxembourg and the ECtHR in Strasbourg.

As the CJEU argues in Opinion 2/13, submission of the EU to judicial control on the basis of an international agreement, is subject to a *conditio sine qua non*: such an international agreement, which provides for existence of another court, will be acceptable and may affect the Court’s powers ‘only if the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequentially, there is no adverse effect on the autonomy of the EU legal order’.<sup>56</sup> In this particular case, the judges clarify that ECHR bodies, particularly the ECtHR, may not bind the EU, including its institutions, ‘to a particular interpretation of the rules of EU law’.<sup>57</sup> As things stand, it would be the interpretation of ECHR by the ECtHR that would bind the CJEU but, as the judges explicitly admit, it will not be the other way round. To put it differently, accession to the ECHR will only be possible if it is guaranteed that the CJEU will have the exclusive competence to determine whether EU law, particularly the Charter of Fundamental Rights, applies or whether a particular case falls within the remit of the ECHR.

Behind all this lies Article 344 TFEU, which provides that ‘Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein’. This provision has continuously been used by the CJEU to claim its exclusive jurisdiction whenever the interpretation or application of EU law is at stake.<sup>58</sup> As already explained, Article 6(2) TEU makes it clear that the accession will not affect the Union’s competences as defined in the Treaties. Furthermore, Article 3 of Protocol 8 confirms that nothing in the Agreement will affect Article 344 TFEU.

Yet, Article 344 TFEU merely refers to Member States submitting a dispute. In that respect the Commission argued that disputes between the Member States in the context of the ECHR would be about the interpretation or application of the ECHR rather than about the EU

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<sup>56</sup> Opinion 2/13 (n 1) para 183.

<sup>57</sup> *ibid* para 184.

<sup>58</sup> See further below (Section C) and for instance Opinion 1/91, ECLI:EU:C:1991:490, [1991] ECR I-6079, para 35 and Opinion 1/00, ECLI:EU:C:2002:231, [2002] ECR I-3493, paras 11 and 12; judgments in C-459/03 *Commission v Ireland* (n 19) paras 123 and 136, and *Kadi and Al Barakaat International Foundation v Council and Commission*, ECLI:EU:C:2008:461, [2008] ECR I-6351, para 282.

Treaties. Obviously, in cases where the content of ECHR and EU provisions is similar, Article 344 TFEU could be infringed.<sup>59</sup> Therefore, a special provision on the inadmissibility of those disputes would not be necessary. This view was shared by Greece, but not by France, which argued that it must still remain possible for a Member State to appear as a third-party intervener in support of one or more of its nationals in a case against another Member State that is brought before the ECtHR, even where that other Member State is acting in the context of the implementation of EU law.

The Court devotes several paragraphs to its exclusive jurisdiction, the autonomy of EU law, the legal structure of the EU (including fundamental rights), the obligations of the Member States (for instance on the basis of the principle of sincere cooperation) and the need for consistency and uniformity in the interpretation of EU law.<sup>60</sup> It concludes that ‘[f]undamental rights, as recognised in particular by the Charter, must therefore be interpreted and applied within the EU in accordance with the [this] constitutional framework’.<sup>61</sup> While this conclusion should not come as a surprise, given the presence of Article 344 in the TFEU (as well as reference to that provision in Protocols and Declarations), it remains difficult to square these starting points with the notion (which is at the heart of the Strasbourg system) that external judicial control is to be accepted once a violation of ECHR provisions is at stake. A solution found in this respect was a prior involvement procedure, laid down in Article 3(6) of the Draft Accession Agreement. Ironically, this procedure is also under attack in the Court’s Opinion.

Hence, over the years the CJEU has been quite consistent in pointing to some of the consequences of Article 344 TFEU. Yet the interpretation of this provision now seems to affect the very idea of joining the ECHR. For all other parties to the Convention, being bound by the fundamental rights in ECHR in the exercise of their internal powers is the very essence of joining the system in the first place. While the Court seems to acknowledge this in paragraph 185 of the Opinion, it nevertheless maintains that ‘it should not be possible for the ECtHR to call into question the Court’s findings in relation to the scope *ratione materiae* of EU law, for

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<sup>59</sup> Opinion 2/13 (n 1) paras 106–07.

<sup>60</sup> *ibid* paras 163–74.

