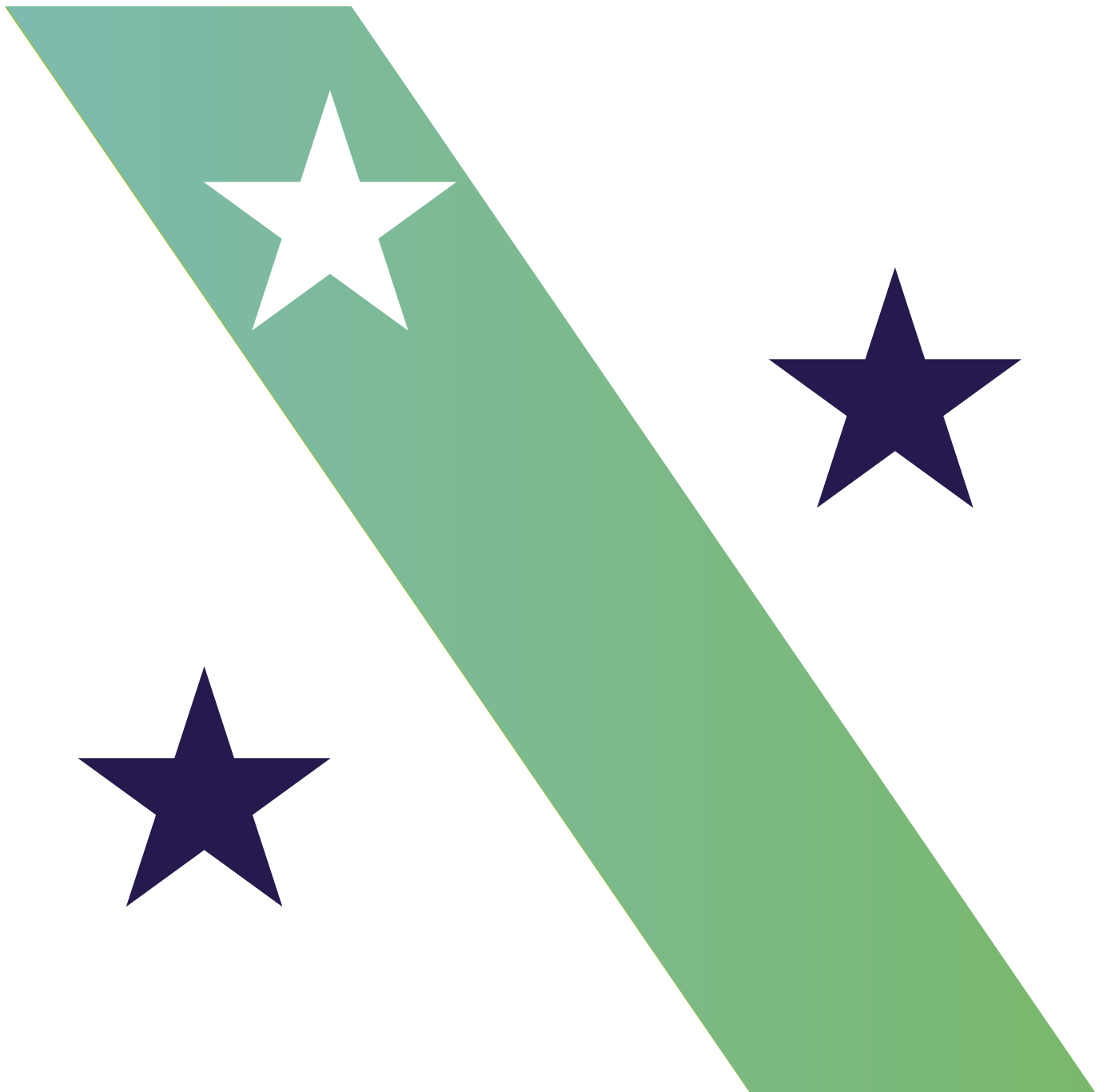


# Dispute resolution after Brexit



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## About this paper

The role of the European Court of Justice (ECJ) after Brexit has emerged as one of the flashpoints of negotiations. Given the Government's stated objective to end the direct jurisdiction of the ECJ after Brexit, this paper looks at a range of options for new means of dispute resolution to replace it, including other courts, arbitration mechanisms and committees. This builds on *Brexit and the European Court of Justice*, a previous paper that considered how Parliament should handle the European Court in the EU (Withdrawal) Bill.

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## Key messages

### **The UK and the EU will need a dispute resolution mechanism for both the withdrawal agreement and the future partnership – but the two sides are a long way apart on institutional design**

There needs to be some means of resolving future disputes about the meaning of the UK-EU treaties, and dealing with cases where governments fail to play by the rules. If the treaties end up being more honoured in the breach than citizens, businesses and governments will lose out on the benefits of trade and co-operation. Both sides accept this, but that is where the consensus ends. The EU proposes to establish the European Court of Justice (ECJ) as the ultimate arbiter of much of the withdrawal agreement, and possibly all of it. The UK says this court can have no jurisdiction in the UK.

### **Accepting the EU's proposals on the ECJ would not be in UK interests**

As one of the EU's own institutions, the ECJ would struggle to be neutral in any dispute between the UK and the EU after Brexit. As the UK Government notes, for the ECJ to assume this role would also be an extraordinary departure from its previous role, and an extremely unusual dispute resolution system for an international agreement.

### **But the UK will not be able to cut off the influence of the ECJ on the UK completely, and should not try to**

The Government is legislating to ensure that pre-Brexit case law of the ECJ will remain part of UK law after Brexit. It is inevitable, however, that post-Brexit jurisprudence of the court will also continue to affect the UK, its businesses and its citizens. For one, any acts of EU bodies or agencies that concern UK citizens or businesses are reviewable by the General Court of the ECJ, as is the case for private parties from the United States to China. This will not change after Brexit.

In addition, the more closely the UK wishes to co-operate with the EU in the future, the closer a relationship the UK will have with the ECJ. Where countries' rules line up or converge, there are fewer barriers to trade. Chicken that complies with regulations in one territory is more likely to be legal in another. Yet there is no point in countries lining up their rules if they cannot agree on what those rules mean. To the extent that the UK accepts regulatory influence from Brussels after Brexit, it will need to accept the interpretation of those regulations from Luxembourg too.

### **The Government must also accept that the ECJ will strike down any dispute resolution mechanism that, in its view, threatens the EU's legal autonomy**

When the European Commission says that any dispute resolution mechanism (DRM) must respect the 'legal autonomy' of the EU, it is stating a legal constraint, not a political objective. The concept of legal autonomy is defined and developed by the ECJ. Previous opinions of the court, on the dispute resolution system for the European Economic Area (EEA), suggest that the ECJ will strike down the UK-EU treaty if it judges that the dispute resolution system gives another tribunal the ability to issue binding judgments on EU law, or replicas of EU law, for EU institutions, and possibly for EU citizens and businesses too. Elements of EU law are likely to appear in the withdrawal agreement and transitional arrangements.

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The ECJ's view on the UK case could be different. It is not technically bound by its previous opinions. If the Commission and the Council are behind a DRM that cuts against the grain of previous ECJ opinions, it is conceivable that the court's thinking could evolve. Its interpretation of legal concepts is undoubtedly shaped by political factors to a greater extent than some other courts'.

However, the UK Government should not pin its hopes on that prospect. There is no sign that the court's interpretation of legal autonomy is becoming any more flexible. In any case, deadlines are tight and negotiators should strive to avoid the hold-up that a hostile ECJ opinion would bring about.

### **The EFTA Court, or an EFTA Court replica, could end the current stalemate**

At present, the UK and EU positions on dispute resolution are diametrically opposed. However, if both sides are willing to make some compromises, there is a landing zone.

