Current and Future Dispute Resolution Mechanisms and the role of the Court of Justice of the European Union

Professor Theodore Konstadinides, Dr Anastasia Karatzia and Dr Niall O'Connor, University of Essex, School of Law.

We are a group of legal academics working at the School of Law at the University of Essex. Our research interests lie in the broad field of European Union Law and we have a particular interest in exploring the impact of Brexit on the continued relationship between EU and domestic UK law.

Summary

This submission will address the relevant point of the call for evidence related to the current and future mechanisms for dispute resolution available to the United Kingdom (UK) and the European Union (EU). First, it will provide an overview of the relevant mechanisms to resolve disagreements under the EU-UK Withdrawal Agreement and the Future Relationship Agreement. Second, it will evaluate the future jurisdiction of the Court of Justice of the European Union (CJEU) as a dispute settlement forum and the extent to which the UK will remain subject to it in the long term. The latter is particularly significant since the UK Government has made it explicit from the outset of the Brexit negotiations that the exclusion of the UK from the CJEU's jurisdiction is a key objective of the UK's withdrawal from the EU.

There are two models of dispute resolution explored in this submission—one established under the Withdrawal Agreement and one envisaged under the future relationship.[1] A question that we raise pertains to the extent to which the Withdrawal Agreement dispute resolution mechanism will (or should) provide a blueprint for the future agreement between the UK and the EU. We propose that for reasons of legal certainty, the transition into a new legal relationship should take into account the users of the system who would benefit from having a degree of continuity in place including, but not exclusively applying, to dispute settlement. We further suggest that the

[1] For the purposes of this response, we assume that there will be an agreement on the future relationship between the EU and the UK.

ongoing role of the CJEU cannot be ignored and that to do so risks upsetting the EU's constitutional arrangements with the potential effect of undermining aspects of the Withdrawal Agreement and future relationship between the EU and the UK. Where the CJEU is best placed to settle a dispute, whether due to its adjudicative expertise or its role in the EU's legal order, its jurisdiction should be relied on despite the UK's desire to avoid this.

I. Dispute Resolution under the EU-UK Withdrawal Agreement

The Withdrawal Agreement provides for a number of distinct dispute resolution mechanisms depending on the nature and timing of the dispute. Broadly speaking, the categories of dispute envisaged by the Agreement are (i) Disputes that arise prior to the end of the transition period on 31 December 2020; (ii) Disputes that arise after the end of the transition period; (iii) Disputes relating to the citizens' rights provisions of the Agreement and (iv) Disputes surrounding the Protocol on Ireland/Northern Ireland post-transition. As we will see, categories (i), (iii) and (iv) provide for a particularly extensive continued role for the CJEU in the resolution of disputes—a role which cannot be replaced by another body.

(i) Disputes that arise prior to the end of the transition period

Any dispute arising prior to the transition period ending will be subject to the EU's normal dispute resolution mechanisms including infringement proceedings under article 258 of the Treaty on the Functioning of the European Union (TFEU). This continuity is provided for in article 131 of the Withdrawal Agreement. This aspect of the Withdrawal Agreement dispute resolution mechanism has already been put to use during the current case pending against the UK in relation to the Internal Market Bill. On 1 October 2020, the European Commission (the Commission) issued a formal request for information, noting that certain aspects of the Internal Market Bill were in breach of the UK's continuing obligation to act in good faith under article 5 of the Withdrawal Agreement.[2] In particular, the notice alleged that the Bill if adopted without

[2] See Select Committee on the Constitution, UK Internal Market Bill, 14 October 2020, Evidence Session No.5, especially Lord Pannick's questions to the Lord Chancellor. Available from: https://committees.parliament.uk/oralevidence/1029/html/. Mark Elliott criticises Clause 45 in particular: 'First, this

amendment, would infringe the Ireland/Northern Ireland Protocol to the Agreement to the extent that the Bill purported to allow the UK Government to disregard the legal effects of the Protocol. The UK Government was given one month to respond to the request for information, which it failed to do. The next step in the process would be for the Commission to issue a reasoned opinion formally requesting that the UK comply with its obligations under the Withdrawal Agreement.