<sup>61</sup> *ibid* para 177.

the purposes, in particular, of determining whether a Member State is bound by fundamental rights of the EU'.<sup>62</sup>

The problem therefore seems to flow from the risk that the application and interpretation of internal EU law (in disputes between Member States *inter se* or between Member States and the Union) will be by-passed. However, the question is how big a risk this is. Member States are well aware of the Court's case law on this point and it could perhaps even be solved on the basis of so-called disconnection declarations.<sup>63</sup> At the time of writing this chapter, debates are ongoing as to a possible way out,<sup>64</sup> yet a reopening of the negotiations seems unavoidable.<sup>65</sup>

## ii. The European Economic Area and the European Patent Court

The ECHR case was not the first one in which the CJEU eliminated all potential threats *ab initio*. This happened with the EEA Court in Opinion 1/91, and the European Patents Court in Opinion 1/09.<sup>66</sup> The starting point is that subjecting the EU and the Court to an external judicial authority 'is not, in principle, incompatible with EU law' (as the Court repeated in paragraph 182 of the ECHR Opinion; see further section III below).<sup>67</sup> If a dispute settlement body finds that a Union measure violates the provisions of an EU international agreement, the measure is not automatically invalidated, but it is up to the EU to take the appropriate measures so as to

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<sup>62</sup> *ibid* para 186.

<sup>63</sup> Advocate General Kokott mentioned the possibility used in Art 282 of the United Nations Convention on the Law of the Sea (para 115 of the View). Kuijper refers to the example of Annex 2 of the UNESCO Convention on cultural diversity, which states that the Member States of the EU which are party to the Convention (next to the EU itself) will apply the provisions of the agreement in question in their mutual relations in accordance with the EU's internal rules and without prejudice to appropriate amendments being made to these rules. PJ Kuijper, 'Reaction to Leonard Besselink's ACELG Blog', 6 January 2015; <http://acelg.blogactiv.eu/2015/01/06/reaction-to-leonard-besselinks-s-acelg-blog/>; further on disconnection clauses, see M Cremona, 'Disconnection Clauses in EC Law and Practice' in C Hillion and P Koutrakos, *Mixed Agreements Revisited – The EU and its Member States in the World* (Oxford, Hart Publishing, 2010).

<sup>64</sup> See also 'Editorial Comments' (2015) *CMLRev* 1.

<sup>65</sup> See also Łazowski and Wessel, 'When Caveats turn into Locks' (n 1).

<sup>66</sup> See Opinion 1/91 (n 59), Opinion 1/09 *Unified Patent Court*, ECLI:EU:C:2011:123, [2011] ECR I-1137.

<sup>67</sup> Yet, Opinion 1/91 (n 59) seems to indicate that the arguments were drawn more from international law under which the Community was capable of 'creating or designating' international tribunals (para 40), than from EU law logic.

conform with the EU's international obligations.<sup>68</sup> In Opinion 1/91 (EEA) the CJEU concluded that '[t]he system of judicial supervision which the Agreement proposes to set up is incompatible with the EEC Treaty'.<sup>69</sup> One main reason is that the foreseen 'legal homogeneity' is not possible because of the special nature of the EU legal order. For the present chapter, however, the other argument used by the Court is more relevant, and in fact could already have warned the negotiators in the ECHR case: the fact that the foreseen EEA Court could be called upon to define the notion of Contracting Parties and thereby rule on the division of competences of the European Community (as it then was) could jeopardise the autonomy of the Community legal order. As the Court argued, this competence:

Is likely adversely to affect the allocation of responsibilities defined in the Treaties and, hence, the autonomy of the Community legal order, respect of which must be assured by the Court of Justice pursuant to Article 164 of the EEC Treaty. This exclusive jurisdiction of the Court of Justice is confirmed by Article 219 of the EEC Treaty, under which Member States undertake not to submit a dispute concerning the interpretation or application of that Treaty to any method of settlement other than those provided for in the Treaty.<sup>70</sup>

And, yes, given the status of international agreements in the Community's legal order, the decisions of the external Court would be binding on the Community institutions, including the CJEU.

In addition, the model of CJEU judges participating in the EEA Court sounded like a good idea at first, but the CJEU held that because of the two instruments' divergent objectives, the CJEU justices would have to apply and interpret 'the same provisions but using different approaches, methods and concepts'.<sup>71</sup> This would affect their independence as a CJEU judge. The bottom line in Opinion 1/91 was that interpretative jurisdiction had to remain exclusively with the CJEU.