The presidents of both the ECJ and the European Free Trade Association (EFTA) Court have made public remarks on the possible benefits of an EFTA-style solution. Michel Barnier, the EU's Chief Brexit Negotiator, also flagged up the EEA-EFTA system as an example of how a court system could be made to 'dovetail' with the ECJ. These remarks suggest that the EU could accept an EFTA Court-style solution for the withdrawal agreement. It remains to be seen whether this solution is politically acceptable on this side of the Channel. It has support among a number of Leave-supporting MPs and commentators, but some are discomfited by the EFTA Court's close relationship with the ECJ.<sup>1</sup>

There are two plausible routes to an EFTA Court-style solution. First, the UK could try to 'dock' to the EFTA Court and the EFTA Surveillance Authority, asking those institutions to apply and interpret the withdrawal agreement, or at least EU law-related provisions of the withdrawal agreement, on the UK side while the ECJ and European Commission do that job on the EU side. This would probably involve joining EFTA, but need not involve remaining within the EEA.

Second, the UK could try to build a new system which replicates the EEA-EFTA model. That would involve a new tribunal to interpret the withdrawal agreement on the UK side. This would be a tougher sell, however, as a perfect EFTA Court replica would involve only UK judges and so would look more like the UK marking its own homework.

### **Alternatively, negotiators could try to design something innovative**

Other precedents – Swiss-style joint committees of diplomats and politicians or ordinary ad hoc arbitration – are unlikely to give the EU the guarantees it wants on the withdrawal agreement. If an EFTA Court-style solution too closely resembles the ECJ to meet the UK Government's negotiating objectives, it could try to design an innovative arbitral system. A surveillance authority, a constantly resourced infrastructure to support the DRM, a special system to increase access to justice for small companies and individuals, and references to the ECJ are all features the UK could propose to add to ordinary ad hoc arbitration in order to boost the chances of agreement.

If the UK Government does try to innovate, it needs a firm grip on the various components of institutional design and a good understanding of the trade-offs they

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embody. In particular, there is an unavoidable trade-off between how quick and cheap the system is, and its ability to deliver legal certainty. There is also a trade-off between effective enforcement and national sovereignty – two of the Government’s own negotiating objectives.

### **The right DRM for the ‘future partnership’ will depend on its contents**

It is still unclear what the future partnership agreement will contain. If it looks like an ordinary trade agreement, with some high-level commitments to regulatory co-operation, some shallow mutual recognition and comprehensive tariff reduction, then an ordinary, light-touch arbitration regime will likely suffice.

However, if it goes beyond an ordinary trade agreement, with closer regulatory alignment allowing more frictionless trade, many of the same issues, concerning the interpretation of EU law, will recur. The deeper and more dynamic a relationship the UK wants, the more robust an enforcement mechanism it will have to accept.

### **The Government also needs to consider mechanisms for ‘dispute prevention’**

This paper focuses mainly on how to resolve disputes when they arise. Better that they do not arise at all. This can be achieved, in part, by ensuring that there are forums for regular negotiation, consultation and discussion, such as joint committees, and by building and maintaining trust.

The Government should also consider more formal modes of dispute prevention, in particular mechanisms for regulatory co-operation with the EU.

### **The UK Government needs to work out how it wants to give effect to the withdrawal agreement in UK law, and commit to doing this with an Act of Parliament**

Dispute resolution is a matter for the negotiation, but it will also require legislation. It will be UK legislation that determines what effect the UK-EU treaties will have in UK law, and so, in turn, what role any dispute resolution mechanism has in the interpretation of UK law. So far both sides’ statements on legislative implementation have focused on the withdrawal agreement.

The EU’s position – that rights in the withdrawal agreement must have direct effect, underwritten by the ECJ – is driven by a desire to entrench those rights, to stop Parliament destroying or amending them after Brexit. The Government’s own position on the status of the withdrawal agreement in UK law is increasingly unclear: the Prime Minister has said the agreement will be ‘incorporated’ into UK law, but this phrase hides a multitude of legislative sins. The Government must make its position clear.

The Government must also commit to implementing the withdrawal agreement with an Act of Parliament, not with a statutory instrument as is currently provided for in the Withdrawal Bill. An Act of Parliament is a more stable source of law, since it is not subject to judicial review. Making this change also opens up the possibility that the courts would designate the Act a ‘constitutional statute’, preventing implied repeal and thus affording the rights some level of entrenchment. That would make the negotiation easier, and possibly open up more options on dispute resolution. It is an easy win.

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## **If negotiators are to make any progress, the Government needs to go beyond consideration of past dispute resolution mechanisms and make constructive proposals on the way forward for the UK and EU**

The Government's recent paper on dispute resolution contained welcome discussion of precedents for the UK-EU dispute resolution mechanism. It said nothing, however, about what mechanism the UK wants for the future.

The Government should not be tempted to postpone a meaningful conversation about dispute resolution until the end of the negotiation, either in Westminster or in Brussels, for two reasons.

First, the content of the EU (Withdrawal) Bill will determine how the withdrawal agreement is given effect in UK law, including the role of any dispute resolution mechanism in interpreting the law. Parliament therefore needs to understand the options now.

Second, disagreements over dispute resolution have the potential to derail negotiations. The Government and the European Commission are still a long way apart. If negotiators discover at the eleventh hour they have irreconcilable differences, with each other, with the ECJ or with the parliamentarians responsible for ratification, prospects for a timely deal will evaporate. The Government can mitigate that risk by starting an informed debate now.

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# 1. Introduction

When the Prime Minister notified the European Council of the United Kingdom's intention to leave the European Union, she promised that the UK would be the EU's 'closest friend and neighbour' in the years to come.<sup>2</sup> Yet even close friends quarrel.

*"I thought we agreed that you were paying for that."*

*"You said that it wouldn't get in the way of our friendship when you moved – but we don't talk like we used to."*

*"Welcome! Can I get you anything to... – no, please don't touch that. And stop using that. And please take those off! Didn't I tell you that if you want to come here, you have to respect the rules?"*

These disputes are as likely between states as between friends and, if countries are bound by treaties that commit them to co-operate and trade with one another, they are likelier still. The UK and the EU will quarrel after Brexit.

There could be disagreements over who owes whom money, if one side says the other has failed to live up to its financial obligations under the withdrawal agreement. There could be disagreements about whether the UK treats EU citizens and companies as it promised to before the change, and likewise whether the governments of EU member states treat UK citizens and companies as they promised. There will certainly be disagreements about whether the UK and EU are paying enough attention to each other's rules and regulations when they make their own.<sup>3</sup> In fact, just about any provision of the withdrawal agreement, or of any agreement on the future relationship, could give rise to disputes.

Some agreed processes for resolving these disputes are needed. Projections of the economic benefits of trade agreements are based on the assumption of 100% compliance.<sup>4</sup> This cannot be expected without a 'dispute resolution mechanism'<sup>\*</sup> (DRM) to enforce the deal or deals. These boost compliance both by correcting infractions and, more importantly, by deterring them in the first place. If the treaties end up being more honoured in the breach, everyone loses out on the benefits of trade and co-operation.

Yet dispute resolution has already emerged as one of the thorniest elements of Brexit negotiations. There is a considerable gulf between the two sides. The EU says that its own dispute resolution mechanism, the European Court of Justice,<sup>\*\*</sup> must be the dispute resolution of last resort for many UK-EU disputes arising out of the withdrawal

\* Sometimes called a dispute settlement (e.g. by the World Trade Organization). There is no substantive difference between the two terms, though arbitrators often prefer the ring of finality offered by 'resolution'.

