DISPUTE SETTLEMENT MECHANISMS IN INTERNATIONAL AGREEMENTS OF THE EUROPEAN UNION

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This article attempts a systematisation of the types of dispute settlement mechanisms in EU international agreements, and it comments upon their most salient features from the perspective of EU law. All EU dispute settlement is peaceful dispute settlement. Within this type of dispute settlement, several categories can be distinguished: some EU international agreements contain no dispute settlement clause; some allow for the imposition of coercive measures such as sanctions; and most foresee the recourse to judicial or quasi-judicial avenues. In addition to judicial avenues in an independent court, EU international agreements in fact also include 'softer' mechanisms for consultation, mediation, or cooperation whereby the parties endeavour to reach a mutually agreed solution for solving any dispute before recurring to judicial avenues. This article suggests possible taxonomies of judicial or quasi-judicial mechanisms based on the body in charge of setting the dispute, on the procedure and on the subject matter, and it identifies common patterns in the inclusion of these forms of dispute settlement in EU international agreements.

1 INTRODUCTION

With its insistence on a rules-based international order,[1] in line with its constitutional objectives,[2] the European Union contributes to an international economic order based on multilateralism and on international law.[3]

International political actors, including the EU, have developed sophisticated legal tools to *avoid* and *settle* disputes.[4] Avoidance and settling of disputes is here understood as meaning the

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[1] See e.g. European External Action Service, 'A Strategic Compass for Security and Defence' (March 2023) 10 <https://www.eeas.europa.eu/sites/default/files/documents/strategic_compass_en3_web.pdf> accessed 01 September 2024.

[2] See especially Article 3(5) TEU and Article 21(2)(b) and (h) TEU.

[3] Opinion 1/17 *Free Trade Agreement with Canada* EU:C:2019:341 para 213: the CETA dispute settlement advanced the objective of free and fair trade laid down in Article 3(5) TFEU. See also Article 21(2)(e) TEU.

[4] For the purposes of international law, according to the often-quoted definition given by the Permanent Court of International Justice in *Mavrommatis*, a dispute is 'a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons' ((1923) PCIJ Ser A No 2,11). The European Court of Justice has developed a justiciability doctrine to decide when a genuine dispute exists in the context of a question referred by a national court for a preliminary ruling (see e.g. Case 104/79 *Foglia v Novello* EU:C:1980:73, para 11) but not, to the best of my knowledge, in the context of an international dispute. In the case of disputes between Member States, in proceedings brought under Article 259, 273, or relating to Article 344 TFEU, justiciability doctrines (lack of jurisdiction, locus standi, political question doctrines) are used, but the notion of 'dispute' is not defined (see e.g.

situation when a party to an agreement complies wholly or partially with another party's interests.[5] These legal tools for avoiding and settling disputes are usually designed with disputes involving economic interests in mind,[6] but since contention may arise in any area of international relations, this article will consider also settlement mechanisms when non-commercial interests are involved.[7] This article attempts a systematisation of the models of dispute settlement mechanisms in EU international agreements[8] and comments upon their most salient features from the perspective of EU law.

In its international agreements, the European Union has set in place dispute settlement mechanisms which vary significantly in nature. Although not all EU international agreements include a dispute settlement mechanism,[9] those which do are usually modelled on, or make explicit reference to, the mechanisms existing under WTO law. The standard model is that the agreements foresee that the parties shall enter into consultation, failing which one party can trigger arbitration, and the losing party of such arbitration shall comply with the arbitral decision lest the other lawfully retaliate by withdrawing benefits under the agreement. A distinctive arrangement of EU international agreements (as opposed to state agreements)[10] is the fact that the inclusion of a settlement mechanism for investor-state disputes may trigger the so called 'mixity',[11] i.e. the EU's international agreement in question may have, as one party, the EU and

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Case C-364/10 *Hungary v Slovakia* EU:C:2012:630; in Case C-457/18 *Slovenia v Croatia* EU:C:2020:65, the Court did not have jurisdiction on the merits of the dispute but still invited the parties to submit the dispute to the Court as arbitrator).

[5] The aim of the WTO dispute settlement mechanisms 'is to secure a positive solution to a dispute' (Article 3.7 of the Understanding on rules and procedures governing the settlement of disputes, Annex 2 of the Agreement Establishing the World Trade Organization ('the DSU')). This is narrower than *avoiding* and settling disputes, which is, instead, the stated objective of dispute settlement chapters under many EU FTAs. E.g. Article 15.1 EU-Vietnam FTA; Article 21.1 EU-Japan FTA.

[6] Indeed, helping to solve (trade) controversies was originally the function of law in the international community, to borrow the phrase from Lauterpacht.

[7] Ingo Borchert et al, 'The Pursuit of Non-Trade Policy Objectives in EU Trade Policy' (2021) 20(5) World Trade Review 623. A useful counterpoint is to consider ways in which Courts decide not to engage in the resolution of certain disputes, on which see e.g. Thomas M Franck, *Political Questions Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* (Princeton University Press 1992); Jed Odermatt, 'Patterns of Avoidance: Political Questions before International Courts' (2018) 14(2) International Journal of Law in Context 221.

[8] In the interest of brevity, the phrase 'EU international agreements' will be used in this article to refer to the entire class of treaties concluded by the EU and by the EU and its Member States (see discussion on mixity below), even though this article mostly focuses on agreements with a strong component of trade involved, i.e. custom unions (CUs), association agreements (AA), free trade agreements (FTAs), and partnerships and cooperation agreements. Thus, the Article does not consider the case of agreements in which only Member States, but not the EU are a party; nor intra-Member States agreements.

[9] See Section 4.

[10] This is in turn due to the fact that the EU is an autonomous legal order with 'specific characteristics' that 'include those relating to the constitutional structure of the EU, which is seen in the principle of conferral of powers referred to in Articles 4(1) TEU and 5(1) and (2) TEU, and in the institutional framework established in Articles 13 TEU to 19 TEU' (Opinion 2/13 EU *Accession to ECHR* EU:C:2014:2454 para 165).

[11] This follows from the CJEU, Opinion 2/15 *Free Trade Agreement with Singapore* EU:C:2017:376 paras 292 and 305, where the Court held that, since not all forms of investment are EU's exclusive competence (Article 206 TFEU), the inclusion, in an international agreement, of provisions on investment dispute settlement and on portfolio investment triggers mixity.

its Member States.[12]

This variety is due to the fact that parties to an international treaty will typically enjoy a degree of discretion as to the choice of dispute settlement. This flexibility means that the resort to a mechanism often depends on the relative economic and political power of the parties. In other cases, the parties bind themselves to discharging a procedure for consultation, amicable settlement and mandatory mediation before escalating to judicial resolution and, only once that procedure is terminated, having recourse to unilateral remedies such as trade defence instruments. The choice of dispute settlement mechanism may also depend on the nature of the rules to be enforced. A distinction between symmetrical exchanges ('you can trade in my country with no tariffs and in return I can trade in your country with no tariffs') and asymmetrical ones ('you play the piano for me and in return I pay you') may be useful: in EU international agreements most of the rules are formulated symmetrically, but the reality is that the exchanges will often be asymmetrical (if, for example, it is the case that the EU invests in a third country disproportionately more than the other way around). Practice shows that asymmetrical exchanges tend to be enforced by non-judicial avenues (including the adoption of sanctions or trade defence instruments).[13]

In general, EU dispute settlement mechanisms vary among themselves depending on the substantive subject matter rather than on the form and depth of the international agreement. In other words, whether the EU wants to create a custom Union with Turkey, set up comprehensive trade agreement with Canada to reduce custom tariffs or simply establish a framework for bilateral economic relations with Kazakhstan, the difference in the scope and depth of commitments does not in itself influence the form of dispute settlement: most agreements foresee the same model of arbitration; and within one single agreement we can find, for example, arbitration for disputes arising out of one area and mediation for a dispute on a different matter.