If the UK fails to respond with an indication of the steps it has taken to comply with the Commission's request, the Commission may then refer the case to the CJEU under article 258 TFEU. This moves the process from the administrative phase (involving the dialogue between the Commission and the UK) to the judicial phase, which involves the CJEU. As part of this judicial phase under article 258 TFEU, the Commission can obtain a declaration from the CJEU that the UK has violated its obligations under the Withdrawal Agreement and or Protocol (known as a declaratory judgment). The UK will then have a legally binding obligation to comply within a reasonable time period. If the UK does not comply, the Commission can bring a second case under article 260(2) TFEU asking the CJEU to impose financial penalties on the UK in the form of a lump sum or a penalty payment for the failure of the UK to comply with the Court's first judgment.

This article 258 TFEU action against the UK will not cease because of the lapse of the transition period. This is because article 86 of the Withdrawal Agreement grants the CJEU 'jurisdiction in any proceedings brought by or against the UK before the end of the transition period'. The CJEU's jurisdiction extends beyond the interpretation or application of the Withdrawal Agreement if the issue arose prior to the end of the transition. Furthermore, article 87 of the Withdrawal Agreement ensures that the Commission can bring proceedings under article 258 TFEU against the UK within four years of the end of the transition if it considers that there has been a failure to fulfill an obligation arising up until 31 December 2020 ie the end of the

---

provision hammers home the fact that the arrangements set out in clauses 42 and 43, and the regulations that can be made by Ministers exercising powers under those provisions, are to be regarded as legally effective notwithstanding any incompatibility with (among other things) the Withdrawal Agreement and the Northern Ireland Protocol. If there was any room for doubt (which there is not) that clauses 42 and 43 set out to authorise Ministers to breach international law obligations, any such doubt is entirely removed by clause 45.' 'The Internal Market bill: A perfect constitutional storm'. Available from: https://publiclawforeveryone.com/2020/09/09/the-internal-market-bill-a-perfect-constitutional-storm/.

transition period.[3] As such, for the duration of the transition period, the EU enforcement regime that applies to the UK does not fall far from EU membership enforcement and dispute resolution. The role of the CJEU is vital in ensuring compliance with the Withdrawal Agreement in the same way it is imperative that the CJEU ensures compliance with the Treaties and EU primary and secondary legislation.

(ii) Disputes arising after the end of the transition period

General disputes arising after the transition period has ended are subject to the new dispute resolution mechanisms introduced by Part Six, Title III of the Withdrawal Agreement. The starting point is article 167, which obliges the UK and the EU to 'make every attempt, through cooperation and consultations, to arrive at a mutually satisfactory resolution of any matter that might affect [the operation of the Agreement]'.

The Agreement then provides for a mechanism for resolving disputes between the UK and the EU which resembles the dispute resolution mechanisms of the 2014 Association Agreements between the EU, Ukraine, Georgia, and Moldova.[4] Article 168 of the Agreement provides that recourse shall not be had to any other dispute resolution procedure than that set out in the Agreement. Any disputes arising out of the Agreement will be adjudicated, in the first instance, by the UK-EU Joint Committee (article 169 of the Agreement). If the consultations within the joint committee fail to reach a conclusion, then the dispute is sent to an arbitration panel (article 170 of the Agreement). The panel is composed of experts nominated by the UK and the EU under the conditions set out in article 171. The parties are obliged to comply with any ruling issued by the panel and failure to do so can lead to either a financial penalty or suspension of aspects of the Agreement. In order to ensure the uniform interpretation and application of EU law, the Agreement also envisages a potential role for the CJEU in the resolution of disputes.

[3] On 31 December 2019 there were 66 infringement proceedings against the UK open, of which 30 opened in 2019. European Commission, 'Monitoring the application of EU law: United Kingdom report 2019' https://ec.europa.eu/info/sites/info/files/file_import/report-commission-2019-national-factsheet-united-kingdom_en.pdf .

[4] Julien Mieral, Catherine Barnard, 'UK-EU dispute resolution, after the transition period' (8 Oct 2020) available at: https://ukandeu.ac.uk/uk-eu-dispute-resolution-after-the-transition-period/.