The arguments were not all new and could already partly be found in Opinion 1/76 on a European Laying-up Fund for Inland Waterways.<sup>72</sup> The Convention which was to set up that

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<sup>68</sup> Opinion 1/00 (n 59).

<sup>69</sup> Opinion 1/91 (n 59) para 51. See more extensively eg B Brandtner, 'The "Drama" of the EEA Comments on Opinions 1/91 and 1/92' (1992) 3 *European Journal of International Law* 300.

<sup>70</sup> Opinion 1/91 (n 59) para 35.

<sup>71</sup> Opinion 1/91 (n 59) para 51.

<sup>72</sup> Opinion 1/76, *European Laying-up Fund for Inland Waterways*, ECLI:EU:C:1977:63, [1977] ECR 471.

system included the establishment of a Tribunal composed of judges from the CJEU and Switzerland with a competence to interpret the Agreement. In Opinion 1/76 the CJEU held that its own jurisdiction might be by-passed by the Tribunal, or that Member States would have the possibility to shop for a forum. At the same time, the participation of CJEU judges in the Tribunal could cause problems; albeit that the Court in Opinion 1/76 seemed to use more practical than principled arguments (for example it would be difficult to find enough judges for CJEU sessions when many of them would have participated in Tribunal cases).

In the case of the European Patent Court,<sup>73</sup> the problem emerged from the fact that an external dispute settlement body would have explicit jurisdiction to apply EU law. The draft agreement conferred on it exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of patents. This would imply that domestic courts would be deprived of certain competences and retain only those powers which did not fall under the exclusive jurisdiction of the Patent Court. This, in turn, would affect the powers of the CJEU to reply, by preliminary ruling, to questions referred by the national courts. The Patent Court would have the duty to interpret and apply not only the international agreement, but also provisions of EU law. Accordingly, the agreement would alter the essential character of the powers conferred on the institutions of the Union and on the Member States which are, in the eyes of the CJEU, indispensable to the preservation of the very nature of EU law.

### **C. The European Union's Contribution to the Development of IDS**

A different, but related, question is to what extent the difficulties of the EU in participating in IDS affect its influence on international law-making in that area.<sup>74</sup> After all, since the Treaty of Lisbon in particular, the EU Treaties clearly reveal the EU's global ambitions in this area, which basically boil down to the idea that the EU should—at least partly—shift its focus from its own Member States to third countries,<sup>75</sup> thereby even limiting the possibilities for its own Member

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<sup>73</sup> Opinion 1/09 (n 67).

<sup>74</sup> See more extensively on the influence of the EU on international law: RA Wessel, 'Flipping the Question: The Reception of EU Law in the International Legal Order' (2016) *Yearbook of European Law*, 533-561. Parts of this section are based on that publication.

<sup>75</sup> See in particular Arts 3(5), 21 and 22 TEU.

States to contribute on their own to international law-making.<sup>76</sup> Obviously, the principle of autonomy could lead to further fragmentation and a disconnection between EU law and international law.<sup>77</sup> Hence, we are used to extensive referencing by the EU Court to international law. As some observers found:

A survey of the ever-burgeoning CJEU jurisprudence reveals that the EU courts, when faced with questions of international law, show a high degree of deference to the case-law of the ICJ and use it as an authoritative interpretation of international norms that are of relevance to their work. This is especially the case when they are faced with questions of customary international law—chiefly relating to international law of the sea and to international treaty law.<sup>78</sup>

And, ‘recent practice shows that the EU Courts are making knowledgeable references to the case-law of the ICJ in order to settle a wider gamut of international law questions’.<sup>79</sup>

Yet, it remains unclear to which extent these references by the CJEU have contributed to international law-making. The CJEU is believed to have had some influence through its interpretation of international treaty law. As Odermatt argued in relation to international treaty law:

By applying the VCLT, the CJEU can be seen as contributing to the ‘strict observance and the development of international law’. Like any domestic Court, however, the CJEU may employ international treaty law in a way that deviates from established practice in international law ... This means the CJEU will sometimes contribute to international law by deciding upon the customary international law status of the VCLT rules.<sup>80</sup>

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<sup>76</sup> P Koutrakos, ‘In Search of a Voice: EU Law Constraints on Member States in International Law-Making’ in R Liijova and J Petman (eds), *International Law-Making: Essays in Honour of Jan Klabbers* (London, Routledge, 2014) 211.