As this article shows, some patterns may nonetheless be identified within this variety. First, a degree of geographical and political proximity usually results in greater involvement of EU institutions. Second, more recent agreements tend to be more formalised than previous ones.

2 A TAXONOMY OF DISPUTE SETTLEMENT MECHANISMS IN EU INTERNATIONAL AGREEMENTS

For a systematisation of the dispute settlement mechanisms of the EU, this article begins by drawing a qualitative distinction, central to international law and also found in the seminal work by Schelling *Arms and Influence*, between coercion and diplomacy. Needless to say, all dispute settlement of the EU is peaceful dispute settlement. But the distinction remains nonetheless. On the one hand there is coercion: historically (for the EU, this is of course not an option not even in theory), *use* of force or the *threat* thereof is a way to stimulate compliance (Section 3); coercion

[12] A recent contribution on this is Merijn Chamon and Inge Govaere (eds), *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (Brill 2020).

[13] For the concrete example of the EU-China photovoltaic dispute, see Tancrède Voituriez and Xin Wang, 'Real Challenges behind the EU–China PV Trade Dispute Settlement' (2015) 15(5) Climate Policy 670.

may also take place through measures not involving the use of force, such as sanctions or trade defence instruments (Section 4).[14] On the other hand, there is diplomacy, consisting either of delegation of decision-making to a third party, or of direct bargaining:[15] what these have in common is an attempt at respecting common interests of the parties to a dispute. The EU's international agreements foresee the recourse to judicial or quasi-judicial avenues (Sections 5 and 6). This article suggests possible taxonomies of these mechanisms based on the body in charge of setting the dispute, on the procedure, and on the subject matter. In addition to judicial avenues, EU international agreements also include 'softer' mechanisms for consultation, mediation or cooperation, whereby the parties endeavour to reach a mutually agreed solution for solving any dispute before recurring to judicial avenues.[16] In practice, these non-judicial actions are the most widely used category of dispute settlement mechanisms. It would, of course, be possible to classify each dispute settlement mechanism on a spectrum going from one extreme of formalisation to the other: for example, some memoranda of understanding on taxation have no dispute settlement clause at all, and on the other side of the spectrum agreements with European micro-states whose currency is the Euro foresee the exclusive jurisdiction of the CJEU. Similarly, it would be possible to provide a chart or table detailing the minute differences between the hundreds of EU international agreements. These exercises are not necessary for the purpose of the present inquiry. The distinction between coercive measures and diplomatic measures is the most useful in informing the article's structure, as it shows different attitudes of the EU, as elaborated in Section 3. Finally, it may be recalled that in their classic study on dispute settlement, Keohane, Moravcsik and Slaughter suggested another qualitative difference between international and transnational dispute resolution: in the latter,

> access to courts and tribunals and the subsequent enforcement of their decisions are legally insulated from the will of individual national government. The tribunals are therefore more open to individuals and group in civil society.[17]

All dispute settlement mechanisms of the EU are by constructions 'transnational' in the sense that those authors have identified: including, even for the UK, those in the Withdrawal

[14] See the definition of coercion (by third countries) contained in EU secondary law: 'economic coercion exists where a third country applies or threatens to apply a third-country measure affecting trade or investment in order to prevent or obtain the cessation, modification or adoption of a particular act by the Union or a Member State, thereby interfering in the legitimate sovereign choices of the Union or a Member State', Article 2 Regulation (EU) 2023/2675 of the European Parliament and of the Council of 22 November 2023 on the protection of the Union and its Member States from economic coercion by third countries [2023] OJ L2023/2675 ('the anti-coercion instrument').

[15] For these two elements see the classic Robert O Keohane, Andrew Moravcsik, and Anne-Marie Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational' (2000) 54(3) International Organization 457, defining international courts and tribunals as a 'key dimension of legalization', because 'instead of resolving disputes through institutionalized bargaining, states choose to delegate the task to third-party tribunals charged with applying general legal principles'.

[16] The article does not consider ways to terminate the agreement, because they are not ways to solve a dispute for the purposes of the definition given above.

[17] Keohane, Moravcsik, and Slaughter (n 15) 458.

Agreement (WA)[18].

3 STATES 'CONDEMN RECOURSE TO WAR FOR THE SOLUTION OF INTERNATIONAL CONTROVERSIES'

'Diplomacy' – wrote Schelling – 'is bargaining; it seeks outcomes that, though not ideal for either party, are better for both than some of the alternatives […] there must be some common interest, if only in the avoidance of mutual damage, and an awareness of the need to make the other party prefer an outcome acceptable to oneself'.[19] Force, instead, is when a country pursues its own interests '*forcibly*, accommodating only to opposing strength, skill, and ingenuity and without trying to appeal to an enemy's wishes'.[20]

From a historical perspective and for the sake of completion it bears mentioning at the outset that, traditionally, war has been a way to settle disputes involving commercial, border, ideological and other issues.[21] It is only less than a century ago that states formally started condemning 'recourse to war for the solution of international controversies'.[22] Obviously, recourse to *military* force (or a threat of it) is not an option for the EU – not even in theory, since it does not control military assets that can be deployed. It might instead have recourse to a third option, a mix between diplomacy and brute force, that Schelling called 'coercive diplomacy' (discussed in the next Section), a coercion by '*threat* of damage, or of more damage to come' which can make someone yield or comply.[23] Coercive diplomacy 'tries to structure someone's motives, while brute force tries to overcome its strength'.[24]

By and large, international politics now seeks to solve controversies by appealing to common interests. Law is an important tool to that end. As Lauterpacht stated, 'the function of law is to regulate the conduct of men with reference to rules whose formal […] source of validity lies, in the last resort, in a precept imposed from outside'.[25] This is possibly among the reason for the increased attention the EU has paid to the legal engineering of its dispute settlement mechanisms, implying that increased legalisation, if not downright judicialization, enhances their legitimacy. This is a shift both from older EU international agreements that preferred non-

[18] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community2019/C 384 I/01 XT/21054/2019/INIT (OJ C 384I)
[19] Thomas C Schelling, *Arms and Influence* (2020 Yale University Press) 1.
[20] ibid
[21] Thus, a classic treatise of international law, James R Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxfor University Press 2012) 744, considers the use of force in the part on disputes, citing Grotius in De Iure Belli ac Pacis (1625, Tuck ed, 2005) I.i §1, in support of the statement that 'In the practice of states in nineteenth-century Europe, war was sometimes still represented as a last resort, that is, as a form of dispute settlement'.
[22] General Treaty for Renunciation of War as an Instrument of National Policy signed in Paris on 27 August 1928 by Germany, France, and the United States.
[23] Schelling (n 19) 3.
[24] ibid.
[25] Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford University Press 2011, 1st edn 1933) 3.