Article 19(1) of the Treaty on European Union (TEU) provides that the CJEU 'shall ensure that in the interpretation and application of the Treaties the law is observed'. As such, the CJEU continues to enjoy exclusive jurisdiction over issues relating to the interpretation, application or enforcement of EU law pertaining to disputes under the Withdrawal Agreement or future relationship. This is also reflected in article 174 of the Withdrawal Agreement. Post-transition, the panel will need to submit the EU law issue to the CJEU for adjudication, which the CJEU will interpret and apply in a uniform manner. In fact, article 174 sets out a number of broadly defined situations where the arbitration panel *must* submit a dispute to the CJEU: where the dispute raises a question of interpretation of a *concept* of EU law, a question of interpretation of a provision of Union law referred to in the Withdrawal Agreement, or a question of whether the UK has complied with its obligations under article 89(2) of the Withdrawal Agreement. The ruling of the CJEU will be binding on the arbitration panel and thus to the parties to the dispute. The CJEU also continues to enjoy jurisdiction over certain provisions of Part Five of the Agreement concerning the financial settlement, and in matters relating to the UK army bases in Cyprus.

The two latter situations stipulated in article 174 of the Agreement directly relate to the interpretation and application of the Withdrawal Agreement, as they refer to provisions and obligations set out in the text of the Agreement. The first situation, however (ie 'where the dispute raises a question of interpretation of a *concept of EU law*) is notably broad. It does not sit well with EU law Treaty drafting terminology, which is usually more precise by referring, for example, to specific legal instruments (EU Regulations, EU Directives etc) or legal principles (EU general principles), or values (eg article 2 TEU). In fact, the word 'concept' does not appear at all in the TEU but it was manifest in the seminal *Costa v ENEL* judgment where the CJEU emphasised that the transfer of the rights and obligations arising under the Treaty carry a limitation of sovereign rights for Member States against which no unilateral act can prevail against a *concept* of the Community.[5] In *Costa* the use of *concept* served as a means for the CJEU to solidify the status of EU law as a system uniformly and generally applicable throughout the EU.

[5] Case C-6/64 *Costa v ENEL* ECLI:EU:C:1964:66.

While the broad terminology in the Withdrawal Agreement may not be indicative of the limiting effect of post-Brexit laws, it may render it difficult to delineate the jurisdiction of the CJEU or to limit the instances where the arbitration panel is obliged by the Agreement to submit a dispute to the CJEU. Given the wide application of EU law, it is difficult to imagine a situation where the arbitration panel may consider that a dispute in hand does not touch on EU law and therefore should not be submitted to the CJEU.

The *Achmea* decision is indicative of the CJEU's mindset predicated on the idea that the lack of possibility for judicial review where issues of EU law might be engaged deprives EU law from its *full effectiveness*.[6] This line of argument was also echoed in the CJEU's seminal Opinion 2/13 although it shall be noted that while the arbitration panel is outside the institutional and judicial framework of the EU it is not an international court as such. Even when the arbitration panel decides that a dispute between the EU and the UK does not involve a concept of EU law, the panel is under obligation to give reasons for its assessment and the parties to the dispute may ask for its review (article 174, paragraph 2). Following such a review there appears to be no further recourse to the CJEU as the arbitration panel ruling is final and legally binding (article 175) and its decision to abstain from referring a dispute to the CJEU is not subject to review by the CJEU.

All of the above demonstrate the continued formal role of the CJEU even in those areas where an attempt has ostensibly been made to exclude its jurisdiction, as was the case with the creation of the new dispute resolution mechanisms under the Withdrawal Agreement.

(iii) Disputes relating to citizens' rights post-transition

Article 158 of the Withdrawal Agreement provides that, where a case concerning citizens' rights has commenced within eight years (with the possibility of an extension in certain cases) of the end of the transition period, a preliminary reference may be made to the CJEU. Cases concerning article 19 of the Agreement, which governs residence documents can be heard by the CJEU eight years from the date of the provision's application. The effects of such a decision by the CJEU are the same as those found under the existing Treaty provision, namely article 267 TFEU. The

[6] Case C-284/16 *Slowakische Republik v Achmea BV* ECLI:EU:C:2018:158.

citizenship provisions are to be further overseen by an independent authority, which will have powers similar to the Commission in investigating alleged breaches of the Treaties.

(iv) Disputes relating to the Ireland/Northern Ireland Protocol post-transition

Article 12 of the Ireland/Northern Ireland Protocol grants the CJEU a similar jurisdiction to that found in article 131 of the Withdrawal Agreement. In other words, for issues relating to the Protocol post-transition, the CJEU's existing jurisdiction is largely preserved. It is important to note, however, that jurisdiction under articles 12 of the Protocol and article 131 of the Withdrawal Agreement are mutually exclusive.

