THE SETTLEMENT OF DISPUTES ARISING FROM THE UNITED KINGDOM’S WITHDRAWAL FROM THE EUROPEAN UNION
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Abstract
This study, commissioned by the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs at the request of the AFCO Committee, analyses the various jurisdiction options, under EU law and under public international law, in settling disputes arising from the Withdrawal Agreement of the UK from the EU and in the context of the Future Relationship Agreement with the UK. It examines in particular the continued involvement of the CJEU in the new context of the EU-UK relations and, based on CJEU case-law and previous international agreements, presents the various governance possibilities for these agreements.
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<tr>
<td>CETA</td>
<td>Comprehensive Economic and Trade Agreement</td>
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<td>CFR</td>
<td>European Union Charter of Fundamental Rights</td>
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<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>DCFTA</td>
<td>Deep and Comprehensive Free Trade Agreement</td>
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<td>DSB</td>
<td>Dispute Settlement Body</td>
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<td>EC</td>
<td>European Community</td>
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<td>ECA</td>
<td>European Communities Act 1972</td>
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<td>ECAA</td>
<td>European Common Aviation Area</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>EEA</td>
<td>European Economic Area</td>
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<td>EFTA</td>
<td>European Free Trade Area</td>
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<td>EP</td>
<td>European Parliament</td>
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<td>EU</td>
<td>European Union</td>
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<td>EUWB</td>
<td>European Union Withdrawal Bill</td>
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<td>FRFA</td>
<td>Future Relationship Framework Agreement</td>
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<tr>
<td>FTA</td>
<td>Free Trade Agreement</td>
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<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
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<tr>
<td>ICS</td>
<td>Investment Court System</td>
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<tr>
<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
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<tr>
<td>MS(s)</td>
<td>Member State(s) of the European Union</td>
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<tr>
<td>TEU</td>
<td>Treaty on European Union</td>
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<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<tr>
<td>UK</td>
<td>United Kingdom</td>
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<td>VCLT</td>
<td>1969 Vienna Convention on the Law of Treaties</td>
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<td>WA</td>
<td>Withdrawal Agreement</td>
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<td>WTO</td>
<td>World Trade Organisation</td>
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EXECUTIVE SUMMARY

1. The United Kingdom’s withdrawal from the European Union (EU) will in all likelihood lead to the conclusion of **two agreements**: the Withdrawal Agreement (WA) and the Future Relationship Agreement (FRA). The application of these agreements will undoubtedly lead to disputes between the parties, many of which can derive from their enforcement in the domestic legal order. This study looks at the possible options available to settle disputes arising from the application of these agreements and examines the most convenient jurisdiction for the EU in each case.

2. **The enforcement of rulings** under the future relationship agreement and during the latter period of application of the WA implies an inevitable **asymmetry**. This is because EU law is an autonomous regime within public international law, and therefore enforcement of dispute settlement rulings differs **within** and **outside** this EU legal regime. As a rule, international agreements concluded by the EU with third countries do not entail the jurisdiction of the Court of Justice of the European Union (CJEU) outside the EU. By contrast, these international agreements form part of EU law and the CJEU has full jurisdiction over their enforcement within the Union.

3. The **CJEU’s jurisdiction over the WA** does not depend on considerations deriving from the nature of the agreement, but rather from the fact that the WA would (or would not) **interpret or apply EU law**. If the WA includes a transitional period, during which EU law will continue to apply in the UK, jurisdiction would ultimately reside with the CJEU. The CJEU has the institutional monopoly to guarantee the autonomy of EU law and its uniform and homogenous interpretation. If the WA does not include a transitional period but it is necessary to interpret EU law (for example on the provisions of EU law, which regulate the payment obligations of the UK, namely the so-called resté à liquider), the competent jurisdiction can only be the CJEU.

4. The **Future Relationship Agreement** would be an international agreement like any other concluded by the EU with a third country. To settle differences between the parties (UK and the EU) derived from its application, the usual means on settlement of international disputes would probably be employed; these would not include the jurisdiction of an international court but more flexible means. Something similar would happen for the WA, during the period subsequent to the UK’s withdrawal and any transitional period, if there are no references to EU law. On the contrary, during the **transitional period of the WA**, the application of EU law will continue in the UK, although it will be then a third country, **leading necessarily to the CJEU jurisdiction**.

5. However, we can distinguish **two main categories** in these agreements. If the agreement with a third country does **not create an integrated relationship structure** (such as the Singapore FTA, the CETA with Canada or the, DCFTA with Ukraine and Moldova), the mechanisms of dispute settlement are flexible and based on consultation, mediation and arbitration. The agreement does not have direct effect, the inter-state Joint Committee has limited competences over the application, implementation, surveillance and solution of disputes through negotiations, while, the disputes that cannot be solved by the above-mentioned procedures, are referred to an arbitration panel. **An investor-State disputes arbitration procedure** could be added (like in CETA). However, the Belgian Government has requested a CJEU opinion on the compatibility of this provision in the CETA agreement with the Treaties.

6. Such flexibility does not apply if the agreement **creates an integration structure** within which mechanisms of dispute settlement and enforcement of decisions entail the existence of a **court distinct from the CJEU with jurisdiction outside the EU**. Thus, in the European Economic Area (EEA), there is a three-pillar system: an interstate Joint
Committee, a Surveillance Authority and the European Free Trade Area (EFTA) Court. The main reason lies in the application of rules “like the EU ones” that must be interpreted in an identical manner to the original ones. In this case, the agreement produces direct effect; there is a Joint Committee with quasi-legislative competences monitoring the identical interpretation of rules and a court offering persons an “equivalent guarantee” to the CJEU, open to EU citizens.

7. If, as is likely, there is a transitional period in the WA, it should serve to extend the applicability of part of EU law within the UK, even if it is no longer a Member State, but a newly third country. The domestic enforcement of the provisions in the transitional arrangements would require maintaining the direct effect and the primacy of that part of EU law referred to in the WA. It would also require the respect of the guarantees provided by EU law to individuals, allowing them to invoke these rules in the UK as in the EU-27. This entails keeping the CJEU jurisdiction and maintaining the loyal cooperation relationship between the UK courts and the CJEU to allow the interpretative preliminary ruling mechanism. At the same time, it would maintain the rule of the responsibility of a state for the infringement of EU law. Therefore, the clear message would be that for the EU and EU citizens the best outcome would be to keep the CJEU jurisdiction as well as that of the UK courts as is until the end of the transitional period provided in the WA.

8. To sustain this position during the negotiations, it might be advantageous for the European Parliament (EP) to request a CJEU opinion by virtue of Article 218 (11) TFEU. The advantage could be that the EP can take this initiative in defense of the rights of citizens earlier than EU MS, because it does not need to wait for a definitively adopted text of the WA, provided that the CJEU has “sufficient information” about the content of the agreement, for example, with the first draft of it. When examining the “material compatibility of the WA with the Treaties”, the Court can take into account “not only the content of the WA, but also what should have been in it, to guarantee the autonomy and homogeneity of EU law. This means a very wide capacity to examine the question posed. Notwithstanding, the disadvantage would be the risk that red lines marked by the CJEU could not be acceptable for the UK and provoke the failure of the WA negotiation.

9. If the WA does not include a transitional period as well as beyond the expiry of any transitional period in the WA, rules on jurisdiction shall be different: given that EU law would no longer apply, there would no longer be CJEU jurisdiction. At that time, an “alternative mechanism” to the CJEU would be appropriate with a Joint Committee with limited competences. However, following the end of the transitional period, this mechanism could be extended. Given that the WA is not a “mixed agreement” EU Member States are not parties to it. Still, it might be possible to allow them access to this alternative mechanism. It would also be interesting to include, in this final scenario, an arbitration panel as well.
1. INTRODUCTION

1.1. Objectives

The decision of the United Kingdom (UK) to withdraw from the European Union (EU) raises a number of problems of a legal nature both under EU law and under public international law. Among them, an important one, throughout the withdrawal negotiations and after the UK leaves the EU, is the governance of the Withdrawal Agreement (WA) and of the possible future relationship agreement between the EU and the UK, that is the decision as to the forum for the solution of disputes arising from their application or interpretation.

In order to better understand and respond to this issue, it is essential to examine the existing means or mechanisms for the settlement of international disputes and to look into the most appropriate one in the present cases. The objective of this study is, therefore, to evaluate the different options available to the EU in the area of dispute settlement mechanisms, which could be used for both the WA and the Future Relationship Framework Agreement.

The analysis of the various options will start from the assumption that the final agreement will most likely have to pass the advisory opinion of the Court of Justice of the European Union (CJEU) before the European Parliament (EP) and the Council of Ministers manifest their consent on behalf of the EU. The first part will examine the different possibilities of dispute settlement mechanisms, taking into account the various comparable agreements already concluded by the EU with several third countries (such as Singapore, Canada, Ukraine as well as the EEA Agreement) which could be used in the future legal framework between the EU and the UK.

The second part will establish the jurisdiction competent for the settlement of disputes arising from the WA, taking into account the CJEU case law. It will also look into the governance of a possible transitional period - if the WA finally includes such an arrangement - which extends the application of parts of EU law after the UK’s withdrawal. During this transitional period, the legal situation can only be more restricted and with fewer options available than in the context of the future relationship agreement, since CJEU jurisdiction would be necessary to guarantee the autonomy and uniform interpretation of EU law.

In any case, the aim of this analysis is to remember the conditions imposed by the EU legal system and formulate suggestions with the aim of permitting the achievement of global agreement with a state that has been member of the European Communities and later of the EU for over forty years.

1.2. The settlement of disputes between subjects of international law

Disputes between states and, in general, between subjects endowed with legal personality in international law, are to be settled based on some general principles entrenched in the

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1 Special, sincere and heartfelt thanks for the revision work of this study to Rosario Huesa Vinaixa (Professor in public international law and Jean Monnet Chair at the University of the Balearic Islands) and Ángel Sánchez Legido (Professor of public international law and EU law at the University of Castilla-La Mancha).

2 Article 50 (2) TEU refers to “the [withdrawing State’s] framework for its future relationship with the Union”. However, this relationship must be legal. In this study, we talk about FFRA or about Future Legal Framework Agreement (FLFA).
system and described in the Charter of the United Nations. This international constitution, in Article 2(3) establishes the principle of peaceful settlement of disputes. 3 Article 33 enshrines the principle of free election of means for the settlement of international disputes, a logical corollary of the sovereignty of the States. 4 International law, thus, does not contain any obligation to resort to any form of an arbitration or judicial tribunal to settle a dispute, and even less, to abide with an automatic and obligatory jurisdiction.

On the other hand, the reference to justice in Article 2 (3) of the Charter of the United Nations must be read in relation (among other things) to the purpose formulated in its Article 1 (3) regarding the respect of human rights. 5 The UN Charter is thus in the remote origin of the rights, freedoms and principles referred both in universal and European rules, like Article 6 of the Treaty of the European Union (TEU), even though, the standards set in this particular regime for the individuals in the EU by EU law are much higher than the general ones in public international law.

The list of the means cited in Article 33 is not exhaustive. Up to a point, it is understandable that a State, which wishes to “recover its sovereignty”, aspires to choose the peaceful means of dispute settlement that it considers most suitable for its case. However, the obligation of a peaceful settlement of disputes is closely linked to the consent manifested in this respect (before and after the dispute has arisen) by the other subjects of international law which are (or may be in future) part to this dispute. In other words, the election of a peaceful means of settlement for a specific controversy must be the object of the conclusive consent of both parties in it. Such consent may have been manifested beforehand, for example, when ratifying the treaty with arbitration clauses of legal settlement, 6 or arbitration settlement, or if the parties accept, by means of a declaration 7 the compulsory jurisdiction of the International Court of Justice (ICJ). In any case, this entails that the subjects of international law can negotiate and agree on a more adequate means of settlement for each foreseeable future dispute between them.

The study shall also take into account the - undesirable - possibility that the withdrawal of the UK from the EU could be concluded without agreement. The most obvious consequence of this eventuality will be that, in the absence of specific rules, both the disputes between the two parties (the EU and the UK), and those relating to citizens’ rights, would then be dealt with in the framework of the general international law rules.

1.3. EU law as an autonomous regime within international law

The EU is an international organisation, which, as affirmed in Article 47 TEU, possesses (international) legal personality. Therefore, it is a subject of public international law with sufficient capacity to choose, negotiate and reach agreements with one or more other parties, and agree with them the means of settlement of disputes arising from these agreements that it considers most opportune in the framework of international law.

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3 “All Members shall settle their international disputes by peaceful means in such a manner that international peace, security and justice are not endangered”.
4 “The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice”.
5 “To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”.
6 Statute of the International Court of Justice (1946), art.36 (1).
7 Ibid, art.36 (2).
The EU has its own legal order and, in order too correctly interpret it, its own Court of Justice, competent with safeguarding the autonomy and the homogenous interpretation of EU law. It is logical, as a result, for the EU to assign to the CJEU the competence to judge the disputes connected to the interpretation and application of EU law. The scope of the CJEU jurisdiction and the conditions for access to it are determined in Articles 259 and following of the Treaty of Functioning of the European Union (TFEU). Its jurisdiction extends to actions carried out by EU Member States and institutions, as well as to actions carried out by physical and legal persons, when they act under EU law, whenever the domestic jurisdiction request a preliminary ruling to the CJEU.

However, since EU law is a particular regime within the general international law, the applicable law and the competent jurisdiction regarding an internal relationship would be the correspondent to this regime itself. Thus, if one party of the relationship is the EU and the other is one or more Member States, or if the relationship is established between two Member States, the applicable law will, most probably, be EU law and the competent court the CJEU.  

The situation is different if the relationship is established between the EU and a third country. The law applicable to the relations between the EU and a third country is determined, in the first instance, by the terms of the actual agreement concluded between them and, in the second instance, by the relevant provisions of the general international law as a subsidiary legal order. It ensures that disputes arising from these agreements and generated outside of the EU do not necessarily end up in the CJEU, but in another, different, peaceful dispute settlement mechanism, whether a pre-existing one or one designed ad hoc in the actual agreement.

1.4. The settlement of disputes between the EU and third countries

In order to project its policies to the world, the EU has constructed an extensive network of international treaties with third countries. The disputes that arise over the application and interpretation of those treaties within the EU must be submitted to the jurisdiction of the CJEU because those treaties form part of EU law. However, it could occur that both parties have provided in the treaty itself to use other specific procedures of settlement of international disputes in other cases, i.e., outside the EU. So, for example, both in the case of the Treaty on the European Economic Area (EEA) with Norway, Iceland and Liechtenstein, as in the case of the Comprehensive Economic and Trade Agreement with Canada (CETA), the organisation of specific dispute settlement mechanisms has led to complex and innovative schemes. These are the EFTA Court for the EEA and the arbitration panels for investment-related dispute settlements in the case of the CETA. This study examines the mechanisms of dispute settlement established for the interpretation and application of the different international agreements concluded by the EU, focusing on the most representative ones and proposes the most adequate mechanisms for the settlement of disputes originated by the withdrawal of the UK in the context of both of the WA and Future Relationship Agreement.

The conventional relations generated by the withdrawal between the EU and the UK correspond to an exceptional model, unique and dual at the same time. It is unique, at least for the moment, because there is no precedent of a state’s withdrawal since the birth

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8 Even in such a case, however, there are occasions where a dispute between two Member States has nothing to do with EU law and, therefore, should be solved resorting to other applicable law and peaceful means of dispute settlement. The arbitration delivered by the Permanent Court of Arbitration (PCA) on the issue of the Iron Rhine, in 2003, between Belgium and Holland is an adequate example thereof. Available at [https://pca-cpa.org/en/cases/1](https://pca-cpa.org/en/cases/1), 24 May 2005, interpretation award, 20 September 2005.
of the EU. It is also dual, or susceptible to become, because the UK is currently a Member State, but will cease to be when the WA enters into force. The transition from Member State to third country will have as likely consequences the conclusion of two different treaties. The first treaty between the EU and a state which is still a member, is the WA, with another (or others) following to regulate a future legal relationship with the new third country. The WA will possibly include an exceptional transitional period of the application of EU law to the nationals of the 28 current Member States, as if the withdrawal had not yet occurred. At an undetermined moment subsequent to the entry into force of the withdrawal, a second agreement will most likely be concluded on the future legal framework of the relationship between the EU and the UK. Differing from the WA, this second agreement will possibly be a mixed agreement if it covers more aspects than the purely commercial and, therefore, in its conclusion both the EU and its MS will participate. The parties have accepted the separate negotiation of these agreements in two phases.

1.5. Structure of the study

Due to the differences in the nature and the content of each of the two agreements, the issue of the jurisdiction will be examined separately for each one of them in the two parts of this study.

The first part will examine the settlement of disputes foreseen in agreements already concluded between the EU and third countries, in general, and the second part will deal with the settlement of disputes arising under the WA.

This approach differs from the negotiating pattern adopted by the EU institutions in the current negotiations process, which is to discuss the WA first and only later, once sufficient progress has been achieved in the withdrawal negotiations, to move towards the discussions on the future relationship framework. However, this choice is dictated by a systematic approach to the issue of dispute settlement and by practical reasons linked to the structure of the study and the evolving character of the WA as will be explained below.

The WA will be the first ever such agreement concluded by the EU. If, in the event, it includes a transitional period after the withdrawal of the UK, it will have an exceptional character compared to other agreements concluded between the EU and third countries because, during that transitional period it would prolong the application of EU law in the UK, following the withdrawal. This prolongation would imply an extraterritorial jurisdiction of the CJEU. In this case, the WA should be analysed taking into account the CJEU jurisprudence requires in order to preserve the autonomy of EU law and its homogenous interpretation.

As EU secondary legislation, the WA remains outside of the general rules that can be applicable to any future relationship agreement. Nevertheless, this situation is only valid for the period when the enforcement of the WA within the UK would require the continuation of the application of EU law in the territory of a third country, as the UK would be following withdrawal. Throughout this transitional period and for that part of EU law whose effectiveness will be extended by the WA, it would be necessary to maintain the set of guarantees established by the EU legal order, including CJEU jurisdiction.

On the other hand, once the transitional period is over and during the remaining time that the WA will be effective, the rules of the game for the enforcement and settlement of

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disputes deriving from the WA will be very different, since the exceptional application of EU law to a third country will also have ended. In parallel, the CJEU jurisdiction will also have ceased. From that moment on, the WA will be like any other agreement concluded by the EU with other third countries. This dual nature of the WA or, if we prefer to call it, this transformation of its legal nature from a certain moment on is difficult to understand. Moreover, it overlaps with another different problem: the ‘asymmetric’ application of international agreements concluded by the EU. In fact, the enforcement and the settlement of disputes arising from an international agreement concluded by the EU are not the same within and outside of the EU. Within the EU, the international agreement functions as any other rule of the EU legal system. In addition, if the agreement produces direct effect, citizens could invoke it before the courts. Outside of the EU, the enforcement of the international agreement within the other state would depend on that state’s rules for the transposition and application of international treaties. Furthermore, the settlement of disputes between the Parties could be out of the CJEU jurisdiction and fall under a different settlement mechanism, for instance arbitration.

Further to the reasons presented above and linked to the convenience of going from the general to the particular, as well as practical reasons deriving from the use of terms, concepts and examples of EU practice, it is easier if we start with examples of jurisdiction in EU agreements that could serve as a model for a future relationship agreement. The rules extracted from this practice (including the asymmetry in enforcement explained above) would also be generally applicable to the WA, but only after the termination of the transitional period and only to the extent that the WA itself does not establish rules that are more specific for this latter period.

Consequently, in the first part we will examine the agreements concluded by the EU with third countries. In the first chapter, the agreements the EU has concluded with countries belonging to a distant geographic and political-legal area. These are also the most recent agreements. Some of them, (like CETA) have not even definitively entered into force. This chapter will analyse the agreements with Singapore (FTA), Canada (CETA) and Ukraine (DCFTA) insofar as the mechanisms designed in them for the settlement of disputes and enforcement of rulings in order to assess their possible use in the future agreement with the UK. The common element in these agreements is that the “international” component usually surpasses the “European” in them. They do not have direct effect and they do not include CJEU jurisdiction in their application outside of the EU, with only the exception of the agreements with Ukraine and Moldova.

The second chapter of the first part examines the agreements concluded with states closer to the EU, both from a geographic and a political-legal point of view. These agreements have established special legal regimes, outside of the EU but close to it. For various reasons, the traditional model of the Association Agreement with Turkey is obsolete and would not be convenient for the EU and its citizens. On the contrary, the EEA agreement is of great interest, as this agreement establishes a highly regulated system where the Parties to the Agreement and citizens could live together while maintaining some equivalent guarantees to the present ones. Such guarantees, of course cover only those matters (four freedoms, competition, state aid, etc.), which are covered by the EEA. A future relationship either under the model of (or, even better within) the EEA could be, thus an adequate solution to the future relationship agreement, is particular as the UK’s most recent papers on dispute settlement mechanisms make references to the EEA system.

The second part of this study deals exclusively with the WA. As previously stated, the WA is negotiated with a state which is still a member, but its provisions will apply to that
state after it has become a third country. In other words, it undergoes a certain “transformation” at the end of the transitional period, which has an impact on the application mechanisms, before and after the transitional period, if there is one. All of this confers it an exceptional character.

Therefore, it is not possible to consider it as one more within the broad category of agreements concluded by the EU with third countries and apply, for dispute settlement, the usual means provided in such agreements. Instead, the rules applied for dispute settlement within the EU, namely the CJEU jurisdiction, should be used in this case. In fact, it would be necessary **to expressly include in the agreement the unusual provision of CJEU jurisdiction regarding a third country, during the term of the transition period, if there finally is one.** As it could not be otherwise, the approach is determined by the jurisprudence of the CJEU. The jurisdiction regarding the application of the clauses relating to EU law in the WA in such a way that they guarantee autonomy and homogeneity in the application of the Union law, **cannot be other than that of the CJEU.** However, the opposing points of view of the negotiating parties regarding this possibility poses an important pitfall for the negotiation.
PART ONE: SETTLEMENT OF DISPUTES UNDER AGREEMENTS BETWEEN THE EU AND THIRD COUNTRIES

This part of the study examines the possible ways to settle disputes that may arise between the EU and the UK in the context of their Future Relationship Agreement. It is likely that such an agreement will be a “mixed” agreement. As such, the parties to it would not only be the EU and the UK but also all 27 EU Member States and the agreement will thus require the approval of the 27+1 national parliaments (and, possibly, regional assemblies in some EU Member States). The mixed character of the agreement would complicate its application and its ratification requirements, which could delay its entry into force.

