Meeting of the Council of Europe Committee of Legal Advisers on Public International Law (CAHDI), Strasbourg, 23 March 2018

The European Court of Justice and Public International Law*

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1. The EU as an external actor and subject of international law

Whilst not being recognised as a State, the EU has developed into a far-reaching regional integration organisation endowed with a constitutional order. The EU legal order is based on a clear distinction between external relations, on the one hand, and the internal market and the (internal) area of freedom, security and justice, on the other. External borders should be effectively controlled while internal borders gradually dismantled. There is a marked difference between the status of Union citizens and that of third country nationals.[1] As will be further explained below, there is also a clear difference between the relations between the EU Member States inter se, on the one hand, and the relations between them and third countries, on the other.

Concerning specifically the external dimension, the EU has become an increasingly active player, which seeks to develop relations and build partnerships with third countries and international intergovernmental and non-governmental organisations.[2] These activities span across a broad spectrum including trade, transport, development, environmental protection and international peace and security. According to Article 3(5) of the Treaty on European Union (hereinafter TEU), the EU, while upholding and promoting its values and interests and contributing to the protection of its citizens, shall contribute to these and other objectives and also to 'the strict observance and the development of international law, including respect for the principles of the United Nations'.

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* Disclaimer: The observations and views put forward in this paper are strictly personal and do not express the position of the European Court of Justice.

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[1] See, eg A Rosas and L Armati, *EU Constitutional Law: An Introduction*, 3rd rev edn (Oxford, Hart Publishing, 2018) forthcoming.

[2] See, eg P Eeckhout, *EU External Relations Law*, 2nd edn (Oxford, Oxford University Press, 2011); I Govaere et al (eds), *The European Union in the World* (Leiden, Martinus Nijhoff, 2014); P Koutrakos, *EU International Relations Law* (Oxford, Hart Publishing, 2015); J Czuczai and F Naert (eds), *The EU as a Global Actor Bridging Legal Theory and Practice* (Leiden, Brill/Nijhoff, 2017).

The EU, of course, has legal personality and, as has been confirmed in the case law of the European Court of Justice (hereinafter the ECJ), the Union is, as a subject of public international law, bound to respect international law, whether treaty law or general international law.[3] Internationally wrongful acts may entail the international responsibility of the Union.[4] The Union has become an important treaty-making power and is a Contracting Party to a great number of bilateral agreements as well as multilateral conventions.

2. The conclusion of international agreements

Article 216(1) of the Treaty on the Functioning of the European Union (hereinafter TFEU), providing for broad powers of the EU to conclude international agreements, confirms a development which had to a large extent already been recognised in the case law of the ECJ. Article 216(2) spells out that agreements concluded by the Union are binding both on its institutions and on its Member States. The procedures for negotiating, signing, concluding and suspending international agreements are laid down in Article 218 TFEU.[5] These provisions do not, however, regulate the question as to the nature of the competence conferred upon the Union – whether it is exclusive, shared, parallel or complementary.

In areas where there is an exclusive rather than shared Union competence, the agreements should, in principle be concluded by the Union alone. Some areas of exclusive competence, such as the common commercial policy, are explicitly listed in Article 3(1) TFEU, while according to Article 3(2) TFEU, the Union shall also have exclusive competence if one of three general criteria are fulfilled. The Treaty of Lisbon, and more specifically Article 207 TFEU on the common commercial policy and the codification of the so-called AETR/ERTA principle in Article 3(2) TFEU, as interpreted in ECJ case law, has contributed to a widening of the scope of exclusive competence.[6] Recent case law, including a judgment concerning a then envisaged Council of Europe convention relating to the protection of the neighbouring

[3] See, eg Case C-286/90 *Poulsen and Diva Navigation* EU:C:1992:453, paras 9-10; Case C-162/96 *Racke* EU:C:1998:293, paras 45-46; Case C-366/10 *The Air Transport Association of America* EU:C:2011:864, paras 101 and 123; Case C-266/16 *Western Sahara Campaign UK* EU:C:2018:118, para 47. See also J Wouters, A Nollkaemper and E de Wet (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States* (The Hague, Asser Press, 2008); E Cannizzaro, P Palchetti and RA Wessel (eds), *International Law as Law of the European Union* (Leiden, Martinus Nijhoff, 2012).