\*\* The Court of Justice of the European Union (CJEU) technically comprises three different courts: the European Court of Justice, the General Court and the Civil Service Tribunal. However, this paper adopts common parlance, in which the entire CJEU is referred to as the European Court of Justice (ECJ). Where it is necessary to make distinctions between the different chambers of the CJEU, this is made explicit.



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agreement, and the European Commission's position paper proposes to establish the court as the ultimate arbiter of the entirety of that agreement. The UK insists the jurisdiction of this court is anathema. In time there may be similar squabbles over the governance of the future partnership agreement.

If both sides cleave to their current positions, they will not be able to reach a deal. This paper argues, however, that there could be solutions acceptable to both the UK and the EU.

The paper begins by explaining the process for dispute resolution at the moment, before Brexit. Thanks to the EU's unique institutional architecture, backed by the direct effect of much EU law for citizens before their national courts and a set of well-resourced, active institutions to deal with infringements, the EU treaties and EU law are thoroughly enforced. States have to accept brakes on their sovereignty and the competences of their own institutions, but citizens and businesses have easy access to justice.

In Chapter 3, the paper sets out the possible subjects for bickering after Brexit, assuming negotiations have been successful enough to spawn an agreement. These include:

- **Disputes over provisions of the withdrawal agreement**, for example over failure to give effect to agreed citizens' rights, or non-payment of debts according to the financial settlement.
- **Trade disputes** arising from the future partnership agreement, for example over unlawful regulatory divergence or regulatory discrimination.
- **Investment disputes**, for example over taxation measures that amount to expropriation of foreign investors' assets (although these will only arise if the UK-EU future partnership agreement includes an investment chapter).
- **Other disputes** over areas of co-operation set out in other parts of the agreement, such as research co-operation.
- **Unforeseen areas of dispute.**

The paper sets out the two sides' positions as expressed at the time of writing:

- **The UK** has said that the 'direct jurisdiction' of the European Court of Justice (ECJ) must end.<sup>5</sup> It has also stipulated a number of criteria for any dispute resolution mechanism that replaces the ECJ. It must respect UK sovereignty, protect the role of UK courts, maximise legal certainty for individuals and businesses,<sup>6</sup> ensure that they can enforce their rights, ensure that the UK continues to respect its international obligations, and respect the autonomy of the EU and UK legal orders.<sup>7</sup> The UK has also promised to incorporate the withdrawal agreement into UK law and make sure the UK courts can refer directly to it, taking into account the judgments of the ECJ.<sup>8</sup>
- **The EU** is seeking a mechanism that protects the 'autonomy' of the EU legal order which, it argues, means ECJ oversight over the withdrawal agreement.<sup>9</sup>

The paper discusses how to design post-Brexit dispute resolution mechanisms from three different angles. Chapter 4 discusses three basic models of dispute resolution – political, judicial and quasi-judicial. On the margins, the boundaries between these

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categories can be fuzzy, but they are helpful in analysing the key decisions and trade-offs that the UK and EU face. The UK appears to favour a quasi-judicial solution, while the EU favours a judicial one.

Chapter 5 offers a toolkit for designing a new DRM, or analysing an old one. It breaks mechanisms into their technical specifications, and discusses the costs and benefits of different approaches to each, along with some trends from previous international agreements. This chapter covers issues such as surveillance, the composition of any decision-making body and the procedure for appointing to it, the remedies it can hand down, and the range of parties that can initiate disputes.

Chapter 6 presents a basic menu of options for dispute resolution mechanisms. Some are existing institutions, such as **the ECJ** and the **EFTA Court**. Others are templates for new solutions, such as a system of **joint committees**, a **new bilateral court** or a **new arbitration mechanism**.

Chapter 7 discusses how the dispute resolution in any UK-EU treaties will interact with domestic law in the UK, in particular the EU (Withdrawal) Bill. It also discusses how the Government can realise its ambition to give the withdrawal agreement some kind of 'direct effect'.

The concluding chapter approaches UK-EU dispute resolution with the options from Chapter 6 and the toolkit from Chapter 5, discussing which dispute resolution mechanisms are desirable and negotiable.

On the basis of a survey of the relevant literature and extensive interviews with international dispute resolution experts, trade lawyers and civil servants, the chapters below set out to inform the decisions of the Government, Parliament and the public on how to set up a post-Brexit dispute resolution system. The paper therefore devotes little attention to a 'no deal' scenario. There will be no dispute resolution chapters in the UK-EU treaties if there are no UK-EU treaties. The paper does not, however, proceed heedless of the risk of no deal. Rather it argues that an effective dispute resolution mechanism, acceptable to both sides, is essential to securing one.

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## 2. Pre-Brexit state of play

### The nature of EU law

This paper is concerned with disputes that involve governments or EU institutions. While the UK is a member of the EU, the process for resolving these is bound up with the EU's unique constitutional order.

There are different types of EU law. Some EU law, including the EU treaties and most EU regulations, are '**directly applicable**'. This means that, as soon as they are passed by the EU's institutions, they automatically apply in member states. Other EU laws, including most EU directives, are not directly applicable. Instead, they have to be implemented by member states' own institutions as those member states see fit.<sup>10</sup>

Two further principles, developed by the ECJ, determine how EU law works in practice. The first is the **principle of direct effect**.<sup>11</sup> This was first articulated in the Van Gend en Loos judgment of 1963. The Dutch courts requested a ruling from the ECJ on whether Article 12 of the Treaty establishing the European Economic Community (TEEC), which prohibited member states from 'introducing between themselves any new customs duties on imports or exports',<sup>12</sup> could be enforced by nationals of member states before their national courts. The ECJ held that it could, ruling that Article 12 was 'ideally adapted to produce direct effects in the legal relationship between Member States and their subjects'.<sup>13</sup>

Therefore, individuals can directly invoke EU legislative acts before their national courts. This is true of all directly applicable EU law. It is also true of some non-directly applicable law, in certain circumstances.<sup>14</sup>

The second key principle is the **supremacy of EU law**.<sup>15</sup> According to this doctrine, first articulated by the ECJ in *Costa v ENEL* (1964), if an EU law contradicts the domestic law of a member state, the member state must apply the EU law. The ECJ held that 'the transfer by the States from their domestic legal systems to the Community legal systems of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.'<sup>16</sup>

The result of these doctrines, in combination, is that EU law runs deep into member states' own legal orders. Member states' courts all apply, interpret and enforce EU law. When that law is unclear, they are able to request a ruling on the matter from the ECJ, which is the ultimate authority on EU law.<sup>17</sup>

### EU law in the UK constitution

This presented a constitutional quandary for the UK. Some countries have 'monist' constitutions, which means that international treaties to which they are party automatically become part of their domestic law (or in some cases, automatically have precedence over domestic law). As the UK Government has pointed out in its paper on dispute resolution,<sup>18</sup> the UK is not such a state. Instead the UK has a 'dualist' constitution. When the Government makes and ratifies treaties, even with the

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involvement of Parliament, this does not change domestic law, as applied by UK judges. The only thing that can do that is legislation by Parliament.<sup>19</sup>

This flows naturally from the doctrine of parliamentary sovereignty. In the words of Albert Venn Dicey, Parliament 'has the right to make or unmake any law whatever: and, further, [...] no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament'.<sup>20</sup> If Parliament can make or unmake any law whatsoever, it can make a law incompatible with the UK's international law obligations. That means that for Parliament to pass a certain law, enforceable by UK judges, can be legal in domestic law, but illegal in international law.

This state of affairs was summarised eloquently by Lord Templeman in the *Tin Council* case [1990] 2 AC 418, at 476F–477A:

The Government may negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty. Parliament may alter the laws of the United Kingdom. The courts must enforce those laws; judges have no power to grant specific performance of a treaty or to award damages against a sovereign state for breach of a treaty or to invent laws or misconstrue legislation in order to enforce a treaty.