In any case, it will be an agreement concluded by the EU with a third country and, in case it stipulates that its provisions will have direct effect, there would be an asymmetry among the foreseen mechanisms for its application within and outside of the EU. Within the EU, it will be applied as another EU legal act and, therefore, the CJEU will have jurisdiction over it. Outside of the EU, as a rule, the CJEU lacks jurisdiction. It will only have it if, by means of a voluntary reference, the agreement resorts to it for some concrete issue.

The first chapter examines the various options for enforcement and dispute settlement in agreements already concluded by the EU with states, which are distant from the fundamental policies of the EU. The range of options available in this context is wide. The chapter examines the agreement with Singapore and the agreements with Canada and Ukraine, which could constitute a model adaptable to the UK. The second chapter examines options for enforcement and dispute settlement in agreements with states or groups of states in close proximity to the fundamental policies of the EU. If the UK opts for a future relationship model, which includes access to the Single Market, the complex mechanism of the European Economic Area (EEA) would be the most appropriate. The EU-Turkey Association Agreement is also examined here, in case the UK opts to remain within the Customs Union even without accessing the Single Market.

It has to be pointed out, though, that this does not seem to be a model suitable for the EU, due precisely to the asymmetry that its application would generate within and outside of the EU for individuals.

One basic objective of the EP throughout the Brexit process is the protection of citizens’ rights. This is a constant and fundamental parameter of the analysis of mechanisms of enforcement and dispute settlement. From this point of view, it must be stressed that the mechanisms providing guarantees for individuals decrease as the agreement moves away from the core of EU policies. All these agreements foresee the constitution of interstate organs (such as Joint Committees), with competences relating to its implementation and application, and, in certain cases, also to the settlement of disputes. However, dedicated arbitration panels, whose decisions are binding on the Parties, perform the final function. The procedures of enforcement of arbitration awards provide for various alternative possibilities (financial compensation, retaliation, suspension of obligations derived from the agreement etc.) in the case of non-compliance with the arbitration decision by the losing Party, following the WTO model.

2. SETTLEMENT OF DISPUTES IN A DISTANT AREA MODEL

Over the last few years, within the framework of its new trade policy\textsuperscript{11}, the EU has concluded agreements with several states, which go beyond traditional Free Trade Agreements. Some of these are with neighbouring Eastern European states (such as Ukraine\textsuperscript{12} and Moldova\textsuperscript{13}), while others are concluded with geographically distant countries (in particular Canada\textsuperscript{14} and Singapore.\textsuperscript{15}) The names of these agreements differ: they can be referred to as Free Trade Agreements (FTAs) such as that concluded between the EU and Singapore; Comprehensive Economic and Trade Agreement (CETA), between Canada and the EU or Deep and Comprehensive Trade Agreement (DCFTA), between Ukraine and the EU (this latter within a wider association agreement). Their common characteristic, however, is that their scope is broader than merely trade. They may cover areas as diverse as investment, services\textsuperscript{16} or even freedom of establishment.

Another shared characteristic of these agreements from the citizens’ perspective is that, contrary to the forms of agreements examined in chapter two below, their provisions have no direct effect over individuals. “This is congruent with the fact that WTO treaties do not create directly effective law”.\textsuperscript{17} From this perspective, there is no asymmetry: the provisions of such agreements cannot be invoked either inside or outside the EU because they are not directly applicable to individuals. The enforcement of this kind of agreement is indirect and passes through the state (whether a State Party to the agreement or an EU Member State). Both parties to the agreement are represented in a Joint Committee, with substantial powers on implementation, application, enforcement and dispute settlement. The CJEU may have jurisdiction only in the EU (if an EU act of application is required), but not over the application of the agreement outside the EU, except by express and voluntary reference to a CJEU competence within the agreement, as is the case in a number of specific examples.

2.1. The influence of WTO rules on enforcement mechanisms

From an economic standpoint, a WTO-type relationship with the EU following Brexit would be a bad solution for the UK, as it would increase the costs of exports to the EU for UK firms and reduce access to the EU market for service providers. After its withdrawal, the UK would automatically fall under the WTO regime in its relations with the EU and UK access to the Single Market would be in the same position as other WTO members, excluding those states with preferential FTAs with the EU.\textsuperscript{18} Even if a future relationship

\textsuperscript{12} Association Agreement between the European Union and its Member States, of the one part and Ukraine, of the other part [2014] OJ L 161/3.
\textsuperscript{14} Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L 11/23.
\textsuperscript{17} Ibid.
agreement with the EU were completed within five years, “ten more years might be necessary before the two thirds of British external trade could be covered by preferential agreements”. Thus, from the UK point of view, a WTO-type relationship is not an advantageous model for a future relationship agreement. Nevertheless, given that the WHO enforcement and settlement of disputes mechanisms have influenced the mechanisms set up in the Singapore FTA or in CETA, it should be useful to examine its main characteristics. The WTO dispute settlement mechanism has been described as follows in one of the UK position papers:

“The general approach on WTO disputes is as follows: the first stage is consultation, where countries in dispute see if they can settle differences themselves. The Dispute Settlement Body (DSB) has authority to establish a ‘panel’ to consider the merits of the particular dispute. Whilst technically a panel simply advises the DSB on its resolution of the dispute, in practice its conclusions are rarely overturned as this would require a negative consensus including the Party or Parties on the other (i.e. winning) side of the dispute; if the panel decides that the disputed trade measure does break a WTO agreement, it will recommend that the measure be brought into conformity with WTO rules, and its report becomes the ruling of the DSB unless it is rejected by a majority of WTO members. It is possible to appeal the report on a point of law. The DSB would set up an Appellate Body that can uphold, modify, or reverse the panel’s findings. The DSB must then accept or reject the appeal’s report – and rejection is only possible by consensus.”

The most original part of this proceeding is the enforcement of the DSB ruling: the text prescribes the outcome of the settlement, but not the means to achieve it. Even if the outcome is binding, if the losing party does not want to abide by the ruling it may negotiate compensation. If no agreement on compensation is reached, the complainant may ask the DSB for permission to retaliate. These kind of countermeasures must be temporary and will cease if the other part finally complies. Thus, the ruling does not lead to one and binding outcome but to three alternatives: complaint, compensation or retaliation (suspension of trade concessions). As to that, the UK Government comments that,

"Indeed, it was for this reason that the CJEU found in the case of Portugal v Council that a DSB decision did not oblige the losing party to achieve full implementation of its recommendations, where the possibility of temporary compensation or retaliatory measures remained available. In other words, the outcome was prescribed, but not the means. This contrasts with the position under EU law, where there is a right to an effective remedy from a judicial body."

Therefore, flexibility is the prominent feature of this enforcement mechanism and is a key component for compatibility with the EU Treaties. The Portugal v Council ruling of the CJEU from 1999 is interesting as it establishes a form of general doctrine about the EU competence on the content and enforcement of international agreements following the entry into force of the WTO Agreement. In particular, it examines the relationship between jurisdiction and asymmetry, on the one hand, and direct effect and enforcement on the other.

First, generally the Parties agreed that there is no direct effect to this kind of agreement.

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20 Composed of all WTO members.
22 Ibid.
By its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts”.24

Second, asymmetry is assumed. CJEU jurisdiction inside the EU coexists with other means of enforcement outside EU.

"34. It should be noted at the outset that in conformity with the principles of public international law, Community institutions which have power to negotiate and conclude an agreement with a non-member country are free to agree with that country what effect the provisions of the agreement are to have in the internal legal order of the contracting parties. Only if that question has not been settled by the agreement does it fall to be decided by the courts having jurisdiction in the matter, and in particular by the Court of Justice within the framework of its jurisdiction under the EC Treaty, in the same manner as any question of interpretation relating to the application of the agreement in the Community (see Case 104/81 Hauptzollamt Mainz v. Kupferberg [1982] ECR 3641, paragraph 17).

35. It should also be remembered that according to the general rules of international law there must be bona fide performance of every agreement. Although each contracting party is responsible for executing fully the commitments which it has undertaken it is nevertheless free to determine the legal means appropriate for attaining that end in its legal system, unless the agreement, interpreted in the light of its subject-matter and purpose, itself specifies those means (Kupferberg, paragraph 18).”25

Third, enforcement can be flexible. Enforcement is not a one-way road. Bona fide is essential in the final outcome. However, the losing Party has the freedom to opt from among various roads, as it prefers. There is nothing, which can force execution in domestic law. The CJEU’s jurisdiction is the rule within the EU. However, outside the EU, the losing party can opt, bona fide, to comply or choose other enforcement possibilities; otherwise, the negotiated solutions provided for in the agreement could not take place. This would lead to depriving “the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counter parts in the Community’s trading partners”26. Therefore, this agreement “interpreted in the light of [its] subject-matter and purpose, [does] not determine the appropriate legal means of ensuring that [it is] applied in good faith in the legal order of the contracting parties”.27

2.2. Dispute settlement mechanisms in the EU-Singapore FTA

Negotiations between the EU and Singapore for the conclusion of a Free Trade Agreement began in March 2010 and were concluded in October 2014. However, as of yet the agreement has not entered into force. The agreement addresses a wide range of tariff and non-tariff barriers in areas such as renewable energy, sanitary measures in animal welfare and the provision of legal services among others. It is an interesting FTA for the purposes of this study because, among others, it has allowed for a significant opinion of the CJEU, following a relevant request by the Commission, on the matter of the division of competences between the EU and Member States and the legal basis for concluding the FTA.

It must be underlined first that this FTA has no direct effect. As the agreement itself states “for greater certainty [...] nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons, other than those created between the Parties

24 Ibid, [48].
25 Ibid, [34]-[35].
26 Ibid, [46].
27 Ibid, [41].
under public international law” (Article 17.15). Second, the internal EU debate regarding the FTA was regarding the extent of EU competences in some areas. For example, Article 207 (1) TFEU includes foreign direct investment among the areas (goods, services, tariffs) over which EU has competences in the context of the Common Commercial Policy. That means that investment protection (if direct) could be a matter of EU decisions while, on the other hand, portfolio investment remain in the power of Member States. Thus, agreements concluded on this area must be mixed agreements. This issue could have an impact on dispute settlement mechanisms on investment matters.

2.2.1 Powers of the Trade Committee

Chapter 17 of the Agreement (Institutional, general and final provisions) contains the provisions for the Trade Committee (17.1) and Specialised Committees (17.2), which are important bodies to achieve the implementation and application of the FTA. Even though this is a mixed agreement, only the EU and Singapore have representatives in the Committee (17.1.1) without Member State representatives. The competences of the Trade Committee are defined in Article 17.1.3 as follows:

“The Trade Committee shall: (a) ensure that this Agreement operates properly; (b) supervise and facilitate the implementation and application of this Agreement, and further its general aims; (c) supervise the work of all specialised committees, working groups and other bodies established under this Agreement; (d) consider ways to further enhance trade relations between the Parties; (e) without prejudice to Chapter Nine (Investment), Chapter Fifteen (Dispute Settlement) and Chapter Sixteen (Mediation Mechanism), seek to solve problems which might arise in areas covered by this Agreement, or resolve disputes that may arise regarding the interpretation or application of this Agreement; and (f) consider any other matter of interest relating to an area covered by this Agreement.”

Furthermore, the Committee may establish or dissolve specialised committees, consider amendments, adopt interpretations of the provisions of the Agreement, which shall be binding on the Parties and all bodies set up under the Agreement, including arbitration panels; adopt decisions or make recommendations as envisaged by this Agreement and take any other action in the exercise of its functions as the Parties may agree (17.1.4). As demonstrated, the Committee’s explicit and implicit powers are broad and decisive for the enforcement of the Agreement.

2.2.2 Settlement of Disputes and the Enforcement of Rulings

Not all the provisions of the FTA are subject to the same method of dispute settlement. This is the case, for example with Chapter 3 (Trade Remedies), where Article 3.5 provides that “the provisions of this Section shall not be subject to Chapter Fifteen (Dispute Settlement) and Chapter Sixteen (Mediation Mechanism)”. In general, though, Chapter Fifteen governs the dispute settlement mechanism between the Parties to the agreement. The disputes must concern the interpretation or application of the FTA (Article 15.1 and 15.2).

The settlement process follows a traditional public international law pattern: it first involves consultations in good faith (Article 15.3) and, second, where the Parties have failed to resolve the dispute by recourse to consultations, “the complaining Party may request the establishment of an arbitration panel” (15.4). The arbitration procedures are described in Articles 15.4 to 15.8 and include a panel composed by three arbitrators (15.3.1.). A novelty of this proceeding is the “preliminary ruling on urgency” (15.6), which allows the panel to issue a preliminary ruling within ten days of its establishment. Normally, there shall be an interim report (15.7.1), regarding which any Party may submit a request “to review precise aspects of [it]” (15.7.2). The arbitration panel can consider these comments and modify its report (15.7.4). Following this, the panel “shall
issue the ruling to the Parties and to the Trade Committee” (15.8) normally within 180 days from the date of its establishment.

The enforcement of the panel ruling is complex, similar to the WTO model. Obviously, “each Party shall take any measure necessary to comply in good faith” (15.9) with the ruling. However, if they fail to comply within a reasonable period (15.10 and 11), temporary remedies can be opened. A party could choose to pay compensation (15.12.1). Alternatively, if no agreement on compensation is reached “the complaining Party shall be entitled (...) to suspend obligations arising from any provision referred (...) at the level equivalent to the nullification or impairment caused by the violation” (15.12.2). This possibility is limited in time (15.12.5) and any measure taken after the suspension could be reviewed (15.13). Of course, an agreed solution to end the dispute shall be possible at any time (15.15). The panel takes decisions by consensus or, if this fails, by majority.

In addition, Chapter Sixteen provides for a mediation mechanism, if the parties to the dispute prefer to use it, which is completely independent from the consultation-arbitration mechanism (Article 16.7). The aim is to reach a mutually agreed solution (16.1). The proceeding can be started by the request of a Party (13.3). A mediator is selected either by the parties or, in case of disagreement, by the chair of the Trade Committee (16.4). The mediator “may organise meetings between the Parties, consult the Parties jointly or individually, seek the assistance of or consult with relevant experts and stakeholders and provide any additional support requested by the Parties” (16.5.2). He may also, “advise and propose a solution for consideration of the Parties who may accept or reject the proposed solution or may agree on a different solution” (16.5.3). “The solution may be adopted by means of a decision of the Trade Committee” (16.5.6).

Finally, another example of the remarkable influence of the WTO is the provision that the Parties can opt to act under the WTO dispute settlement framework (15.21.1). However, where a Party has initiated a dispute settlement proceeding under the WTO Agreement, it may not institute another proceeding regarding the same measure in the other forum until the first one has ended (15.21.2). This freedom of election is commented upon by CJEU (see below point 2.4).

2.2.3 Investor-State Dispute Settlement

Separate from the dispute settlement mechanism described above, there is the (direct) dispute settlement between an investor and a state, that is between a subject of public international law and an individual or entity who is not subject of international law. The dispute links “a claimant of one Party and the other Party” (Article 9.11.1). A claimant means “an investor of a Party which seeks to submit a claim” (9.11.2.b), either, “acting on its own behalf” or “acting on behalf of a locally established company which it owns or controls”. The “other Party” could be Singapore, the EU or an EU Member State (9.11.2.d). This is logical because most differences would be caused by a measure taken by a state that provokes losses, damages or expropriation to an investor. Therefore, if the Agreement wants to provide a direct solution to these kinds of disputes, it needs a MS to be a party in the solution mechanism.

Any dispute can be resolved by negotiation (9.12), consultation (9.13) or mediation (9.14 and Annex 9-E, which is a distinct and alternative mechanism to arbitration). However, if consultation fails, the claimant can pass to arbitration (9.15) and submit a claim (9.16). The claimant is not obliged to follow one unique procedure, but may choose among four possibilities: The two ICSID procedures (the so-called “normal” and the “additional facility rules”), UNCITRAL rules, or any other arbitration institution. The Agreement provides also for the constitution of the tribunal (9.18) and the applicable law
and rules of interpretation (9.19)). The final award can state restitution of property (or else monetary damages, 9.24) or indemnification (9.25).

**The enforcement of awards** is foreseen in Article 9.27, with the awards being binding and the Parties “shall abide by and comply with the terms of the award” (9.27.2). However, “each Party shall ensure the recognition and enforcement of the award in accordance with its international obligations and relevant laws and regulations” (9.27.3). Thus, the mere fact of being party to a FTA agreement does not fully guarantee the enforcement of the award by a losing state, because the award must be recognised by it. Moreover, a state shall decide, bona fide, the means of domestic enforcement of the award “in accordance with its laws”, because there is not a single common procedure for all of them. It appears that an exequatur of the award would be necessary in many cases.

A different question that has provoked a stark debate in doctrine\(^28\) is the **termination of the investment protection treaties** concluded by Singapore with 10 EU Member States, by effect of Article 9.10 of the FTA. Rather, the issue is whether the **substitution principle** is accurate to explain such termination, from the EU’s point of view. The CJEU has state in Opinion 2/15 that,

“[248] When the European Union negotiates and concludes with a third state an agreement relating to a field in respect of which it has acquired exclusive competence, it takes the place of its Member States. It has been undisputed since the judgment of 12 December 1972, International Fruit Company and Others\(^29\), that the European Union can succeed the Member States in their international commitments when the Member States have transferred to it, by one of its founding Treaties, their competences relating to those commitments and it exercises those competences\(^30\).

Doctrine however points out that this is an inaccurate interpretation\(^31\) of the *International Fruit* ruling by the Court: the Advocate General in that case pointed out that, in the context of the GATT Agreement the European Community was substituting Member States only *insofar as the execution of the Agreement was concerned* (rather than in all the competences foreseen by the Agreement). Otherwise, there is not a contradiction between that position of the Court and its position in Opinion 2/13 (examined in the second part of this study), because in human rights matters, the EU has never acquired exclusive competences, but only some (shared) competences.

2.2.4. The CJEU Opinion 2/15 and its consequences

The CJEU opinion was requested by the Commission in 2014 and aimed to clarify *who was the master of the competences* on matters envisaged in this Agreement. Competences in this area could be exclusive to the EU or shared with Member States. The CJEU Opinion established that most competences covered by the FTA were exclusive to the EU, but some were shared with Member States, such as in investment matters (Chapter 9, Section A, about investment protection and no direct investment) and **settlement of disputes between investors and States** (Chapter 9, Section B). Following this Opinion, the Commission, cautiously, qualified the CETA Agreement with Canada as a mixed agreement, thereby requiring the agreement of the EU institutions as well as national parliaments.

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\(^29\) Joined Cases C-21/72 - C-24/72 *International Fruit Company and Others v. Produktshop voor Groenten en Fruit*, 12 December 1972, points 10-18.


In this opinion, the CJEU did not wish to take a position on the compatibility of the FTA dispute settlement mechanism on investment-related controversies with the Treaties, for several reasons. First, Article 15.4 of the Agreement provides that the Parties may request the establishment of an arbitration panel but are not obliged to do so. Moreover, the Parties may choose between the arbitration procedures provided for in the FTA and in the WTO framework. For this reason, the FTA dispute settlement mechanism does not oblige the Parties to seek a settlement mechanism but only provides them with the option of doing so. Second, both the FTA and the WTO systems provide that the EU may have to abide by the decisions of a court or another body having jurisdictional competence; however, in these cases, the EU has competence to conclude such agreements and avoids the problem. Third, in this case the issue of the autonomy or uniform interpretation of EU law is also avoided, because that court or other body having jurisdictional competence is not competent to interpret EU law within the EU. As the opinion states,

"300. The present procedure does not relate to the question whether the provisions of the envisaged agreement are compatible with EU law (...) It is not appropriate to examine whether the dispute settlement regime laid down by Chapter 15 of the envisaged agreement fulfils the criteria set out by those other opinions, in particular the criterion relating to the autonomy of EU law. (...) Neither does this opinion cover the issue of the jurisdiction of the Court so far as concerns the settlement of disputes within the European Union relating to the interpretation of EU law. (...) Since that regime relates to disputes between the European Union and the Republic of Singapore, (...), is not liable to remove disputes from the jurisdiction of the courts of the Member States or of the European Union".

2.3. Dispute settlement mechanisms under CETA

The EU-Canada Comprehensive Economic and Trade Agreement (CETA) provisionally entered into force on 21 September 2017. Most of the agreement now applies but, before it can take full effect, national parliaments in EU Member States – and in some cases regional ones too, will need to approve it.