[4] See, in particular, M Evans and P Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Oxford, Hart Publishing, 2013).

[5] A Rosas, 'Recent Case Law of the European Court of Justice Relating to Article 218 TFEU' in Czuczai and Naert, n 2 above, 365-379.

[6] A Rosas, 'EU External Relations: Exclusive Competence Revisited' 38 (2015) *Fordham International Law Journal* 1073-1096; A Rosas, ' The EU as a Global Trade Actor: The Scope of Its Common Commercial Policy' in M Pavliha et al (eds), *Challenges of Law in Life Reality: Liber Amicorum Marko Ilešič* (Ljublijana, Univerza v Ljubljani, Pravna fakulteta, 2017) 429-447.

rights of broadcasting organizations,[7] demonstrates that the AETR/ERTA principle, according to which there is exclusive competence if the conclusion of an agreement 'may affect common rules or alter their scope'[8], may be applicable in a wide variety of situations, thus reducing the scope for non-exclusive (shared or otherwise) competence.[9]

Especially if it is an area of shared competence, the agreement is likely to be concluded not by the Union alone but together with some or all of its Member States. These so-called mixed agreements pose a number of legal and institutional problems relating to their negotiation, conclusion and application as well as issues of responsibility (who is responsible for what?) which cannot be analysed in detail here.[10] These problems may come before the ECJ, including the question as to the extent of the Court's jurisdiction over such agreements. It is in many cases difficult, if not impossible, to identify provisions of the agreement which would unquestionably and exclusively fall under Member States' competence so that the Court's jurisdiction over the agreement would be excluded.[11]

There are also a number of multilateral agreements which, while covering areas falling within EU competence, the Union has not been able to conclude in its own name, in most cases because the convention in question contains an adherence clause which limits participation to States. Such agreements concluded by the Member States are, from the point of view of Union law, in principle seen as part of the national law of the Member States which have concluded them. Some of these agreements, however, may become relevant also for Union law purposes. This is so, for instance, 1) if Union legal acts contain explicit references to them, 2) if the Union, despite the fact that the agreement belongs to an area of Union exclusive competence, has authorised Member States to conclude it in the

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[7] Case C-114/12 *Commission v Council* EU:C:2014:2151.

[8] By 'common rules' is meant Union legislative and other acts of so-called secondary law but not rules of primary law, Opinion 2/15 (Free trade agreement with Singapore) EU:C:2017:376, paras 233-235.

[9] Apart from Case C-114/12, n 7 above, Opinion 1/03 EU C:2006:81; Opinion 1/13 EU:C:2014:2303; Case C-66/13 *Green Network* EU:C:2014:2399; Opinion 3/15 EU:C:2017:114; Opinion 2/15, n 8 above.

[10] See, eg A Rosas, 'The European Union and Mixed Agreements' in A Dashwood and C Hillion (eds), *The General Law of E.C. External Relations* (London, Sweet & Maxwell, 2000) 200-220; J Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (The Hague, Kluwer Law International, 2001); C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Oxford, Hart Publishing, 2010).