judicial, political dispute settlement mechanisms,[26] and from the trend toward a WTO-inspired legalisation starting in the early 2000s.[27]

4 MEASURES NOT INVOLVING THE USE OF FORCE: SANCTIONS AND TRADE DEFENCE INSTRUMENTS

EU restrictive measures – often referred to as 'sanctions' – consist among others of restrictions on trade and investment, of ban on travels or of asset freezes[28] and are a pivotal tool of the EU's foreign policy.[29] By adopting restrictive measures, the EU spreads its fundamental values and pursues its objectives in the international arena.[30]

Restrictive measures can be conceived of as tools for the settlement of dispute, in so far as they are used to affect the behaviour of an opponent. In particular, the literature has shown that sanctions have been used to coerce or constrain other actors, or to signal the EU's position on a particular issue, or a mix of those.[31] If sanctions are aimed at coercing or constraining a third country, if they are a threat 'of more damage to come', they constitute lawful means to coerce the other party to comply with EU's interests.[32]

Although there are no specific triggering conditions for sanctions in EU primary law,[33] the adoption of such measures is authorised, in certain circumstances, by international agreements concluded by the EU. An example is the EU-Russia partnership agreement, which states that

> nothing in this Agreement shall prevent a Party from taking any measures which it considers necessary for the protection of its essential security interests […] in the event of serious internal disturbances affecting the maintenance of law and order, in time of war or serious international tension constituting threat of war or in order to carry out

[26] See the examples discussed below of the AAs with Mediterranean countries.

[27] The trend was discussed, for the EU, by Ignacio Garcia Bercero, 'Dispute Settlement in European Union Free Trade Agreements: Lessons Learned?' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Areements and the WTO Legal System* (Oxford University Press 2006) 383; for international agreements in general, the trend was discussed in James McCall Smith, 'The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts' (2000) 54(1) International Organization 137.

[28] For the array of measures adopted since 2022 against Russia and Belarus, see Katharina Meissner and Chiara Graziani, 'The Transformation and Design of EU Restrictive Measures against Russia' (2023) 45(3) Journal of European Integration 377; and Luigi Lonardo, *Russia's 2022 War Against Ukraine and the Foreign Policy Reaction of the EU: Context, Diplomacy, and Law* (S.l.: Palgrave Macmillan 2023).

[29] Iana Dreyer and José Luengo-Cabrera, 'Introduction' in Iana Dreyer and José Luengo-Cabrera (eds), *On Target? EU Sanctions as Security Policy Tool* (EUISS Report 2015) 7.

[30] For a discussion of the EU objectives as related to EU sanctions, see Joris Larik, *Foreign Policy Objectives in European Constitutional Law* (Oxford University Press 2016) 169-171.

[31] See Francesco Giumelli, *Coercing, Constraining and Signalling: Explaining UN and EU Sanctions after the End of the Cold War* (ECPR Press 2011).

[32] They may be lawful under international law because what is not prohibited is allowed (the so-called *Lotus* principle). Although sanctions are coercive measures, economic coercion is not prohibited by Article 2(4) UN Charter because it does not amount to use of force, at least according to the prevailing view (see, to that effect, Oliver Dörr and Albrecht Randelzhofer, 'Purposes and Principles, Article 2(4)' in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (3rd edn, Oxford University Press 2012) 200, 210.

[33] See the discussion in Luigi Lonardo, 'Challenging EU Sanctions against Russia: The Role of the Court, Judicial Protection, and Common Foreign and Security Policy' [2023] Cambridge Yearbook of European Legal Studies 1.

> obligations it has accepted for the purpose of maintaining peace and international security.[34]

This is modelled on the security exceptions of Article XXI GATT. In *Rosneft*, the CJEU held that the provision of the EU-Russia agreement permitted the adoption of restrictive measures targeting the Russian energy sector,[35] which the EU adopted on two occasions in 2014, with a view to bring Russian action to a stop over the escalating conflict in Ukraine. The Court took the view that the 'war' or 'serious international tension' does not need to directly affect the territory of the EU for the measures to be authorised.[36] In a subsequent case involving the same set of issues, the Court also found that, even if GATT were directly applicable and could usefully be relied upon by Rosneft, the security exceptions of Article XXI as well as the EU-Russia agreement allowed discretion to each party in the adoptions of the restrictive measures.[37] In construing EU's action in this way, the Court firmly confirmed the compliance of EU with the international economic order even when its essentially security interests were at stake. Such conclusion was mostly based on an appraisal of EU law – rather than international economic law. It is worth stating that under GATT, the security exceptions were designed so as to not enable a party to enforce commercial interests under the pretence of security interests. The ECJ shied away from considering whether that might have been the case, simply referring to the broad discretion that the Council enjoys in the adoption of restrictive measures.[38]

A way to enforce commercial interests is through trade defence instruments. Here, the coercive element is less prominent, but trade defence instruments differ from diplomacy in so far as they do not try to 'structure someone's motives'. Even though trade defence instruments are traditionally not considered among the dispute settlement mechanisms, the opportunity to adopt them is a lawful way to prevent and settle disputes. EU trade defence instruments deal with anti-dumping measures, countervailing measures and safeguard measures, as well as measures under the Trade Barrier Regulation.[39] They are a standard presence in EU FTAs, with minor variations depending on the political priorities of the negotiating partner, as emphasis on procedural considerations in the EU-Korea FTA shows.[40]

In a nutshell, in the context of WTO, anti-dumping measures are applicable pursuant to

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[34] Article 99(1)(d) of the Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, on the one part, and the Russian Federation of the other part, signed in Corfu on 24 June 1994.
[35] Case C-72/15 *Rosneft* EU:C:2017:236 para 110.
[36] ibid para 112.
[37] Case C-732/18 P *Rosneft et al v Council* EU:C:2020:727 paras 132-136; Case T-715/14 *Rosneft et al v Council* paras 180-181.
[38] Case C-72/15 *Rosneft* (n 35) para 113.
[39] See Van Bael & Bellis, *EU Anti-dumping and Other Trade Defence Instruments* (5th edn, Kluwer Law International 2011).
[40] For a detailed analysis, see Dukgeun Ahn, 'Legal and Institutional Issues of Korea-EU FTA: New Model for Post-NAFTA FTAs?' (2010) Sciences Po/GEM policy brief 16 < https://ecipe.org/wp-content/uploads/2014/12/AHN_LEGALANDINSTUTITIONALKOREU_FTA_201010.pdf> accessed 01 September 2024.

the 'Anti-dumping agreement',[41] to which EU international agreements usually refer.[42] Building on Article VI GATT, the Anti-dumping agreement allows a Member to impose discriminatory trade restrictions against another Member 'when a foreign exporter sells its product at less than its "normal value", and this "dumping" causes or threatens to cause "material injury" to that Member's domestic industry'.[43] Under EU law, the legal basis for these is the anti-dumping Regulation,[44] which provides detailed procedural and substantive rules.[45]

Countervailing measures are essentially anti-subsidies proceedings. Much as the previous measures, the WTO allows the adoption of countervailing measures in the 'Agreement on Subsidies and Countervailing Measures' contained in Annex 1A of the WTO Agreement, to which EU international agreements usually refer.[46] The legal basis under EU law is the Regulation on protection against subsidised imports.[47] Measures on anti-dumping and anti-subsidy matters applicable following a WTO Dispute settlement body report are contained in a further Regulation.[48] In addition to anti-dumping and countervailing measures, import from some third countries are also subject to residual safeguard measures.[49]