If a dispute arises in relation to the Protocol post-transition, the parties are likely to invoke the jurisdiction found in article 12 to resolve that dispute. As discussed in relation to article 131 TFEU, article 12 allows for the parties to rely on a dispute resolution mechanism that is very similar to that found in existing EU law in the guise of article 258 TFEU, with the Commission being able to initiate infringement proceedings before the CJEU which could eventually lead to a binding declaration that certain prescribed provisions of the Protocol have been violated. Eventually, such action by the Commission could lead to a financial penalty being imposed by the CJEU under article 260(2) TFEU. An additional mechanism lies in the continued ability for a UK court to make a preliminary reference to the CJEU to request a ruling on the validity or interpretation of certain provisions of the Protocol. Again, this is an already-existing EU enforcement mechanism, as set out in article 267 TFEU.

Article 5(4) and Annex 2 of the Protocol provide a list of EU law provisions that will continue to apply to and in the UK in respect of Northern Ireland. The list includes Regulations, Directives and Decisions. It is key to remember that, in the same way as a UK court can make a preliminary reference request post-transition, national courts of other Member States will have the same course of action under article 267 TFEU. Therefore, the interpretation and application of the legislation set out in Annex 2 will be shaped by preliminary reference judgments that result from requests from other Member States' courts, even after the end of the Brexit transition period. As

such, the role of national courts of the EU's member states as venues for the resolution of disputes affecting the UK post-Brexit cannot be discounted.

II. Dispute Resolution under the Future Relationship

As we do not yet know the shape of the future relationship between the UK and the EU, it is difficult to assess the precise role of any future dispute resolution mechanism. What we do know is that the CJEU is likely to play a subsidiary role in any such process given the UK's newfound status as a third country. The precise dispute resolution procedure will eventually be set out in the agreement between the UK and the EU, or failing such an agreement the general rules applicable under international law, for example the World Trade Organization (WTO) dispute resolution mechanisms. Despite the continued uncertainty, we suggest that it would be a mistake to create an artificial dividing line between dispute resolution under the Withdrawal Agreement and the mechanism to be developed to govern the future relationship. Based on the Political Declaration between the EU and the UK, and the current state of negotiations, some aspects of the Withdrawal Agreement system are expected to be transposed to the future relationship which is important to ensure continuity.

The current negotiating aims are to form a UK-EU comprehensive Free Trade Agreement in the form of an Association Agreement. The EU's current negotiating objectives set out a system similar to that found under the Withdrawal Agreement, with disputes being adjudicated by an independent arbitration panel. The UK negotiation mandate stipulated that any dispute resolution process should be 'appropriate to a relationship of sovereign equals' and suggests that a model might be drawn from existing free trade agreements, for example that between the EU and Canada.

The aspiration that a dispute resolution model can be drawn from existing free trade agreements comes with limitations. First, dispute resolution regimes in existing EU free trade agreements come in different shapes and forms: there is no uniform dispute resolution regime characterising these agreements.[7] Second, all current EU free trade agreements are, essentially, agreements between the EU and a third country that was never part of the EU. This dynamic has allowed for the establishment of sui generis dispute resolution mechanisms. By way of contrast, the previous status of the UK as an EU Member State, combined with the maintenance of a role for the CJEU in issues such as citizens' rights and the Ireland/Northern Ireland Protocol, may signal a stronger role for the CJEU in the context of the EU-UK future relationship even if this appears to be politically inconvenient at present. In other words, we are here faced with the need to develop dispute resolution mechanisms in the context of divergence rather than convergence.

The EU-UK Political Declaration of 17 October 2019 recognises the above dynamics by stating that the future relationship will need to take account of the unique period of the UK's membership of the Union, which has resulted in 'a high level of integration between the Union's and the United Kingdom's economies, and an interwoven past and future of the Union's and the United Kingdom's people and priorities'.[8] Although the Political Declaration does not set out a detailed system of dispute resolution, Part IV of the Declaration provides an overview of the key characteristics of the system.

The plans for the dispute resolution mechanism under the Free Trade Agreement, which are expressed in the Political Declaration, seem largely inspired from the post-transition dispute resolution mechanism envisaged in the Withdrawal Agreement in three ways outlined here and discussed in more detail below.[9] First, there is a dispute resolution role for a Joint Committee. Second, there is an independent arbitration panel, and third, there is a role for the CJEU.