[11] Some mixed agreements are accompanied by declarations of competence purporting to establish a distinction between Union and Member States' competence but such declarations often leave many questions unanswered and some of them are obsolete in view of the development of EU legislation subsequent to the drafting of the declaration, see, eg Case C-240/09 *Lesoochanárske zoskupenie* EU:C:2011:125, paras 28-43 (concerning a declaration of competence, paras 39-40). See also Case C-239/03 *Commission v France* EU:C:2004:598; Case C-459/03 *Commission v Ireland* EU:C:2006:345.

interest of the Union[12] or, 3) by virtue of Article 351(1) TFEU, if the agreement has been concluded by a Member States before its accession to the EU.[13] In the latter case, the derogation from the principle of the primacy of Union law over the national law of Member States, including agreements concluded by them, only applies if the agreement concluded by a Member State before its EU membership establishes an obligation which the Member State is bound to honour vis-à-vis a third country.[14] Agreements concluded by the Member States *inter se* cannot escape the principle of primacy of Union law even if they have been concluded before their accession to the Union. This, once again, illustrates the difference between the external and the internal in the EU constitutional order.

3. The status of international law in EU law

According to settled case law, international agreements concluded by the EU become an integral part of the EU legal order.[15] The conclusion of the agreement (usually by a Council decision) makes it directly applicable. In this sense, the EU may be said to adhere to a 'monist' approach. Direct applicability, however, should not be confounded with direct effect.[16] If an agreement is deemed to have direct effect, it can be invoked directly by individuals before Union and EU national courts. There is an abundance of case law on the presence or absence of direct effect.

While many agreements of a bilateral nature (often trade and cooperation agreements) have been found to contain provisions having direct effect,[17] the contrary is true of a number of multilateral conventions. The ECJ has, in this respect, established a two-pronged requirement for direct effect: The 'nature and the broad logic' of the agreement does not preclude direct effect and the provisions relied upon appear, as to their content, to be 'unconditional and sufficiently precise'.[18] Multilateral conventions found to lack direct effect on the basis of the 'nature and broad logic' of the agreement include the GATT and other

[12] The possibility of such authorisation is explicitly foreseen in Article 2(1) TFEU. See A Rosas, 'Exclusive, Shared and National Competence in the Context of EU External Relations: Do Such distinctions Matter?' in Govaere et al, n 2 above, 17-43 at 32-33.

[13] A Rosas, 'The Status in EU Law of International Agreements Concluded by EU Member States' 34 (2011) *Fordham International Law Journal* 1304-1345. According to Article 351(1) TFEU, the rights and obligations arising from agreements concluded before accession, between Member States and third countries, 'shall not be affected by the provisions of the Treaties'.

[14] Ibid, 1321-1324.

[15] Case 181/73 *Haegeman* EU:C:1974:41 is often cited as the first case to confirm this principle. For examples of recent cases see Case C-224/16 *Aebtri* EU:C:2017:880, para 50; Case C-266/16 *Western Sahara Campaign*, n 3 above, paras 45-46. See also Wouters et al, n 3 above; Cannizzaro, Palchetti and Wessels, n 3 above.

[16] Rosas and Armati, n 1 above, 72, 77-80.

[17] To give but one example, Case C-265/03 *Simutenkov* EU:C:2005:213, para 21.

[18] See, eg Joined Cases C-659/13 and C-34/14 *C & J Clark International* EU:C:2016:74, para 84, and case law cited.

World Trade Organization (hereinafter WTO) agreements,[19] the UN Convention on the Law of the Sea[20] and the Kyoto Protocol to the UN Framework Convention on Climate Change. Examples of conventions which contain provisions which have not been deemed to be unconditional and sufficiently precise include the European Convention on the Protection of Animals Kept for Farming Purposes[21] and the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.[22] Multilateral treaties found to have direct effect include the Yaounde/Lomé/Cotonou agreements between the EU and African, Caribbean and Pacific countries[23] and the Montreal Convention for the Unification of Certain Rules for International Carriage by Air.[24]

According to the Union Courts' case law, the absence of direct effect prevents not only an individual from invoking an agreement before a Union or national court in general but also individuals, EU institutions and Member States from invoking the invalidity of a Union legal act because of incompatibility with the agreement.[25] In the EU internal hierarchy of norms, however, international agreements binding on the Union are, in principle, situated above internal legislation and other legal acts of secondary law. This means that even in the case of an agreement which lacks direct effect, the acts of secondary law must be interpreted as far as possible in keeping with the terms of the agreement (consistent interpretation).[26]