The UK government has expressed its interest, in the first White Paper it published, in the model of CETA as an example of a dispute resolution mechanism that could be applied for a future agreement with the EU; in the subsequent UK paper on dispute resolution, the UK seems to carry on being interested in the CETA, although it also mentioned the Singapore FTA and the Moldova DCFTA even in a "purely illustratively" way. The shadow

32 [298] “As regards the competence of the European Union to approve Chapter 15 of the envisaged agreement, it should be recalled at the outset that the competence of the European Union in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions(...) In the same way, the competence of the European Union to conclude international agreements necessarily entails the power to submit to the decisions of a body which, whilst not formally a court, essentially performs judicial functions, such as the Dispute Settlement Body created within the framework of the WTO Agreement.” (Emphasis added).


of the WTO exists over some of these models\textsuperscript{35}, but the final issue “goes beyond the WTO treaties in several aspects”.\textsuperscript{36}

2.3.1. The Joint Committee’s powers on dispute settlement

CETA provides for arbitration as the main means of dispute settlement. However, arbitration is to be in combination with the Joint Committee, made up of representatives from the parties. This body is established by Article 26 of the Agreement, with general powers on the supervision and implementation of it and resolution of disputes (26 (3)). The Committee has the power to make decisions in respect of all matters when this Agreement so provides” (Article 26 (3) (1)) and, take decisions by mutual consent (Article 26 (3) (3)). The decisions made by the CETA Joint Committee shall be binding on the Parties, subject to the completion of any necessary internal requirements and procedures, and the Parties shall implement them (Article 26 (3) (2)). Article 26 (4) sets out its powers in detail. Among others, it is competent to:

\begin{itemize}
  \item[(a)] supervise and facilitate the implementation and application of this Agreement and further its general aims;
  \item[(b)] Supervise the work of all specialised committees and other bodies established under this Agreement;
  \item[(c)] seek appropriate means and methods of preventing problems that might arise in areas covered by this Agreement, or of resolving disputes that may arise regarding the interpretation or application of this Agreement (…);
  \item[(e)] Adopt interpretations of the provisions of this Agreement, which shall be binding on tribunals established under Section F of Chapter Eight (Resolution of investment disputes between investors and states) and Chapter 29 (Dispute Settlement).
\end{itemize}

In this last context, the Joint Committee possesses important powers in the arbitration procedure too. For example, Article 8 (27) (2) foresees that “the CETA Joint Committee shall (...) appoint fifteen Members of the Tribunal”. According to Article 8 (30) (4), “by decision of the CETA Joint Committee, [it] may remove a Member from the Tribunal”. In particular, Article 8 (31) (3) stipulates, “An interpretation adopted by the CETA Joint Committee shall be binding on the Tribunal established under this Section”. In parallel, under Chapter 29 the Joint Committee transmits the award to the Parties and transforms an interim report into a final and binding report. Thus, public international law subjects, represented in the Joint Committee, supervise the dispute settlement procedure, too. The Committee has powers over all matters; its decisions are binding for the Parties whom are obliged to implement its decisions domestically.

2.3.2. Arbitration Mechanisms

Article 30 (6) (1) provides that CETA’s provisions cannot be “directly invoked in the domestic legal systems of the parties”. Therefore, this agreement has no direct effect and cannot be invoked by individuals under domestic jurisdiction. However, some disputes can be solved by arbitration. There are two different kinds of arbitration in CETA, contained in Chapter 29 and Chapter 8. Chapter 29 provides for a traditional arbitration between two subjects of public international law. On the other hand, Chapter 8 foresees a “modern” arbitration between investors and States.

\textsuperscript{35} For example, in Chapter 29, CETA allows for parties to use either the dispute settlement procedure provided for under CETA, or the WTO dispute settlement procedures, but only one or the other.

\textsuperscript{36} Schiek, D. ‘Escaping the jurisdiction of the Court of Justice for the European Union by EUXIT?’ Available at https://blogs.qub.ac.uk/tensionatthefringes/files/2017/03/Schiek-escaping-ECJ-through-EUXIT-TREUP-occasional-paper.pdf, point c.
Chapter 29 contains provisions for dispute settlement between the Parties to the Agreement (which are subjects of public international law) where the arbitration panel and the Joint Committee play an important role. Disputes may initially be resolved by consultation and mediation. If this fails, they can be referred to an arbitration panel, whose rulings are binding. The composition of the panel is agreed between the Parties. If the Parties cannot agree, a list is used to select the panel, which includes one national of each party, as well as one national of a third country who will act as chair. This panel decides by consensus or, if that is not possible, it reverts to a majority decision.

The procedure is long and complex. In the first instance, the panel produces an interim report, determining if there is a violation of the Agreement. Here, the Parties can make comments on the report and the panel could reconsider any questions put before it. Then, the report will be a binding final report. Following this, the Joint Committee sends it to the Parties. Following its reception, the Parties have 20 days to inform the Joint Committee of their plans to comply with it. At this moment, the procedure introduces traditional public international law elements in an original way, because, if the loser party does not comply, the winner can choose between suspension (of treaty obligations regarding the other part) and compensation. Here the law of treaties and international responsibility combine in an imaginative manner in this ‘do or pay solution’. However, the procedure is not yet completed. If the parties do not agree about the extent of suspension, the matter can be referred again to an arbitration panel. The measures in reciprocity have a temporal scope and finish if the loser complies with the final report.

Chapter 8 on ‘Investment Disputes’ initially included an ISDS (Investor State Dispute Settlement) mechanism. Yet, this first draft was modified by a new system in February 2016. The new approach is known as the Investment Court System (ICS). Under this approach, losses and damages, expropriation or discriminatory treatment would be settled within Chapter 8, Section F, by a mechanism that begins with consultation and mediation. If it is not possible to reach a solution, the dispute is referred to an arbitration panel. The panel will be composed of a Canadian member, an EU member and chaired by a third country member. The award can be subject to a review by an Appellate Tribunal. This proceeding is inspired by the ICSID rules that allow the direct settlement of an investment dispute between investors and States. Therefore, “an investor of a Party may submit to the Tribunal constituted under this Section a claim that the other Party has breached an obligation” under Article 8 (18) (1). The final award can order compensation for the claimant. It is possible that, in the future, CETA shall rely upon another dispute resolution method, particularly if the CJEU opinion requested by the Belgian Government concludes that this out of the usual jurisdiction system is incompatible with the Treaties because it would deprive citizens of some fundamental rights.

Nevertheless, in Article 6 (i) of the Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member

38 “If compared to the other agreements, (...) CETA also attempts to rebalance the protection of private property and the host State’s regulatory autonomy in order not to put at risk the legitimate pursuit of general welfare objectives by the State parties to the agreements”; Ibid, [8].
39 Article 31 (2) (a) of the 1969 Vienna Convention on the Law of Treaties (VCLT) provides, among the general rules of interpretation of a treaty “the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty” distinguishing this from the provision of Article 31 (3 a), which refers to “any subsequent agreement between the parties” with a similar objective. Paragraph 1 of the Joint Interpretative instrument states that “the European Union and its Member States and Canada” (that is all Parties), “make the following instrument at the time of signature of the CETA”. Thus it is a
States, the Parties state, “CETA represents an important and radical change in investment rules and dispute resolution. It lays the basis for a multilateral effort to develop further this new approach to investment dispute resolution into a Multilateral Investment Court. The EU and Canada will work expeditiously towards the creation of the Multilateral Investment Court. It should be set up once a minimum critical mass of participants is established, and immediately replace bilateral systems such as the one in CETA”. In its request, the Belgian government also evokes this possibility, stating that “the Kingdom of Belgium is also conscious of the fact that the ICS is the first step towards the creation of a multilateral Investment Court which, in the long run, shall become the responsible legal institution to resolve conflicts between investors and states”.

2.3.3. The Belgian CJEU request for opinion

The Belgian request for opinion (CJEU Opinion 1/2017) was lodged on 7 September 2017. The content of the request is very different from the one sent by the Commission on the EU-Singapore FTA. The Belgian request does not question the mixed character of the CETA agreement, but its compatibility with the Treaties, including fundamental rights, especially the access to courts by individuals, the right to an impartial and independent judge, the best way to interpret EU law and the exclusive competence of the CJEU to interpret EU rules of law, including treaties concluded with third countries.

"Specifically, the Kingdom of Belgium is requesting the CJEU to provide an opinion regarding the compatibility of the ICS with:

1) The exclusive competence of the CJEU to provide the definitive interpretation of European Union law
2) The general principle of equality and the ‘practical effect’ requirement of European Union law
3) The right of access to the courts
4) The right to an independent and impartial judiciary".

The request in fact goes into the issue of the compatibility of CETA with the very essence of EU law. The second point of the request could be considered inconsistent because the general principle of equality is of course binding but it does preclude that different individuals may be considered differently. In this case there can be specific rules which apply to an investor (whether an individual or a legal person) and do not apply to simple individuals - such a differentiated treatment does not amount to a breach of the principle of equality.

In contrast, the first, third and fourth points of the Belgian request present more serious challenges. The first argument is in line with what this study proposes in its second part, further down, and in particular in conclusions 8.1 and 8.2. The third and fourth points are also arguments of substance. This is because it is not reasonable that investors can escape ordinary jurisdiction by submitting these disputes to arbitration panels.
Arguably, the fourth question is the most powerful one. The Belgian government develops it in this way,

> "Regarding the right to an independent and impartial judiciary, the Kingdom of Belgium wishes to obtain an opinion regarding the following aspects:
> - the conditions regarding the remuneration of the members of the Tribunal and the Appeals Body.
> - the appointment of members of the Tribunal and the Appeals Body.
> - the release of members of the Tribunal and the Appeals Body.
> - the guidelines of the International Bar Association regarding conflicts of interest in international arbitration and the introduction of a code of conduct for the members of the Tribunal and the Appeals Body.
> - the external professional activities related to investment disputes of members of the Tribunal and the Appeals Body".\(^{43}\)

In light of this, it is necessary to take into account that, if the Belgian government has been able to request a CJEU Opinion regarding CETA, it (or another government or an EU institution) is likely to do so again with potentially more substantive reasons if a future relationship agreement between the EU and the UK is based on the CETA model, or, even if rules on jurisdiction regarding the WA do not sufficiently protect citizens.

### 2.4. Dispute settlement mechanisms in the Ukraine DCFTA

The Deep and Comprehensive Free Trade Area (DCFTA) concluded between the EU and Ukraine is 2,135 pages, arguably the largest modern FTA agreement signed by the EU. It forms part of a wider Association Agreement\(^ {44}\) signed between the EU and Ukraine in June 2014 and began to apply on 1 January 2016. The rest of the Association Agreement, containing political and cooperation provisions, has been provisionally applied since November 2014. Despite the size of this new type of Association Agreement, a well-known think-tank has proposed a Ukraine-plus model, with even more provisions, for the future relationship agreement between the EU and the UK.\(^ {45}\)

DCFTA does not possess direct effect: Article 321 (2) affirms that “any ruling of the arbitration panel shall be binding on the Parties and shall not create any rights or obligations for natural or legal persons” (emphasis added) thereby precluding the direct effect of the ruling for individuals. Instead, it may have an indirect one: Article 471 on "access to courts and administrative organs" states that "each Party undertakes to ensure that natural and legal persons of the other Party have access that is free of discrimination in relation to its own nationals to its competent courts and administrative organs, to defend their individual rights and property rights" (emphasis added). Therefore, there is not an automatic effect.

#### 2.4.1. The competences of the Association Council

Article 461 of the DCFTA establishes an Association Council that:

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\(^{43}\) Ibid. About these questions see Hinderlang, S. and Sassenrath, C-P, "The Investment Chapters..." op. cit.


“[...] shall supervise and monitor the **application and implementation** of this Agreement and periodically review the functioning of this Agreement in the light of its objectives. (...) 3. In addition to supervising and monitoring the application and implementation of this Agreement, the Association Council shall examine any major issues arising within the framework of this Agreement and any other bilateral or international issues of mutual interest.”

Furthermore, under Article 463:

“1. (...) the Association Council shall have the power to take **decisions** within the scope of this Agreement, in the cases provided for therein. Such decisions shall be **binding** upon the Parties, which shall take appropriate measures, including if necessary action in specific bodies established under this Agreement, to implement the decisions taken. (...) 2. In line with the objective of **gradual approximation of Ukraine's legislation** to that of the Union as laid down in this Agreement, the Association Council will be a forum for exchange of information on European Union and Ukrainian legislative acts, both under preparation and in force, and on **implementation, enforcement and compliance measures**. 3. The Association Council may update or amend the Annexes to this Agreement to this effect, taking into account the evolution of EU law and applicable standards set out in international instruments deemed relevant by the Parties, without prejudice to any specific provisions included in Title IV (Trade and Trade-related Matters) of this Agreement.”

In practice, however, proceedings are as difficult “as shooting on a moving target”.46

### 2.4.2 Dispute settlement mechanisms

There are several procedures for the settlement of disputes. Article 476 on “fulfilment of obligations” provides for **consultation** through “appropriate channels at the request of either Party, to discuss any matter concerning the interpretation, implementation, or good faith application of this Agreement”. Without prejudice to this, “**each Party shall refer to the Association Council any dispute related to the interpretation, implementation or good faith application of this Agreement**”; the Association Council may settle a dispute **“by means of a binding decision”** (Articles 476 (3) and 477).

This agreement possesses a more elaborate dispute settlement mechanism, modelled upon the WTO mechanism. It provides for the establishment, after the consultation stage, of an **arbitration panel**. Rulings of such a panel are **binding** and each Party must take all measures necessary to comply with them. If the respondent Party fails to take such measures without offering temporary **compensation**, the other Party is entitled to **suspend obligations** arising from the DCFTA at a level equivalent to the nullification or impairment caused by the violation. However, “in the light of the recent gas-conflicts between Russia and Ukraine and its impact of several eastern EU Member States, the DCFTA mechanism establishes shorter procedures regarding disputes concerning an interruption of any transport of natural gas, oil, or electricity or a threat thereof. Moreover, for several DCFTA Chapters, a **mediation** mechanism is provided”.

### 2.4.3 Arbitration panels referring preliminary questions to the CJEU

The DCFTA includes a **unique mechanism** relating to legislative approximation only (Article 322). This procedure only applies to disputes concerning the interpretation and application of provisions regarding legislative approximation in some DCFTA Chapters that imposes on a Party an obligation **defined by reference to EU law**. If a dispute in relation to one of those chapters concerns a question of interpretation of a provision of EU law, the arbitration panel shall not decide the question, “**but request the Court of Justice of the European Union to give a ruling on the question**”, which will be binding on the arbitration

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47 Ibid. p. 20.
panel. “This provision is unique in the sense that in no other agreement concluded by the EU is an arbitration panel given the competence to ask for a preliminary judgment from the CJEU. In a limited number of other EU integration agreements, the CJEU can respond to preliminary questions from a national court or tribunal.” 48

The above quote is correct with a small nuance, however. The UK government paper on enforcement and dispute resolution (August 2017)49 does not contain any references to the DCFTA Agreement, but it did refer twice to the (identical on this matter) Moldova Association Agreement and in both of these references, it recalled the provision for voluntary references to the CJEU for interpretation. This is a very original legal technique allowing an arbitration panel to refer a preliminary question to CJEU on interpretation of EU law, providing the existence of an obligation derived from the agreement which is determined by reference to EU law. Article 403 of the EU-Moldova Association agreement on “referrals to the Court of Justice of the European Union” provides that:

1. The procedures set out in this Article shall apply to disputes concerning the interpretation and application of a provision of this Agreement relating to gradual approximation contained in Chapter 3 (Technical Barriers to Trade), Chapter 4 (Sanitary and Phytosanitary Measures), Chapter 5 (Customs and Trade Facilitation), Chapter 6 (Establishment, Trade in Services and Electronic Commerce), Chapter 8 (Public Procurement) or Chapter 10 (Competition) of Title V (Trade and Trade-related Matters) of this Agreement, or which otherwise imposes upon a Party an obligation defined by reference to a provision of Union law.

2. Where a dispute raises a question of interpretation of a provision of Union law referred to in paragraph 1, the arbitration panel shall not decide the question, but request the Court of Justice of the European Union to give a ruling on the question. In such cases, the deadlines applying to the rulings of the arbitration panel shall be suspended until the Court of Justice of the European Union has given its ruling. The ruling of the Court of Justice of the European Union shall be binding on the arbitration panel.”50

The UK government paper commentary is as follows: “In the case of the Moldova Association Agreement, the responsibility to make a reference rests with the arbitration panel, (…) These example[s] do not involve one party to the agreement deciding, unilaterally, to seek a binding interpretation of the agreement from the CJEU”51 (emphasis added). In my opinion, it neither involves the necessity of a consensus among the Parties to make the reference, because an arbitration panel is not an interstate body such as a joint committee; it rather, at least theoretically, is a supposed impartial and independent tribunal. Therefore, the competences are by the tribunal, not by the States that created this tribunal that is the core of the legal institution. This marks the difference between an inter-state body and a true court.

48 Ibid. p. 20.
50 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part [2014]; OJ L 266/4, Article 403 (1)-(2).
3. SETTLEMENT OF DISPUTES IN A CLOSE AREA MODEL

The analysis of the principal mechanisms for the settlement of disputes existing in the models closest to the core of the EU (namely the EEA and the EU-Turkey Association Agreement) hold the advantage of a practical application extended in time. This guarantees the compatibility with the Treaties and their coexistence with the CJEU. The main difference between the mechanisms of dispute settlement provided in these two agreements and those that have been examined in the previous chapter (WTO, Singapore, Canada and Ukraine), is that their provisions possess direct effect and can be invoked before the courts by individuals.

Neither of the two agreements analysed here were cited to as possible models for the future relationship agreement in the first White Paper of the UK government. In contrast, there are quite a lot of references to the EEA in the document published by the British government in August 2017 relating to the enforcement and settlement of disputes relative to the future agreement with the EU. The CJEU has spoken in the past about the compatibility of the EEA Treaties and their dispute settlement mechanisms in two classical opinions (Opinions 1/91 and 1/92).

The EU-Turkey Association Agreement dates from 1963 and it has served as a model for later association and cooperation agreements with third countries. The fundamental difference between the EEA and the EU-Turkey Association Agreement is that, in the first instance, apart from an interstate mechanism between the parties (Joint Committee), the EFTA Court acts to solve litigations that occur within the EEA. This constitutes a guarantee comparable to that of the CJEU, both as concerns the access of citizens and compliance with its decisions. On the contrary, the EU-Turkey Association Agreement has no tribunal with a similar jurisdiction but only the Association Council. Nevertheless, the CJEU has recognised that certain decisions adopted by the Association Council produce direct effect and can be invoked before the courts within the EU. This provokes a notorious asymmetry as regards the compliance with the agreement within the EU and outside of it.

3.1. Dispute settlement in the EU-Turkey Association Agreement

The EU-Turkey Association Agreement dates from 1963, and is the earliest agreement still in force concluded by the EU; in 1995, the Association Council modified the Agreement to allow for the creation of the Customs Union.

This category of association agreements is both wide and varied. Following Turkey, such agreements have been concluded with the Maghreb states (Morocco, Algeria and Tunisia).
under the term of Cooperation Agreements. A similar model has been successively applied to candidate countries from Central and Eastern Europe who are now EU Member States (Poland, Czech Republic and Bulgaria). Furthermore, this term is also applied to the agreement concluded with the Republic of Chile58 and to the “Association Agreement with a strong trade component”59 agreed with Central America. In addition, there are further agreements under the denomination “Eastern Partnership with the EU” (Ukraine, Georgia, Moldova, Armenia and Azerbaijan). As demonstrated, there is no archetypal model of an association agreement. In light of this, this study will focus on those association agreements with a higher impact for third country nationals, as is the agreement with Turkey.

From a citizen’s perspective, what is essential in these forms of agreements are the opportunities offered to a citizen when demanding the enforcement of the provisions of such an agreement. The EU seeks the equal treatment of EU citizens, particularly when they are residing outside of their country of origin but within another EU Member State. In contrast, there may be inequality between an EU citizen and a third country national residing in a Member State. Such a situation could be tempered by virtue of the agreements concluded by the EU with third countries.60 The conventional models vary from minimum standards-based reciprocity, such as those agreed with ACP countries, to preferential treatment as foreseen in the agreement with Turkey61, which aligns Turkish workers closer to the status of a European worker. The model applied in the association agreements concluded with EU candidate countries62 were very similar, even though the preferential treatment these agreements afforded to Member States’ nationals related to equal treatment more in freedom of establishment and provision of services than in the movement of persons.63

A recent paper produced by the UK government64 suggests that the Future Relationship Agreement could include something similar to a Customs Union between the EU and the UK. However, in the UK government’s document on the settlement of disputes65 there is no reference to the agreement with Turkey, but only to other, more recent agreements

concluded with the EU (Canada, Singapore, Vietnam, Ukraine and Moldova), which are substantively free trade and investment agreements, although some are integrated in a wider Association Agreement (Ukraine and Moldova).

3.1.1. The direct effect of the EU-Turkey Agreement

Articles 22 to 25 of the Agreement provide for the Association Council. Article 23 describes its composition: as it is a mixed agreement, the EU, the EU Member States and Turkey are all Parties and represented in the Association Council. Although it is not expressed, we must suppose that it has parity of composition. According to Article 23 (3), the Association Council adopts its decision by unanimity. Its decision-making powers, according to Article 22, encompass the issues referred to in the Agreement and its protocols. Significantly, it also has the necessary competence to implement them (implicit competences).

Given the evolution of the content of association agreements, nationals of countries with more recent such agreements typically benefit from more rights than nationals of countries with older agreements. To avoid lagging behind, the resolutions of the Association Council update the content of the original agreement, following the development of the context of the bilateral relationship. Although the CJEU initially denied the direct effect of Article 12 of the Agreement and of Article 36 of its Additional Protocol in the Demirel judgment, its position developed considerably, to the point of establishing not only the direct effect of the precepts of the agreement, but also of the decisions of the Association Council. Such decisions, despite originating from an organ with a mixed composition, which is not European in its totality, possess direct effect in the EU, according to reiterated CJEU jurisprudence. It is necessary to highlight, however, that they produce it within, but not outside of the EU. It should also be reminded that that direct effect is a quality that applies to each specific precept rather than for an entire provision. Therefore, there could be (within the same agreement or decision) precepts which have direct effect and others that do not, depending on the nature of the rights and obligations they contain.

If we transfer this legal situation to the context of the UK’s withdrawal, the conclusion is that an agreement of this type would generate a notorious asymmetry. A UK national residing in any of the EU-27 could invoke the direct effect, both from the actual agreement as well as from the Association Council decisions before the courts of their country of residence (an EU Member State), which could request a preliminary ruling of the CJEU in instances of doubt. They could also demand the responsibility of the state in question for violations of EU law before its courts. In contrast, nationals of the EU-27 residing in the UK, although the direct effect is recognised on these decisions, could only invoke them before the UK courts and tribunals. With the Francovich Rule being abolished by the EUWB (Infra, second part, I.3), they could not demand pecuniary responsibility from the violating state. In such a situation, the rights of EU-27 citizens in the UK would be less guaranteed than those of UK nationals in the EU-27. Hence, a Future Relationship Agreement that follows the EU-Turkey model does not result appropriate for safeguarding the rights of EU citizens.