[7] See DG for Internal Policies of the Union Study for the European Parliament AFCO Committee 'The Settlement of Disputes Arising from the United Kingdom's Withdrawal from the European Union' PESP 596.819 - November 2017.
[8] Revised text of the Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom as agreed at negotiators' level on 17 October 2019, to replace the one published in OJ C 66I of 19.2.2019 art 5.
[9] See above under Section I(ii).

Similar to the provisions of the Withdrawal Agreement on post-transition dispute resolution, the Parties should establish 'a Joint Committee responsible for managing and supervising the implementation and operation of the future relationship, and facilitating the resolution of disputes (....)' (paragraph 126 Political Declaration). It is unclear whether this will be the same Joint Committee as that envisaged by the Withdrawal Agreement. The precise details of its operation will be set out in the text of the agreement on the future relationship.

If the matter is not resolved through the Joint Committee, the Committee may refer the dispute to an independent arbitration panel at any time. The decisions of the independent arbitration panel will be binding on the Parties. It may be the case, however, that the Agreement includes additional provisions for expedient problem-solving such as a flexible mediation mechanism, something that does not feature in the Withdrawal Agreement.[10] It is, therefore, likely that the Free Trade Agreement will provide for more routes for dispute resolution mechanisms than those envisaged under the Withdrawal Agreement.

One striking feature of the Political Declaration is the intention of the Parties to maintain a role for the CJEU 'as the sole arbiter of Union law'. According to paragraph 131, if a dispute raises a question of interpretation 'of provisions or concepts of Union law', the arbitration panel should refer the question to the CJEU for a *binding ruling* as regards the interpretation of EU law. When a dispute does not raise such a question, there will not be a reference to the CJEU. The consequences of this provision are explored below in the context of the evaluation of the CJEU's future role. What is clear is that any proclamation by the UK Government on the exclusion of the UK from the CJEU's jurisdiction should be read with caution against the text of the future relationship agreement, should the intention of the Parties find its way into the text of the agreement.

In addition to these aspects, a common principle governs the two mechanisms, namely the requirement of cooperation and exclusivity. This principle is expressed in article 167 of the Withdrawal Agreement, which highlights the need for consultation rather than confrontation. It is

[10] A mediation mechanism is provided in the 2014 EU-Ukraine Association Agreement, available at: https://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155103.pdf. This may constitute a model for the EU-UK future relationship agreement.

also reflected in article 129 of the Political Declaration on the future relationship. Any such future mechanism should also reflect the Withdrawal Agreement and the Political Declaration's (article 122) overarching ambition of respecting the autonomy of the UK and EU legal orders. In order to ensure the proper functioning of the future relationship, the Parties commit to engage in regular dialogue and to establish robust, efficient and effective arrangements for its management, supervision, implementation, review and development over time, and for the resolution of disputes and enforcement, in full respect of the autonomy of their legal orders.

As the agreement reached between the EU and the UK may well end up being a 'mixed agreement', meaning the involvement of the 27 member states, it will be subject to approval in national parliaments. It is possible that there will be challenges to the ratification of the agreement that could end up in national courts, thereby bringing to the fore national courts as new stakeholders in the post-Brexit dispensation, highlighting, in particular, their crucial role as dispute resolution actors under the future relationship. The national governments will also have the ability to refer a question to the CJEU on the validity or interpretation of the future agreement, as Belgium did during the ratification of the CETA agreement with Canada, thereby casting the entire agreement's finalisation into doubt.[11]

In the CETA dispute, the CJEU was asked for an opinion on the compatibility with EU law of CETA's chapter on investor state dispute settlement. In particular, Belgium had expressed concerns as to the compatibility of the novel investment court system with the autonomy of EU law and EU fundamental rights. In Opinion 1/17, the CJEU began by noting that the Union has the right to enter into international agreements which may confer the power on an international tribunal to interpret that agreement so long as such a tribunal does not have the power to interpret or apply EU law. The CJEU was able to hold that CETA conferred no such power to any CETA tribunal. The CJEU further emphasised that any tribunal found in an international agreement to which the Union is a party should be accessible and independent and respect the fundamental rights found in the Charter, for example article 47 on the right to an effective remedy and to a fair trial, regardless of the fact that the non-EU party is not bound by these provisions. Thus,

[11] Kingdom of Belgium Federal Government (2016), CETA-Belgian Request for an Advisory Opinion from the European Court of Justice.

following Opinion 1/17, in order to be compatible with EU law, any dispute resolution mechanism must not undermine the autonomy of the EU legal order or prevent the Union's institutions from complying with their constitutional obligations deriving from EU law. In the same Opinion, the CJEU found that when a dispute arises relating to the interpretation and application of the international agreement, the domestic law of one of the parties (including EU law) was to be considered a question of fact. The CETA tribunal was therefore required to 'follow the prevailing interpretation' given by the CJEU or domestic courts.