A treaty is a contract between the governments of two or more sovereign states. International law regulates the relations between sovereign states and determines the validity, the interpretation and the enforcement of treaties. A treaty to which Her Majesty's Government is a party does not alter the laws of the United Kingdom. A treaty may be incorporated into and alter the laws of the United Kingdom by means of legislation. Except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual.<sup>21</sup>

In the case of the EU, the UK Parliament and the UK courts found a way of squaring this circle. Through the European Communities Act 1972, Parliament itself embedded the EU legal order in the UK legal system. It achieved this as follows:

- Section 2(1) made all directly applicable EU law enforceable in the UK from the point of view of domestic law.
- Section 2(2) gave ministers the power to enact statutory instruments which would give effect to non-directly applicable EU law, like directives.
- Section 2(4) provided that any future Act of Parliament should be construed by the courts in a way that was compatible with the rest of the Act. This articulated, in domestic law, the doctrine of the supremacy of EU law.
- Section 3(1) instructed the UK courts to follow the Court of Justice of the European Union in the interpretation of EU law.

In line with Sections 2(1) and 2(4), the UK courts established that it was 'the duty of a United Kingdom court [...] to override any rule of national law found to be in conflict with any directly enforceable rule of Community [EU] law.'<sup>22</sup> They also established that

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the Act was a 'constitutional statute', that is, a statute that could not be 'impliedly repealed' by a future Act of Parliament.<sup>23</sup> If a future Act of Parliament came into conflict with EU law, and thus with the European Communities Act 1972, but did not expressly repeal any provisions of the European Communities Act 1972, then, as far as the courts were concerned, the European Communities Act 1972, and the EU law it imported were to remain in force.

The Government intends to repeal the European Communities Act 1972 in the EU (Withdrawal) Bill. This will be discussed further in Chapter 7.

## Resolution of disputes

This section considers the current process for resolving disputes between:

- a citizen of one member state and the government of another
- an EU institution and a member state government
- an EU institution and an EU private citizen or company
- one member state government and another.

The section does not consider disputes between EU institutions and other EU institutions. This is because those disputes will have less clear parallels for the UK after Brexit, and so are of less relevance here. Neither does it consider disputes between private citizens or companies of one member state, and private citizens or companies of another, as such disputes raise a different set of legal issues.<sup>24</sup>

Neither does this section discuss the involvement of EU law and EU institutions in disputes between a private party within a member state, and that member state's own government. Although these cases are important, and will be significantly affected by the design of the post-Brexit legal order, they are not matters of international dispute resolution, and so are outside this paper's scope.

### Citizen challenges government

A citizen of one EU member state may believe that the government of another EU member state has treated them in a way that violates EU law. Because of the doctrines of supremacy and direct effect discussed in the previous section, that citizen can bring their complaint before the national courts of the member state that stands accused of wrongdoing. If the case turns on an unresolved question of EU law, and it reaches the member state's highest national court, that court must request a ruling on the matter from the ECJ, which has judges from all member states.

Example: James Wood v Fonds de Garantie (UK Citizen v Member State Government)

James Wood, a UK national, had been living and paying taxes in France for over 20 years. He had three children with his partner, who was a French national. Their eldest daughter Helena died in a road traffic accident while in Australia in 2004. France had a scheme that gave compensation to the family members of such crimes. The responsible government body awarded compensation to Mr Wood's partner, but not to Mr Wood on the basis he was

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not a French national. He challenged this decision before the French courts, which referred the legal issues to the ECJ. The ECJ ruled that the decision had been discriminatory, in breach of EU law.<sup>25</sup>

Example: Van Duyn v Home Office (EU Citizen v UK Government)

Sometimes the citizen of another member state will contest a decision of the UK Government. In 1972, Yvonne van Duyn, a Dutch national, applied for leave to enter the UK in order to take up a position as a secretary at the Church of Scientology. The Home Office refused, on the basis that the activities of the Church were 'socially harmful'. Ms Van Duyn challenged the Government's decision in the UK courts, which referred the legal issues to the ECJ. It ruled that, although EU law did allow member states to refuse EU nationals entry on the basis of 'public policy', such a decision had to be 'based exclusively on the personal conduct of the individual concerned'. For this reason, the Home Office could not lawfully refuse entry to Ms van Duyn.<sup>26</sup>

The process is the same when a company believes that a member state government has treated it in a way that violates EU law.

Example: Cassis de Dijon (Company v Government)

The famous case of Cassis de Dijon is the classic illustration of the EU single market at work. In 1976, a German company requested permission to import Cassis de Dijon, a French liqueur, into Germany. The German Government refused, as German regulations dictated that spirits of this kind must have an alcohol content of some 32%, whereas Cassis de Dijon had a strength of only 15%–20%. The company challenged this decision before the German courts, which referred the legal issue to the ECJ. The ECJ ruled that Germany's fixing of minimum alcohol content constituted a barrier to trade, incompatible with free movement of goods under the EU treaties.<sup>27</sup>

## EU institution challenges government

It is the European Commission's responsibility to keep an eye on member states, ensuring that they implement EU directives and legislate only in such a way as is compatible with EU regulations and the EU treaties. This is known as the Commission's 'monitoring' or 'surveillance' function.<sup>28</sup>

The process often begins with a complaint from an individual, company or non-governmental organisation. In 2016, the Commission handled 3,458 complaints.<sup>29</sup>

If the Commission believes that a member state, such as the UK, is failing to fulfil its obligations, it will first send a letter of formal notice to the state. Some 986 such letters were sent in 2016, 28 of them to the UK.<sup>30</sup> Fully 53% of cases were resolved immediately after this stage in 2016.<sup>31</sup>

If a formal notice does not resolve the matter, the Commission will 'deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations'. The Commission sent 292 reasoned opinions to member states in 2016, seven of them to the UK.<sup>32</sup> Another 13% of infringement cases were resolved immediately after this stage in 2016.<sup>33</sup>

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If the state does not comply within the period set by the Commission, the Commission 'may bring the matter before the Court of Justice of the European Union'.<sup>34</sup> If the ECJ agrees with the Commission and finds the state has erred in law, it can require the state 'to take the necessary measures to comply with the judgment of the Court'. If the state fails to do so, the Commission can bring the case before the ECJ again, and the ECJ can impose a 'lump sum or penalty payment'.<sup>35</sup>

In 2016, about 2% of cases were resolved after the decision to bring the matter before the court. Another 1% were resolved once the matter had been brought before the court, but before the court had reached its final ruling.<sup>36</sup>

Example: Commission v United Kingdom [2006]

The UK passed the Working Time Regulations 1998, a statutory instrument, to implement the EU's Working Time Directive 1993 (since amended). Government guidelines explaining those regulations to employers stated that 'employers must make sure that workers can take their rest, but are not required to make sure that they do take their rest'. The European Commission delivered an opinion to the UK Government, arguing that these guidelines endorsed a practice of non-compliance with the directive's requirements. The Commission then brought the case before the ECJ. The ECJ sided with the Commission.<sup>37</sup> The Government had to change its guidelines.

## Government or citizen challenges EU institution

### What mechanism?

If a member state, or a citizen or company, believes that one of the institutions, bodies, offices or agencies of the EU has acted in an unlawful way, it can challenge its action at the ECJ, by bringing an 'action for annulment'.<sup>38</sup> For instance, if a member state believes that the European institutions have adopted legislation which is outside their remit, it can bring this matter before the court.