The Trade Barrier Regulation (TBR)[50] allows industries and enterprises in the EU to bring complaints to the European Commission when illegal foreign trade measures or actions are taken by the EU's trading partners. Where the Commission finds that further action is needed in order to remove the injury and/or relevant trade obstacle, it may take specific actions, the first step being recourse to the procedure foreseen in the bilateral international agreement, first through non-judicial avenues such as finding a mutually acceptable solution and then through judicial avenues. Only once that procedure has terminated (Article 13(2) TBR), the Commission may consider suspending any trade concessions with the relevant countries, imposing or increasing customs duties on imports, or introducing restrictions on imports or exports from the third

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[41] Agreement on implementation of Article VI of the GATT 1994.
[42] E.g. Article 5-11 EU-Japan FTA; Article 3.1. EU-Vietnam FTA.
[43] Laura Rovegno and Hylke Vandenbussche, 'A comparative analysis of EU Antidumping rules and application' in Sanford E Gaines, Birgitte Egelund Olsen, and Karsten Engsig Sørensen (eds), *Liberalising Trade in the EU and the WTO: Comparative Perspectives* (Cambridge University Press 2012).
[44] Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union [2016] OJ L176/21 (TBR).
[45] For a fully detailed exposition of the previous versions of the Regulation, see Van Bael & Bellis (n 39).
[46] E.g. Article 5-11 EU-Japan FTA; Article 3.1. EU-Vietnam FTA.
[47] Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union [2016] OJ L176/55.
[48] Regulation (EU) 2015/476 of the European Parliament and of the Council of 11 March 2015 on the measures that the Union may take following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters [2015] OJ L83/6.
[49] Regulation (EU) 2015/755 of the European Parliament and of the Council of 29 April 2015 on common rules for imports from certain third countries [2015] OJ L123/33; Regulation (EU) 2015/478 of the European Parliament and of the Council of 11 March 2015 on common rules for imports[2015] OJ L83/16; Regulation (EU) 2015/477 of the European Parliament and of the Council of 11 March 2015 on measures that the Union may take in relation to the combined effect of anti-dumping or anti-subsidy measures with safeguard measures [2015] OJ L83/11.
[50] Regulation (EU) 2015/1843 of the European Parliament and of the Council of 6 October 2015 laying down Union procedures in the field of the common commercial policy in order to ensure the exercise of the Union's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (codification) [2015] OJ L272/1.

country concerned (Article 13(3) TBR).[51]

5 DISPUTE SETTLEMENT THROUGH JUDICIAL AVENUES

The EU includes a dispute settlement provision in nearly all its bilateral agreements.[52] In practice, recourse to dispute settlement tends to be the mandatory forum, and this excludes in particular, that parties have recourse to WTO dispute settlement procedures. Admittedly, the standard rule is that recourse to dispute settlement under its FTAs is without prejudice to any action in the WTO framework,[53] but the EU's FTAs state by way of (important) derogation that parties 'shall not, for a particular measure, seek redress for the breach of a substantially equivalent obligation under this Agreement and under the WTO Agreement or under any other international agreement to which both Parties are party in the relevant fora'.[54]

The mechanisms may be classified according to several criteria, all of which shed light on partially overlapping features. First, criteria concerning the characteristics of the body entrusted with solving the controversy (5.1); second, criteria concerning the degree of formality of the procedure (5.2); third, the mechanisms may be classified according to the subject matter of the controversies (5.3). In terms of access,[55] these are all bodies in which the EU or the other party may file suit against each other: individuals do not have standing, with the important exception of the investor-state dispute settlement discussed below. In practice, however, individuals or groups (such as industries) can and do lobby the relevant side to start litigation.[56]

5.1 THE BODY

The body may be dependent or independent, temporary or permanent; this creates four possible categories.

Dependent bodies (either temporary or permanent) are best construed as non-judicial,

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[51] The anti-coercion instrument (n 14) and the international procurement instrument (Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 June 2022 on the access of third-country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries [2022] OJ L173/1) are also worthy of mention as measures aimed at *avoiding* disputes in the broad sense, but they are not contained in EU international agreements nor do the measures adopted pursuant to these two instruments need to have any connection with EU international agreements.

[52] Except certain memoranda of understanding, such as the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments – Memorandum of Understanding [2004] OJ L385/30, and amending protocols.

[53] Article 15.24.1 EU-Vietnam FTA.

[54] Article 15.24.2 EU-Vietnam FTA. A derogation to that derogation is for disputes on breaches of the Agreement on Technical Barriers to Trade in Annex 1A to the WTO Agreement, in which case the complaining party shall select the dispute settlement mechanism under the WTO Agreement.

[55] The category is used as classification criterion in Keohane, Moravcsik, and Slaughter (n 15) 462.

[56] The literature is very vast indeed. See, for the case of the EU, Christina Fattore, 'Interest Group Influence on WTO Dispute Behaviour: A Test of State Commitment' (2012) 46(6) Journal of World Trade 1261; Dirk De Bièvre et al, 'International institutions and interest mobilization: The WTO and lobbying in EU and US trade policy' (2016) 50(2) Journal of World Trade 289.

because they lack by design the characteristic of impartiality (a characteristic which, as the CJEU has held,[57] is of the essence to ensure effective *judicial* protection). For this reason, they are discussed in the next Section (on non-judicial avenues).

5.1[a] Temporary (Or Ad Hoc) Independent Bodies

These are panels of experts or arbitration panels. For the parties, the advantages of these bodies lies in their lack of permanence and *ad hoc*, *ex post* nature as well as in the role of the parties in the appointment procedure.[58]

Panel of experts may be set up to solve specific controversies that arise in given subject matters. The experts are drawn from lists of individuals with specialised knowledge in a certain field who serve in their individual capacities and do not take instructions from the parties with regards to the matter at stake.[59] The lists are drafted by the relative specialised committees.

An arbitration panel may be set up by the parties after non-judicial mechanisms have been exhausted. Arbitrators are drawn from lists of individuals with specialised knowledge in a certain field[60] who serve in their individual capacities and do not take instructions from the parties with regards to the matter at stake.[61] As discussed in Section 5.2 below, the detailed rules on the appointment of arbitrators[62] are a strong guarantee that the arbitration panel will indeed come into existence where necessary so as to minimise procedural obstructions.

5.1[b] Permanent Independent Bodies

To this category belong the arbitral tribunal established by the Canada-EU Trade Agreement (CETA)[63] and the Court of Justice of the EU itself. This Section considers them in turn.

The CETA tribunal

For the investors-state dispute settlement (ISDS), by way of innovation from the traditional, 'ad hoc' ISDS, CETA foresees the establishment of Tribunal (with a possibility to appeal to an Appellate Tribunal) as well as, in the longer term, a multilateral investment tribunal (and appellate mechanism) which would bring to an end the functioning of the initial tribunals. The aim is thus to establish a system of 'independent, impartial and permanent' courts,[64] of which the CETA

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[57] Case C-216/18 PPU *LM* para 48.
[58] See in similar terms Maria Fanou, 'The independence and impartiality of the hybrid CETA Investment Court System: Reflections in the aftermath of Opinion 1/17' (2020) 4(1) Europe and the world: A Law Review, 4.
[59] Article 13.17.4 EU-Vietnam FTA.
[60] The requirement for their expertise tends to be slightly more specialised than those foreseen in Article 8.1 DSU.
[61] Unlike the provision of Article 8.3 DSU, arbitrators usually are nationals of the parties.
[62] See, for example, those contained in Articles 21.8 and following EU-Japan FTA.
[63] In 2015, the Commission has developed a vision for a multilateral court system in investor-state disputes so that provisions on investment disputes may be read in light of that vision, as discussed below. See Commission Concept Paper of 5 May 2015, entitled 'Investment in TTIP and beyond — the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court' <https://www.tweedekamer.nl/downloads/document?id=2015D17383> accessed 01 September 2024.
[64] Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States [2017] OJ L11/3.