<sup>77</sup> See also Esa Paasivirtaa, ch 3 in this volume.

<sup>78</sup> E Kassoti and L Louwerse, ‘Like Ships in The Night? The CJEU and the ICJ at the Interface’, paper presented at the 1st Jean Monnet workshop on the *Dialogue between Judges: The Court of Justice of the European Union and Other International Courts*, Geneva, 23–26 September 2015.

<sup>79</sup> *ibid* 19.

<sup>80</sup> J Odermatt, *The European Union as a Global Actor and its Impact on the International Legal Order*, PhD thesis, University of Leuven, 2016, at 127.

Odermatt's study also points to the fact that the CJEU often interprets treaty law in a somewhat 'selfish' way and its application is influenced by its approach to the interpretation of EU law.<sup>81</sup> This may even lead to a misuse of international law and to further fragmentation.<sup>82</sup>

Yet, it may be also argued that by relying on ICJ interpretations of international law and by confirming the status of the rules, the EU in fact contributes to the coherence of the international legal system. The problem, however, is that, as Nevill has pointed out:

There are no references to the decisions of the EU courts in judgments of the ICJ, the Inter-American Court of Human Rights, the Iran-US Claims Tribunal or International Tribunal for the Law of the Sea (ITLOS) awards. By contrast, the ICJ, Iran-US Claims Tribunal and the Inter-American Court cite judgments of the European Court of Human Rights and domestic courts.<sup>83</sup>

Only a very indirect reference to EU law may perhaps be found in the ICJ judgment on the *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, where the CJEU's view on commercial policy as presented in its Opinion 1/76 was accepted by the ICJ.<sup>84</sup>

Nevill added that:

World Trade Organization ... panel and Appellate Body reports refer to judgments of the European Court of Justice ... but references are for the most part made in the context of an analysis of compliance by the EU and its member states with their WTO obligations, not as a subsidiary source of international law.<sup>85</sup>

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<sup>81</sup> *ibid* 145. See also B De Witte, 'A Selfish Court? The Court of Justice and the Design of International Dispute Settlement Beyond the European Union' in M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Oxford, Hart Publishing, 2014) 33.

<sup>82</sup> Odermatt (n 81) 145.

<sup>83</sup> P Nevill, 'The European Union as a Source of Public International Law', *Hungarian Yearbook of International Law and European Law* (The Hague, Eleven International Publishing, 2013) 281. See on the impossibility of the EU appearing before the ICJ (and, nevertheless, the possibility for it to present its views) Esa Paasivirtaa, ch 3 in this volume.

<sup>84</sup> *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Rep 213. Credit is due to Professor Enzo Cannizzaro for drawing our attention to this case.

<sup>85</sup> *ibid* 283.

Indeed, not only by the CJEU, but also by international tribunals, EU law is generally perceived as different or special, as for instance became clear in a WTO Panel decision when China relied on a judgment of the CJEU.<sup>86</sup>

[T]he fact that it may be legally appropriate for the [CJEU] not to apply EC rules on the free movement of goods to an import transaction involving hard-copy cinematographic film does not mean that it would be legally appropriate for a WTO panel not to apply China's trading rights commitments to an analogous import transaction.<sup>87</sup>

The study by Nevill also highlighted that other international tribunals occasionally refer to CJEU case law, but that this case law hardly affects the outcome of a case. Thus, for instance, 'there are only a handful of cases where the ECJ judgment has been invoked by the [ECtHR] in support of a particular interpretation or application of a Convention right'.<sup>88</sup> Even more scarce are references to EU law by the UN human rights bodies. On the other hand, in investor–state disputes, CJEU judgments (as well as other EU law) do seem to play a somewhat larger role.<sup>89</sup>

As we have seen, in many cases, the EU, as reflected in the CJEU's case law, presents itself as a closed entity, zealous to maintain its autonomy. Perhaps the 'otherness' or 'specialness' of the EU in itself as well as its effect on the 'statehood' of EU Member States may be the most visible contribution to, at least, the practice of international dispute settlement.<sup>90</sup>

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<sup>86</sup> *In casu* Case C-17/92 *Federación de Distribuidores Cinematográficos v Estado Español and Unión de Productores de Cine y Televisión*, ECLI:EU:C:1993:172, [1993] ECR I-2239.