Of course, the above analysis is premised on the conclusion of a deal between the UK and EU. In the event of a no-deal end to the transition, the parties will have to fall back on the dispute resolution mechanisms found in international law, save to the extent that specific provisions have been made in the Withdrawal Agreement, for example disputes concerning citizenship. Even in a no-deal scenario, however, the voice of the CJEU will still be echoed in UK courtrooms in cases pertaining to retained EU law. UK courts will treat past CJEU authorities according to the same principles as if they were their own case law and, as such, may decide to depart from them. The practical implications of any future departures from CJEU judgments can hardly be understated in light of the parallel development of post-exit CJEU case law in Luxembourg. As argued by Weinberg, recalling Lord Neuberger's and Lady Hale's concerns expressed at the House of Lords Committee on the Constitution in 2018,[12] Parliament needs to provide more information about the domestic role of post-exit CJEU case law and UK courts should not be criticised for future misinterpretations of unclear law or for being seen to be making policy decisions, therefore upsetting the constitutional balance of powers.[13]

III. Concluding Remarks: Evaluating the Role of the CJEU

The Withdrawal Agreement takes as its starting point that any dispute resolution mechanism should 'fully respect the autonomy of the respective legal orders of the Union and of the United

[12] 9th Report of Session 2017-19 - published 29 January 2018 - HL Paper 69, See Chapter 7, interpretation of retained EU law, Available from: https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/69/6910.htm#_idTextAnchor076.
[13] Nyasha Weinberg, ' No Deal Brexit, Business and the Rule of Law', Bingham Centre for the Rule of Law, Available from: https://binghamcentre.biicl.org/documents/65_no_deal_brexit_business_and_the_rule_of_law_-_4_october_jsc.pdf.

Kingdom as well as the United Kingdom's status as a third country'. A consequence of this approach is that the CJEU's jurisdiction under the Agreement has been carefully circumscribed and depends on the nature and timing of the dispute.

We have already seen that the CJEU will continue to exercise jurisdiction over certain specified areas such as citizenship rights and the Ireland/Northern Ireland Protocol. The Court will also be able to hear a dispute arising prior to the end of the transition period. Perhaps more important is the CJEU's continuing exclusive jurisdiction over matters pertaining to EU law which has the potential to be disruptive, not only in the context of the Withdrawal Agreement, but also to the future EU-UK relationship. We discussed above article 174 of the Withdrawal Agreement, whereby if a dispute raises 'a question of *interpretation* of a concept of Union law, a question of interpretation of a provision Union law referred to in this [Withdrawal] Agreement or a question of whether the United Kingdom has complied with its obligations under Article 89(2) [which requires the UK to fulfill its legal duties]', the matter *shall* be referred to the CJEU by the arbitration panel. Either party can request that the matter be forwarded to the CJEU, in which case the panel must provide reasons for its assessment as to whether the interpretation of EU law is or is not raised.

A closer look into this mechanism reveals that it is explicitly confined to the interpretation of EU law, rather than to, say, its application or implementation. Article 267 TFEU, for example, allows a national court to refer a preliminary question to the CJEU to rule on the interpretation or *validity* of EU law. Article 174 of the Withdrawal Agreement would seem to have limited the ability of the panel to refer a question on the validity of EU law. There has also been a long line of complex case law governing the question of whether a dispute falls within the scope of EU law ie whether it concerns an issue of EU law. The term 'scope of EU law' is rather nebulous and includes, but is not confined to, cases where the member states implement EU law or when they derogate from EU law.[14] The concept of the scope of EU law is not necessarily expansive and the CJEU has found that the mere fact that a dispute arose in a field over which the EU had competence was not enough to bring the case within the scope of EU law.[15]

[14] Case C-260/89 *ERT* ECLI:EU:C:1991:254**.**
[15] Case C-206/13 *Siragusa* ECLI:EU:C:2014:126.