Tribunal would be merely a first stage.[65] As the CJEU has held in Opinion 1/17, the CETA tribunal differs from ad hoc bodies in two regards:[66] the composition and the dealing with cases.[67] Unlike traditional ad hoc tribunals, the composition of the divisions of CETA Tribunal that hear a given case will be 'random and unpredictable'.[68] As for the dealing with cases, the Court noted that CETA Tribunal has mandatory jurisdiction.[69]

It is worth mentioning that in Opinion 1/17, the CJEU found that the Member States are precluded from setting up a tribunal which, while being outside the EU judicial system, has the power to interpret or apply provisions of EU law (other than those of the agreement itself) or to make awards that might have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework. The pronouncement on the CETA tribunal, which essentially articulates a well-established line of case law on tribunals set up by EU's international agreements,[70] is worthy of closer scrutiny for its implications on the relationship between such tribunals and the CJEU and the requirements for their independence. This will be considered in turn.

The CETA tribunal was deemed to be outside the EU judicial system because 'it is separate from the domestic courts of Canada, the Union, and its Member States'.[71] While there is not an express provision in CETA where it would be stated that the Tribunal is separate from the domestic courts of the contracting parties, it is difficult to see how it could be otherwise. The establishment of an impartial – in the sense that it belongs to neither party – tribunal is one of the aims of CETA. The same rationale was adopted by AG Bot to reach the same conclusion.[72] The Tribunal is not empowered to refer preliminary questions (there are no provisions in CETA to this effect), but this fact is used by the Court to support the compatibility of CETA with EU law: the lack of power to issue preliminary references is a consequence, and not evidence, of the fact that the Tribunal is outside the EU judicial system.[73] There is a case to be made that the Court's reasoning is opaque on why CETA tribunal is outside the judicial system. In *Portuguese judges*,[74] the Tribunal de Contas was considered falling within the EU judicial system because it could apply EU law;[75] in Opinion 1/17, it was the other way around: since CETA tribunal is outside the judicial system, it cannot apply EU law.

As far as the independence of the tribunal is concerned,[76] the requirements of Article 47

[65] Opinion of AG Bot in Opinion 1/17 *Free Trade Agreement with Canada* EU:C:2019:72 para 7.
[66] See for a detailed discussion Fanou (n 58) 10.
[67] Opinion 1/17 *Free Trade Agreement with Canada* (n 3) para 194.
[68] Opinion 1/17 *Free Trade Agreement with Canada* (n 3) para 195.
[69] ibid para 198.
[70] Opinion 1/91 *EEA* EU:C:1991:490 paras 33-36; CJEU, Opinion 2/13 *Accession to ECHR* (n 10).
[71] Opinion 1/17 *Free Trade Agreement with Canada* (n 3) para 114
[72] Opinion of AG Bot in Opinion 1/17 *Free Trade Agreement with Canada* (n 65) para 179.
[73] Opinion 1/17 *Free Trade Agreement with Canada* (n 3) para 134.
[74] In that case the Court sought to establish whether the Portuguese Tribunal de Contas was a court or tribunal for the purposes of Article 19 TEU.
[75] Case C-64/16 *Portuguese judges* EU:C:2018:117 paras 37-40.
[76] For a more detailed discussion see Fanou (n 58).

of the EU Charter of fundamental rights apply,[77] since CETA is an integral part of the EU legal order. In Opinion 1/17, the CJEU was satisfied that the CETA Tribunal was independent from external influence[78] and was impartial, i.e. equidistant from the parties.[79] This was the case in the light of the rules guaranteeing against the removal from office, the remuneration and the lack of instructions from third parties. In addition, the power of CETA joint committee to adopt interpretations of the agreement that are binding over the Tribunal did not affect the latter's independence. The Court added an important qualification to this finding, namely 'that interpretations determined by the CETA Joint Committee have no effect on the handling of disputes that have been resolved or brought prior to those interpretations'.[80] This approach finds the right balance between safeguarding the fundamental right to an independent court protected by the Charter and ensuring the functioning of any other (actual or potential) EU international agreements containing an ISDS.

Opinion 1/17 is an important pronouncement as its rationale is applicable to other arbitral tribunals, either ad hoc or permanent, established by current or future EU FTAs. Bodies thus established must either be capable to refer questions for preliminary rulings to the CJEU, or, absent this condition, they cannot bind EU institutions to any interpretation of EU law.[81]

The Court of Justice of the European Union

As hinted at in the introduction, agreements with states with whom the EU has a high degree of interdependence tend to have distinctive dispute settlement mechanisms. They usually foresee the involvement of the CJEU in one way or another. Three examples will illustrate this.

First, the Withdrawal Agreement (WA).[82] Dispute settlement under the WA has a strong symbolic and political relevance, since the agreement is the first legal instrument dealing with the concrete possibility of a dispute between the EU and a former Member State, and since it implicitly sets a model in case more of such agreements were needed in the future (i.e. if other Member States leave the EU). The WA foresees highly distinctive judicial avenues such as litigation before the CJEU,[83] an arbitration panel that shall refer questions of EU law to the

[77] 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. […]'.
[78] Opinion 1/17 *Free Trade Agreement with Canada* (n 3) para 223
[79] ibid para 203.
[80] ibid para 236.
[81] A point elaborated below, in the Section on procedure.
[82] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019/C 384 I/01) [2019] OJ C 384I/1 (WA). On this see Marise Cremona, 'The Withdrawal Agreement and the EU's international agreements' (2020) 45(2) European Law Review 237; Adam Łazowski, 'Court of Justice of the European Union and the United Kingdom after Brexit: Game Over?' (2022) 47(6) European Law Review 666; Steve Peers, 'The End – or a New Beginning? The EU/UK Withdrawal Agreement' [2020] Yearbook of European Law 122.
[83] For facts relevant to the obligations under the WA and happened during the transition period, the CJEU retains its ordinary jurisdiction (Article 131 WA). Idem for cases pending at the end of the transition period (Article 86 WA). This is also to be contrasted with the situation under UK law, where, in principle, there is no role for the CJEU even for the 'retained' EU law. See Marco Galimberti, 'Farewell to the EU Charter: Brexit and

CJEU, and, in the UK, an independent authority monitoring implementation and authorised to refer cases to UK courts, as well as non-judicial avenues for dispute settlement that are in line with those observed in other EU international agreements. Domestic courts of UK and other EU Member States are also involved in the process as they are entitled to refer preliminary questions to the CJEU.[84] For courts of EU Member States, the WA mandates that the UK is notified when they make a reference. For UK courts, the power to refer a question lasts for cases 'commenced at first instance within 8 years from the end of the transition period' when they concern citizens' rights.[85] As Peers notes, the March 2018 draft of the WA