<sup>87</sup> *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (2009), Panel Decision of 12 August 2009. See more extensively Nevill (n 84) at 283.

<sup>88</sup> Nevill (n 84) at 284.

<sup>89</sup> *ibid.*

<sup>90</sup> Wessel (n 75).

### **III. Principles Underlying the EU's (Non-)participation in IDS**

The previous sections shed light on actual and attempted EU (and MS) participation in IDS. The preliminary conclusion was that such participation remains limited at least if one considers IDS of a judicial or quasi-judicial nature.<sup>91</sup> The question can thus be asked as to possible reasons behind this phenomenon; and in particular whether EU law is part of the explanation.<sup>92</sup>

As hinted earlier, various rules governing the EU participation in IDS have been spelled out in the case law of the CJEU rather than being clearly specified in primary law (section III.C). This does not mean that treaty provisions have little to say on the matter. This section thus briefly underlines the relevance of EU external objectives and competence, in that they establish the normative (section III.A) and constitutional framework (section III.B) within which the Court is to adjudicate on the issue of EU participation. This discussion indeed reveals a discrepancy between this framework on the one hand, and some of the judge-made conditions for EU participation in IDS, on the other.

#### **A. The Normative Element: EU Participation and Objectives of EU External Action**

A cursory look at the objectives of the EU in the field of external action suggests that far from dissuading EU participation in IDS, those objectives seem on the contrary to encourage it. Thus, EU involvement in IDS may be viewed as a means to achieve ‘the strict observance and the development of international law, including respect for the principles of the United Nations Charter’, mentioned in Article 3(5) TEU.

It also corresponds to the general ambition, set out in Article 21(1) TEU, that

[t]he Union's action on the international scene ... be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the

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<sup>91</sup> If the notion of IDS is defined more broadly in the sense of encompassing non-judicial / ‘political’ IDS set up by bilateral agreements (eg association or cooperation agreements), participation of the EU is then far more developed. This would point to the importance of the nature (judicial or not) of IDS as determinant of EU participation.

<sup>92</sup> See more extensively on the questions of the autonomy of the EU legal order and the legitimacy of EU law Christina Eckes, ch 9 in this volume.

wide word [including] the rule of law ... and respect for the principles of the United Nations Charter and International Law...

The intention is to ‘promote multilateral solutions to common problems, in particular in the framework of the United Nations’. It may equally help fulfilling the Union’s objective, enshrined in Article 21(2)(a) and (h) TEU, to ‘consolidate and support ... the rule of law ... and the principles of international law [and] promote an international system based on stronger multilateral cooperation and good global governance’.

In short, EU participation in IDS neatly fits with the teleological framework within which the EU ought to act externally. Further, such participation can be viewed as an effective means for the EU to be an active player on the international scene in line with its own objectives, not only in terms of its role as rule-promoter but also as rule-complier and rule-enforcer.

## **B. The Constitutional Element: EU Competence to Participate in (Specific) IDS**

The EU capacity to take part in and be bound by IDS derives from its legal personality confirmed by Article 47 TEU. The latter replicates the original phrasing of Article 210 EEC, which the Court of Justice had interpreted broadly.<sup>93</sup> In the above-mentioned judgment concerning the EU’s participation in proceedings of the International Tribunal of the Law of the Sea (ITLOS), the CJEU also recalled the significance of the legal capacity that the EU enjoys under Article 335 TFEU, according to which:

In each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Union shall be represented by the Commission. However, the Union shall be represented by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation.

The Court thus found that:

[I]t is clear from the case law of the Court that Article 335 TFEU, although restricted to Member States on its wording, is the expression of a general principle that the European Union has legal capacity and is to be represented, to that end, by the Commission (see, to that effect, judgment in *Reynolds Tobacco and Others v Commission*, C-131/03 P, EU:C:2006:541, paragraph 94).

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<sup>93</sup> Case 22/70 *Commission v Council (ERTA)*, ECLI:EU:C:1971:32, [1971] ECR 263.

It follows that Article 335 TFEU provided a basis for the Commission to represent the European Union before ITLOS in Case No 21.