While international agreements, and especially those having direct effect, thus prevail over acts of secondary law, the same is not true with respect to the founding Treaties and other parts of primary law. In the well-known *Kadi I* case, relating to the implementation of UN Security Council sanctions decisions, the ECJ held that, in the EU constitutional order, the primacy of international agreements over acts of secondary law does not extend to primary law, 'in particular to the general principles of which fundamental rights form part' and that international agreements 'cannot have the effect of prejudicing the constitutional principles of the [Union Treaties], which include the principle that all [Union] acts must respect fundamental rights'.[27] The Court did recognise that, in implementing UN sanctions, the Union is required to 'take due account' of the terms and objectives of the resolution concerned and of the relevant obligations under the UN Charter (despite the fact that the

[19] See, eg Case C-149/96 *Portugal v Council* EU:C:1999:574, para 47; Joined Cases C-659/13 and C-34/14 *C & J Clark International*, n 18 above, para 85.

[20] Case C-308/06 *Intertanko* EU:C:2008:312, paras 53-65.

[21] Case C-1/96 *Compassion in World Farming* EU:C:1998:113, paras 32-34.

[22] Case C-240/09 *Lesoochranárske zoskupenie*, n 11 above, paras 44-45.

[23] See, eg Case C-469/93 *Chiquita Italia* EU:C:1995:435.

[24] See, eg Case C-344/04 *IATA and ELFAA* EU:C:2006:10, para 39.

[25] See, eg the case law referred to in nn 18-21.

[26] Rosas and Armati, n 1 above, 50 et seq, 70-71.

[27] Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* ("Kadi I") EU:C:2008:461, paras 285, 308.

EU is not a member of the UN)[28] but could not accept that the internal Union acts implementing UN sanctions would fall outside judicial review, taking into account that such review did and still does not exist at UN level and that EU national courts are precluded from reviewing the validity of Union acts.[29]

The Union Courts have since long considered that the EU is bound to respect not only international agreements concluded by it but also customary and other unwritten general international law.[30] While the exact status of general international law in the Union legal order remained somewhat unclear, an ECJ judgment of 2011[31] brought further clarification in this regard. The Court formulated two basic conditions for the control of validity of Union acts: first, the relevant principles of customary law should be 'capable of calling into question the competence of the [EU] to adopt that act' and, second, the act in question should be 'liable to affect rights which individuals derive from [Union] law or to create obligations under [Union] law in this regard'. A further reserve was added with respect to the intensity of judicial control: since, according to the Court, a principle of customary law does not have the same degree of precision as a provision of an international agreement, judicial review must be limited to the question whether, in adopting the act in question, 'the institutions of the EU made manifest errors of assessment concerning the conditions for applying those principles'.[32]

4. Avoidance of material breach

Whilst the ECJ has insisted on the respect for the fundamental principles of the EU constitutional order even in the implementation of international obligations, the Union, of course, remains bound, vis-à-vis third countries and international organisations, of these obligations and may incur responsibility for internationally wrongful acts. The Court has held that the EU Member States, which, under Article 216(2) TFEU, are bound by agreements concluded by the Union, fulfil in this respect an obligation in relation to the Union, 'which has assumed responsibility for the due performance of the agreement'.[33]

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[28] Ibid, para 296.

[29] A Rosas, 'Counter-Terrorism and the Rule of Law: Issues of Judicial Control' in AM Salinas de Frás, KLH Samule and ND White (eds), *Counter-Terrorism: International Law and Practice* (Oxford, Oxford University Press, 2012) 83-110 at 105-110.

[30] See, eg, the judgments referred to in n 3 above.

[31] Case C-366/10 *The Air Transport Association of America*, n 3 above.