> provided that cases pending in the UK courts at the end of the transition period which concerned EU law issues could still be sent to the CJEU for a preliminary ruling after that point. This prospect has disappeared entirely.[86]

Implementation in UK courts is helped by another body distinctive to the WA, the independent authority ('the Authority'). This shall have 'powers equivalent to those of the European Commission acting under the Treaties to conduct inquiries on its own initiative concerning alleged breaches' of citizens' rights by UK authorities.[87]

The WA is, in sum, firmly anchored to EU institutional structures, whereas the EU-UK Trade and Cooperation Agreement[88] is more international law oriented.[89] With such distinctive dispute settlement mechanisms, the WA crystallises the relative negotiating strength of the parties, as it places questions of EU law firmly under the jurisdictional monopoly of the CJEU. Indeed, the fact that the CJEU shall deliver rulings (not merely 'preliminary rulings') binding on the arbitration panel suggests that this body does not have any further discretion. But it is difficult to see how it could be otherwise: the case law on autonomy and independence recalled above made it so that, as a matter of EU law, the choices for institutional set up of such a tribunal were limited. The jurisdictional monopoly of the CJEU could under no circumstances be affected.

The Northern Ireland Protocol (which sets out arrangements necessary to address the

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Fundamental Rights Protection' (2021) 4(1) Nordic Journal of European Law 37, 38. The WA also provides that CJEU case law on the interpretation of the EU law referred to in the agreement will be binding upon the UK up until the end of the transition period, and 'due regard' shall be had for CJEU rulings after the end of the transition period: a provision destined to create interpretative problems for UK courts but whose interpretation is outside the scope of this article.

[84] On this see Joris Larik, 'Decision-Making and Dispute Settlement' in Federico Fabbrini (ed), *The Law and Politics of Brexit. Volume 2: The Withdrawal Agreement* (Oxford University Press 2020).

[85] Article 158.1 WA.

[86] Steve Peers, 'Analysis 3 of the Revised Brexit Withdrawal Agreement: Dispute settlement' (*EU Law Analysis*, 18 October 2019) <http://eulawanalysis.blogspot.com/2019/10/analysis-3-of-revised-brexit-withdrawal.html> accessed 01 September 2024.

[87] Article 159.1 WA.

[88] Trade and Cooperation Agreement Between the European Union And The European Atomic Energy Community, Of The One Part, And The United Kingdom Of Great Britain And Northern Ireland, Of The Other Part [2020] OJ L 444/14.

[89] On this see also Federico Casolari, 'I principi del diritto dell'Unione europea negli accordi commerciali: una visione di insieme' in Giovanna Adinolfi (ed), *Gli accordi di nuova generazione dell'Unione europea in materia di commercio ed investimenti* (Giappichelli 2021).

unique circumstances on the island of Ireland)[90] also deserves a mention in this context. Its Article 16 foresees a specific consultation and arbitration procedure to manage issues arising out of the Protocol itself. No sooner than ten days after it began to regulate some aspects of trade between the UK and EU, the House of Commons considered invoking Article 16 to address problems around the transit of goods between Northern Ireland and the rest of the UK. Since then, the EU came close to invoking Article 16,[91] and the UK has now notified the EU that unilateral steps will be taken to deal with issues arising as a result of its implementation. In the first instance, Article 16 may be invoked when the application of the Protocol 'leads to serious economic, societal or environmental difficulties that are likely to persist' or 'diversion of trade'. The procedures are then governed under Annex 7 to the Protocol: safeguarding measures may be adopted if, after having notified the Joint Committee, a consultation procedure has been concluded or one month after notification. In exceptional circumstances requiring immediate action, consultation may be done away with. Strictly necessary measures may be taken to remedy the situation. The measures thus taken shall be consulted on within Joint Committee every three months from the date of their adoption. Either party may at any time request the Joint Committee to review the measures. The dispute-settlement procedure of the Withdrawal Agreement was activated in March 2021 when the European Commission issued a written notice in response to the UK's unilateral decisions to extend 'grace periods' for certain provisions of the Protocol.[92] The European Commission urged the UK to engage in bilateral consultations within the Joint Committee in a spirit of cooperation, aiming to find a mutually acceptable solution by the end of the month. Despite no agreed solution being reached by the end of March 2021, bilateral consultations took place, and the European Commission refrained from formally initiating the dispute-settlement procedure outlined in the Withdrawal Agreement.

Second, the EEA Agreement.[93] It foresees the 'standard' dispute settlement mechanism of a Joint Committee, that is, the non-judicial body set up by the agreement,[94] but, failing resolution pursuant to this procedure, there is a highly distinctive mechanism.

> If a dispute concerns the interpretation of provisions of this Agreement, which are identical in substance to corresponding rules of the [EU Treaties] and if the dispute has not been settled within three months after it has been brought before the EEA Joint Committee, the Contracting Parties to the dispute may agree to request the Court of Justice of the European [Union] to give a ruling on the interpretation of the relevant rules.[95]

If the parties decide not to involve the CJEU, then the fallback provision of taking safeguards

[90] Protocol on Ireland/Northern Ireland ('the Northern Ireland protocol').
[91] John Campbell, 'Brexit: EU introduces controls on vaccines to NI' (*BBC*, 29 January 2021) <https://www.bbc.com/news/uk-northern-ireland-55864442> accessed 01 September 2024.
[92] European Commission Press Release, 'Withdrawal Agreement: Commission sends letter of formal notice to the United Kingdom for breach of its obligations under the Protocol on Ireland and Northern Ireland' (15 March 2021<https://ec.europa.eu/commission/presscorner/detail/en/IP_21_1132> accessed 01 September 2024.
[93] Agreement of the European Economic Area [1994] OJ L1/3 (and EFTA States' official gazettes).
[94] See Section 6.1[b] below.
[95] Article 111(3) EEA Agreement.

measures applies.

Third, monetary agreements with micro-states who adopt the Euro. These provide for the exclusive jurisdiction of the CJEU for settling any dispute that is not solved by the Joint Committee, that is, the non-judicial body set up by the agreement,[96] as is the case of the EU-Monaco monetary agreement.[97]

5.2 PROCEDURE

Independent bodies are subject to specific rules of procedures. These rules are mostly modelled on WTO Dispute Settlement Understanding (DSU), with the significant exception of the Association Agreements (AAs) with Mediterranean countries mentioned below. The procedures may be either contained in an annex to the agreement, or, for panels of experts, may be adopted by the relative specialised committee. The arbitral procedure has a standard but derogable timeframe for the delivery of the final report (six months from the beginning of the procedure);[98] it foresees the opportunity to require technical advice, as well as requirements for the statement of the reasons for its adoption. These three rules are equivalent to those in the DSU.[99]

The rules for appointment and decision-making of panels of experts and of the arbitrators are a strong guarantee that the body will in fact come into existence and will adopt a final report. The chances for failure are minimised by procedures designed to avoid stand-offs on the appointments: a timeframe is set, after which, if the composition of the body has not been agreed, the members are selected by lot from the list.[100] The agreements usually provide a default terms of reference for panels of experts[101] and arbitration panels,[102] but the parties are free to agree on different terms.[103] The panels of expert do not adopt binding decisions, but reports on which the parties discuss in order to find appropriate implementing measures.[104] The arbitration panel instead shall adopt a final report, with which parties shall comply promptly and in good faith.[105] The final deliberations are to be made publicly available (but may be redacted to protect sensitive information).[106] The bindingness of this final report is guaranteed by remedies in case of non-compliance,[107] which are essentially modelled on the WTO dispute settlement: if a party fails to comply with the report, the complaining party may suspend benefits under the agreement as form of proportionate and temporary retaliation. Much like the WTO dispute settlement, the first objective of judicial mechanisms in EU international agreements is 'to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of