In Opinion 1/91, the Court found that the (then)

Community's competence in the field of international relations and its capacity to conclude international agreements *necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement* as regards the interpretation and application of its provisions.<sup>94</sup>

As we have seen, it also considered that submission of the EU to external jurisdiction is not *per se* in conflict with the characteristics of the EU's legal order:

[W]here ... an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting parties to the agreement, and, as a result, to interpret its provisions, the decisions of that Court will be binding on the Community institutions, including the Court of Justice. Those decisions will also be binding in the event that the Court of Justice is called upon to rule, by way of preliminary ruling or in a direct action, on the interpretation of the international agreement, insofar as that agreement is an integral part of the Community legal order. An international agreement providing for such a system of courts is in principle compatible with Community law.<sup>95</sup>

That the full legal capacity has been vested on the EU as a whole has been subsequently acknowledged in Opinion 1/09,<sup>96</sup> and more recently in Opinion 2/13 where the Court recalled that:

[A]n international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not, in principle, incompatible with EU law; *that is particularly the case where, as in this instance, the conclusion of such an agreement is provided for by the Treaties themselves*. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the

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<sup>94</sup> Opinion 1/91 (n 59). Emphasis added. It added that then Art 238 EEC could be a legal basis for this kind of agreement, at para 70.

<sup>95</sup> Opinion 1/91 (n 59) paras 39–40. The Court had implicitly taken that position earlier in Opinion 1/76 (n 73): ‘The Community is ... not only entitled to enter into contractual relations with a third country in this connexion but also has the power, while observing the provisions of the Treaty, to cooperate with that country in setting up an appropriate organism such as the public international institution which it is proposed to establish under the name of the “European Laying-up Fund for Inland Waterway Vessels”. The Community may also, in this connexion, cooperate with a third country for the purpose of giving the organs of such an institution appropriate powers of decision and for the purpose of defining, in a manner appropriate to the objectives pursued, the nature, elaboration, implementation and effects of the provisions to be adopted within such a framework’ (para 5).

<sup>96</sup> Opinion 1/09 (n 67) para 74.

decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions.<sup>97</sup>

As the italicised phrase indicates, EU Treaties may indeed contain a specific mandate for the Union to take part in IDS. In establishing that the EU shall accede to the ECHR, Article 6(2) TEU implies that the EU is empowered (if not bound) to become part of the judicial system set up by the ECHR, albeit under the conditions contained in particular in Protocol 8, as further discussed below.

Arguably, the inclusion of foreign direct investment in the Common Commercial Policy, as per Article 207 TFEU (see above), also points towards the implicit acceptance, if not intention, of the treaty drafters that the EU will get involved in related IDS. In particular, empowering the EU to conclude investment treaties (alone or with Member States), suggests the acknowledgement that it could participate in the dispute settlement mechanism that often features in such treaties.

In sum: EU primary law contains several elements that point towards an interest in the EU's participation in IDS. This is not only inherent in its international legal personality, it also derives from various treaty provisions which articulate this specific aspect of the EU international legal personality.<sup>98</sup> Having established its connection between EU participation in IDS and the EU global objectives, as well as having recalled the EU constitutional mandate for such a participation, the next section turns to the additional conditions governing this participation, which the CJEU has set out.

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<sup>97</sup> Opinion 2/13 (n 1) para 182. Emphasis added.

<sup>98</sup> In a recent judgment concerning the EU's participation in the proceedings of the International Tribunal of the Law of the Sea (ITLOS), the Court also recalled the significance of Art 335 TFEU according to which: 'In each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Union shall be represented by the Commission. However, the Union shall be represented by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation.' In that judgment (*Council v Commission (ITLOS)* (n 30)), the Court thus found that: 'it is clear from the case law of the Court that Article 335 TFEU, although restricted to Member States on its wording, is the expression of a general principle that the European Union has legal capacity and is to be represented, to that end, by the Commission (see, to that effect, judgment in *Reynolds Tobacco and Others v Commission*, C-131/03 P, EU:C:2006:541, paragraph 94). It follows that Article 335 TFEU provided a basis for the Commission to represent the European Union before ITLOS in Case No 21.'

### **C. General Conditions Governing the EU (and Member State) Participation in IDS**

As one of its expressions, participation in IDS by the EU (and Member States) is governed by the basic principles that organise the EU's external action .

Hence, the EU may only take part in IDS if it has the (substantive) *competence* to conclude the international agreement that sets it up, and if the international agreement concerned allows organisations such as the EU to take part.

