

The European Union and International Dispute Settlement: Introduction

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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 medal, 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

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

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 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.

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

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 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 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.

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

⁴ Opinion 2/13 (n 1).