[96] See Section 6.1[b] below.
[97] Article 12 Monetary Agreement between the European Union and the Principality of Monaco.
[98] Article 104.9.c EU-South Africa TDCA.
[99] Article 12.7, 12.8 and 13.1 DSU.
[100] Article 13.17.5 EU-Vietnam FTA.
[101] Article 13.17.6 EU-Vietnam FTA.
[102] Article 15.6 EU-Vietnam FTA; Article 21.13.1 EU-Japan FTA.
[103] Exactly as in Article 7.1 DSU.
[104] Article 13.17.9 EU-Vietnam FTA.
[105] Article 15.12 EU-Vietnam FTA.
[106] Article 21.10.4 EU-Japan FTA.
[107] Article 15.15 EU-Vietnam FTA; Article 21.22.2 EU-Japan FTA.

the covered agreements', as opposed to, for example, merely obtaining compensation.[108] Unlike the WTO system, there is no appellate body that may review the decisions of the arbitral panel. Another meaningful alternative for the avoidance and settlement of dispute might be the enforcement obligations in the domestic courts of the parties. The two models – independent arbitration and enforcement in domestic courts – are sometimes seen as alternatives,[109] but EU international agreements do not exclude that both may take place, as some provisions of EU's international agreements may confer rights directly on individuals[110] (it is open to EU institutions, when concluding an international agreement with a third country, 'to agree with that country what effect the provisions of the agreement are to have in the internal legal order of the contracting parties').[111] The seven AAs concluded in the 90s and early 2000s with Mediterranean countries constitute an important exception to what was detailed in this paragraph.[112]

It is worth recalling that the EU international agreements surveyed so far are silent on whether bodies set up under them may apply or interpret provision of EU law other than those of the agreement. It is submitted, however, that in light of the ruling in Opinion 2/13 and in Opinion 1/17 EU institutions cannot be bound to an interpretation of EU law given by a court or tribunal sitting outside the EU judicial system. This has a consequence that if an arbitration panel established by an EU international agreement were to issue a final report declaring a provision of EU law invalid, that report could not be lawfully given effect under EU law.[113]

5.3 SUBJECT MATTER

It is not unusual that the forms of dispute settlement (or prevention) vary according to the subject matters – especially those requiring highly specialised expertise. The EU-Japan FTA, for

[108] Article 3.7 DSU.

[109] Marco Bronckers, 'Is Investor-State Dispute Settlement (ISDS) Superior to Litigation before Domestic Courts? An EU View on Bilateral Trade Agreements' (2015) 18(3) Journal of International Economic Law 655.

[110] Francesca Martines, 'Direct Effect of International Agreements of the European Union' (2014) 25(1) European Journal of International Law 129. Christopher Vajda, 'The EU and Beyond: Dispute Resolution in International Economic Agreements' (2018) 29(1) European Journal of International Law 205, 206 discussing specific instances in which the existence of a dispute settlement procedure has not precluded the CJEU from holding that certain provisions have direct effect.

[111] Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:362 para 17.

[112] Unlike later agreements, the Mediterranean AAs do not contain any provisions regulating the amount of time available to the parties for appointing arbitrators, their background and their qualifications, or on the procedure they should follow, there is no timeframe for the adoption of the final report, and no provision allowing for temporary retaliation in case of non-compliance. See also Stefan Szepesi, 'Comparing EU free trade agreements Dispute Settlement' (2004) European Centre for Development Policy Management Brief No 6 July 2004 <https://ecdpm.org/application/files/1816/5547/2862/IB-6G-Comparing-EU-Free-Trade-Agreements-Dispute-Settlement-2004.pdf> accessed 01 September 2024.

[113] On commercial arbitral tribunals, in his opinion in Case C-567/14 *Genentech* EU:C:2016:177 AG Whatelet in para 59 wrote that 'the Court has held that arbitral tribunals "constituted pursuant to an agreement" [scil. between private parties] are not courts of the Member States within the meaning of Article 267 TFEU. Consequently, they cannot refer questions for a preliminary ruling. It is therefore for the courts of the Member States, within the meaning of Article 267 TFEU, to examine, if necessary by referring a question for a preliminary ruling, the compatibility of (international or domestic) arbitral awards with EU law where an action is brought before them for annulment or enforcement, or where any other form of action or review is sought under the relevant national legislation'.

example, mandates technical consultation with respect to sanitary and phytosanitary measures of significant concern before dispute settlement proceedings can be initiated. The EU-Vietnam FTA imposes an ad hoc procedure for the solution of controversies in the event of disagreement on provisions related to social and environmental sustainability.[114] In other cases, the distinctiveness is due to the political preferences of the parties.[115] By way of example, the EU-Japan FTA and the EU-Korea FTA foresee an accelerated dispute settlement specifically for motor vehicles.[116] The TDCA with South Africa and the FTA with Japan distinguish general issues (development, financial, other areas of cooperation) and trade-related disputes:[117] the former are tendentially excluded from quasi-judicial dispute settlement, whereas the latter can be decided through arbitration. Indeed, some matters are typically excluded from the dispute settlement provisions of an EU international agreement. This might be due to the specialised expertise required to solve dispute in the area (e.g. of phytosanitary products),[118] to political compromise[119] or, as is the case for anti-competitive conduct,[120] because other remedies are foreseen: it will be recalled that under EU law the trade defence instruments mentioned in Section 4 are essentially a last resort measure requiring the prior discharge of the procedure set out in a bilateral international agreement with the third country. For this reason, in EU's international agreements the provisions on trade defence instruments are usually not subject to dispute settlement.[121] As mentioned, recent agreements foresee a distinctive dispute settlement mechanism for investor states disputes (but not, for example, in the EU-Japan FTA, or the EU-Singapore FTA despite the presence of investment protections).

6 DISPUTE SETTLEMENT THROUGH NON-JUDICIAL AVENUES

Non judicial avenues such as consultation or mediation are the required first step of the dispute settlement procedure; they can, however, also be foreseen as the specific dispute-settlement mechanism for a given subject matter, such as the duty of consultation in case of objection to modifications to covered procurement in the EU-Vietnam FTA.[122] They can also be classified according to characteristics of the decision-making body, or the formality of their procedure.

[114] Article 13.16 EU-Vietnam FTA.
[115] Michael Frenkel and Benedikt Walter, 'The EU-Japan Economic Partnership Agreement: Relevance, Content and Policy Implications' (2017) 52(6) Intereconomics 358, 360.
[116] See their respective motor vehicle annexes.
[117] This distinction bears relevance also as a matter of EU law, see Opinion of AG Sharpston in Opinion 2/15 *Singapore FTA* para 480.
[118] Article 6.16.1 EU-Japan FTA.
[119] The EU-Japan FTA excludes significant areas from the dispute settlement chapter: Article 14.55 excludes intellectual property cooperation; Article 15.7 excludes corporate governance; Article 18.19 excludes the areas of regulatory practices and cooperation; Article 19.8 excludes the field of cooperation in agriculture.
[120] Article 10.13 EU-Vietnam FTA; Article 11.9 EU-Japan FTA; Title VII EU-Chile AA.
[121] Article 3.5 EU-Vietnam FTA; Article 5.9 and 5.11 EU-Japan FTA; Article 3.7 CETA; Article 14 Global Agreement with Mexico etc. Exceptions are the Mediterranean AAs.
[122] Article 9.20.8 EU-Vietnam FTA.