3.1.2. The Association Council and dispute settlement

There is no direct access for individuals to the Association Council, although they can be the final beneficiaries of its decisions and, therefore, invoke them before a domestic court or tribunal.

Article 25 regulates the dispute settlement procedures relating to the interpretation and application of the Agreement. The parties can submit to the Association Council any dispute of this type, which affects the EU, the MS or Turkey. According to Article 25 (2), the Council can adopt, to begin with, two types of decisions. A decision that settles (directly) the dispute, or, a decision that forwards it to another settlement organ, either the CJEU or another tribunal (without specifying if it can be domestic or international). As prescribed in Article 25 (3), the parties have the obligation to respect these decisions. Finally, according to Article 25 (4), “Where the dispute cannot be settled in accordance with paragraph 2 of this Article, the Council shall determine (…) the detailed rules for arbitration or for any other judicial procedure to which the contracting parties shall resort”.

As it can be observed, the Association Council enjoys a wide range of competence, rather similar to those of the Joint Committees created by other EU-third country agreements. If an organ with similar competences were constituted within the framework of the Future Relationship with the UK, it would not be detrimental to citizens’ rights nor to the EU interests.

3.2. The European Economic Area

The aim of the European Economic Area (EEA) Agreement is to guarantee the free movement of persons, goods, services and capital in an enlarged European Economic Area, to provide equal conditions of competition and to abolish discrimination on the grounds of nationality. As a matter of principle, EU law concerning the Single Market have been transposed and are being transposed to the EEA legal order by the Joint Committee since there is no automatic transposition of such legislation, for instance by means of its publication in an official journal, as in the EU system. The successful operation of the EEA depends upon the uniform implementation and application of the common rules in all EEA states. To this end, a two-pillar system of supervision has been devised. The EFTA Surveillance Authority has been given powers corresponding to those of the EU Commission in the exercise of its surveillance role. In addition, a two-pillar structure has also been established as far as judicial control is concerned; the EFTA Court operates in parallel with the CJEU.

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68 Article 102 (1) EEA provides that as soon as an EEA-relevant EU legal act has been adopted in the EU, the EEA Joint Committee shall take a decision concerning the appropriate amendment of the EEA Agreement with a view to permitting simultaneous application of the legislation in the whole of the EEA. Since 2014, there is a decision of the Standing Committee of the EFTA States Nº 1/2014/SC, of 8 May 2014 on procedures for the incorporation of EU acts into the EEA Agreement. See, Von Liechtenstein, N. (2014), ‘The EEA Joint Committee-A Political Assessment, EFTA Court’ in Baudenbacher, Speitler, C.P. and Pálmarssdóttir, B. (eds.), The EEA and the EFTA Court. Decentred Integration, Hart Publishing, Oxford, 475-483.

69 The Surveillance and Court Agreement is an agreement between the EFTA states and is not an agreement between the EU and the EFTA states.

3.2.1. The role of the EFTA Court

The EFTA Court has jurisdiction with regard to EFTA States who are parties to the EEA Agreement. The Court is primarily competent to deal with infringement actions brought by the EFTA Surveillance Authority against an EFTA state concerning the implementation, application or interpretation of EEA law. Second, it has jurisdiction over appeals against decisions taken by the EFTA Surveillance Authority. Its main functions, therefore, are similar to those exercised by the CJEU in the framework of an infringement procedure brought by the Commission (Articles 258 and 260 TFEU). Third, the EFTA Court can give advisory opinions to courts in EFTA states on the interpretation of EEA rules. This is the most interesting function of the Court for the protection of citizens’ rights. It is a mechanism that functions in a similar manner as CJEU preliminary rulings, albeit, in this case the interpretation of the EEA rules is made by the EFTA Court rather than the CJEU. Furthermore, – despite the terminology – these opinions are binding on the domestic court that has requested the opinion.

At the same time, Article 107 and Protocol 34 to the EEA foresee an authentic preliminary request to the CJEU. The mechanism designed here is optional: an EFTA state has the possibility (if it becomes part of Protocol 34) to allow its judges to request from the CJEU to “decide on the interpretation of an EEA rule” which corresponds to a rule of EU law. This obtuse language can only be understood if we take into account that the rules (in continuous evolution) of the EEA (in development of the original agreement), are “duplicated” in the rules of EU law. Such rules are transposed by means of Joint Committee decisions, to preserve the sovereignty of Norway, Iceland and Liechtenstein, which, unlike EU Member States, have not transferred legislative competences to the EU institutions. For each legislative act of the EU institutions applicable to the EEA, the Joint Committee consults with the states and shall immediately decide their incorporation to the EEA. Thus, the problem consists in avoiding a divergent interpretation of those rules that have an identical content. Finally, the domestic judge may raise the preliminary ruling, but there is no superior tribunal that is obliged to raise it, although the ruling of the CJEU is always binding. The system is, therefore, doubly optional: for the State Party to the EEA and for its judges.

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73 Protocol 34 on the possibility for Courts and Tribunals of EFTA States to request the Court of Justice of the European Communities to decide on the interpretation of EEA rules corresponding to EC rules, Article 1. When a question of interpretation of provisions of the Agreement, which are identical in substance to the provisions of the Treaties establishing the European Communities, as amended or supplemented, or of acts adopted in pursuance thereof, arises in a case pending before a court or tribunal of an EFTA State, the court or tribunal may, if it considers this necessary, ask the Court of Justice of the European Communities to decide on such a question. Article 2. An EFTA State which intends to make use of this Protocol shall notify the Depositary and the Court of Justice of the European Communities to what extent and according to what modalities the Protocol will apply to its courts and tribunals (emphasis added).
3.2.2. The cooperation between the EFTA Court and the CJEU

The cooperation between the EFTA Court and the CJEU is essential and the key to their compatibility is mutual respect for each court’s independence. Yet, this does not prevent a loyal collaboration based on dialogue. However, this result required a laborious process, as in Opinion 1/91 the CJEU considered that the first EEA draft agreement was incompatible with the Treaties. It was only through the modification of the EEA text, following the CJEU indications, which allowed for a positive reaction from the CJEU in Opinion 1/92. There were several elements that led to the rejection of the initial draft, which was based on the integration of the new legal organ in the structure of the CJEU. Any attempt to unify the two courts capable of applying EU law under only one legal structure has always been rejected by the CJEU. This happened regarding not only the EFTA Court but also the ECHR, as highlighted in CJEU Opinion 2/13. Thus, a first condition of compatibility would be the structural independence of both courts.

Concerning the homogeneity of EU law, Opinion 1/91 does not only require the identity of provisions, but also the identity of interpretation. The homogeneity of EU law is not secured by the fact that the provisions applicable in both legal spaces (EEA and EU) are identical. Two identical provisions may be interpreted in different ways if different criteria are used. For example, if we apply the general criteria of public international law, the grammatical criteria prevail (Art 31 VCLT); in the framework of EU law, though, teleological criteria may be used as necessary for the EU to achieve its objectives. Therefore, a second condition would be that any other court should interpret EU law in the same way and using the same method as the CJEU. The way to achieve this is to link past CJEU case law with its future. The first EEA draft did not refer to future case law and that was another of the motives for its rejection by the CJEU.

77 CJEU Opinion 1/92, “The EFTA Court will have jurisdiction only within the framework of EFTA and will have no personal or functional links with the Court of Justice” (emphasis added).
78 See, CJEU Opinion 1/91, “The context in which the objective of the agreement is situated also differs from that in which the Community aims are pursued. The EEA is to be established on the basis of an international treaty which, essentially, merely creates rights and obligations as between the Contracting Parties and provides for no transfer of sovereign rights to the inter-governmental institutions which it sets up. In contrast, the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. (…). The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves. It follows from those considerations that homogeneity of the rules of law throughout the EEA is not secured by the fact that the provisions of Community law and those of the corresponding provisions of the agreement are identical in their content or wording. It must therefore be considered whether the agreement provides for other means of guaranteeing that homogeneity. Article 6 of the agreement pursues that objective by stipulating that the rules of the agreement must be interpreted in conformity with the case-law of the Court of Justice on the corresponding provisions of Community law” [13].
3.2.3. The role of the EEA-EU Joint Committee

To avoid problems in the homogeneity of the interpretation and, at the same time, respect the sovereignty of EEA states that are not EU Member States, the EEA Agreement established a new organ responsible for ensuring a uniform interpretation. This organ is not an independent court, but an organ composed of States' representatives: the Joint Committee. The Committee plays a decisive role as, on the one hand, it constitutes the necessary filter for the integration of new rules of EU law to EEA law and, on the other hand, it ensures the continued incorporation of CJEU jurisprudence in the EFTA Court one, ensuring that there is no divergence between them (Article 105 EEA).

In practice, the CJEU indirectly enforces its interpretation of EU law within the EEA, albeit, with complete respect for the sovereignty of the EEA states. However, Article 105 (3) provides that, if the Joint Committee does not directly manage to achieve uniform interpretation, Article 111 would be applied. This Article provides for a different procedure whereby the Joint Committee would transmit the divergence to the CJEU, which will give a “ruling on the interpretation of the relevant rules”, as per Article 111 (3) to be applied by the Joint Committee. The possible intervention of an arbitration panel is also foreseen if a (new) dispute arose over the safeguarding measures, in its case adopted by one of the State Parties in a previous dispute, as per Article 111 (4). However, as the Joint Committee has been efficient in its operation, these latter procedures have never been applied. What this complex mechanism ultimately highlights is that the CJEU considers that an agreement is compatible with the Treaties when the CJEU's interpretation of its provisions prevails, even if indirectly. Only through this method is the homogeneity in the interpretation of EU law guaranteed.

3.2.4. Third country courts preliminary references to the CJEU - the case of the ECAA

The European Common Aviation Area (ECAA) Agreement is an agreement concluded between the European Union and its Member States, Albania, Bosnia and Herzegovina, Bulgaria, Croatia, the Former Yugoslav Republic of Macedonia, Iceland, Montenegro, Norway, Romania, Serbia and the United Nations Interim Administration Mission in Kosovo. Its objective was to integrate the EU’s neighbours in South-East Europe in its internal aviation market which, at that time, consisted of 25 EU Member States as well as Norway and Iceland. The eight South-East European partners agreed to the full application of the European Community’s aviation law (Community acquis). Once ECAA partners fully implement the EC’s aviation acquis, ECAA airlines will have open access to the enlarged European single market in aviation. The ECAA agreement will therefore create new market opportunities due to an integrated aviation market of 36 countries and more than 500 million people. At the same time, the agreement will lead to equally high standards in terms of safety and security across Europe, through the uniform application of rules. Despite

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79 CJEU Opinion 1/92, "In order to achieve the objective of reaching the most uniform interpretation possible of the provisions of the agreement and of the corresponding provisions of Community law, Article 105(2) of the agreement provides that the Joint Committee is to keep the development of the case-law of the Court of Justice and of the EFTA Court under constant review. The Joint Committee is to act so as to preserve the homogeneous interpretation of the agreement" [6] (emphasis added).

80 CJEU Opinion 1/92, "The agreement provides for two procedures, the first being designed to preserve the homogeneous interpretation of the agreement, the other being concerned with the settlement of disputes between Contracting Parties. In the course of that dispute-settlement procedure, the Court of Justice may be asked to give a ruling on the interpretation of the relevant rules" [14] (emphasis added).

81 See Tobler, Ch. op. cit., 550-551.

82 Decision of the Council and of the representatives of the Member States of the European Union Meeting within the Council, of 9 June 2006 (2006/682/EC); L 285/1. Amended by decision from 18/03/2009 (L 72).

83 European Commission, International Aviation-ECAA. Available at: (https://ec.europa.eu/transport/modes/air/international_aviation/country_index/ecca_en).
its provisional application by the EU Member States, the entire agreement is scheduled to enter into force for all the Parties on 1 December 2017.\(^{84}\)

During the conclusion process, the Commission requested an opinion from the CJEU\(^ {85}\) as it considered it one of the most complicated agreements concluded by the EU.

The ECAA agreement also provides for a referring procedure. In this case, a domestic court, either from a Member State or a third country party to the ECAA Agreement, may refer to the CJEU. In addition, it can take place either through the Joint Committee or not.

The ECAA Agreement has direct effect, as Article 17 requires the Contracting Parties to ensure that rights derived from the ECAA Agreement, including Annex I thereto, may be invoked before the national courts. That Article also confers exclusive jurisdiction on the CJEU to review the legality of decisions taken by EU institutions under the ECAA Agreement. Article 23 sets out the rules of interpretation in this way, “In so far as the provisions of this Agreement and the provisions of the acts specified in Annex I are identical in substance to corresponding rules of the EC Treaty and to acts adopted in application of the EC Treaty, those provisions shall, in their implementation and application, be interpreted in conformity with the relevant rulings and decisions of the Court of Justice”. When a question of interpretation of this Agreement (…) arises in a case pending before a court or tribunal of a State Party, the court or tribunal asks, if it considers this necessary to enable it to give a judgment and in accordance with Protocol IV, the Court of Justice of the European Communities to decide on the question.

This is logical and identical with rules provided in the general EEA framework. Similarly, there is a Joint Committee with a guarantee function that goes beyond the EEA’s equivalent, but operates in a different context due to the lack of an umbrella organisation.

To further complicate the analysis, there are two different procedures, set in Articles 23 and 27 respectively. Regarding this, the above mentioned CJEU Opinion 1/00 states,

“\textit{The ECAA Agreement has objectives comparable to those of the EEA Agreement but a different institutional structure.} Whilst the EEA Agreement is based on the ‘twin pillar’ of the Communities on the one hand and the EFTA on the other, the proposed agreement provides for the ECAA to be founded on a ‘single pillar’, a solution which is made possible and necessary by the absence of pre-existing institutional links between the States Parties in the area of air transport (…) It also confers on the Joint Committee of the ECAA responsibilities which may prove to be more far-reaching than those entrusted to the EEA Joint Committee. Cases liable to come before the ECAA Committee involving divergent interpretation or implementation of the rules of the ECAA Agreement could be more numerous as a result of the fact that the States Parties have neither a specific umbrella organization comparable to the EFTA nor a common judicial body”.\  

In that context, with a large number of the rules of the ECAA Agreement being essentially rules of EU law, it is incumbent on the CJEU to guarantee the uniform interpretation of those rules so as not to affect the autonomy of the EU legal order. Thus, the agreement must not prevent the uniform interpretation of EU law. Furthermore, the same Opinion 1/00 states below that,

“The Court has already recognised that an international agreement entered into by the Community with non-Member States may affect the powers of the Community institutions, without, however, being regarded as incompatible with the Treaty (…). Although the proposed ECAA Agreement affects the powers of the Community institutions, it does not alter the essential character of those powers and, accordingly, does not undermine the autonomy of the Community legal order.”\(^ {85}\)

\(^{85}\) Opinion 1/00 of the Court of 18 April 2002.
Thus, the mechanisms for ensuring uniform interpretation and disputes resolution of the ECAA Agreement must be clear safeguarding the correct interpretation of the rules of EU law reproduced in the agreement. To achieve this, Opinion 1/00 states that,

“The procedures for preliminary references provided for in Article 23 (2) of, and Protocol IV to, the proposed agreement, which give the States Parties the power to authorise their courts to make references to the Court, may be considered to be compatible with the Treaty (...) The Court has already acknowledged, as regards the equivalent provisions of the EEA Agreement, that States may be allowed to decide whether or not to permit their courts and tribunals to make referrals to the Court (Opinion 1/91, paragraph 60). In the same Opinion, the Court also found that courts or tribunals other than those of Member States could refer questions to it for a preliminary ruling, provided that the answers given by it were binding on the referring courts (Opinion 1/91, paragraphs 59 and 61 to 65). That is certainly the case in the proposed ECAA Agreement”.

In addition, in Opinion 1/92, the CJEU already found that the procedures for its case-law to be taken into account in the EEA framework were sufficient, because the EEA Joint Committee would receive the judgments and decisions of the CJEU and of the EFTA Court and was to keep the development of their case-law under constant review in order to preserve the uniform interpretation of the Agreement concerned. A second reason was that decisions of the Committee do not alter the CJEU’s case law. Finally, in Opinion 1/00, the CJEU states,

“Any action taken by the Committee in that context is, like the more general one of Article 23 (1) of the proposed agreement, to ensure uniform application of the rules of the ECAA Agreement. The requirement that decisions of the Joint Committee be in conformity with the case-law of the Court thus applies in all cases in which the Committee is seeking to attain that objective, whether under paragraph (1) or under paragraph (3) of Article 23. The proposed ECAA Agreement, without being identical to the EEA Agreement, contains broadly comparable safeguards (...)”

Thus, first, it is stated in the proposed agreement itself that decisions of the Joint Committee taken in that context ‘shall not affect the case law of the Court’. Second, (...) any disputes that the Joint Committee does not succeed in resolving may be referred to the Court, whose decision will be ‘final and binding’. Therefore, the mechanisms for ensuring uniform interpretation of the rules of the ECAA Agreement and for resolving disputes will not have the effect of binding the Community and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of Community law incorporated in the agreement.”

3.2.5. The EEA as a model of enforcement and dispute settlement for the future relationship agreement with the UK

If the EU and the UK opt for an EEA-like system for their Future Relationship Agreement, it would be necessary to adapt some aspects of it. Firstly, the UK should re-join EFTA and then apply for accession to the EEA Agreement (which would require the consent of all EEA Member States). Alternatively, the Parties to the EEA and the UK should extend the competences of the EEA dispute settlement mechanisms (in essence the EFTA Court) to allow for the settlement of disputes in the application and the interpretation of the Future Relationship Agreement.

Jurisdiction over the application and interpretation of the Future Relationship Agreement within the EU lies with the CJEU, since the agreement is an international agreement concluded by the EU and forms part of EU law. A different question would be its application outside of the EU. It should be recalled that the organs of the EEA (EFTA and Joint Committee) are, for the moment, in charge of only the enforcement of EEA rules. For them to also be entrusted with the interpretation and enforcement of the Future Relationship Agreement, it would have to be expressly stipulated at the same time as the UK joins the
EEA. There would then be an asymmetry between the enforcement within the EU, conducted by the domestic judges of the EU-27 in loyal cooperation with the CJEU, and its enforcement outside of the EU and within the EEA, which would correspond to the domestic judges of the EEA Member States in collaboration with the organ appointed in the future agreement (EFTA Court or Joint Committee). Despite the aforementioned formal asymmetry, the set of guarantees granted by the organs of the EFTA and the EEA would be comparable with those granted by the EU organs.

This approach would open up two alternative options: the first would be to grant the EFTA Court jurisdiction over the interpretation and enforcement of the future agreement by virtue of an amendment to the EEA. The second option would be not to grant jurisdiction to the EFTA Court and to provide that disputes relating to the interpretation and enforcement of the future agreement be resolved by the Joint Committee, likewise by means of an amendment of the EEA. It must be clear that, if the other States Parties of the EEA (Norway, Iceland and Liechtenstein) do not agree to these amendments, there could not be a dispute settlement mechanism derived from the Future Relationship Agreement within the framework of the EEA.

There would be two possibilities regarding the enforcement and the settlement of disputes in this situation. The first would be that, if we choose the jurisdiction of the EFTA Court over the enforcement of the future agreement, there would be a number of differences in comparison to the CJEU’s jurisdiction, in the respect that citizens do not have direct recourse to the EFTA Court similar to the one foreseen in Articles 263 and 265 TFEU for CJEU. However, the difference is more theoretical than practical, due to the enduring lack of the legal standing of a plaintiff in EU law derived from the difficulty to demonstrate a “direct and individual effect” caused by an act (or an omission thereof) of the institutions. Although the Lisbon Treaty has widened the scope of the Article 263 (4) TFEU, eliminating the requirement for an individual effect to “institute proceedings” against rules which directly affect any person, this does not alter the fundamentals. Litigation for the enforcement of EU law is normally established in an indirect way. An individual challenges an act of a public administration that does not comply with an obligation established by EU law. Therefore, citizens usually initiate legal proceedings before their own national courts or by means of the legal recourses offered via national law. This is one of the consequences of the direct effect of EU law.

Such a situation finds a parallel before the EFTA Court. An examination of the Court’s case-law demonstrates that numerous judgments have been issued on matters of freedom of establishment, provision of services, recognition of professional titles, free circulation of workers, no discrimination for nationality reasons, etc. Curiously, a judgment is issued also when the Court is required to formulate an “Advisory Opinion” by virtue of Article 34 of the Agreement for the constitution of a Surveillance Authority and a Tribunal, agreed by the EEA Member States. In practice, the difference is not significant and the enforcement of the future agreement within the EEA would be similar or equivalent to that within the EU. This option would provide the best guarantees for EU citizens. In its first White Paper, the UK government did not express any interest in this option. In contrast, in the paper published in August 2017, it analyses the tasks of the EFTA Court, the Surveillance Authority and the Joint Committee in seven different places. That could imply that the UK technical advisors look possibly towards this direction.

86 For example, Case E-13/11 Granville Establishment v Volker Anhalt, Melanie Anhalt and Jasmin Barbaro, née Anhalt, 25 April 2012.
However, up to now, the official declarations of the UK government, for example in Prime Minister’s Florence speech on 22 September, are not consistent with that option.87

Taking into account the UK position, up to now, to reject the jurisdiction of courts other than its own, a second option could be studied, consisting of ensuring that disputes derived from the enforcement of the future agreement only go to the Joint Committee. In that case, the protection of citizens’ rights derived from the agreement would be less satisfactory. Although this would not be tantamount to denying the direct effect of the future agreement, it would imply that the only organs before which an EU-27 citizen could appeal to in the UK would be the domestic courts and tribunals. However, the respective Member States (and not only the EU) would be parties to the future agreement, if this were of “mixed” character. This would allow an indirect defence of the rights of EU-27 citizens in the framework of the Joint Committee by means of the action of the Member State on behalf of its nationals, if the future agreement allowed for such an action. For that, it would be necessary to provide for the prior exhaustion of domestic remedies in the infringing state and, furthermore, that the Parties to the agreement agree that the Member State could be represented in these cases in the Joint Committee.