Example: Tobacco Advertising Case [2000]

In 1998, the EU adopted a directive that completely banned tobacco advertising aimed at the public. Germany submitted to the ECJ that the European Council and Parliament had gone beyond their powers, which only extended so far as enabling the function of the internal market. The directive was so exhaustive that it could not be justified by the need to knock down barriers to trade. (The UK entered the case as an 'intervener', siding with the EU institutions against Germany.) The court agreed with Germany, and annulled the directive.<sup>39</sup>

### Whose decisions may be reviewed?

The range of bodies that can now be challenged is large.

The Treaty establishing the European Economic Community (TEEC) only provided for decisions of the Council and Commission to be annulled. However, the ECJ stretched that provision and the stretch was codified by the Treaty on the Functioning of the European Union (TFEU), which provided that 'the Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and

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opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.<sup>40</sup>

Bodies that may thus have their decisions challenged in court include:

- EU Intellectual Property Office
- European Aviation Safety Agency
- EU Chemicals Agency
- European Medicines Agency
- European Banking Agency
- Community Plant Variety Office.

The details vary from agency to agency. Paul Craig notes that in the cases of the Office for the Harmonization of the Internal Market (which has become the Intellectual Property Office),<sup>41</sup> along with the European Aviation Safety Agency (EASA),<sup>42</sup> the regulations that set up the bodies themselves set out review procedures that involve the ECJ. This is likewise the case for the European Medicines Agency (EMA) and the Community Plant Variety Office (CPVO).

For other bodies, such as the European Agency for Safety and Health at Work (EU-OSHA), the regulation which sets up the agency allows for review by the Commission. It does not explicitly say that the Commission's decision could then be reviewed by the ECJ but, in Professor Craig's words, 'the EU courts would have little difficulty in reading this into the Regulation'.<sup>43</sup>

There is a final category of bodies – including the European Maritime Safety Agency (EMSA) and the European Union Agency for Network and Information Security (ENISA) – whose regulations say nothing explicit about review by the Court or the Commission,<sup>44</sup> but whose decisions could nonetheless be reviewed under Article 263 of the TFEU as detailed above.

### **Who can request an annulment?**

**Member states** (along with the European Parliament, Council and Commission) can bring a judicial review on the grounds of:

- lack of competence
- infringement of an essential procedural requirement
- infringement of the treaties or of any rule relating to their application
- misuse of powers.<sup>45</sup>

**Private persons** may bring a judicial review of an EU body's act, says the treaty, where it is 'of direct and individual concern to them'.

Anthony Arnall explains that the meaning of that phrase has been controversial.<sup>46</sup> In general, the court has applied restrictive tests. In 1963 it said that a person only falls



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into this category if the relevant decision 'affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed'.<sup>47</sup> Some have argued for a test that makes it easier for private parties to bring judicial reviews.<sup>48</sup> The court argued, however, that private persons within the EU have access to the ECJ through a reference by national courts.<sup>49</sup>

Importantly, it is well established that a private person does *not have to be a citizen of an EU member state* in order to seek a judicial review of this kind before the General Court. Cases in recent years, for example, have been brought by the American company PayPal against the Intellectual Property Office<sup>50</sup> and by a Chinese solar glass manufacturer against the Commission.<sup>51</sup>

### Government-government disputes

Under Article 259 TFEU, 'a Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union', so long as it has first brought the matter before the Commission.<sup>52</sup>

The use of this process is extremely rare. To date only six cases opened under Article 259 have reached the court. Most alleged infractions are instead picked up by the Commission.

## A unique system

This chapter has outlined the dispute resolution mechanisms from which the UK is about to withdraw. They are extensive, and unusual in two ways.

First, individuals and companies have direct access to their rights under the EU treaties, and other EU legislation, in their national courts. If they are denied their rights by one member state, they need not lobby their government to take up the matter with that member state. Instead they can go straight to the court. The obstacles for individuals and companies to challenging the acts and decisions of EU institutions and EU bodies are higher, but such challenges are still possible under EU law.

Second, the EU's own institutional architecture to deal with infringements of the treaties or of EU law is big, active and robust. The European Commission has buildings, staff and money from the EU budget to respond to complaints and look out for infractions. The 28 judges of the ECJ, likewise, stand ready in Luxembourg to hear cases brought before them, and have comprehensive powers. They can bind national courts and fine national governments.

UK individuals and businesses have become accustomed to having their rights enforced in this comprehensive way. Depending on the DRM that the UK and EU design, that may change. It is possible to exaggerate the extent to which UK individuals and businesses could lose access to their rights in EU member states after Brexit. They will still have access to any rights they enjoy as private parties from third states under EU law, since those laws will still have direct effect in EU countries. Some provisions of the Brexit agreements between the UK and the EU could have direct effect in EU

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member states too, although the ECJ's case law is divided on the direct effect of EU treaties with other countries.<sup>53</sup>

Individuals and businesses will therefore be able to enforce many of their rights under the new treaties in EU member states' domestic courts. However, they will not be able to enforce all of them. Some activities that are cross-border in nature may not be covered by EU law, insofar as the border crossed is the external EU border. Some legal experts interviewed by the Institute for Government took the view that, if, for instance, the German Government argued that a good imported from the UK fell into a certain tariff class, but the UK exporter disagreed, the UK exporter would struggle to challenge this under EU law in the German courts. On this view, the UK exporter would then have to resort to the UK-EU dispute resolution mechanism, whatever this was. Other interviewees took the view that there would, in most cases, be EU law under which a UK exporter, investor or person could challenge the decision of a member state government in the member state's own courts, even with regard to cross-border activities.

In addition, if the withdrawal agreement bestows upon either side any rights that EU law does not, then private parties could find it difficult to enforce these rights before national courts.

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## 3. The problem

### What will there be to fight about?

The UK and EU could find themselves in a dispute over any provision of the withdrawal agreement, any provision of the future partnership agreement, or any aspect of the future relationship that was not explicitly provided for in those treaties.

With respect to provisions of the treaties, disputes can arise over:

- **Non-implementation.** One party fails to take the domestic measures required to implement the agreement, so the other lodges a complaint using the dispute resolution mechanism. This is covered by the dispute resolution mechanisms in all trade agreements.
- **Interpretation of provisions.** There is a disagreement over what some provision of the agreement means, so the parties use the dispute resolution mechanism to settle the question of interpretation. This is covered by some dispute resolution mechanisms, but not others.<sup>54</sup>

Within non-implementation, disputes can arise over:

- **Government measures.** One party passes a law, or carries out an executive action, that the agreement prohibits. Or, one party fails to pass a law, or carry out an executive action, that the agreement demands. This is covered by the dispute resolution mechanisms in all trade agreements.
- **Proposed government measures.** The government of one party proposes to pass a law, or carry out an executive action, that the agreement prohibits. This is covered by some dispute resolution mechanisms, but not others.<sup>55</sup>

The substance of the disputes depends on the content of the agreements, and the actions of parties to the agreements after Brexit. It is possible to speculate nevertheless.

There could be **disputes over provisions of the withdrawal agreement**. For example:

- A UK citizen resident in Spain does not believe they are receiving the pension payments from the Spanish Government that the withdrawal agreement guaranteed them.
- An EU company believes that the UK Government is breaching the competition law provisions of the withdrawal agreement by offering loans at preferential interest rates to UK companies.
- The UK Government and the European Commission disagree about whether contributions towards the pensions of a certain class of EU official are covered by provisions on the 'financial settlement' (often referred to as the 'divorce bill').
- The European Commission, or an EU member state, believes that the UK Parliament has passed a law which conflicts with provisions of EU law that the UK committed to maintain during a 'transitional' period.