6.1 BODY

6.1[a] Dependent Ad Hoc Bodies

By 'dependent' it is meant that the body in question comprises individuals who work for, and take instructions from, one of the parties. Examples of these are the working groups established by each party.

6.1[b] Dependent Permanent Bodies

It is usual that EU international agreements set up a joint committee[123] comprising representatives of both Parties. This is, by rule, a Commissioner for the European Union and a minister for the third country.[124] The body thus set up is conferred general powers as well as a residual task for dispute resolution. Typically, this committee ensures the proper operation of the FTA, inter alia by reviewing its implementation, supervising the work of the specialised committees, adopting procedural rules (including the procedure for mediation where the FTA does not already provide for one). As far as dispute settlement is concerned, these bodies seek to solve disputes that may arise under the agreement. In some cases, the agreement provide that the joint committee may adopt interpretations of the provisions of that agreement which are binding on all the bodies set up by the agreement, including tribunals and panels.[125] This power has been interpreted by the CJEU as having equivalent effect to a 'subsequent agreement' for the purposes of the Vienna Convention on the Law of Treaties.[126] Significantly, the binding interpretations were found not to be contrary to the independence of the tribunals.[127]

EU primary law (Article 218(9) TFEU) empowers the Council to adopt a decision 'establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects'. It is worth recalling that the choice for the procedural rules for the adoption of that decision (rules which depend, in turn, on the subject-matter of the position to be adopted by the EU) have proved controversial and have resulted in inter-institutional disputes before the CJEU.[128]

In addition, EU FTAs set up an array of specialised committees. They typically comprise senior officials from the relevant administrations of each Party or officials they designate.[129] The committees set up their own rule of procedures and play a role in the establishment of *ad hoc* panels of experts.

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[123] This body goes by various names depending on the FTA but its powers are standard. It is called 'Joint Committee' in CETA, 'Cooperation Council' in the EU-Kazakhstan agreement; 'Partnership Council' in the EU-Armenia agreement, 'association council' in AAs with Mediterranean countries, etc.

[124] Article 22.1.1 EU-Japan FTA; Article 268 EU-Kazakhstan agreement.

[125] Article 22.1.5(e) EU-Japan FTA; Article 26.1.5(e) CETA.

[126] Opinion 1/17 *Free Trade Agreement with Canada* (n 3) para 234.

[127] On this point see more detailed discussion about CETA Tribunal, below Section 6.2 on procedure.

[128] Case C-244/17 *Commission v Council (Kazakhstan)* EU:C:2018:662.

[129] E.g. Article 13.15.2 EU-Vietnam FTA on the Committee on Trade and Sustainable Development.

6.2 PROCEDURE

Non judicial avenues also come on a spectrum of formality. On one end of this spectrum, a party may request consultations to which the other party is to accord 'sympathetic consideration';[130] on the other end there are forms of mediation by specialised bodies. It is usual for these procedures to contain a 'best endeavour clause', through which the parties agree to make an effort to eliminate or reduce the cause of the nuisance for the other party.

In slightly more detail, EU's FTAs usually subject to resolution though non-judicial avenues the areas that would otherwise be excluded from dispute settlement (see examples in Section 5.3). The same agreements foresee that the parties shall endeavour to resolve disputes that fall under the scope of dispute settlement by entering into consultations in good faith with the aim of reaching a mutually agreed solution,[131] failing which a party may trigger arbitration. There are usually rules for the place and timeframe of the consultations.[132] Parties are encouraged to enter into mediation at any time.[133] The mediation procedure may be detailed in the FTAs (or in an annex),[134] or it may be adopted by the Joint Committee.

Committees tend to enjoy a degree of autonomy and flexibilities in their procedure. Under the EU-Vietnam FTA, the parties may refer controversies to the Committee on Trade and Sustainable Development. The Committee may seek the advice of the domestic advisory group or groups of either Party or both Parties or other expert assistance. As the committees as made up of appointed – i.e. unelected – members, commentators have attracted attention to the lack of democratic legitimacy of these bodies.[135]

7 CONCLUSION

EU international agreements showcase a vast array of dispute settlement mechanisms. They go from containing no dispute settlement provision at all, to assigning exclusive jurisdiction of the CJEU, thus subjecting the contracting third state to the jurisdictional monopoly of the Court in the same way as it happens for the EU Member States. A discernible pattern is that more recent EU international agreements tend to have more formalised forms of dispute settlement than older ones.

The basic framework for judicial dispute settlement mechanisms is modelled on WTO dispute settlement, with consultations followed, if necessary, by arbitration (even though, unlike in the WTO design, there is no appellate body in EU international agreements).

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[130] Article 10.8 EU-Vietnam FTA; Article 4.2 DSU.
[131] Article 15.3.1 EU-Vietnam FTA; Article 21.5 EU-Japan FTA.
[132] These are based on Article 4 DSU.
[133] Article 15.4 EU-Vietnam FTA; Article 21.6.1 EU-Japan FTA ; Article 5.3 DSU.
[134] Annex 15-C EU-Vietnam FTA.
[135] Isabella Mancini, 'Fundamental Rights in the Institutional Architecture of EU Trade Agreements: A Tale of Omissions' (2020) EUTIP Working paper 04/2020 <http://epapers.bham.ac.uk/3295/1/IEL2020IMancini_IEL_WorkingPaper2002-03.pdf> accessed 01 September 2024; Wolfgang Weiss, 'Joint organs in EU free trade agreements as a threat to democracy' in Isabelle Bosse-Platière and Cécile Rapoport (eds), *The Conclusion and Implementation of EU Free Trade Agreements. Constitutional Challenges* (Edward Elgar 2019).

Some international agreements foresee distinctive mechanisms. Here another pattern can be identified: these mechanisms are foreseen either due to the pursuit of a policy agenda or to reflect the unique nature of the political relationship with the partner. An example of the first is investor-state dispute settlement, closer to a permanent court than to an arbitration panel, established pursuant to the EU's vision to set up in the future a permanent, multilateral court. Examples of the second include: the Withdrawal Agreement – highly distinctive in its judicial forms of dispute settlement because it stems from a highly distinctive circumstance[136] (even though it is inspired by international law, it is heavily anchored to EU law and EU institutions); and the EEA agreement – which foresees a role of the CJEU for provisions 'identical in substance' to those of the EU Treaties.

In practice, the EU has been reluctant to make recourse to these mechanisms, preferring instead non-judicial, political compromise. When the EU has used coercive measures such as restrictive measures, it has done so mostly in pursuit of non-commercial interests.

[136] It is well-established that dispute settlement procedures vary depending on the 'problem the institutions are trying to solve', Barbara Koremenos, 'If Only Half of International Agreements Have Dispute Resolution Provisions, Which Half Needs Explaining?' (2007) 36(1) Journal of Legal Studies 189, 192.

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