Such a solution may not be agreeable to the three EEA members. The probable content of a Future Relationship Agreement (rules on the four freedoms, on competition or on state aid for instance) would have a third mechanism for enforcement and dispute settlement (in addition to the CJEU within the EU and the EFTA Court within the other EEA Member States), which would be applicable in the UK. All three mechanisms would cover rules of an identical content in substance thus increasing the risk of divergent interpretations and a possible discriminatory application over citizens on either side of the Channel.

Such an approach could provoke resistance from the CJEU if its opinion was requested during the conclusion of the future agreement, unless it contained a similar mechanism to that of the ECAA, capable of guaranteeing the autonomy and uniform interpretation of EU law, by the use of past and future CJEU jurisprudence, and, by means of preliminary rulings, whether referred by a court in an EU Member State or in the UK. For this, a special protocol would most likely be necessary for its new “users” to be able to access the CJEU.

87 “I don’t believe either of these options would be best for the UK or best for the European Union. European Economic Area membership would mean the UK having to adopt at home – automatically and in their entirety – new EU rules. Rules over which, in future, we will have little influence and no vote. Such a loss of democratic control could not work for the British people. I fear it would inevitably lead to friction and then a damaging reopening of the nature of our relationship in the near future: the very last thing that anyone on either side of the Channel wants”.

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4. CONCLUSIONS OF THE FIRST PART

4.1. A categorisation of the agreements with third countries

This first part has examined the various agreements with third countries concluded by the EU, in terms of their dispute settlement provisions. It concluded that these agreements could be categorised into two main groups, based on geographical remoteness as well as limited content of the agreements: those concluded with a view of a distant area model and those under a close area model. It has also established a number of common characteristics in the dispute settlement provisions of these two models. This categorisation shows two different realities and differing structures, which could be used or adapted in the context of the future relationship agreement with the UK.

A distant area model agreement does not only refer to states that are geographically remote from the EU; it also implies that the EU has few integrated structures with the third country. In this category of agreements, dispute settlement procedures are flexible and normally include an interstate body, such as a Joint Committee, where both parties to the agreement are represented and which takes decisions by consensus. The powers of this interstate body are generally linked to the implementation and application of the agreement. Often, these agreements foresee an arbitration panel, able to produce a report that will be binding on the parties in the dispute. In these cases, the enforcement of decisions could again use public international law procedures such as financial compensation, countermeasures (retaliation) or suspension of the treaty obligations if there is no voluntary compliance. The WTO model exerts a powerful influence over these agreements and relations between the parties are derived more from public international law than from EU law.

In the second category, or close area model agreements, in particular the EEA, dispute settlement is very different. Relations between the two parties are much more integrated. The impact of such integration does not only affect traders and enterprises but individuals in general, including, for example, services providers and workers as well as their families. In such models, the rules governing relations among these actors are the same. Thus, the interpretation of these rules must also be the same to avoid uncertainty and confusion. In this context, there is again a comparable interstate organ, such as the Joint Committee, but with different competences compared to distant area models because its main aim is to integrate the EU rules in the EEA system and maintain the same interpretation of them. This is achieved by continuously monitoring the jurisprudence of both the CJEU and the EFTA Court. In this context, the EFTA Court plays an essential role, guaranteeing the compliance with the rules, not only of States but also of persons.

The realities of either of the two models explained above are very different. They nonetheless provide two different directions for the EU-UK future relationship. Therefore, the question is to which model of relationship the future agreement should correspond. If the EU and the UK finally opt for a close future relationship, which for instance would include access to the Single Market (‘soft Brexit’), the EEA mechanism of dispute settlement seems appropriate, even though some adjustments might be necessary. On the contrary, if it chooses a more radical departure from the EU (‘hard Brexit’), the range of options would be wider. The CETA or the FTA agreements with Singapore or Ukraine could form the basis upon which to tailor a model for the UK. Depending on the option, the two parties could decide upon the most appropriate dispute settlement mechanisms. However, if there is still no agreement over the content of the
future relationship, it will be very difficult to construct the most appropriate structure thereof. The best way to clarify this issue is by examining the four most relevant questions that any mechanism should take into account, comparing their regulation in the two categories.

4.2. Direct effect of the agreements

Most distant area model agreements do not produce direct effect. Among those expressly denying direct effect are the WTO, the Singapore FTA and CETA. The Ukraine and Moldova Association Agreements also deny, implicitly, direct effect. In these agreements, citizens cannot directly challenge the application of the agreements, which must always be enforced through the states. The agreement with Turkey does not refer to direct effect, but the CJEU has confirmed its direct effect within the EU.

On the other hand, the EEA agreement has direct effect and citizens may invoke it before national courts regarding EU law transposed into EEA law on areas covered by the agreement. They can also naturally invoke it before the EFTA Court (not before the CJEU), if national courts refer to it through a question for a preliminary ruling. Some of the areas covered by the agreement (such as air transport) are specifically regulated by a separate agreement (the European Common Aviation Area or ECAA agreement), bringing together EU member states, EEA member states and other third countries. This agreement also has direct effect.

However, the reference to the direct effect could be misleading. It is necessary to adapt it by taking into account the asymmetry in the application of the agreements within or outside the EU. The direct effect of such agreements can be comparable to the direct effect in the EU only in areas of cooperation which create a sufficiently deep level of integration among its members, as in the case of the EEA; in this case, there is a court comparable to the CJEU to which a person can appeal to defend his or her rights. For this reason, it does not seem appropriate to base a future relationship agreement with the UK on outdated models of Association Agreements, like the EU-Turkey agreement, because individuals in the UK would be in a less favourable situation to enforce the agreement in the UK than individuals in the EU-27.

To summarise, a future relations agreement with the UK, based on a WTO, Singapore FTA or CETA model, will have no direct effect. Such an agreement with the UK would fall clearly into a distant area model; thus, it would necessary to ensure compliance by the state parties even after the dispute has been settled through one of the traditional means of dispute settlement under international law. On the other end, a future relationship agreement with the UK modelled after the EEA agreement would provide for direct effect and an administrative (the Surveillance Authority) or judicial means (the EFTA Court) of enforcement which are also applicable outside the EU, so within the EEA area.

4.3. Competences of the inter-state mechanisms

All these agreements include some form of inter-state mechanisms. The Trade Committee of the Singapore FTA, the Joint Committee in CETA or the Association Councils of the association agreements with Ukraine and Moldova are inter-State organs representing the interests of each party. These mechanisms make easier the relationship between the parties but do not have the power to take decisions independently from the parties. Decisions are adopted by consensus.
The main difference between the distant and the close area models here can be observed in the competences conferred to these interstate mechanisms. Distant area models confer competences on the implementation and application of the agreements and, occasionally the capacity to initiate a dispute settlement proceeding, directly or indirectly referring it to an arbitration panel if the interstate body is unable to reach a consensual solution on its own. They can also communicate to the parties in the dispute the final report of an arbitration panel and monitor its enforcement. On the other hand, close area models provide the interstate body with additional, more relevant, competences. The Association Council with Turkey takes decisions that have direct effect within the EU (with the asymmetry already explained as regards the effect of such decisions outside the EU). The EEA Joint Committee monitors continuously the case law of the CJEU and the EFTA Court and, if the EFTA Court does not follow the CJEU jurisprudence, can take the necessary measures to achieve it. Thus, it does not only have executive competences but also some form of “legisprudential competences”, with the aim of maintaining a uniform interpretation of rules.

4.4. Independent dispute settlement mechanisms

Distant area models generally include provisions on prior consultation and mediation in order to settle disputes among parties. Notwithstanding these, all these agreements include arbitration as a dispute settlement option. There are, however, two different forms of arbitration.

The first refers to a traditional arbitration panel or tribunal to solve a dispute between the parties, as subjects of public international law; such panels can be established under the WTO, FTA, CETA and DCFTA agreements. This approach confirms that most states and the EU consider this the most appropriate means to settle a dispute in such a context. The originality of the WTO model, reproduced in the others, consists in taking legal forms from public international law and introducing them in the final part of the procedure on the enforcement of the arbitration report. In this case, the losing party can choose between compliance and compensation (the so-called ‘do or pay’ solution). And, the winning party can be more persuasive vis-à-vis the other side, in case it does not comply within a reasonable period, by taking some provisional counter measures, such as retaliation (if it is authorised by the Joint Committee or the DSB in the WTO). If all these measures fail, the suspension of the agreement (or a part of it) is always a last resort. This combination between arbitration and self-resolution between the parties has been successful within the WTO. The remaining agreements are in operation since relatively recently, so it is still not possible to draw conclusions from the effect of these mechanisms, but it is obvious that the parties replicated the WHO model because they have confidence in its effectiveness.

In addition, the Singapore FTA and CETA include also a second form of arbitration, an investor-state arbitration procedure, based on the ICSID and UNCITRAL rules, that allows for a direct solution to a dispute between a subject of international law and individuals or entities, which are not subjects of international law, without passing through domestic courts and exhausting national remedies. The ICSID Convention dates from 1965 and has a consolidated practice in solving disputes between mostly enterprises from the ‘Global North’ and governments from the ‘Global South’, in most of the cases in favour of the investors. However, the European context is different and is particularly troubled by the ongoing debate relating to the TTIP relevant provisions. The rule of law principle in the EU requires that any citizen have the right of access to an independent and impartial judge. This is a fundamental right enshrined in the
constitutions of EU Member States, and protected by Article 6 (1) ECHR and by Article 47 of the Charter of the Fundamental Rights of the European Union (CFR). Thus, the Belgian government's request for a CJEU opinion on the compatibility of the CETA provisions with the Treaty may represent an indirect and serious obstacle to applying this procedure within the EU, because it might be considered to deprive citizens of a fundamental right. The future relationship agreement with the UK may face the same problem if it includes a similar procedure. Since the CJEU will probably issue its opinion before the future agreement is concluded, it is assumed that it will be possible to replace this mechanism with another related means of dispute settlement, such as a Multilateral Investment Court; which could be separated in form from the rest of the agreement (for instance as a separate protocol to the agreement) and remain outside the direct control of national parliaments. A necessary prerequisite would be that this protocol should not be considered to be a “mixed agreement”.

On the other hand and up to now, the EFTA Court and the Surveillance Authority are the only mechanisms able to apply legislation similar to EU law outside the EU in a way that the CJEU has considered compatible with the Treaties. This system does not create any problems with the uniform interpretation of EU law, because the Joint Committee, indirectly, ensures that the EFTA Court interpretation of the EU rules transposed into EFTA law will be and continue being the same as that of the CJEU for the original EU rules. Such a mechanism also respects the autonomy of EU law, because any occasional divergent interpretation of the rules by the EFTA Court cannot be imposed on the CJEU, because there is no organic integration between the two courts. Finally, there is no problem with the relationship between the national courts of EEA member states and the EFTA Court, because this system creates a parallel provision similar to the preliminary request, which allows the EFTA Court to solve questions of interpretation in a binding manner. The mechanism has worked well since 1994 and it would be an excellent model for the future relationship agreement with the UK. A better still solution would be that the future agreement could be integrated into the EEA if all the actors concerned (Norway, Iceland, Liechtenstein, the EU-27, and the UK) agreed to it. It is certainly not simple but, technically, possible provided there is political will.

4.5. Voluntary references to CJEU jurisdiction

When the UK becomes a third country, CJEU jurisdiction over it shall, as a rule, end, without prejudice of the ongoing procedures, which will most likely remain under CJEU jurisdiction. The examination of the agreements above, however, demonstrates that there are a few exceptions to this rule; in certain cases, these agreements expressly confer the CJEU jurisdiction by means of preliminary rulings, in the case of third countries.

The most original such case is the indirect reference for a preliminary ruling to the CJEU, by an arbitration panel. Such a possibility exists in the Ukraine and Moldova association agreements. This procedure only applies to disputes concerning the interpretation of provisions regarding legislative approximation, where obligations are defined by reference to EU law. This limitation provides the logical link to the interpretative jurisdiction of the CJEU. A second condition for the use of this system is that the dispute in question must have been referred previously to the arbitration panel. Given that these agreements have only recently entered into force, there is no sufficient evidence as to the application of this possibility.

A second exception is found in the EEA Agreement, where Article 107 and Protocol 34 allow a court from an EFTA state to submit a request to the CJEU to interpret EEA rules identical in substance to EU rules, in order to guarantee a uniform interpretation of it. This
possibility has never been used, because the alternative EFTA Court mechanism works satisfactorily.

A third exception exists in the ECAA Agreement. ECAA confers exclusive jurisdiction on the CJEU to review the legality of decisions taken by EU institutions under the ECAA Agreement. However, insofar as the ECAA provisions are identical in substance to corresponding rules of the Treaties and acts adopted in its application, those provisions shall be interpreted in conformity with the relevant rulings of the CJEU. When a question of interpretation arises in a case pending before a court of a State Party, the court could refer the issue to the CJEU. As a result, the courts from States Parties (whether EEA members, EU members or third countries) could refer a question to the CJEU.

Therefore, even though this is not normally the case, contracting parties in a treaty concluded between the EU and third countries can introduce, by an express clause in that agreement, voluntary references to CJEU jurisdiction to solve future disputes on interpretation of certain rules, identical in substance to EU ones. This does not mean that it would be necessary for a future relationship agreement between the EU and the UK to include such a clause. At the current stage, it does not seem probable that such an agreement would include an approximation of legislation (as in the agreements with Ukraine and Moldova) or reproduce the content of future EU legislation in the UK legal system.
PART TWO: SETTLEMENT OF DISPUTES UNDER THE WITHDRAWAL AGREEMENT

This second part of the study examines the questions related to the jurisdiction over issues arising under the Withdrawal Agreement (WA). The first chapter explains the UK legal system in relation to the possible content of the WA and its jurisdiction. The direct applicability and direct effect of the WA is necessary to allow citizens to invoke it before courts, if some elements of EU law continue to apply in the UK during a transitional period. The UK will repeal the 1972 European Communities Act (ECA) by means of the European Union Withdrawal Bill (EUWB), maintaining secondary EU law. However, it also intends to exclude CJEU jurisdiction over the WA by disconnecting the future rights of EU-27 citizens in the UK and EU law. This position is not congruent with CJEU case law. Alternatively, it is possible to enforce the WA by means of public international law as between two subjects of international law, especially following the end of the transitional period.

The second chapter explains the perspective of the EU institutions, which includes the rule related to the continuity of the jurisdiction of the CJEU on pending ongoing procedures. The jurisdiction on the interpretation and application of the WA should correspond to the CJEU, without prejudice to any additional dispute settlement mechanism for the governance of the WA.

The third chapter examines the possibility of obtaining an opinion of the CJEU already during the conclusion process of the WA. If it were requested under Article 218 (11) TFEU, the opinion of the Court would be binding. The Council and the European Parliament could only agree to the WA if it were in accordance with the Treaties. Therefore, the content of the WA should be coherent with the CJEU's jurisprudence. If the WA incorporates a transitional period which extends the application of EU law in the UK following the withdrawal, it must maintain the same set of guarantees of autonomy and homogeneity inherent to EU law; indirectly, this means CJEU jurisdiction on the rights of citizens. For this reason, the third chapter suggests that the EP should request an opinion from the CJEU over the compatibility of the WA with the Treaties.
5. THE DIRECT EFFECT AND ENFORCEMENT OF THE WA IN AND BY THE UK

The UK legal system is dualist, and therefore requires the transposition of the content of any treaty by means of a law to allow for its domestic application and for its invocation by citizens. To return to the situation which existed prior to joining the EC, the UK needs to repeal the legal act that introduced the Community order within its legal system, the European Communities Act (ECA), 1972. For this reason, the UK parliament shall adopt a repeal bill, entitled European Union Withdrawal Bill (EUWB). This legal act should predictably be approved soon in order to provide reassurance to all those involved in the withdrawal process. The main aim of the EU institutions before this process would be to achieve that this should be carried out without adversely affecting citizens’ rights. At first sight, the “repeal-with-retention of EU secondary law” foreseen in the EUWB can be compatible with a WA which includes a transitional period of extension of the application of EU law and the jurisdiction of the CJEU, providing that the UK leaves pending the application of two of its provisions.

However, apart from the EUWB, the negotiation documents made public reveal a second positioning of the UK which aims, supposedly, at “safeguarding citizens’ rights”. Now, a replica, for new standards of domestic rights in the UK, of the rights of the citizens (and the companies) up to now within the European Citizens Statute and in the four freedoms of the single market, would aim to endow jurisdiction to the courts of the UK excluding the jurisdiction of the CJEU. The content of the second law does not seem compatible with the extension of EU law during the transitional period.

Finally, notwithstanding the above, the risk of a breach of the WA by either part would have to be evaluated. And it would be convenient to consider weather, given that the WA agreement is an international treaty between subjects of public international law, it would be possible to resort to some international means for the settlement of disputes between the EU and the UK for the period after the end of the transitional period. The answer would be affirmative.

5.1. The transposition and domestic application of a treaty in the UK

In the UK, the conclusion of international treaties – or treaty-making power – is a competence of the Government. Therefore, a parliamentary intervention is not normally necessary prior to the process of an international conclusion of a treaty. However, as from the end of the last century, the practice known as the Ponsonby Rule has prevailed, under which, if a treaty requires a solemn form of manifestation of consent, it is sent to the Parliament before the mentioned consent is delivered.88 Exceptionally, the ratification of the international treaties which amended the Constitutive Treaties of the EU starting from the Treaty of Lisbon, require parliamentary authorisation since the European Union Act of 2008, Section 6, amended by the European Union Act, of 2011.

Despite the increasing parliamentary intervention throughout the conclusion process, any rule of international law must be transformed by legislation to be applicable within the

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88 “It is the practice in the UK to lay before both Houses of Parliament all treaties which the UK has either signed or to which it intends to accede. The text of any agreement requiring ratification, acceptance, approval or accession has to be laid before Parliament at least twenty-one sitting days before any of these actions is taken.” Shaw, M. (2008), International Law, 6th ed., Cambridge University Press, p. 152.
municipal legal order. Therefore, international treaties do not automatically form part of the municipal law of the UK for the simple fact of its international entry into force. As affirmed by Lord Oliver in the matter *MacLaine Watson International Tin Council*[89], a treaty does not form part of the English law unless, and as from the moment in which, it has been incorporated by a law.

This transposition law of a treaty may be revoked by a subsequent law, adopted by the Parliament or by the UK government itself, if the Parliament has delegated in it the corresponding legislative authority (as is foreseen in the EUWB). This could pose a problem with the implementation of the WA, in case a UK law subsequent to its entry in force, modifies or revokes the agreements incorporated in the British legal system by means of the WA transposition law.

If the government agreed to a treaty regulating matters relating to citizens’ rights and later incorporated it without the authorisation of the Parliament, it would be “legislating” in an indirect way in matters which are the reserved competence of the Parliament. Hence, the need for treaty transposition in the UK legal system in these cases. On the other hand, if the treaty was destined to produce obligations in the international legal order only or if the obligations at domestic level do not affect citizens’ rights, its transposition by law would not be necessary.

Furthermore, even after a treaty is transposed into the domestic legal order, not all of its provisions can be applied to individuals or be invoked by them, as not all generate obligations or subjective rights in the legal sphere. For a citizen to be able to invoke the content of an international treaty before a judge in the UK it is necessary that the treaty provisions relied upon clearly formulate a subjective right of the citizen. This has to be formulated in such a way that no further legislative development is required for that right to be born into the legal sphere of the citizen who invokes it. The content of the treaty is applicable and, in return, its invocability by the beneficiaries of the rights provided therein exist in public international law as in EU law. In EU law, this characteristic is known as direct effect. It is claimed that the provision (of the TEU, TFEU, or any other EU law) must be clear and precise, its application should not be conditional, it should not permit a discretional margin of application by the state and it should not require a regulatory development.

Therefore, even if the parties in the WA expressly or implicitly recognise the direct effect of its provisions, not all of these provisions would be justiciable by citizens. For example, provisions relating to the financial settlement could not be invoked by citizens before a court, as they are not addressed at them and do not create any rights which a person can rely upon before a court.

Finally, to allow the enforcement of a legal decision related to citizens’ rights provided in the WA during the transitional period, it would be necessary for citizens to be able to initiate proceedings before UK courts. This means that they should hold the procedural capacity and the necessary legal interest to undertake legal proceedings respecting the domestic requirements. It should be stressed that, in terms of procedure, the situation would be the same as today: the competent judge to apply EU law in Member State, in so far as the competence for the application of EU law within a Member State remains with the judge in the regular procedure of that state, in accordance with its procedural provisions. This is what the UK courts have been doing since joining the European Communities (EC).

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5.2. The dual nature of the Withdrawal Agreement

The legal nature of the WA is complex. The WA is negotiated with a Member State of the EU, but it will be applied to a third country as the UK will be after its withdrawal. The nature of legal act does not change, either before or after the withdrawal. What changes is the legal position of the UK vis-à-vis the EU and the usual territorial scope of application of EU law. If it did not include a transitional period, the WA would be similar to any other treaty concluded by the EU. Within the EU it would be another source of EU law. The CJEU would have jurisdiction over its application within the EU. On the other hand, outside of the EU its application would be regulated by the specific provisions contained in it and, subsidiary to this, by public international law. The domestic enforcement of the agreement in the (new) third country would take place by means of the mechanisms of incorporation of treaties foreseen in national legislation.

If the WA includes a transitional period, during which the application of certain areas of EU law are extended to the third country (UK), the normal framework of application of EU law can no longer be used. For this reason, it would be necessary to explicitly insert in the agreement a provision that would allow for the CJEU jurisdiction (even if it were only through preliminary rulings) over the application and interpretation of the WA regarding the rights of EU-27 citizens residing in the territory of the third country during the that transitional period. This may most likely require another modification of EU primary law which can be achieved by means of a protocol between the new third country, the EU and its Member States. Therefore, from a legal point of view, the key question is whether the WA will include, or not, a transitional period extending the EU acquis. If there is such a transitional period, it is necessary that it preserves all the guarantees inherent to the system. Otherwise, the CJEU might, if consulted, prevent the conclusion of the agreement as it might violate the autonomy and uniform interpretation of EU law.