There could be **trade disputes** arising from the 'future partnership' agreement. For example:

- The European Commission, or an EU member state, believes that the UK Parliament has passed a law which diverges from the regulatory standards set out in the trade agreement.
- A UK company has tried to put its products on the EU market, but has had access denied, and believes this decision contravenes the terms of the agreement.

Trade agreements often exclude certain provisions or chapters from their dispute resolution mechanisms, allowing disagreements over these provisions to be resolved informally. The following data on exclusions were compiled by the World Trade Organization (WTO) in 2013.<sup>56</sup>

**Table 1: Exclusions from dispute resolution**

Chapter of trade agreement	Proportion of trade agreements excluding chapter from dispute resolution mechanism
Competition	46%
Services trade	38%
Sanitary measures	33%
Anti-dumping measures	20%
Environment provisions	19%
Technical barriers to trade	18%
Labour provisions	12%
Co-operation on certain issues	12%
Government procurement	9%
Investment	8%
Intellectual property	8%
Global safeguards	7%

**Investment disputes** are also possible, but they could only arise if the UK-EU 'future partnership' agreement includes an investment chapter. Investment chapters in trade agreements are largely identical in substance to bilateral investment treaties (BITs). Most often, they protect against the expropriation of foreign investors' assets, and guarantee foreign investors 'fair and equitable treatment'. Disputes, therefore, could be along these lines:

- A UK investor in an EU country believes that the country's government has levied a tax on its assets that constitutes a form of indirect 'expropriation' proscribed by the agreement.
- A European investor in the UK believes that a UK regulator has taken a decision which discriminates against foreign companies, denying the company the 'fair and equitable treatment' guaranteed in the agreement.

The EU's recent trade agreements, along with trade agreements it is in the process of negotiating – with Canada, Vietnam, Singapore, the USA and Japan – include an

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investment chapter. However, it is not yet clear whether the UK-EU trade agreement would include an investment chapter. Additionally, the trade agreements that include investment chapters do not all use the same dispute resolution mechanisms. The ‘investor-state dispute settlement’ system included in some investment chapters, and many bilateral investment treaties, has recently attracted considerable controversy. The EU has moved away from this model. These issues are discussed in greater detail in Chapter 5.

There could also be **other disputes** over any area of co-operation set out in other parts of either agreement. These include special provisions on the Ireland-Northern Ireland border, provisions on security co-operation, research co-operation and nuclear co-operation.

There could be **unforeseen areas of dispute**, which do not specifically concern the interpretation or implementation of any UK-EU treaties. The treaties can nonetheless set out mechanisms to resolve these disputes, should they occur.

The UK and the EU have both acknowledged that different DRMs will be appropriate to different types of dispute. This is crucial. This paper does not go in search of a single, overarching DRM to catch all disputes in both the withdrawal agreement and the future partnership agreement. Instead it presents a wide range of existing options and a toolkit to design more. They can be mixed and matched.

## The EU’s position

The EU has made the running on dispute resolution, setting out the principles of its position in the Commission’s negotiating mandate in May, and nuancing this with a more detailed position paper in June.<sup>57</sup> So far Brussels has only discussed governance of the withdrawal agreement (under Article 50). It says that governance of the future partnership agreement, as with all issues relating to that agreement, will be broached later.

### Governance of the withdrawal agreement

#### General principles

The European Commission’s negotiating mandate set out some general principles:

- The withdrawal agreement should ‘**set up an institutional structure** to ensure an effective enforcement of the commitments under the Agreement’.
- That structure should **protect the EU’s ‘autonomy and its legal order**, including the role of the Court of Justice of the European Union’. The concept of ‘autonomy’ is explained and discussed below.

As far as the specifics of institutional design are concerned, the EU wants to deal with the withdrawal agreement in a bifurcated way. It proposes one process for provisions of the agreement that relate closely to EU law, and another for provisions which do not.

#### Category 1: EU law-related provisions

The Commission’s negotiating mandate said that the jurisdiction of the **ECJ**, along with the supervisory role of the European **Commission**, ‘should be maintained’ in the following areas:

- 
- continued application of Union law
  - citizens' rights
  - application and interpretation of the other provisions of the agreement, such as the financial settlement or measures adopted by the institutional structure to deal with unforeseen situations.<sup>58</sup>

The later position paper nuanced this position. It listed the provisions covered by the Commission and the ECJ as:

- provisions on the continued application of Union law, in particular as regards goods placed on the market, ongoing Union procedures or co-operation procedures between member states
- provisions relating to citizens' rights.<sup>59</sup>

The financial settlement was not mentioned.

The position paper also went into more detail on how the Commission and Court would be involved. It said the Commission should have full powers for 'the monitoring of the implementation' of these provisions, under Articles 258 and 260 of the TFEU. These are the treaty provisions that govern the process set out in the previous section, 'Government or citizen challenges EU institution' (page 13).

Likewise, the position paper said that the ECJ should have jurisdiction over these cases under TFEU provisions, including its ability to issue binding judgments on states concerned and fine states for non-compliance.

### **Category 2: Other provisions**

The position paper broke new ground by discussing a 'joint committee' to oversee the withdrawal agreement. The Commission does not discuss membership of the joint committee, nor its procedures, but it is standard for such a committee to comprise senior diplomats or ministers from each side, and to meet regularly to discuss issues with the treaty or its implementation.

This joint committee, says the Commission, should

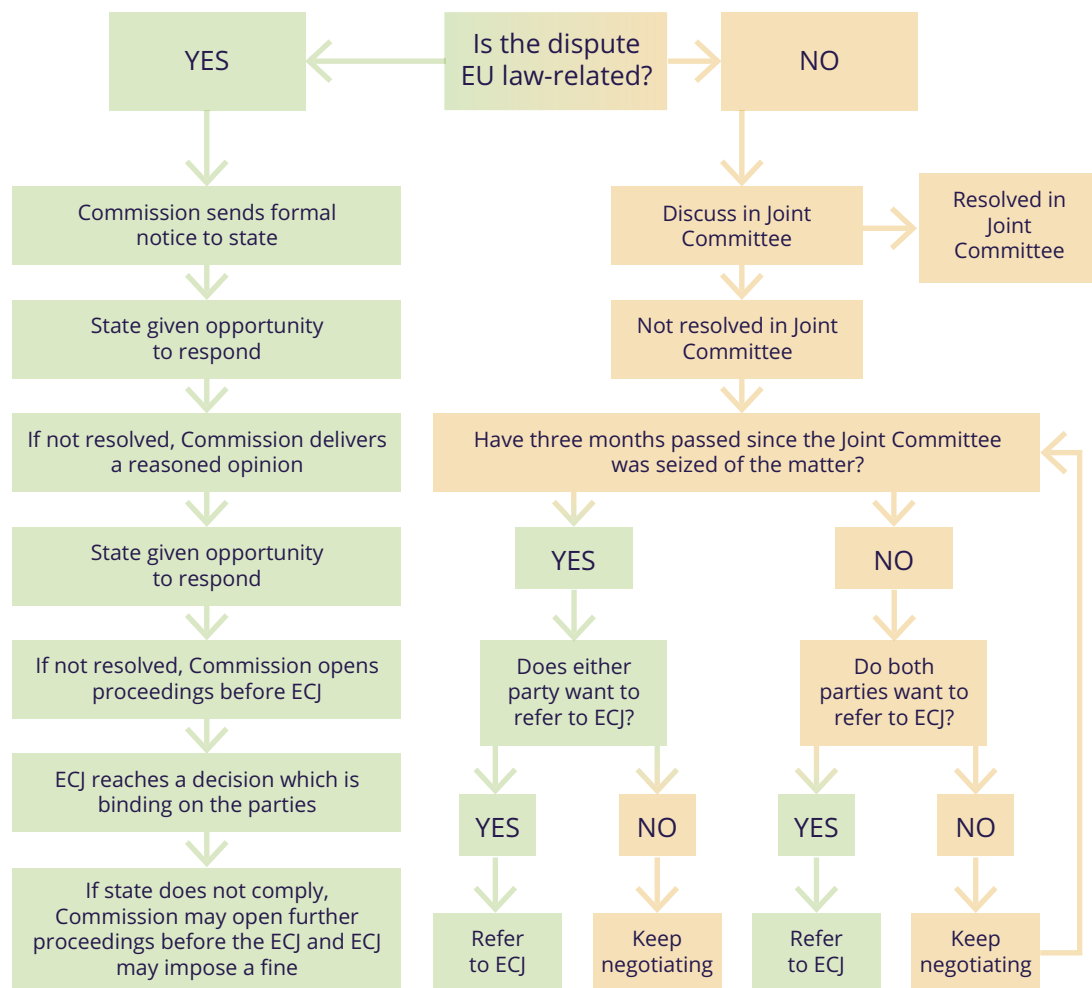
1. Ensure the good functioning of the agreement.
2. Adopt all measures necessary to deal with unforeseen situations not covered in the withdrawal agreement under the conditions set out in the withdrawal agreement.
3. Decide on the incorporation of future amendments to Union law in the withdrawal agreement where such incorporation is provided for in the withdrawal agreement.
4. Discuss divergences of views between the parties as set out in the withdrawal agreement.
5. Perform any other task conferred on it by the withdrawal agreement.