[32] Ibid, paras 107-110.

[33] Case 104/81 *Kupferberg* EU:C:1982:362, para 13. See also Case 12/86 *Demirel* EU:C:1987:400, para 11; Case C-13/00 *Commission v Ireland* EU:C:2002:184, para 15; Case C-239/03 *Commission v France,* n 11 above, para 26. It is not possible here to go into the complex question of international responsibility for breach of mixed agreements, see the literature referred to in n 10 above.

With the broadening of the scope of the EU's international action, issues relating to its international responsibility may arise in a wide variety of situations. This reality is also reflected in the case law of the Union Courts. To provide some examples of public international law issues which have come before these courts, they include various questions relating to international treaty law and the principles recognised in the Vienna Convention of 1969,[34] questions concerning borders, territory, sovereignty and recognition,[35] the principle of the right of peoples to self-determination,[36] various matters relating to the law of the sea,[37] the relation between anti-terrorism law and international humanitarian law applicable in armed conflicts,[38] international human rights law,[39] issues of UN law,[40] international environmental law,[41] international transport agreements[42] and, of course, international trade law.[43]

There are some mechanisms in the EU legal order which may have a direct or indirect bearing on the objective of ensuring compliance by the Union of its international obligations. The judicial control of the validity of Union legal acts with regard to international agreements binding upon the Union constitutes one relevant device. True, the lack of direct effect of a particular agreement may be an obstacle to such review. On the other hand, the principle of consistent interpretation will often be enough to guarantee the fulfilment of international obligations. It should also be noted that lack of direct effect could in some instances enhance rather than hamper the achievement of this objective. WTO law

[34] To mention but a few examples, see Case C-162/96 *Racke*, n 3 above; Case C-386/08 *Brita* EU:C:2010:91, paras 41 and 42; Case C-104/16 P *Council v Front Polisario* EU:C:2016:973. See also D Verwey, *The European Community, the European Union and the International Law of Treaties* (The Hague, TMC Asser Press, 2004).

[35] Case C-432/92 *Anastasiou* EU:C:1994:277 (Northern Cyprus); Case C-386/08 *Brita*, n 34 above (territories of the West Bank and the Gaza Strip); Case C-104/16 P *Council v Front Polisario,* n 34 above (Western Sahara).

[36] Case C-104/16 P *Council v Front Polisario,* n 34 above*,* paras 88-93.

[37] See, eg Case C-146/89 *Commission v United Kingdom* EU:C:1991:294; Case C-286/90 *Poulsen*, n 3 above; Case C-405/92 *Mondiet* EU:C:1993:906; Case C-37/00 *Weber* EU:C:2002:122; Case C-299/02 *Commission v Netherlands* EU:C:2004:620; Case C-308/06 *Intertanko*, n 20 above; Case C-347/10 *Salemink* EU:C:2012:17; Case C-106/11 *Bakker* EU:C:2012:328.

[38] Case C-158/14 *A and Others* EU:C:2017:202.

[39] Apart from The European Convention on Human Rights, which enjoys 'special status', universal human rights instruments sometimes become relevant in cases before the ECJ, see, eg A Rosas, 'The Charter and Universal Human Rights Conventions' in S Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (Oxford, Hart Publishing, 2014) 1685-1701.

[40] See notably Joined Cases C-402/05 and C-415/05 P "*Kadi I*", n 27 above.

[41] There is fairly extensive case law relating to the application or interpretation of international environmental conventions, for examples, see Case C-240/09 *Lesoochranárske zoskupenie*, n 11 above; Case C-366/10 *The Air Transport Association of America*, n 3 above.

[42] See, eg Case C-439/01 *Cipra and Kvasnicka* EU:C:2003:31; Case C-224/16 *Aebtri*, n 15 above.