Compliance with the provisions of the WA does not stop at the end of the transitional period, because the provisions of the WA might extend further in time. After the end of the transitional period, EU law would not be applied in the third country and thus the remaining jurisdiction of the CJEU would cease. The law applicable to this international agreement would be that of public international law and its enforcement would follow what UK domestic law provides for any other international treaty. Notwithstanding this, the EUWB will transpose into UK law EU secondary law after the withdrawal enters in force. The rule of this secondary legislation will continue to be interpreted according to the jurisprudence dictated by the CJEU up to now.

Finally, the WA could stipulate the form of control of the implementation of the agreement between the Parties. In the context of public international law, monitoring the implementation of an international agreement can be attributed to surveillance and dispute settlement mechanisms. It may that, at a further stage of the negotiation, these tasks could be conferred to the Alternative Mechanism provided in the WA. The first part of this study analysed the competences of a number of inter-state mechanisms supervising the application of agreements concluded by the EU and third countries, in view of their possible assignment to a future WA. However, for the moment, the parties in the current negotiation have not suggested anything to this kind.
5.3. The European Union Withdrawal Bill and its consequences

UK’s membership of the EC meant an authentic upheaval for the British legal system. The problem was solved in a peculiar way, by the adoption of the European Communities Act (ECA) and by accepting the “unique character of the Adhesion Treaty”, in other words, its difference compared to any other international treaty concluded previously. Despite this, the **direct effect and the primacy** of EU law within the legal system of the UK is explained within its own domestic system through its incorporation by the ECA. As the UK Supreme Court indicated in **Miller**, EU law is a source of law within the UK and conserves its primacy over other UK law only as long as the ECA remains in force.

A repeal of the ECA requires a new piece of legislation: this is the primary objective of the **EUWB**. In addition, the EUWB fulfils a second, no less important objective: **the retention of existing EU law**, or more specifically, the transformation of all EU secondary legislation currently in force into UK domestic law with the aim to avoid a major legislative vacuum. Thereby, the EUWB establishes that EU-derived law will continue to be enforceable in domestic law on and after exit day.

The EUWB would only retain EU law in force prior to the entry in force of the WA, not subsequent EU law. Once EU law has been transposed into the UK’s domestic legal order it will no longer hold primacy, and thus may be repealed by subsequent domestic legislation, enacted either by the Parliament or by the government under the delegated powers it receives by the EUWB itself. In the long term, this legal situation is unavoidable, as the UK will gradually become a third country with regards to the EU law but, **while the transitional period is in force, it is necessary to ‘freeze’ any such legislative action.**

The EUWB intends also to solve another problem: the **interpretation of retained EU law**, that is of all secondary EU legislation incorporated in UK law. It shall use, for this purpose, the Treaties and, above all, the CJEU case-law in the interpretation of EU...
legislative provisions. The interpretative value of such precedents would be equivalent to that of a UK Supreme Court judgment.

The proposed solution does not in itself imply a violation of EU law, and, above all, it is compatible with an exceptional period of extension of EU law in certain areas, as well as CJEU jurisdiction. This would simply require a provisional exception from the general rule of the derogation of the primacy of the EU law, as foreseen in the EUWB. In fact, the only thing that would have to be done is to provide for an exception to the general derogation in certain matters regarding the current beneficiaries of the rights contained within, during the transitional period. The relevant Working Paper of the European Commission describes the personal scope and the material scope which should be contained in the WA with regard to this.

As previously stated, the only way to guarantee the effective application of the WA for citizens’ rights, would be by maintaining the direct effect and the primacy of EU law referred to in the WA during the transitional period. This would require the suspension of the application of the Section 5 (1) of the EUWB which provides that “the principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day”. The provision would result in that ‘supremacy’ of EU law would continue to apply during the time of suspension of this section.

5.4. The exclusion of CJEU jurisdiction for citizens’ rights

Nobody doubts the capacity of the country which proclaimed the first Bill of Rights in history to protect the rights of its citizens. However, what is now at stake are the rights of EU-27 nationals. Therefore, it is not possible to assess positively a second legislative project of the UK on the safeguarding of the rights of the citizens, based on what has been revealed up to now.

With the aim of avoiding CJEU jurisdiction after the date of the entry into force of the withdrawal, the UK government has announced a questionable method to ensure the protection of citizens’ rights. It first proposes the creation of a new legal status for EU citizens residing in the UK, that of a “settled” person (settled status). This is a new legal status created by UK domestic legislation and disconnected from its predecessor created by EU law; thus, the competent jurisdiction to resolve disputes derived from its application would be only the UK one, thereby severing ties to the CJEU preliminary rulings.

Taking into account relevant repeated statements of the UK government, there is concern that the real objective of this rule is not the safeguarding of citizens’ rights, but the exclusion of CJEU jurisdiction. Still, the UK proposals contain an alternative approach, whereby protection of the rights “safeguarded” by the WA could be guaranteed not only by means of the UK’s domestic jurisdiction, but also beyond domestic courts, in the context of public international law. In any case, an external guarantee would be possible whenever the organ of guarantee were not the CJEU.

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98 The UK position is, “6. (...) Those rights will be enforceable in the UK legal system and will provide legal guarantees for these EU citizens. Furthermore, we are also ready to make commitments in the Withdrawal Agreement which will have the status of international law”. But, “The Court of Justice of the European Union (CJEU) will not have jurisdiction in the UK” [4]. (Emphasis added).
99 “58. The arrangements set out above will be enshrined in UK law and enforceable through the UK judicial system, up to and including the Supreme Court. We are also ready to make commitments in the Withdrawal Agreement which will have the status of international law”. But, “The Court of Justice of the European Union (CJEU) will not have jurisdiction in the UK” [4]. (Emphasis added).
In the long term, this UK approach is unavoidable, because it derives directly from the UK’s desire to “recover its sovereignty”. However, in the short term, it would be incompatible with the extension of the application of EU law during the transitional period. Although not detailed, the British proposal would consist in replacing CJEU jurisdiction with an international dispute settlement mechanism, an existing generic mechanism, or an ad-hoc mechanism. This proposal lacks, for the moment, further details as to this mechanism’s structures and functions; in particular, it must specify whether individuals can have access to it. In such a case, the mechanism would have sufficient capacity to respond to potential complaints of four million people and –to the extent that it should adjudicate on rights up to now integrated in EU law- it should provide guarantees equivalent to those of the CJEU on its uniform interpretation and homogeneous application. This would be very difficult.

5.5. Compliance with the Withdrawal Agreement: CJEU and domestic jurisdictions

After the UK’s withdrawal, the role of national jurisdictional bodies on substantive rights of the individuals will not change. They have been concerned with and are still concerned with the protection of the rights conferred by EU law and ensure the full effectiveness of EU law, its direct effect and, in the case of conflict, its primacy over domestic law. The fact that the content of EU rules would pass to form part of domestic law (if the EUWB retains such rules), would not alter, in principle, the function of guarantor of these rights. What would change is, in the first instance, the ability of domestic judiciary to make a preliminary reference to the CJEU and, secondly, the possibility to invoke the responsibility of the state for violating EU law and the resulting obligation to compensate for damages to the party that suffered the violation. The 1991 Francovich judgment of the CJEU set a precedent to this: the Court confirmed that the principle according to which a Member State should be responsible for the damages to persons due to a violation of EU law is inherent to the legal system of the Treaties.100

Claiming damages for a state’s responsibility before that state requires to use the appropriate procedural means provided in its legal order. Therefore, it is in domestic procedural rules where we must seek the appropriate action for the filing of the appeal before the competent domestic jurisdiction. This basic issue is dealt with by the EUWB, in its Schedule 1 Section 5 (6) (Further provision about exceptions to savings and Agreement which will have the status of international law. The Court of Justice of the European Union (CJEU) will not have jurisdiction in the UK” [17] (emphasis added).

100 Joined Cases C-6/90 and C-9/90 Andrea Francovich and Danila Bonifaci and others v Italian Republic, 19 November 1991. Point [3] “The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain reparation when their rights are infringed by a breach of Community law for which a Member State can be held responsible. Such a possibility of reparation by the Member State is particularly indispensable where the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law. It follows that the principle whereby a State must be liable for loss and damage caused to individuals by breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty. A further basis for the obligation of Member States to make good such loss and damage is to be found in Article 5 of the Treaty, under which they are required to take all appropriate measures, whether general or particular, to ensure the implementation of Community law, and consequently to nullify the unlawful consequences of a breach of Community law.” (Emphasis added). See also, Joined Cases C-46/93 and C-48/93 Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen/Secretary of State for Transport, ex parte Factortame and Others, 5 May 1996; Case C-392/93 Brasserie du pêcheur v H.M. Treasury, ex parte British Telecommunications, 26 March 1996; Case C-5/94 The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland), 23 May 1996; Joined Cases C-178, 179, 188-190/94 Dillenkofer and Others v Bundesrepublik Deutschland, 8 October 1996.

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incorporation), which results in the fact that, there is no right in domestic law on or after exit day to damages in accordance with the rule in Francovich ruling.

Therefore, it would be necessary to maintain, throughout the transitional period included in the WA, the direct effect and the primacy of EU law contained in the WA. This would mean, on the one hand, the jurisdiction of the CJEU via the preliminary interpretation of provisions contained in the WA which form part of EU law. And, on the other hand, the necessary action in UK law to claim for damages derived from a violation of EU law, against the actor of its violation.

Thus, in order to allow a physical or legal person to request the enforcement of the WA, the following would be necessary. In the first place, the UK Parliament Act that incorporates the WA should also amend any domestic rule that hinders a full application of the agreement. To achieve this “full effect” it would be necessary to maintain the direct effect and primacy of the provisions of EU law which recognise the citizens’ rights and whose enforceability was extended during the transitional period. Therefore, during that period, the provisions of the WA should prevail over other UK domestic legislation, both earlier and subsequent (as the ECA did in its day). This would be the only reliable method to protect citizens’ rights in light of the possibility that a subsequent domestic law could modify the application of the provisions in the WA. In addition, it would be necessary to maintain the invocability (clarity, precision, lack of conditioning, in other words the direct effect) of the provisions of EU law relating to citizens’ rights extended by the WA. Thirdly, the individual should be able to bring a legal action for the claim before the UK courts (active legitimacy). The last consideration is that a UK court applying the WA, should be able, if there were doubts about its interpretation, to continue to refer to the CJEU a preliminary question.

It is probable, however, that the WA will continue producing effects even after the transitional period, regarding for instance the possible scheduling of the “divorce check” payments beyond that period. This requires to foresee possible differences that will arise after the transitional period. CJEU's jurisdiction on these matters cannot be imposed; a solution could be to provide the “alternative mechanism” with competence to rule over such differences or to foresee the general dispute settlement mechanisms provided in public international law.

5.6. The absence of equivalent protection for citizens’ rights

This is not what is foreseen in the EUWB nor in the draft law aiming to “safeguard” citizens’ rights. The UK negotiators could, of course, challenge the EU as to the differences between the protection system in the EU and the UK. For the UK the rights to be protected are the same rights as recognized by EU and their protection would be overseen by the very same judges who enshrine them since 1973: from that point of view, the guarantees offered would be practically the same. Hence for the UK the requirement of “equivalent guarantees” is fulfilled.

In order to assess, however, the existence of “equivalent guarantees” one should proceed to two levels of comparison. Firstly, to compare the protection offered by the UK Supreme Court and the CJEU in order to assess whether the guarantees provided for the protection of the same substantive rights in either court are the same. Secondly, it would be necessary to compare the jurisdiction of UK judges with the jurisdiction exercised by any other international dispute settlement mechanism (besides the CJEU) which the WA could provide for citizens’ access to protect their rights such as the ECtHR, provided that such mechanism were compatible with the system established by the Treaties.
There are two elements to take into account in this discussion. Firstly, during the 1970s the EU legal order faced what is known as the “revolt of the Constitutional Courts” which subsided with the ratification of the Maastricht and Lisbon Treaties. In addition the developments, during the last stage of the unfinished process of accession of the EU to the ECHR, particularly after the ECHR Bosphorus case and with the relevant CJEU document101, before its Opinion 2/13 where it considered the draft agreement of accession of the EU to the ECHR to be incompatible with the Treaties.

Certainly, there are considerable differences between the earlier debates and the current situation of the UK withdrawal. However, there are also two important similarities. On one hand, the issue is about fundamental citizens’ rights under EU law (if the WA foresees a transitional period), with the set of guarantees that EU law involves. On the other hand, it is necessary to examine whether, during the application of EU law, the guarantees inherent to it would be respected for individuals and whether these guarantees are “analogous” to those offered by the national judicial system. The “dialogue” between the highest jurisdictions would develop this way. The CJEU examined whether there existed a guarantee for persons, analogous to that of the German Constitution, in the context of EU law102 and, after finding out that the system of guarantees offered by EU law has not been ignored in the judgment Solange II103, it concluded that such guarantees were “analogous” to that of the German constitutional system.

Thus, if we were to compare the guarantees offered by the announced UK legislation and the UK Supreme Court jurisdiction with EU law and CJEU jurisdiction, the result would be evident: the guarantees offered by both systems after the withdrawal of the UK would not be analogous. Even in the case of the same substantive right (for example, permanent residence) and even if the specific standard of protection were identical (for example, five years of uninterrupted legal presence in the territory), the inherent guarantee under the legislation in force could never be analogous. In this way, if we deprive the domestic judge of the possibility to make a request for a preliminary ruling in interpretation, we are curtailing the possibility for those who wish to avail their right to enjoy a possible extensive interpretation of that right, as the case was many times in the past with the CJEU. Moreover, if we also deprive individuals of the possibility to directly seek compensation for damages caused by the violation of their rights attributable to the state under whose jurisdiction they find themselves (Francovich Rule), we are curtailing

102 “A. However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community. It must therefore be ascertained, in the light of doubts expressed by the Verwaltungsgericht, whether the system of deposits has infringed rights of a fundamental nature, respect for which must be ensured in the Community legal system” (emphasis added). Internationale Handelsgeellschaft mbh v Einfuhr und Vorratsstelle fur Getreide und Futtermittel (11/70), about private property rights. Bearing in mind that this right is not subject to an autonomous regulation in EUL, but is usual in Constitutions, could be understood better caution of German Constitutional Court. This right is completely different of 4 Freedoms or European Citizenship."

103 “It must be held that, so long as the European Communities, and in particular the case law of the European Court, generally ensure an effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German civil courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Constitution” (emphasis added).
the most important part of the logical corollary deriving from the violation of an international obligation, namely the duty to reparation by the perpetrator of a violation. Even if the problem of the compatibility with the Treaties of the new mechanism foreseen in the WA were previously solved, the new UK legislation and UK jurisdiction, together with the "commitments which have the status of international law", could not guarantee an "equivalent protection" to that granted by the loyal cooperation between the courts of a Member State and the CJEU in the application of EU law.

Already in its Opinion 2/94, of 28 March 1996, The CJEU has stated that the accession of the EC to the ECHR would entail a substantial change, due to its integration in a distinct institutional system.\(^{104}\) Such an accession would not only extend the law applicable by the CJEU to include the rights enshrined in the ECHR; it would also integrate in the CJEU the (legal) mechanism of application of the ECHR, presided by the ECtHR.

The compatibility of two international legal mechanisms of guarantee regarding EU law is not impossible, but it is very difficult. The CJEU, implicitly, made this clear in its Opinion 1/91, 14 December, 1991.\(^{105}\) Therefore, if the WA contained an obligatory dispute settlement mechanism the decisions of which were to be imposed on the EU institutions, that system could be compatible with EU law only if it respected a number requirements very difficult to attain. The draft agreement providing for the accession of the EU to the ECHR did not manage to do so, as it results in Opinion 2/13.\(^{106}\) It appears therefore improbable that a new international mechanism can achieve this, especially since it is not even clear whether it could be directly accessed by individuals. In case, therefore, a relevant request for a CJEU opinion under Article 218 (11) TFEU might receive a negative answer, namely that any alternative dispute settlement mechanism during the transitional period would not be compatible with the Treaties, including fundamental rights and CJEU jurisdiction.

It is not necessary to go through all the points listed by the CJEU in Opinion 2/13.\(^{107}\) We will focus on the point relating to the autonomy of EU law\(^{108}\) and the need to interpret its provisions in a certain manner, distinct from the manner interpretation is carried out in public international law. The interpretation of EU law must not only be uniform (hence the importance of the preliminary rulings to achieve this), but it must also be systematic and teleological. It must be made, "within the framework of the structure and objective of the EU".

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\(^{104}\) Opinion 2/94 of the Court of 28 March 1996, [34] “A substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order” (emphasis added).


\(^{106}\) “39. (…) 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, in so far as that agreement is an integral part of the Community legal order.

40. An international agreement providing for such a system of courts is in principle compatible with Community law. The 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” (emphasis added).


\(^{170}\) See point 170. “The autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU (see to that effect judgments in Case C-11/70 Internationale Handelsgesellschaft, 17 December 1970, [4], and Case C-402/05P Kadi and Al Barakaat International Foundation v Council and Commission, 3 September 2008,[281]-[285]) (emphasis added).”

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Throughout its jurisprudence, the CJEU has declared that dispute settlement organs established by international agreements concluded by the EU and third countries are incompatible with the Treaties; the same has been the case with organs entrusted capacity to interpret EU law or set conditions on the CJEU interpretation. Later, this organ of settlement of disputes could not adequately interpret the WA, which forms part of EU law, if it is not done with the actual interpretative criteria of EU law and in accordance with the precedent of the CJEU. And less if the WA contains references to the standards of EU law in such matters as the European Citizenship Status, the four Freedoms, the cross-border welfare or the pensioners’ rights, which are included in the Commission position paper.

5.7. The possibility of a breach of the WA

It is possible that the WA will be effective in some of its provisions even after the brief transitional period, for instance as regards the scheduling of the payments derived from the “divorce check” which might go beyond the transitional period. Thus, the need to foresee the possibility of a dispute deriving from the application of the WA following the end of the transitional period. It does not seem that, in such a case, CJEU’s jurisdiction should necessarily be imposed. A possible solution would be to give competence over such disputes to the “alternative mechanism” suggested in the Commission paper or to use the means of dispute settlement generally provided in public international law.

A different problem would be a breach **attributable to any of the parties in the WA (the EU and the UK) under the provisions of public international law**. A breach of the WA would be an internationally wrongful act. The basic rule of responsibility for an international wrongful act consists in that a subject of public international law is internationally responsible for the acts of its organs, if they belong to the legislative, executive or judicial branches, whether by the central authorities, regions or even organs of the local administration. In the case under examination, this would clearly happen when a UK authority or any of the EU institutions or organs breach the WA.

In this case, according the Law of Treaties, we would firstly be before a **breach of a treaty** (under Article 60 VCLT 1969 and VCLT 1986) which, in the case of a bilateral treaty, would have as a consequence the suspension or termination of the treaty. And, secondly, as far as the responsibility in concerned, the injured party could invoke the international responsibility of the party breaching the obligation. If the competent dispute settlement organ found that there is a breach, the consequences would be satisfaction, termination of the wrongful act and guarantees of no repetition, as well as, where appropriate, adequate compensation.

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111 International Law Commission (ILC), Responsibility of States for Internationally Wrongful Acts; “Article 4 Conduct of organs of a State 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State”. Available at: http://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/1_2_1982.pdf&lang=EF.

112 http://legal.un.org/docs/?path=./ilc/texts/instruments/english/draft_articles/9_6_2001.pdf&lang=EF (VCLT between States and International Organizations; Article 60. Termination or suspension of the operation of a treaty as a consequence of its breach 1. "A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part”.

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For all the aforementioned reasons, it would be convenient to include a dispute settlement mechanism in the WA. Without such a mechanism, possible disputes must follow the general course provided in public international law and be subject to its requirements. For example, the breach of a treaty can only be alleged by someone who is party of the treaty; thus only the EU, and not its Member States, would have the capacity to claim the breach of the WA before an international dispute settlement forum of a general character.\textsuperscript{113}

Although the EU has an international legal personality, the ICJ is only open to states; hence, the EU could not even bring the UK before the ICJ. Therefore, an EU claim that the UK violated the WA would have to be solved by the legal means of the negotiation, mediation or conciliation, unless the parties in the dispute come to an agreement to resort to arbitration. An example of such an approach is the case of \textit{Atlanto-Scandian Herring Arbitration}\textsuperscript{114}, between the EU and Denmark, before the PCA, although there the dispute was between the EU and a Member State and in the case of a the WA it would be between the EU and a former Member State.

One traditional variant in the case of international responsibility consists in that the state of nationality of the individual who has suffered the damage could claim against the state that has caused it to demand “the compliance of the public international law in the person of its nationals”. This 	extbf{diplomatic protection}\textsuperscript{115}, would require a prior exhaustion of domestic remedies in the state causing the damage. Likewise, it would be necessary to mention the 	extbf{consular protection}, which counts on reiterated issues in which the ICJ enforced provisional measures to avoid the execution of the death penalty in the USA\textsuperscript{116}, will limited effect.