Where there is a disagreement about some provision not discussed in the last section, the Commission says the complaining party may 'request a discussion of the issue in Joint Committee'. Where the Joint Committee is unable to reach a solution, the matter

may be referred to the ECJ jointly by the parties at any time, or by one party once three months have passed since the Joint Committee began considering the issue.

The Council’s negotiating mandate also said that, for any dispute resolution mechanism other than exclusive oversight by the Commission and the ECJ, there must be a provision according to which ‘future case-law of the Court of Justice of the European Union intervening after the withdrawal date’ is taken into account. However, the Commission’s position paper envisaged a system in which all disputes can be handled by the EU institutions. This process is shown in Figure 1.

**Figure 1: The EU’s dispute resolution proposal**



## Governance of the future partnership agreement

The EU scrupulously avoids discussion of the future partnership agreement. Its position is that the Union’s approach to these negotiations will have to be separately agreed by the Council, with a separate negotiating mandate for the Commission.

## The UK’s position

In August 2017 the UK Government published a ‘future partnership paper’ on enforcement and dispute resolution. In reality this document seemed to concern the governance of the withdrawal agreement as much as the future partnership agreement. The UK’s position so far is outlined in that paper, along with its Brexit white paper of

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February 2017, various ministerial statements and a speech delivered by the Prime Minister in Florence in September 2017.

### **No to the ECJ**

The Government has frequently reiterated that it will 'end the jurisdiction of the European Court of Justice' after Brexit.<sup>60</sup> More recently, it has said that it will end the 'direct' jurisdiction of the court.<sup>61</sup> 'Direct jurisdiction' has no technical legal meaning but can be read as a combination of the direct effect of EU law, the interpretation of that law by the ECJ and the binding status of the ECJ's rulings.

The EU (Withdrawal) Bill also says, however, that though a UK court or tribunal 'need not have regard to anything done on or after exit day by the European Court, another EU entity or the EU', the court 'may do so if it considers it appropriate to do so'.<sup>62</sup> This was broadly in line with the recommendation of a previous Institute for Government report.<sup>63</sup> The Prime Minister's Florence speech reiterated this commitment, noting that the UK courts will 'be able to take into account the judgments of the European Court of Justice with a view to ensuring consistent interpretation' of citizens' rights.<sup>64</sup>

### **But maybe yes to the ECJ at the start of the transition**

The Prime Minister's Florence speech acknowledged that the Government is seeking a time-limited period, after March 2019, "in which access to one another's markets should continue on current terms". She also said that "the framework for this strictly time-limited period [...] would be the existing structure of EU rules and regulations". Taken at face value, this suggests that the Prime Minister is prepared to accept that the ECJ, along with other EU supervisory and enforcement mechanisms, could continue to have jurisdiction during the transition.

She added, however, that since neither the EU nor the UK will want the UK to stay longer in the existing structures than is necessary, "we could also agree to bring forward aspects of that future framework such as new dispute resolution mechanisms more quickly if this can be done smoothly". The Government's position seems, therefore, to be that the ECJ will retain jurisdiction during part of the transition, but ideally not for all of it.

### **Yes to something**

The Government has said that the UK will 'seek to agree a new approach to interpretation and dispute resolution with the EU'. The 'actual form of dispute resolution', said the Government's white paper on Brexit, will be 'a matter for negotiations between the UK and the EU, and we should not be constrained by precedent [...] Different dispute resolution mechanisms could apply to different agreements, depending on how the new relationship with the EU is structured.'

The Brexit white paper set out three objectives for any dispute resolution mechanism:

1. Respect UK sovereignty.
2. Protect the role of our courts.
3. Maximise legal certainty.<sup>65</sup>

Government thinking appears to have moved on since then. The future partnership



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paper on enforcement and dispute resolution set out a different set of objectives, closer in substance to the EU's. It said that the UK wants to:

1. Maximise certainty for individuals and businesses.
2. Ensure that they can effectively enforce their rights in a timely way.
3. Respect the autonomy of EU law and UK legal systems while taking control of our own laws.
4. Continue to respect our international obligations.<sup>66</sup>

Both the white paper and the future partnership paper also discuss a number of dispute resolution mechanisms in existing agreements, though they do so only for illustrative purposes, and do not commit the Government to one model or another. The Prime Minister reiterated in her Florence speech that the Government is 'confident' that an 'appropriate mechanism' can be found for the future partnership agreement.<sup>67</sup> Elsewhere, the Government has said that the withdrawal agreement will also include 'mechanisms for the resolution of disputes'.<sup>68</sup> The Government does not seem to have a firm view on whether the DRM for the withdrawal agreement and the DRM for the future partnership agreement should be the same, or different.

### Maybe to an arbitration arrangement

In public and media appearances, David Davis, the Secretary of State for Exiting the European Union, has gone a hair's breadth further into the detail.

- Appearing on *The Andrew Marr Show* on 25 June 2017, Mr Davis said that "when we're doing all these deals on trade and other areas, there will be arbitration arrangements. There won't be the ECJ. There'll be a mutually agreed chairman and somebody nominated from both sides. [That] is the normal way but there may be other ways too. And it may well be we have an arbitration arrangement over this but it's not going to be the Court of Justice."<sup>69</sup>
- Speaking at *The Times* CEO summit on 27 June 2017, Mr Davis said: "We will seek a new dispute resolution mechanism. It won't be the European Court of Justice; it will be international."<sup>70</sup>

### A new kind of 'direct effect'?

As discussed in Chapter 2, the doctrine of direct effect ensures that any rights granted by EU legislation can be accessed by private parties before their national courts.

The Government's position on direct effect seems to be evolving. The Government's dispute resolution paper said that, 'when the UK leaves the EU [...] the jurisdiction of the CJEU and the doctrine of direct effect will cease to apply in the UK. This means the question of domestic implementation of UK-EU agreements will be addressed through the UK's domestic legal order.' Likewise a technical note on the implementation of the withdrawal agreement, published on 13 July 2017, acknowledged the Commission's position that citizens' rights and other EU law provisions should be 'directly enforceable in EU law', but argued that this would be 'both inappropriate and unnecessary'.<sup>71</sup>

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However, the Prime Minister seemed to go further in her Florence speech, promising to “incorporate our agreement fully into UK law and make sure the UK courts can refer directly to it”. The Prime Minister did not use the language of ‘direct effect’, which is an EU law concept, but the Secretary of State for Exiting the EU called this “direct effect, if you like”.<sup>72</sup> The meaning of this commitment is unclear. It is discussed further in Chapter 7.