[43] There is an abundance of case law relating to international trade law, whether in the context of WTO law or bilateral trade agreements. Concerning the WTO, see at n 57 below, where examples are given of references to WTO dispute settlement decisions in judgments of the ECJ.

comes readily in mind, since because of its complexity, there is a risk that decisions of lower national courts in particular would not be based on a proper understanding of the various numerous WTO agreements and the extensive case law of the WTO dispute settlement bodies.[44]

It should be underlined that the great bulk of the Union Courts' activities concern a wide range of Union law issues which have very little or nothing to do with public international law. The Union Courts are neither international courts nor human rights courts[45] in the strict sense of these notions and the expertise of their members is mainly in the areas of Union law and/or national law. It is thus natural that in their search for the appropriate interpretation of public international law rules, the Union Courts turn to guidance which may be provided by the case law of international courts proper.[46] It should be noted that the Union Courts may for this purpose refer to decisions of such bodies even if the latter are not part of a dispute settlement system contained in a convention to which the Union itself has adhered.

The European Convention on Human Rights (hereinafter ECHR) and the case law of the European Court of Human Rights is a special case in point in view of the close links which exist between Union law and the European human rights system.[47] As is well-known, the Union, despite the fact that Article 6(2) TEU provides that the Union 'shall accede' to the ECHR, is not a Contracting Party to this Convention.[48] Already since the 1990s, the ECJ nevertheless started to refer not only to the provisions of the ECHR but also to individual decisions of the Strasbourg Court. While since the entry into force of the Lisbon Treaty (2009), the EU Charter of Fundamental Rights has become the main source for the Union Courts in applying or interpreting fundamental rights, the ECJ, in particular, still refers fairly

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[44] See A Rosas, 'International Responsibility of the EU and the European Court of Justice' in Evans and Koutrakos, n 4 above, 139-159 at 147. See, more generally, A Rosas, 'Implementation and Enforcement of WTO Dispute Settlement Findings: An EU Perspective' 4 (2011) *Journal of International Trade Law* 131-144.

[45] A Rosas, 'Is the EU a Human Rights Organization?' *CLEER Working Papers* 2011/1 (The Hague, Centre for the Law of EU External Relations, 2011); A Rosas, 'The European Union and Fundamental Rights/Human Rights: Vanguard or Villain?' 7 (2017) *Adam Mickiewitcz University Law Review* 7-24.

[46] A Rosas, 'With a Little Help from My Friends: International Case-Law as a Source of Reference for the EU Courts', 5 (2005) *The Global Community Yearbook of International Law and Jurisprudence* (Oceana Publications, 2006) 203-230; A Rosas, 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue', 1 (2007) *European Journal of Legal Studies*.

[47] See the Article 6 TEU and the Preamble and Articles 52(3) and 53 of the EU Charter of Fundamental Rights. There is an abundance of literature relating to the relation between the two systems, see, eg A Rosas, 'Fundamental Rights in the Luxembourg and Strasbourg Courts' in C Baudenbacher, P Tresselt and T Örlygsson (eds), *The EFTA Court: Ten Years On* (Oxford, Hart Publishing, 2005) 163-175; H Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System: An Analysis of the European Court of Human Rights and the Court of Justice of the European Union* (Cambridge, Intersentia, 2011).

[48] A draft accession agreements was declared incompatible with Union law in Opinion 2/13 EU:C:2014:2454.

frequently to Strasbourg case law. That this practice is likely to continue is underscored by the fact that according to Article 52(3) of the Charter, the rights contained in it which correspond to rights recognised under the ECHR should be given the same meaning and scope as those laid down by the Convention. According to the Explanations to the Charter, attention should be paid not only to the text of the ECHR but also to the case law of the Strasbourg Court and the Union Courts.[49]

A somewhat similar situation has arisen with respect to the EFTA Court, which functions as a dispute settlement body for the Agreement on a European Economic Area (hereinafter EEA), binding, apart from the Union and its 28 Member States, on three non-EU States (Iceland Liechtenstein and Norway). As EEA law should be closely aligned with Union law (principle of homogeneity), it is understandable that the EFTA Court regularly makes references to ECJ case law. In some instances, however, it is the other way around: the latter has cited EFTA Court judgments.[50]