A different question would be that a Member State had a prior jurisdictional link agreed with the UK, as both agree to fall under the “compulsory jurisdiction” of the ICJ. In that case, that EU Member State could lodge a claim against the UK before the ICJ for some of the causes provided in Article 36 (2) of the ICJ Statute over the WA.\textsuperscript{117} Most EU Member States fall under this category.\textsuperscript{118} However, this does not mean that it such an option is the best. The UK is the only Permanent Member of the United Nations Security Council which still is bound by the ICJ compulsory jurisdiction. The reason could be that – unlike France and the USA – it has not lost any case before the ICJ in over half a century. Besides the excellence of its legal counsels (and the influence of the Anglo-Saxon lobby in this field) we should add the fact that it would be impossible to forcefully execute an ICJ judgment against the UK without its consent: according to Article 94 (2) of the UN Charter,\textsuperscript{119}

\textsuperscript{113} At the first time on EC age, it was used “substitution principle” to argue EC was obliged by GATT rules (CJEU, \textit{International Fruit Company}, C-21 to C-24/72), even if are not part in that agreement. But, this rule was applied only respect treaties concluded by MS before to come in EC. Otherwise, in Human Rights matters, never was employed this principle. Because [EC and] EU have \textit{not an} exclusive competence on human rights matters. This was ruled by CJEU in Opinion 2/94. So, it would be necessary the accession of EU to ECHR, if sometimes shall happens. However, see supra, First Part, I.2, about new reflections on this “principle” under Singapore FTA agreement and relationship with the character (exclusive or shared) of the EU competence.

\textsuperscript{114} \textit{Atlanto-Scandian Herring Arbitration}, between Denmark (acting on behalf of the Faroe Islands) and the European Union, 23 September 2014 (\url{https://pcacases.com/web/sendAttach/781}).

\textsuperscript{115} Subject to strict rules than make difficult international courts judge on merits, especially if injured person is a company. See European Parliament Policy Department for Citizens’ Rights and Constitutional Affairs, \textit{The impact and consequences of Brexit on acquired rights of EU citizens living in UK and British citizens living in the EU27}, Study for the AFCO Committee, April 2017, IPOL STU (2017) 583.135, EN, pp. 22-27.

\textsuperscript{116} ICJ Judgments, \textit{Bréard} (Paraguay v USA); \textit{LaGrand} (Germany v. USA), 27 June 2001; \textit{Avena y otros nacionales mexicanos} (México v USA), 31 March 2004.

\textsuperscript{117} “a. The interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation”.

\textsuperscript{118} \url{http://www.icj-cij.org/en/declarations}: Austria, Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Spain, Sweden and UK.
the necessary measures to implement the execution of a judgment would have to be adopted by the Security Council (if considered necessary). And the UK maintains a veto right (Article 27 (3) UN Charter) over any such decision.

For all these reasons, it would be more appropriate that the WA includes an international settlement of dispute mechanism. There are pros and cons in that EU Member States could also have access to it. In favour of such access is the argument that, even though Member States are not parties to the WA, they are obliged to comply with it by virtue of the Article 216 (2) TFEU. Therefore, they would have obligations but not rights derived from the WA whose compliance would be requested. It therefore seems fair to offer Member States access to this mechanism, faster than the general provisions of public international law consent, to allow eventual claims to diplomatic protection for its nationals go through a quicker means of settlement. On the other hand, the disadvantage is that Member States acquire a competence over the application of the WA which was exclusive to the EU during the negotiation of the WA and could negatively influence the necessary consensus vis-à-vis the UK, still negotiating a Future Relationship Agreement with the EU.
6. THE EU POSITION OVER CJEU JURISDICTION

According to the EU, the jurisdiction on the interpretation and application of the WA should correspond to the CJEU, notwithstanding the existence of a second dispute settlement mechanism of an extrajudicial character linked to the governance of the WA. Following a first EP resolution of 5 April 2017119, the EU position was formulated in the orientations of the European Council of 29 April 2017, the guidelines\(^\text{120}\) of the Council of 22 May 2017,\(^\text{121}\) a Commission paper on “essential principles” of 29 May 2017\(^\text{122}\) and of 12 June 2017\(^\text{123}\), completed with a number of other position papers.\(^\text{124}\) These latter texts are complementary to each other but on occasions they contain information which is not always congruent. More specifically, it is convenient to examine the position of the EU in four different aspects: 1) the continuity of the CJEU jurisdiction in ongoing issues; 2) the CJEU jurisdiction on the interpretation and application of the WA; 3) the complementary settlement of dispute mechanism; and 4) the financial settlement.

6.1. The continuity of CJEU jurisdiction in ongoing matters

The orientations of the European Council of 29 April 2017 examined the continuance of jurisdiction over pending issues before the CJEU at the moment of the UK’s withdrawal. This is a question of pure procedural logic and legal security which will evidently cease to exist, after a reasonable amount of time. The principle of continuity of jurisdiction should cover not only the ongoing procedures before the CJEU, but also the administrative procedures initiated by the Commission. That jurisdiction would extend to the disputes relating to acts (or situations) occurring before the entry in force of the withdrawal related to the application of EU law.\(^\text{125}\) This approach has been referred to by the Council in its Negotiation Guidelines of 22 May, which added the continuity of the enforceability of the acts which impose pecuniary obligations and/or the rulings of the CJEU dictated before the entry in force of the withdrawal.\(^\text{126}\) To this we would further add

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\(^{119}\) European Parliament Resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union, 2017/2593, Strasbourg, 5 April 2017.


\(^{121}\) Council of the European Union (2017), Annex to Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union, 21016/17 ADD 1 REV 2, 22 May.


\(^{125}\) Point 16. “Arrangements ensuring legal certainty and equal treatment should be found for all court procedures pending before the Court of Justice of the European Union upon the date of withdrawal that involve the United Kingdom or natural or legal persons in the United Kingdom. The Court of Justice of the European Union should remain competent to adjudicate in these procedures. Similarly, arrangements should be found for administrative procedures pending before the European Commission and Union agencies upon the date of the withdrawal that involve the United Kingdom or natural or legal persons in the United Kingdom. In addition, arrangements should be foreseen for the possibility of administrative or court proceedings to be initiated post-exit for facts that have occurred before the withdrawal date”.

\(^{126}\) Council of the European Union (2017), Annex to Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union, 21016/17 ADD 1 REV 2, 22 May, p.15.
the continuity of the jurisdiction on the issue of “goods placed on the market” the day of the entry in force of the withdrawal.\textsuperscript{127}

In its position paper of 28 June 2017, the Commission distinguishes its general approach to the issue and a specific treatment relating to the fields of Police and Judicial Cooperation in Criminal Matters\textsuperscript{128} and Judicial Cooperation in Civil and Commercial Matters\textsuperscript{129}; in this latter, it refers to the domestic Member States courts. Regarding the CJEU, the continuity of the jurisdiction would affect the procedures for infringement (Articles 258 to 260), failure to act (Article 263), omission (Article 265), preliminary rulings (Article 267), jurisdiction clauses contained in a contract (Article 272) and jurisdiction by special agreement (Article 273) as well as on the request for interim measures (Article 279)\textsuperscript{130}, that is, the main procedures which can be brought before the CJEU.

These guidelines could be important when deciding on the CJEU jurisdiction for the actions occurring in the course of the negotiation. Up to now, it does not appear that the UK government is opposed to this, except to that relating to the actions derived from facts arising before withdrawal, with respect to which the UK would not admit the CJEU jurisdiction, if the claim were subsequent to the withdrawal. The UK believes that the resulting situation could negatively affect certainty for citizens and firms.\textsuperscript{131} In any case, such disputes could be solved by applying Article 70 (1) (b) of the 1969 VCLT\textsuperscript{132}, which is a rule of international customary law and which provides that the termination of a treaty “\textit{does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination}” (emphasis added). However, in view of a possible application of the customary rule included in the VCLT, it would be better to refer to “actions” that generate “\textit{rights, obligations or legal situations}” arising before the withdrawal.

The unilateral approach of the UK government in order to avoid CJEU jurisdiction consists of leaving citizens’ rights out of the WA. In any case, if the Commission found that the UK infringed EU law before withdrawal and thus while the EU law is still in force in the UK, it could initiate an infringement procedure before withdrawal enters into force\textsuperscript{133} and aim to

\begin{footnotesize}
\begin{enumerate}
\item[129] https://ec.europa.eu/commission/publications/position-paper-transmitted-eu27-judicial-cooperation-civil-and-commercial-matters_en. Later referred to domestic courts of MS. “The relevant provisions of Union law applicable on the withdrawal date should continue to apply to choices of forum and choices of law made prior the withdrawal date. Judicial cooperation procedures that are ongoing on the withdrawal date should continue to be governed by the relevant provisions of Union law applicable on the withdrawal date.” And, like a General Principles, “(2) The relevant provisions of Union law applicable on the withdrawal date establishing the Member State whose courts are competent should continue to govern all legal proceedings instituted before the withdrawal date. (3) Choices of forum made prior to the withdrawal date should continue to be assessed against the provisions of Union law applicable on the withdrawal date. (4) The relevant provisions of Union law applicable on the withdrawal date on recognition and enforcement of judicial decisions should continue to govern all judicial decisions given before the withdrawal date”.
\item[132] As was explained at the report quoted in footnote 112 at supra, [31-33].
\end{enumerate}
\end{footnotesize}
provide the CJEU with sufficient competences to decide on that infringement after withdrawal.

6.2. The CJEU’s jurisdiction on the interpretation and application of the WA

The EP was the first to claim that the CJEU should be the competent authority to supervise the interpretation of, and compliance with, the WA. Access to the Single Market and the Customs Union entails the acceptance of the four freedoms and the jurisdiction of the CJEU, including during the transitional period. Likewise, the orientations of the European Council, albeit in a more implicit manner, confirmed the convenience of a dispute settlement mechanism in the WA which includes the CJEU, given the necessity to preserve the autonomy of the EU legal system. The guidelines proposed by the Commission for approval by the Council place more emphasis on CJEU jurisdiction. Those guidelines pose a number of issues.

Firstly, it is foreseen that the WA should contain an institutional structure which is responsible for monitoring the enforcement of the agreement. Such a structure must include the CJEU. Furthermore, the institutional structure would also regulate the settlement of disputes and enforcement of the agreement on certain issues, such as the continued application of EU law, citizens’ rights, the financial settlement and unforeseen circumstances.

Secondly, the competent jurisdiction over the WA is, by default, the CJEU and an alternative mechanism is envisaged for the application and interpretation of provisions other than those “relating to Union law.” The text confirms directly and implicitly that it would fall upon the CJEU to have jurisdiction over all matters relating to the interpretation and application of EU law regarding the WA. The UK response, though, to safeguard citizens’ rights only under UK jurisdiction is not acceptable. To bring into line such diverging positions, it would be necessary to fine-tune the criteria of attribution of

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135 Annex to Council decision (EU, Euratom) 2017/... authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union - Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, point 17. “The withdrawal agreement should include appropriate dispute settlement and enforcement mechanisms regarding the application and interpretation of the withdrawal agreement, as well as duly circumscribed institutional arrangements allowing for the adoption of measures necessary to deal with situations not foreseen in the withdrawal agreement. This should be done bearing in mind the Union’s interest to effectively protect its autonomy and its legal order, including the role of the Court of Justice of the European Union” (emphasis added). (https://www.consilium.europa.eu/media/21766/directives-for-the-negotiation-xt21016-ad01re02en17.pdf).

136 Ibid. point 39: “The Agreement should set up an institutional structure to ensure an effective enforcement of the commitments under the Agreement, bearing in mind the Union’s interest in effectively protecting its autonomy and its legal order, including the role of the Court of Justice of the European Union.”

137 Ibid. point 41: “The Agreement should include provisions ensuring the settlement of disputes and the enforcement of the Agreement. In particular, these should cover disputes in relation to the following matters: - continued application of Union law; - citizens’ rights; - application and interpretation of the other provisions of the Agreement, such as the financial settlement or measures adopted by the institutional structure to deal with unforeseen situations”.

138 Ibid. Point 42: “In these matters, the jurisdiction of the Court of Justice of the European Union (and the supervisory role of the Commission) should be maintained. For the application and interpretation of provisions of the Agreement other than those relating to Union law, an alternative dispute settlement should only be envisaged if it offers equivalent guarantees of independence and impartiality to the Court of Justice of the European Union” (emphasis added).

139 It has to be noted that the English and French versions of paragraph 43 are not exactly identical. The English version speaks of “alternative dispute settlement” and the French version of “Système de règlement extrajudiciaire des litiges”. So, at first sight, we do not know whether this alternative mechanism could be a court or not.
jurisdiction to the CJEU. Throughout its case-law, the CJEU has set as criterion for its jurisdictional role, on one hand, the necessity to maintain the autonomy of EU law and, on the other, that of ensuring a uniform and homogenous interpretation of it, to guarantee the “very nature” of EU law and, indirectly, fundamental rights within the legal field of the EU.

Thirdly, the interpretation of the WA should be carried out following the jurisprudence of the CJEU. There is no problem, from the UK side, to accept the case-law issued before withdrawal, the incorporation of which is foreseen through the EUWB. But the UK opposes taking into account future case-law. However, in the case of the WA with a transitional period, the future CJEU case-law should continue to be applied during the transitional period to avoid a lack of homogeneous application of EU law. Therefore, the possible alternative mechanism of dispute settlement must also follow such a guideline.

The Commission proposes the creation of a “mechanism analogous to Article 267 TFEU” able to interpret the WA. Arguably it would be easier to maintain the existing mechanism under Article 267 during the transitional period than to establish a new one for the same purpose.

However, for this to happen it would be necessary to solve a problem. The Treaties do not foresee that the courts of a third country could resort to the CJEU. This is significant because UK domestic courts and tribunals would be organs of a third country from the moment the withdrawal enters into force. However, as seen if the first part of this study, some agreements concluded by the EU with third countries allow for the possibility of a preliminary ruling being by third countries’ courts.

The best way to allow for such a possibility could be by means of a protocol between the EU, the EU Member States and the UK. The protocol would have a limited duration during the transitional period. The EEA has foreseen such a solution, without limiting its application in time. There are other mechanisms with similar effects that could have inspired the Commission’s idea of an “analogous mechanism” but, judging by the CJEU opinion on the European Patent Tribunal, such mechanisms could have difficulties to pass an eventual opinion of the CJEU over an “analogous mechanism”. There is of course a

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140 Ibid point 43. “The Agreement should foresee that any reference to concepts or provisions of Union law made in the Agreement must be understood as including the case-law of the Court of Justice of the European Union interpreting such concepts or provisions before the withdrawal date. Moreover, to the extent an alternative dispute settlement is established for certain provisions of the Agreement, a provision according to which future case-law of the Court of Justice of the European Union intervening after the withdrawal date must be taken into account in interpreting such concepts and provisions should be included” (emphasis added).

141 Ibid (2) Citizens should thus be able to enforce their rights granted by the Withdrawal Agreement in accordance with the same ordinary rules as set out in the Union Treaties on cooperation between national courts and the Court of Justice, i.e. including a mechanism analogous to Article 267 TFEU for preliminary reference from UK courts to the Court of Justice of the European Union” (https://ec.europa.eu/commission/sites/beta-political/files/essential-principles-citizens-rights_en_3.pdf).

142 Protocol 34 of the EEA Agreement on the possibility for Courts and Tribunals of EFTA States to request the Court of Justice of the European Communities to decide on the interpretation of EEA rules corresponding to EC rules.

143 Ibid point 64. The system set up by Article 267 TFEU therefore establishes between the Court of Justice and the national courts direct cooperation as part of which the latter are closely involved in the correct application and uniform interpretation of European Union law and also in the protection of individual rights conferred by that legal order”. It follows from all of the foregoing that the tasks attributed to the national courts and to the Court of Justice respectively are indispensable to the preservation of the very nature of the law established by the Treaties. (…) 89. Consequently, the envisaged agreement, by conferring on an international court which is outside the institutional and judicial framework of the European Union an exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of the Community patent and to interpret and apply European Union law in that field, would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts and, consequently, would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law” (emphasis added).
difference: after the withdrawal, the UK courts even though they would continue to act as courts of a Member State, they will be courts of a third country. As a result, the dual nature of the agreement (if it includes a transitional period) may provoke a degree of duality in the UK’s domestic courts and tribunals. The issue at stake is whether the fact that the UK courts act as courts of a Member State while they do not actually enjoy that status might lead the CJEU to decide that this might deprive courts in the UK “of their powers in relation to the interpretation and application of EU law”.

6.3. A complementary dispute settlement mechanism

The European Council Guidelines provide little detail on the alternative dispute settlement mechanisms which the WA could contain. They do not clarify, in the first place, what would be an “alternative” mechanism, or if preferred, a complementary mechanism to the CJEU. Secondly, it is not clear whether it would be “extrajudicial”, that is a Joint Committee, or a court or tribunal. Third, its competences would revolve around “the application and interpretation of provisions of the Agreement other than those relating to Union law”, but the criteria of attribution of competence would difficult to understand for the EU and its Member States since the WA in its totality forms part of EU law. However, institutions may be thinking of a means of dispute settlement over provisions of the WA after the end of the transitional period. However, there is no clarity about the period in which this mechanism could work. If this mechanism were a Joint Committee, it would be enough to provide whether it would have competence to settle a dispute directly or also, if necessary refer it to an arbitration tribunal.

Nevertheless, minor questions could be asked as to its competence over issues such as the costs derived from the actual process of negotiation of the WA as well as the possibility of “unforeseen situations”. However, its practical importance would be greater than initially foreseen in so as much as issues to be found in the following situations could ultimately end up in the alternative mechanism. In the first instance, (other) issues that the CJEU does not have jurisdiction over according to the Treaties. Second, issues relating to which, even with the CJEU possibly having jurisdiction, there be an agreement between the parties for them not to be submitted to its jurisdiction. Or if preferred, in which both parties renounce making use of their capacity to pose the difference before the CJEU.

A Commission position paper helps to explain this vague draft. The alternative mechanism would be nothing more than a Joint Committee, to which the parties of the WA could refer to resolve the dispute. The Committee would have competence to adopt, “where necessary, appropriate measures to implement the solution agreed between the contracting parties”. However, an area which may require further clarification is that, if the Joint Committee is “unable to reach a solution”, the issue can be referred again to the CJEU. As a result of this, the mechanism stops being an “alternative”. Therefore, the possibility of being able to access an arbitration panel (such as in the Singapore FTA or CETA) should be examined.

Two further issues remain unresolved in the current draft. The first regards the possibility to foresee access for the Member States, even though they are not strictly “parties” of the WA. The second regards the right for individuals, too, to access to have access to the Joint Committee.

The first question would seek to resolve the problems that an EU-27 Member State could face, under public international law, because of the fact that, as it is not “party” of the

WA, it would lack legal standing to litigate against another subject of public international law causing damage to its nationals by the breach of the WA. The Joint Committee would be a quicker and more flexible mechanism than the ICJ or an arbitration panel, to settle a dispute between the Member State in question and the UK. In addition, this mechanism would offer an advantage in a situation where there is no WA or if the WA includes an alternative mechanism to which the MS of the EU could not resort. However, the disadvantage is the risk of a breakdown of consensus within the Council during a period of time in which it still would be negotiating the Future Relationship Agreement.

The second question is more complex and could be resolved by arguing that the access of the individuals would be possible, but not convenient. After the Second World War, a Mixed Commission of Conciliation and Arbitration was established, before which individuals could claim reparations for the damage they had suffered. At that time, however, the regimes that had caused the damage has disappeared and, in many cases, the corresponding legal documents to which the people could have pleaded had also vanished.

In another contemporary case (disputes generated by the revolutionary regime of Iran\textsuperscript{145}), a conciliation and arbitration mechanism with direct access for the affected individuals functioned successfully. However, it does not seem that an Iranian residing in the USA could have access to Iranian courts for the damages caused by the regime to his economic rights, which would eliminate the problem of the exhaustion of domestic remedies. Furthermore, after the assault on its embassy in Teheran, in 1979, the US government froze Iranian public funds in North American banks which allows to provide funds for the compensation of damages and, also, for the cost of the mechanism. Again though, the context would not be comparable.

But the most significant factor is that such an approach would weaken the most orthodox and efficient solution to protect citizens’ rights, which is maintaining the CJEU jurisdiction and the loyal cooperation of the domestic jurisdiction of the withdrawing State during the transitional period. In fact, any potential access of individuals to the alternative mechanism could only be considered after the end of the transitional period and, normally, only after the exhaustion of the domestic remedies in the state of residence.

6.4. Jurisdiction and the financial settlement

The practical importance of the financial settlement is not going to be as great as the media suggests, judging by the published information. A report from the House of Lords defines the reste à liquider or amount pending payment as a difference between the payments committed and those already paid\textsuperscript{146}. Although the present Multiannual Financial Framework will end in 2020 and the British withdrawal should normally be produced on March 2019, many of those payments could be postponed until 2023\textsuperscript{147}.

Another extensive report (July 2017) from the UK Office for Budget Responsibility, signals that, even though (the amount) of the “divorce bill attracts attention, it does not put the UK budget sustainability in danger. Much more important for the long-term growth of the


\textsuperscript{146} House of Lords European Union Committee, Brexit and the EU Budget, HL Paper 125, 4 March 2016-17, p.12, (https://publications.parliament.uk/pa/id201617/idselect/ldeucom/125/125.pdf).

\textsuperscript{147} Under decommitment rule or N+3 rule. Ibid.
British economy would be the Future Relationship Agreement.\textsuperscript{148} Brexit generates uncertainties regarding future productivity, negative growth of the working population and the weakening of the economic growth around the time of the withdrawal\textsuperscript{149}. There are risks associated with Brexit. Since the referendum, the UK pound sterling has gone down 14\% and it has weakened foreign investment in the UK. In the short term productivity and investment is likely to decrease. Furthermore, if immigration process is made to be more difficult then there is the potentially tax revenues to also decrease. The financial sector will also be substantially affected.\textsuperscript{150}

From a legal perspective, the “divorce bill” does not affect persons directly and individually and thus do not engender rights that may be invoked before a court, even though in some cases they were final beneficiaries of the committed financial contribution (ERASMUS students or beneficiaries of the Facility for Refugees in Turkey). Whatever the content of the agreement it does not seem to put in danger the uniform application, the autonomy or the homogeneity of EU law. Independently of the schedule of the payments, the settlement would take place in only one act, without any projection in the future. The question is rather whether disputes arising from its application should necessarily fall under CJEU jurisdiction.

The position of the EU is that the competent jurisdiction over financial settlement issues should be the CJEU, due to the fact that the origin of the financial settlement is the EU budget and the separate budgets of its organs, agencies and affected funds.\textsuperscript{151} And, above all, the connection of all those entities with the 65 legal based acts corresponding to the EU. In this case, according to paragraph 42 of the European Council’s guidelines, the CJEU would have jurisdiction.