EU participation also depends on the scope of the agreement establishing the IDS. If the agreement and ensuing remit of the IDS relate to an area that falls outside areas of exclusive competence, the agreement will be mixed, and the right to participate in the IDS might have to be allocated between Member States and the EU, or joined, depending on the subject matter.

In this mixed framework, joint participation of Member States and the EU will equally be governed by general obligations deriving from EU external relations law, and particularly the duty of compliance and cooperation. The Court has thus articulated various obligations of conduct stemming from the duty of cooperation which bind Member States vis-à-vis EU institutions, including duties to inform and consult.<sup>99</sup>

In addition to these principles, the basic rules governing the functioning of the EU institutional framework also have significance for the EU's participation in IDS proceedings. The principles of inter-institutional conferral, balance and cooperation, enshrined in Article 13(2) TEU,<sup>100</sup> are of particular relevance.<sup>101</sup>

That said, the EU (and Member State) participation in IDS also involves specific conditions. Partly enshrined in EU primary law, such conditions have been articulated by the

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<sup>99</sup> See eg *MOX Plant* (n 19).

<sup>100</sup> 'Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.'

<sup>101</sup> See eg *Council v Commission (ITLOS)* (n 30).

CJEU, and partly codified since—viz in relation to the accession to the ECHR. These additional rules constrain both the EU participation in IDS, and that of Member States.

Hence, the CJEU considers that the participation of the EU is conceivable provided the *autonomy of the EU legal order* is preserved, a condition that, in effect, has led the Court to reject several international agreements on the ground that the IDS they established would be incompatible with the EU Treaties.

One particular aspect of this autonomy is that the IDS cannot interpret or apply *EU* law. In acknowledging that the EU had the capacity to conclude agreements, it emphasised that the IDS is acceptable only if its jurisdiction is limited to the interpretation and application of the agreement that establishes it:

[T]he competence of the European Union in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit itself to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of *their* provisions.<sup>102</sup>

In particular, the international treaty and its IDS should not alter the distribution of power within the EU, notably between the EU and the Member States. In *MOX Plant*, the Court underlined that ‘an international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system, compliance with which the Court ensures’,<sup>103</sup> even though it subsequently admitted that ‘an international agreement may affect its own powers *provided that the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the European Union legal order*’.<sup>104</sup>

The scrupulous respect of the autonomy of the EU legal order also means, for the Court, the obligation for Member States to respect the *exclusivity of its jurisdiction* stipulated in Article 344 TFEU. This condition was understood broadly in Opinion 2/13:

201. ... an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court. That principle is notably enshrined in Article 344 TFEU, according to which Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties *to any method of settlement other than those provided for therein* (see, to that effect, Opinions 1/91, EU:C:1991:490, paragraph 35, and 1/00, EU:C:2002:231, paragraphs 11 and

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<sup>102</sup> Opinion 1/09 (n 67), para 74. Emphasis added.

<sup>103</sup> *MOX Plant* (n 19). Emphasis added.

<sup>104</sup> Emphasis added. See Opinion 1/00 (n 59), later confirmed in Opinion 1/09 (n 67).

12; judgments in *Commission v Ireland*, C-459/03, EU:C:2006:345, paragraphs 123 and 136, and *Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:461, paragraph 282).

202. Furthermore, the obligation of Member States to have recourse to the procedures for settling disputes established by EU law—and, in particular, to respect the jurisdiction of the Court of Justice, *which is a fundamental feature of the EU system*—must be understood as a specific expression of Member States’ more general duty of loyalty resulting from Article 4(3) TEU (see, to that effect, judgment in *Commission v Ireland*, EU:C:2006:345, paragraph 169), it being understood that, under that provision, the obligation is equally applicable to relations between Member States and the EU.<sup>105</sup>

It is indeed for the CJEU to determine the perimeter of that exclusive jurisdiction, based on the subject matter of the dispute.<sup>106</sup> As a complementary condition, the Court held in Opinion 1/09, that EU (and Member State) participation in IDS cannot have the effect of diminishing the jurisdiction of Member States’ courts and tribunals, as courts of the EU. For the Court they are ‘the guardians of [the EU] legal order and the judicial system of the European Union’, alongside the Court of Justice ‘the[ir] tasks ... are indispensable to the preservation of the very nature of the law established by the Treaties’.<sup>107</sup>