As to universal dispute settlement bodies, the ECJ from time to time refers to judgments or advisory opinions of the International Court of Justice (hereinafter ICJ) as an indication of the state of public international law (often in the form of customary law) on a certain subject. This is so despite the fact that the EU cannot be a party in proceedings before the ICJ.[51] Subjects on which guidance from ICJ case law have been sought include the international law of treaties, as codified in the Vienna Convention of 1969,[52] the law of the sea, as codified in the UN Convention on the Law of the Sea,[53] and issues of borders, territory, sovereignty and recognition.[54] To my knowledge, the ECJ has not so far had occasion to cite the International Tribunal for the Law of the Sea, despite the fact that the EU is a Contracting Party to the Convention (although the Union has not in advance accepted the compulsory jurisdiction of the Tribunal) and has once also been a party before the Tribunal.[55] The ECJ, on the other hand, has cited once the Human Rights Committee acting under the International Covenant on Civil and Political Rights of 1966 (but the Court

[49] [2007] OJ C303/17.

[50] Baudenbacher et al, n 46 above; EFTA Court (ed), *The EEA and the EFTA Court: Decentred Integration* (Oxford, Hart Publishing, 2014).

[51] Rosas, Global Community Yearbook, n 46 above, at 222-226.

[52] See, eg Case C-162/96 *Racke*, n 3 above, paras 24, 50.

[53] See, eg Case C-286/90 *Poulsen and Diva Navigation*, n 3 above, para 10; Case C-37/00 *Weber*, n 37 above, para 34.

[54] Case C-104/16 P *Council v Front Polisario,* n 34 above, paras 28, 88, 91.

[55] *Chile v European Community* (the Swordfish Case), see n 62 below. See moreover Case C-73/14 *Council v Commission* EU:C:2015:663, which concerned a statement made to the International Tribunal by the European Commission on behalf of the EU and relating to the request for an advisory opinion.

did not follow the position taken by the Committee, noting that its decisions are not legally binding).[56]

Finally, there are several cases in which the ECJ has cited decisions of the WTO dispute settlement bodies (panels and the Appellate Body).[57] This is natural given that fact that the EU is a Contracting Party to the WTO Agreements including their compulsory dispute settlement system and that there is a close relation between WTO law and some parts of EU law mainly in the area of the Union's common commercial policy. While the WTO rules are not deemed to have direct effect in Union law contexts, the principle of consistent interpretation and the risk that violations of WTO law incur the international responsibility of the Union have in some instances prompted the ECJ to look at WTO case law, as interpreted by the dispute settlement bodies, for guidance.

5. Dispute settlement mechanisms

The ECJ has constantly held that the EU, as a subject of international law, may, in principle, become bound by clauses on third-party dispute settlement contained in international agreements concluded by the Union.[58] On the other hand, the Court has circumscribed this possibility with some conditions and has in some instances found that a specific dispute settlement mechanism contained in a draft agreement was incompatible with the Union legal order. Negative opinions in this respect have been rendered with regard to the judicial organ envisaged for an agreement establishing a European laying-up fund for inland waterway vessels, the first (hybrid) version of the judicial system envisaged for the EEA Agreement, the international judicial body envisaged for the unified patent regime and the draft agreement providing for the accession of the EU to the ECHR.[59]

Among the dispute settlement mechanisms to which the EU has adhered, the WTO system is by far the most important one.[60] To date, the EU has been a party, either as a claimant or

[56] Case C-249/96 *Grant* EU:C:1998:63, paras 43-47.

[57] See, eg Case C-245/02 *Anheuser Busch* EU:C:2004:717, paras 49 and 67; Case C-260/08 *HEKO Industrieerzeugnisse* EU:C:2009:768, para 22. See also Rosas, International Responsibility, n 44 above at 148.