Some details allow to perceive that the EU position would be more flexible on this point than on the citizens’ rights. In the first place, there is no express reference to the CJEU jurisdiction either in the working paper of the Commission\textsuperscript{152} or in its previous position paper.\textsuperscript{153} Secondly, there is reference that the reconstruction of the debt and the postponement of its payments could pass over to the second phase of the negotiation.\textsuperscript{154} It is to be assumed that an eventual “leftover” without closure of this part of the negotiation would not prevent the conclusion of the WA.

Therefore, although the optimal solution for the financial question would be a negotiated one, CJEU jurisdiction over it does not constitute an insurmountable legal obstacle: an eventual dispute on some relevant point could pass to the Joint Committee instead of the CJEU. This can be achieved either by a technical dossier protocol annexed to the WA setting the terms of that dispute and separating it from EU law or by an special agreement between the Parties involved (the EP, the Commission, the Council and the UK), whereby they would expressly renounce their right to bring a legal action before the CJEU for an issue relating to financial settlement. Anyway, it would always be better to solve an isolated controversy through the Joint Committee rather than fail to conclude the WA since

\textsuperscript{148} “A lot of attention focuses on the possible "divorce bill", but, while some numbers mooted for it are very large, a one-off hit of this sort would not pose a big threat to fiscal sustainability. More important are the implications of whatever agreements are reached with EU and other trading partners for the long-term growth of the UK economy”. \textit{Fiscal risks report}, July 2017, Cm 9459 (http://budgetresponsibility.org.uk/fiscal-risks-report/), p. 5.

\textsuperscript{149} Ibid. p. 7.

\textsuperscript{150} Ibid. p. 68-69.

\textsuperscript{151} They include 11 organs, 6 agencies, 35 decentralized agencies, 8 joint ventures, 1 associated fund, 2 not consolidated funds, 4 trust funds and 6 other bodies. Ibid. p. 75.


\textsuperscript{154} Ibid. p. 5.
it is worth to remember that, in the absence of a WA, public international law is “slow to litigate and hard to enforce”.\textsuperscript{155}

\textsuperscript{155} \textit{Brexit and the EU Budget}, op. cit. p. 64.
7. A CJEU OPINION ON THE WITHDRAWAL AGREEMENT

7.1. Who can request an opinion and for what purpose

The negotiation procedure for an international agreement by the EU allows, before the consent of the EU is provided, to consult the CJEU on the compatibility with the Treaties, including fundamental rights, without prejudice to its right to rule subsequently on the interpretation and application of the agreement. The objective of jurisdiction subsequent to the agreement’s entry into force would be different, as the CJEU would then examine the validity of the acts of the EU institutions by which the agreement is approved and could, for instance, annul the Council’s act which enacted the agreement. However, to verify the compatibility of the content of the agreement with EU law, the consultation path has to be used.

Article 50 (2) TEU refers to Article 218(3) TFEU regarding the procedure for the conclusion of the WA. Although it does not imperatively demand a prior consultation of the CJEU, there exists a high probability of it by means of the application of Article 218 (11) TFEU. Therefore, the Council, the Commission, the EP or Member State could ask for the opinion under Article 218 (11) TFEU. Arguably it would be reasonable to do so with a treaty of such importance for the coherence and homogeneity of EU law and for the protection of citizens in particular as it is important to avoid “serious difficulties” in their complex application. In the majority of cases it has been the Commission which proposed the consultation. However, in the case of the WA, bearing in mind that the weight of the negotiation falls on the Commission, it would seem more logical that it should be the EP, the Council or a Member State member to request the opinion.

The CJEU could declare the WA incompatible with the Treaties, as much for reasons of lack of competence of the EU institutions or for defects in the form or the procedure, as for fundamental reasons, if the content of the WA were different to what it should be, taking into account the inherent guarantees to an matter of the EU legal system (material incompatibility).

Moreover, the terminology employed should not lead to error: the CJEU opinion, if required under Article 218 (11) TFEU, is binding on the EU. For example, if the WA includes a dispute settlement mechanism whose compatibility with the Treaties is questioned and the CJEU is consulted in this respect, the EU cannot conclude the WA, if and the Court finds that this mechanism is incompatible with the Treaties, unless it eliminates the incompatible content, or unless the relevant provisions in the EU Treaties revised, something highly unlikely. It is therefore necessary that the WA does not contain any provision which the CJEU has considered incompatible with the Treaties in its previous case-law.

156 As evidenced in the question for opinion submitted to the CJEU by the Belgian government over chapter 8, section F, of the CETA agreement with Canada (see above Part One).
157 For example, Case C-104/16P Council v. Front Polisario, 21 December 2016
158 “[11] A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised”.
159 Opinion 1/09 of the Court, 8 March 2011, European and Community Patents Court; “[48] A possible decision of the Court, after the conclusion of an international agreement binding upon the European Union, to the effect that such an agreement is, by reason either of its content, or of the procedure adopted for its conclusion, incompatible with the provisions of the Treaties could not fail to provoke, not only in the internal European Union context, but also in that of international relations, serious difficulties and might give rise to adverse consequences for all interested parties, including third countries”.

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7.2. The timing of requesting the opinion

The normal time for such a request to the CJEU would be when there is already an established text of the WA and before the EU manifests its consent thereupon. In practice however, it is not essential that there be a definitive text already agreed by both parties. On various occasions, an opinion has been requested when there was still no definite text. There is, however, no precise procedural moment to submit the request, but rather a period of time which starts when there is **sufficient information** about the content of the agreement, and ends when the EP and the Council manifest their consent to the agreement.

In most cases that the CJEU has issued an opinion on an agreement whose text has not yet been adopted definitively, it has referred to questions of compatibility extrinsic to the actual agreement, in particular (as in Opinion 2/94, the first of those relating to the accession to the ECHR\(^{160}\)), to whether the EU possessed the **competence** to conclude it. But this has not always been the case: in approximately half a dozen cases the question focused on the compatibility of the content of the agreement with the Treaties. In five of those cases, the CJEU stated that the content of the agreement was incompatible with the Treaties. “Most of the cases of material incompatibility are linked with the desire of the CJEU to preserve the autonomy of EU law and, particularly, its position as **guarantee of that regulation**”.\(^{161}\)

7.3. The content of the question: material compatibility with the Treaties, including fundamental rights

The crux of the question would be that of the limits of the CJEU jurisdiction in the framework of Article 218 (11) TFEU. In theory, the field of a consultative jurisdiction should be limited by the actual terms of the consultation. If the question regarded an international agreement and there were a draft text of that agreement, the question would normally refer to some specific provision or aspect of that draft which raises doubts of compatibility.

Yet, it does not necessarily have to be this way. For example, if the CJEU pronounced on questions of material compatibility, or that is, between the content of the agreement and the rest of EU law, could the scope of the question be extended to issues that have formed part of the negotiation but have finally not been included in the definitive text of the agreement?

The question is not trivial if we consider the possibility that, in the light of such divergent perspectives between the UK and the Commission during the first stage of the negotiations, it may not be possible to reach an agreement on citizens’ rights. The first option would be not to conclude any form of WA, which would lead to a withdrawal without an agreement. Another option, though, would be to conclude an agreement on the other negotiated issues (financial settlement, the Irish border etc.), leaving out citizens’ rights or some parts of it. Protection of these rights, then would only rely on the new UK legislation leaving its application in the hands of the UK courts or in that of the courts of the EU-27 if it concerns UK nationals in one of the EU-27.

In the light of the significance of the issues, the possibility exists that the EP refuses to give its consent to the WA before the Council. A second option could be that, before it gives its consent, it consults with the CJEU about the material compatibility with the

\(^{160}\) Opinion 2/94 of the Court of 28 March 1996.

\(^{161}\) Sánchez Legido, A. *op. cit.* [489].
Treaties of the incomplete WA (that is, whose definitive adopted text does not include a substantial part of what initially negotiated).

The EP could raise such question without having to come to an agreement with the other EU institutions. It could also raise such a request before any other interested actor, strengthening its position. For example, it could occur that a Member State particularly affected due to the number of its nationals residing in the UK (such as Poland), becomes a minority in the Council, in the case of a breakdown in the consensus and decides to request such a consultation. Alternatively, a Member State like Belgium whose parliament is particularly sensitive to fundamental rights of citizens (as seen in the request of opinion about the CETA) decides to request a CJEU opinion thereupon. In both cases, the EP could act before these states, because its intervention in the process to consent to the WA comes before the other actors and because citizens’ rights are one of the more relevant concerns of EP in this negotiation.

In either instance, we would have to start from the presumption that those who can request the opinion of the Court possess a legitimate interest in the question and possess knowledge of the content initially foreseen in the WA thanks to the relevant documentation issued by the Commission in its Position Papers, in which the question of the citizens’ rights figures extensively and in detail. The question could ask whether it is compatible with EU law that the EU conclude a WA which does not contain a guarantee of protection of citizens’ rights. It is clear that there are no “acquired rights” for citizens derived of a state’s EU membership after that state’s withdrawal. The extension of such rights would only be possible if provided in the WA.

The question could have two variants. First, that the content of the WA does not contain a reference to citizens’ rights, meaning that they would have no form of protection other than that granted by UK domestic legislation. Second, that the content of the WA relating to citizens’ rights is incompatible with the Treaties, for example, if it provided that the settlement of the disputes relating to their enforcement would fall completely outside of CJEU jurisdiction. The second variant would foreseeably meet with a rejection by the CJEU. The first, however, would not be so clear, in as much as the CJEU guarantees the homogenous interpretation of EU law within the EU, not necessarily in a third country. However, we must recall that there are at least three exceptional cases in which an interpretative preliminary reference could be made to the CJEU from a court, tribunal or arbitration panel of a third country.

In any case, what is intended with this protection against the risk of omission to protect or of inadequate protection, is an increase of the constitutional function of the CJEU by means of a prior compatibility control of an international agreement with the Treaties. The doctrine has affirmed “the constitutional scope of this control and the constitutional mission with which the CJEU will be endowed when it happens”.

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162 In its Opinion 1/09, CJEU told: “[55] As regards, thirdly, the question raised as to institutional balance, it must be observed that it is not a prerequisite condition of being able to submit a request for an Opinion pursuant to Article 218 (11) TFEU that the institutions concerned have reached final agreement. The right accorded to the Council, the Parliament, the Commission and the Member States to ask the Court for its Opinion can be exercised individually, without any coordinated action and without waiting for the final outcome of any related legislative procedure. In any event, the Parliament retains the right itself to submit a request for an Opinion” (emphasis added).


it could be useful to remind the Council of the aims of the Union which should continue to guide the European project.

Over the years, the CJEU has expressed on numerous occasions its desire to maintain its exclusive competence over the homogenous and uniform interpretation of EU law. Although in theory the existence of another court capable of applying EU law or part of it is indeed compatible with the Treaties (Opinions 1/91 and 1/92), in practice the only tribunal which managed to pass the test of compatibility has been the EFTA Court in the EEA. Neither the projected European Patents Tribunal nor the ECtHR have passed the necessary requirements in a satisfactory manner. In the event that the application of EU law should continue during the transitional period stipulated in the WA, the final arbiter and guarantor should continue to be the CJEU.

Certainly, in the case we contemplate the situation would be exceptional: the CJEU would guarantee these rights in a third country (the UK) rather than in the EU. This situation would imply that the CJEU receives an extraterritorial interpretative jurisdiction. For such a situation to function, the loyal cooperation of UK judges would be essential. They, in turn, would rely on the terms of the EUWB adopted by the UK Parliament. If such an exceptional guarantee is not foreseen in the WA during the transitional period it would render it legally unfeasible. The EU negotiators might convince the UK to accept such a provision if it were established as a necessary condition for the approval of the WA by the EP. The EP could also make its consent conditional upon the CJEU’s clear declaration in its opinion that, during the transitional period, it has jurisdiction over the interpretation of EU law also on the UK territory.

For the CJEU, this would be an occasion to proclaim that it is an effective guarantor of rights, given the criticism it received after the Opinion 2/13 blocked the process of accession of the EU to the ECHR. Therefore, a question on the compatibility of the WA with the Treaties if the negotiators agree to leave the citizens’ rights out of the WA or provide for insufficient guarantees thereof does not seem absurd. It is of course uncertain whether the CJEU will take position on issues which do not form part of the text of the agreement, but should have been part of it, taking into account the duties of the EU and of Member States to protect their citizens.

Taking into account the CJEU Opinion 1/09 on the European Patents Tribunal, the information on the content as well as on the background of the WA, besides the documentation published by the Council and the Commission, would be sufficient for the Court to form a sufficiently certain judgment on the question raised. Therefore, the duty of the EU to guarantee the fundamental rights of citizens, could extend not only to the expected final content of the agreement, but also to what it should have contained to maintain coherence with the Treaties. Even with such uncertainty,

165 González Alonso, N. (2012), “¿Fundamentalismo constitucional en Luxemburgo? El Tribunal de Justicia y los límites de la autonomía del sistema jurídico de la Unión Europea a la luz del dictamen 1/09”, 43 REDE, 251-254. 166 "[49] It should be recalled that, where the Court is required to rule on the compatibility of the provisions of an envisaged agreement with the rules of the Treaty, the Court must have sufficient information on the actual content of that agreement (see Opinion 2/94, paragraphs 20 to 22). [51] Moreover, it must be observed that the request for an Opinion makes reference to the background to the draft agreement (...). [52] In those circumstances, the Court considers that it has sufficient information both on the content of and background to the envisaged agreement. [53] (...) it must be recalled that a request for an Opinion can be submitted to the Court before the commencement of international negotiations, where the subject-matter of the envisaged agreement is known, even though there are a number of alternatives still open and differences of opinion on the drafting of the texts concerned, if the documents submitted to the Court make it possible for the Court to form a sufficiently certain judgment on the question raised by the Council (emphasis added)”. 167 Opinion 2/13 of the Court, 18 December 2014, [150], The Court inserts this key paragraph, "(...) The Court must confine itself to examining the compatibility of that agreement with the Treaties and satisfy itself not only that it does not infringe any provision of primary law but also that it contains every provision that primary law may require” (emphasis added).
the mere possibility of a CJEU consultation on the content of the WA during the negotiation process would create an element of pressure on the UK to accept the EU position and maintain CJEU jurisdiction on citizens’ rights during the transitional period.
8. CONCLUSIONS OF THE SECOND PART

8.1. The role of the CJEU in WA disputes

The CJEU’s jurisdiction over the WA does not depend on considerations deriving from the nature of the Agreement but rather from the fact that the WA would (or would not) interpret or apply EU law. Thus, it is important to distinguish between two possible situations. First, if the WA does not include a transitional period and second, if as more likely, it does.

If the WA does not include a transitional period during which EU law would continue to apply in the UK, it would not be necessary for the CJEU to have compulsory jurisdiction to settle disputes between the parties to the WA, unless it is necessary to interpret or apply EU law (for example to interpret the provisions of EU law which regulate the pending payment obligations of the UK, namely the so-called reste à liquider). In such a case, the competent jurisdiction over the interpretation of such provisions can only be the CJEU.

For the other provisions of the WA, international dispute settlement mechanisms could be chosen by the parties in accordance with the principle of the free choice of means (Joint Committee, arbitration or the jurisdiction of a court other than the CJEU, such as the EFTA Court), as it happens with all other agreements concluded between the EU and third countries.

This may explain why the EU institutions have made reference to an “alternative mechanism”, in addition to CJEU jurisdiction. The primary reason is that any dispute settlement mechanism for the WA would only start operating subsequent to the entry into force of the agreement, which is at the moment of the UK’s departure. Thus, the mechanism would apply once the UK became a third state vis-à-vis the EU and would, as a general rule, be outside CJEU jurisdiction, except for issues related to the interpretation of EU law. The same situation would occur after the end of the transitional period.

8.2. The role of the CJEU in interpreting the WA during the transitional period

If, which is more likely, the WA does include a transitional period during which EU law (or part of it, such as the rights of citizens, the four freedoms, competition rules or public procurement provisions) would continue to apply in the UK, by then a third state, jurisdiction would ultimately reside with the CJEU: the reason being that one cannot separate EU law from the mechanisms of its interpretation and enforcement, given the institutional role of the CJEU to guarantee the autonomy of EU law and its uniform and homogenous interpretation.

The WA is an exception to the general rule in the EU’s agreements with other third countries which do not usually include CJEU jurisdiction. This exception is due to the fact that references to EU law in the WA, and its extension during a transitional period, are at the core of the agreement rather than a secondary issue to free trade provisions.

As seen in the first part, there are other exceptional cases where CJEU jurisdiction is provided for. However, such exceptions are always linked to the CJEU’s interpretative function. Therefore, it would be logical to also apply the same rule in an agreement (the WA) whose core is based precisely on the homogenous interpretation and application of
EU law to the citizens of the EU-27 in the UK and citizens of UK in the EU-27 as before the withdrawal, during the transitional period.

Contracting parties in three different agreements concluded by the EU (which then comprised the UK sharing this approach) and eleven third countries were able to introduce voluntary references to CJEU jurisdiction to solve future disputes on interpretation of certain of their rules, identical in substance to EU rules. Then, it is with greater reason that CJEU jurisdiction should be maintained for disputes arising from the application, during the transitional period, of the EU law itself.

8.3. Maintaining loyal cooperation during the transitional period

The WA should guarantee the future protection of EU-27 citizens for the longest possible time. For this to be achieved, it is necessary to include in the WA a transitional period in which the application of citizens’ rights is prolonged, as if the UK’s withdrawal had not yet occurred. To fully ensure citizens’ rights during the transitional period, the principle of loyal cooperation between the UK courts and tribunals and the CJEU must be maintained, as has been the case since 1973. This requires maintaining the possibility for UK courts to continue submitting to the CJEU preliminary requests of interpretation and to respect the Francovich rule on the responsibility of a Member State for violations of EU law. Both requirements would only apply over matters forming part of EU law to which the WA makes reference. Thus, UK courts should not just continue to apply the jurisprudence created by the CJEU until the withdrawal, but could also incorporate new jurisprudence created during the transitional period.

The UK must accept that, if they wish to benefit from the advantages of a transitional period, they would have to postpone, during that time the application of the two provisions of the EUWB: they should first maintain direct effect and guarantee the primacy of these sections of EU law referred to in the WA and, second, secure the primacy of the WA implementing Act in the UK legal order.

This also requires the postponement, until after the end of the transitional period, of any new UK legislation with the objective of safeguarding fundamental rights, which may lead to the exclusion of the CJEU jurisdiction. Such legislation would never establish analogous or equivalent guarantees to those of the CJEU and would cause an irreversible erosion in the legal situation of EU-27 citizens. The application of such a law would be incompatible with a WA during the transitional period.

.4. A European Parliament request for a CJEU opinion

Throughout the withdrawal negotiations, the EP should be fully aware of the CJEU’s role as guarantor of the autonomy of EU law and of its homogeneous interpretation as well as, indirectly, of citizens’ rights derived from EU law. The most reliable method to secure the necessary level of protection for such rights would be for the EP to request a CJEU opinion on the compatibility of the WA with the Treaties.

The consultative jurisdiction of the CJEU is prior to the conclusion of any international agreement by the EU. Therefore, the request should be made before the EP approves the definitive, established text of the WA. There is not a single opportune procedural moment for this under Article 218 (11). In other words, the request can be made even before the text of the WA has been definitively established (for example, as soon as there is a first draft), the prerequisite being that the CJEU must have sufficient information on the content of the WA to be able to form a full judgment on it. This implies that the EP could potentially request the opinion during the negotiation, should it
detect a risk that citizens’ rights are not going to be sufficiently protected in the WA.

The question itself would refer to the material compatibility of the WA with the EU’s legal order. It could not only cover the content of the draft agreement which is to be submitted for approval by the EP and the Council, but also what should have been included in it (as it formed part of the content of the negotiation) and finally was not included in the text adopted by the WA.

It is not possible to predict with a degree of certainty what the Court’s position would be. Primarily it would depend on the content of the WA, but it could also take into account, as it stated in Opinion 2/13, whether the WA “contains every provision that primary law may require”. This allows the CJEU a wide margin in the evaluation of what the WA should contain to guarantee the autonomy and homogeneity of EU Law and indirectly, citizens’ rights.

8.5. The convenience of an alternative mechanism following the end of the transitional period

The relationship between both dispute settlement procedures foreseen in the WA can be compared to the two sides of a scales. The more you strengthen one, the more you weaken the other. Thus, increasing the competences of the Joint Committee could weaken the possibilities of continuing CJEU jurisdiction.

In light of this, it would be appropriate to extend the competences of the so-called “alternative [to the CJEU] mechanism” for settling disputes, only during the period in which the WA is still in force, but the transitional period has ended, because the application of EU law in the UK and CJEU jurisdiction will also have ceased.

Access to the Joint Committee by the EU Member States could be foreseen following the end of the transitional period, but this possibility could have advantages and disadvantages.

All the Joint Committees created by the agreements studied have competence on the application, implementation or monitoring the agreement. Most of them also have competence in the direct settlement of disputes. They can further start an indirect dispute settlement procedure by intervening in the constitution of an arbitration panel, a possibility which does not currently appear, however, in the position papers of the EU institutions. Such a set of competences would be sufficient for the Joint Committee of the WA. Notwithstanding this, the WA itself can provide for a possible extension of the transitional period, since a two-year period may be insufficient to agree upon the future relationship framework between the EU and the UK. One of the more relevant “unforeseen situations”, in such a case, could be the extension of the transitional period if an agreement for the future relationship has not been reached. A discreet way to achieve this aim could be via the Joint Committee having expressed competence over this matter.
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This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, analyses the various jurisdiction options, under EU law and under public international law, in settling disputes arising from the Withdrawal Agreement of the UK from the EU and in the context of the Future Relationship Agreement with the UK. It examines in particular the continued involvement of the CJEU in the new context of the EU-UK relations and, based on CJEU case-law and previous international agreements, presents the various governance possibilities for these agreements.