Similarly, under the doctrine of acte clair, a national court is under no obligation to refer a question to the CJEU where the CJEU has already issued a ruling on the interpretation of the relevant provision or where the correct application of EU law is so obvious that there is no room for doubt and therefore no need for the CJEU to issue a ruling.[16] It is not at all clear how this existing jurisprudence will apply to the panel's discretion in deciding whether a case raises a 'question of interpretation of a concept of Union law'. The intention may be that the existing jurisprudence on Article 267 TFEU will not apply to the panel's discretion, perhaps as an attempt to diversify dispute resolution post-Brexit from that pre-Brexit. In this instance, a new body of case law will have to emerge to clarify the terminology used in the future relationship agreement and the exact dynamics between the arbitration panel and the CJEU through this new semi-preliminary reference procedure.

The referral mechanism under the Withdrawal Agreement also bears striking similarity to one found within the agreement governing the EU's accession to the European Convention on Human Rights (ECHR). In order to preserve and protect the autonomy of the EU legal order, the agreement provided that the European Court of Human Rights (ECtHR) could rule on a matter concerning EU law, only if the matter had already been addressed by the CJEU in its case law. For the CJEU, this mechanism overlooked the fact that it is for the CJEU itself to decide whether or not a matter relating to EU law had already been addressed by that Court. Otherwise, would be to give the ECtHR an indirect power to rule on the interpretation of CJEU case law. This was one of the factors that led to the CJEU finding that the draft agreement was not compatible with EU law in its Opinion 2/13.[17] Under the Withdrawal Agreement, the arbitration panel is being given a similar power to decide whether or not a dispute touches upon the interpretation of EU law, which may be open to challenge before the CJEU on similar grounds to those found in Opinion 2/13. It is likely that the CJEU will continue to be watchful and to guard its exclusive jurisdiction over the interpretation of EU law in all aspects of the Withdrawal Agreement and future relationship. A key difference between the EU-UK mechanism and that found in CETA, was that CETA provided for no such possibility for a reference to the CJEU on a point of EU

[16] Case 283/81 *CILFIT* ECLI:EU:C:1982:335.
[17] ECLI:EU:C:2014:2454.

law. Therefore, the CETA tribunals would not be faced with a decision as to whether an EU law point is raised.

It appears that the existing dispute resolution under the Withdrawal Agreement has provided a blueprint for the parties' intention regarding the future relationship dispute resolution mechanism. However, Opinion 2/13 as well as Opinion 1/91 on the First Draft of the EEA Agreement show that the CJEU may eventually reject the dispute resolution model that the UK and the EU will agree upon.[18]

As is the case with any agreement entered into between the EU and a third country, disputes arising between the EU and the UK over the future relationship are likely to be subjected to the jurisdiction of the CJEU to the extent that those agreements form part of EU law, save to the extent that the parties have provided for permissible alternative mechanisms in their agreement. For example, disputes concerning the Treaty on the European Economic Area (EEA) are heard before the European Free Trade Association (EFTA) Court. Any future agreement, as an act of the Union, will also be subjected to the jurisdiction of the CJEU vis a vis the EU which must act compatibly with the Treaties, including fundamental rights, in all its dealings. The Political Declaration at article 131 recognises the ongoing jurisdiction of the CJEU over matters concerning the interpretation of EU law.

Beyond the Withdrawal Agreement and the future relationship, the CJEU will continue to play a role in the resolution of disputes within the UK. The CJEU's continued influence will be mediated via domestic mechanisms such as the EU (Withdrawal Act) 2018, which preserves existing CJEU case law as retained EU law. The UK Government has recently issued a response to a consultation indicating that it will extend the ability of the domestic courts to depart from this retained case law. The UK courts will, however, be permitted to have regard to future decisions of the CJEU, although they will no longer be bound to do so. The UK courts are particularly likely to continue to look to the CJEU for guidance on those legal fields that until now have been heavily influenced by EU law. These include for instance, employment law and

[18] Although see discussion above under section I(ii). See also Carl Baudenbacher 'Britzerland': the problem of dispute resolution post-Brexit' https://blogs.lse.ac.uk/brexit/2018/10/29/britzerland-the-problem-of-dispute-resolution-post-brexit/.

competition law. UK courts will not be permitted to address a preliminary reference to the CJEU except in the field of citizenship rights and the Ireland/Northern Ireland Protocol where references will be permitted beyond the transition period.

More broadly, the Union will continue to be bound by the rulings of the CJEU even in its interactions with the UK. This includes all aspects of EU law such as the Charter, which the UK has decided not to make part of its retained EU law. These EU law sources will continue to have an indirect or legacy effect in the UK well beyond Brexit.