As alluded to earlier, the TEU now refers to specific conditions regarding the EU accession to the ECHR. Protocol 8 foresees that the Accession Agreement is to make provision for preserving the specific characteristics of the EU and EU law and ensure that accession does not affect the competences of the EU or the powers of its institutions, or the situation of Member States in relation to the ECHR, or indeed Article 344 TFEU. Aside from the reference to ‘specific characteristics of the EU and EU law’, the Protocol thus essentially reiterates the conditions that had been developed in the case law, and recalled above. This suggests that even without this Protocol, the Court could have reached the same conclusion in Opinion 2/13. To be sure, the Court’s strict application of that Protocol confirms that participation in IDS is subject to very strict conditions, based on a broad concern for the autonomy of the EU legal order, and the preservation of its numerous specific characteristics, particularly the Court’s position therein.

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<sup>105</sup> Emphasis added.

<sup>106</sup> See *MOX Plant* (n 19).

<sup>107</sup> Opinion 1/09 (n 67) paras 66 and 85.

## IV. Conclusions

Normatively and constitutionally, the EU participation in IDS appears to be encouraged by EU Treaties, albeit under certain broad conditions, including the classic rules governing the external action of the EU. Partly based on the EU primary law, such conditions have been developed by the CJEU, around the cardinal principle of the autonomy of the EU legal order, which have arguably inspired the prerequisites included in primary law, conditioning the specific process of EU accession to the ECHR. The way in which the conditions have been articulated and interpreted lately by the CJEU appears to leave little room for actual participation.

That said, the mapping exercise undertaken here of successful and unsuccessful attempts by the EU to participate in IDS did not reveal definitive criteria for such participation. This ambiguity is borne out by a comparison between Opinion 2/13 (ECHR) to Opinion 1/94 (WTO). As held by Cottier,

[the] WTO dispute settlement and its transmutation into a judicial system is a fascinating example how international law has begun to change and affect internal structures of the European Union. First, the expansion of the scope of WTO law cuts through traditional modes of allocating powers between the Union and the Member States ... Second, the *juridification* of WTO dispute settlement means rethinking the role of the courts and their relationship to WTO rules.<sup>108</sup>

While these elements did not prevent the Court of Justice from approving the Union's accession to the WTO, similar arguments were at the heart of its disapproval in Opinion 2/13.

This brings us to the key question raised in this chapter: given that the EU participation in IDS appears to be encouraged by EU Treaties, what are the conditions under which this participation would be in conformity with the principles underlying the EU legal order?

On the basis of primary law as well as case law flagged up here, we come to the following list:

1. IDS does not entail an adverse effect on the autonomy of the EU legal order.
2. IDS does not affect the allocation of powers between the EU and its Member States.
3. IDS cannot interpret EU law.

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<sup>108</sup> Cottier (n 11) 378. Emphasis in the original.

4. IDS does not limit the jurisdiction of the Court in relation to the application and interpretation of EU law.
5. CJEU judges cannot sit on IDS tribunals.

These criteria in turn lead to a new set of questions, including:

1. How can possible issues relating to the autonomy of the EU legal order be adequately solved given the restrictive approach taken by the CJEU in Opinion 2/13?
2. As an EU international agreement becomes EU law, thus falling within the exclusive jurisdiction of the CJEU, how can consistency be ensured between the interpretation given by IDS of the agreement to which it belongs, and that provided by the CJEU of the same instrument as part of EU law? And, how should possible differences be addressed?
3. How can the rule of Article 344 TFEU be reconciled with, for example, the treaty-based obligation for the EU to accede to the ECHR?
4. Is there a possible tension between the principles invoked by the CJEU to support its restrictive approach to EU participation in IDS (for example autonomy of the EU legal order) and other principles underpinning the EU external action? Does the Court's case law adequately reflect the treaty-based ambitions and powers vested in the EU?

The conclusion may very well be that EU participation in IDS would only be acceptable if the dispute to be settled concerns an interpretation of the international instrument and not interpretation of EU law, thus leaving the exclusive power to set the terms of internal application to the CJEU. Yet, given the EU's treaty-based mandate to participate in IDS and the questionable compatibility between the Court's stance and the principles enshrined in Article 13(2) TEU to which it is subject as an EU institution, it may be wondered whether the issue of EU participation should ultimately be left to the EU judiciary, particularly in view of the institutional interests that might colour its position.