[58] See, eg Opinion 1/91 (EEA Agreement), EU:C:1991:490, paras 39-40, 70; Opinion 2/13, n 48 above, paras 182-183. See more generally A Rosas, 'International Dispute Settlement: EU Practices and Procedures' 46 (2003) *German Yearbook of International Law* 284-322; A Rosas, 'The EU and International Dispute Settlement' 1 (2017) *Europe and the World: A Law Review* 7-35; M Cremona, A Thies and RA Wessel (eds), *The European Union and International Dispute Settlement* (Oxford, Hart Publishing, 2017).

[59] Opinion 1/76, EU:C:1977:83; Opinion 1/91, n 58 above; Opinion 1/09, EU:C:2011:123 and Opinion 2/13, n 48 above. See also Rosas, n 58 above, at 12-18.

[60] On the Union's participation in the WTO dispute settlement system see, eg Rosas, Journal of International Trade Law, n 44 above; G Marín Durán, 'The EU and Its Member States in WTO Dispute Settlement: A "Competence Model" or a Case Apart for Managing International Responsibility?' in Cremona et al, n 58 above, 237-273.

a respondent, to close to 200 cases which have come before a WTO panel, and in most cases, also the Appellate Body. Apart from the WTO system, the EU is bound by a considerable number of compulsory arbitration clauses contained mostly in bilateral trade and agreements with third countries but also in the Energy Charter Treaty and the UN Convention on the Law of the Sea.[61] These clauses have so far triggered only a few cases of concrete litigation. In the *Swordfish Case* between Chile and the EU,[62] the parties, despite the fact that the EU has not accepted the compulsory jurisdiction of the International Tribunal of the Law of the Sea, submitted the case to a chamber of this Tribunal. The case was later settled out of court, however, and two other cases have had the same outcome, namely a fisheries case between the Faero Islands and the EU and an arbitration procedure under the EU-US Open Skies aviation agreement (concerning the access of a European airline to the US market).[63]

Finally, it should be noted that the question of investor-to-state dispute settlement mechanisms (ISDS) poses some particular problems in relation to the application of Union law.[64] Suffice it to recall in this context that, with respect to an ISDS clause in a trade agreement with a third country, the ECJ held in a recent Opinion that such a clause, which can be triggered by a private investor, is susceptible to remove investment disputes from the jurisdiction of the courts of the EU Member States in favour of an international arbitral body and cannot therefore be established without the Member States' consent.[65] At the time of writing, a request for another Opinion is pending before the Court, this time on the compatibility of the ISDS mechanism contained in an agreement with Canada (CETA) with Union law.[66] While these cases concern ISDS mechanisms agreed with third countries, a very recent judgment deals with the legality, under Union law, of ISDS clauses contained in investment agreements concluded by the EU Member States inter se. The Court concluded that Union law precludes such clauses, as they imply that, unlike what is the case with commercial arbitration, where two private parties have agreed to submit their dispute to arbitration, a Member State has agreed to remove from the jurisdiction of its own courts (which constitute a crucial component of the EU judicial system) disputes which may concern the application or interpretation of Union law.[67]

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[61] Rosas, in Europe and the World, n 58 above, at 18-26.

[62] *Chile v European Community*, ITLOS Case No 7. See, eg Rosas, in German Yearbook, n 58 above, at 301-302; E Paasivirta, 'The European Union and the United Nations Convention on the Law of the Sea' 38 (2015) *Fordham International Law Journal* 1045-1071 at 1056-1057.

[63] Rosas, in Europe and the World, 9-10.

[64] See, eg ibid, 23-26.

[65] Opinion 2/15, n 8 above, paras 291-293.

[66] Opinion 1/17 (request made by Belgium in September 2017).

[67] Case C-284/16 *Achmea* EU:C:2018:158.