The UK and EU positions on dispute resolution for the withdrawal agreement are still a long way apart. The Commission has proposed a system that makes the ECJ the ultimate arbiter of all disputes. The UK has made clear that this would be unacceptable, but the Government has so far said little about what mechanism it would prefer.

This paper now turns, therefore, to different approaches to dispute resolution. As the Government crafts its own position, it will have to decide which suits the UK’s priorities and interests best.

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## 4. Approaches to dispute resolution

### Three types of dispute resolution

Dispute resolution mechanisms are often divided into the three categories: judicial, quasi-judicial and political/diplomatic. In practice, the boundaries between these three categories are often blurry. The descriptions in this section are ideal types, intended to give an indicative flavour of the main approaches rather than delineate three mutually exclusive categories.

Chapter 5 will go into more detail on questions of institutional design.

#### Judicial

##### What is it?

A judicial DRM is a court. When countries disagree about the interpretation or implementation of a treaty, they refer the dispute to a permanent institution with a standing tribunal. That tribunal is made up of judges appointed by the parties to the treaty, and possibly some third parties too. The judges and the staff who support them are employed by the institution, and are salaried.

Their processes have the trappings of a domestic legal system, sometimes including an appeal stage. The court's proceedings are transparent, with judgments published. The judges often use a system of precedent, whether *de jure* or *de facto*, reasoning from the decisions of their predecessors to reach conclusions on the case before them.

##### Where has it been used?

This category includes the ECJ, the EFTA Court and the Andean Tribunal of Justice (ATJ).

The WTO's Appellate Body, which does not hear disputes in the first instance but hears them on appeal, is also judicial in character.

#### Quasi-judicial

##### What is it?

A quasi-judicial DRM is like a court, but is not a court.

It is like a court insofar as it is legalistic. When parties to a treaty disagree, they consider their disagreement to be about the law of their treaty. They engage lawyers to present arguments in support of their position, which are heard by adjudicators expert in the law.

A quasi-judicial DRM is not a court insofar as it is *ad hoc* rather than *permanent* in character. Whereas a court exists in space, a quasi-judicial DRM exists on paper, as a set of rules and procedures. When parties disagree, they compose a panel of experts, according to those rules, to act as judges for their disagreement. The parties bear the costs of a dispute, both legal and administrative, as they arise. There is usually no standing staff or infrastructure.

The panellists hear the arguments from each party's own lawyers, according to the rules. This process does not occur in a dedicated building, but in any location that is mutually convenient. Information about the progress of the dispute is not necessarily

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released to the public. Because the process is often less transparent, the panel may not take as much notice of previous cases as a court would. The panel concludes by issuing a written ruling, interpreting the treaty for the dispute at hand. The panel then disbands. Subsequent disputes are decided by a different panel.

### **Where has it been used?**

The first stage of formal dispute settlement at the WTO falls into this category. So do the DRMs in most contemporary free trade agreements (FTAs).

In addition, there are numerous private courts of arbitration which use their own rulebook and provide space, personnel and arbitrators for parties, sometimes including states, to settle their disputes. It is not known for sure how often states use these forums.

## **Political/diplomatic**

### **What is it?**

In this model, disputes are resolved not by lawyers but by politicians and diplomats.

There is often a 'joint committee', comprising senior officials and possibly ministers, from each party to the agreement. This committee meets regularly, a number of times a year and more frequently in emergencies. The committee is tasked with ensuring the effective implementation of the agreement and negotiating resolutions to any disputes as to its meaning.

### **Where has it been used?**

Almost every contemporary international agreement provides for a joint committee to oversee its good functioning and implementation. This is where most disputes will first be raised. However, it is now rare for trade agreements to provide that this is the only forum in which to resolve them.

A notable exception is the set of agreements between Switzerland and the EU. Save for a few agreements (such as the Air Transport Agreement), Switzerland's bilateral agreements are overseen only by joint committees, with no more formal or legalised dispute resolution mechanism. However, Brussels is increasingly unhappy with this arrangement. This issue is discussed further in Chapter 6.

## **Trends**

These approaches to dispute resolution are not mutually exclusive. Indeed, they are sometimes arranged in a full sequence, with political and diplomatic negotiation coming first, followed by an ad hoc panel, followed by appeal to a court-like body.

However, it is useful to compare the three approaches as dispute resolution mechanisms of last resort. In other words, a completely political DRM is one that finishes with a negotiation stage. A quasi-judicial DRM is one that finishes with ad hoc arbitration, or similar. A judicial DRM is one that finishes in court.

Researchers at the WTO have conducted an analysis of trends in dispute resolution in recent decades. They have found that, overall, there has been a switch in preference from the political model, which dominated from the 1950s until the early 2000s, to the quasi-judicial model, which is well ahead now. Of the 24 trade deals concluded by the

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EU with third parties between the establishment of the WTO in 1995 and 2013, 83% have used the quasi-judicial model.<sup>73</sup>

The switch is partly because trade agreements have been getting deeper. Increasingly they aim to liberalise trade in services, as well as goods. That means more regulatory co-operation and convergence which, in turn, requires more robust and legalistic enforcement structures to interpret and apply the rules.

## Dispute resolution for Brexit

This three-part framework is a useful tool for policymakers as they investigate precedents for dispute resolution mechanisms in past international agreements. However, they also need a firm idea of how they want to use those precedents.

Here again, there are three options:

- 1 **Something old.** The UK and EU could ask an existing institution, or set of institutions, to handle their future disputes.
  - a. They could try to use the institutions of the EU: the European Commission and ECJ. It is unlikely, however, that the EU institutions would oversee all aspects of the UK's and EU's treaties, since not all provisions of those treaties will relate to EU law.
  - b. They could use the institutions of the European Economic Area (EEA): the EFTA Court and EFTA Surveillance Authority. This would be a natural solution if the UK tried to achieve continuing membership of the European single market, which it could do by joining EFTA and remaining within the EEA as an EEA-EFTA state. It could also be possible, however, if the UK left the EEA, but nevertheless became a member of EFTA.<sup>74</sup>
  - c. For trade disputes, they could use the WTO's dispute settlement system. This is normally used for countries that do not have trade agreements with one another, but it can be used for countries which do, too.
- 2 **Something borrowed.** It would be possible to design an institution from scratch, modelled closely on any of the above. Equally, it would be possible to design a system that copies the dispute settlement procedures in past trade agreements.
- 3 **Something new.** Alternatively, it would be possible to depart from precedent and design a system or set of institutions unlike what has gone before.

The next section provides the basic toolkit needed to analyse the DRMs that already exist and, if necessary, to design a new one.

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## 5. Designing a dispute resolution mechanism

A dispute resolution mechanism (DRM) is a machine of many parts. When combined in different ways, they produce different outcomes.

This chapter sets out the key questions that policymakers need to answer if they are to design a DRM from scratch, going through the machine part-by-part. It also identifies the political trade-offs inherent in many elements of institutional design. Two are particularly important. First, there is often a choice to be made between robust enforcement and states' national sovereignty. If the UK Government's priority is certainty and access to justice for individuals and businesses, it will lean towards robust enforcement. If its priority is for UK institutions to take back control, it will lean towards national sovereignty. Second, there is often a tension between the imperative to design a system that is expeditious and inexpensive, and one that respects and promotes the rule of law.

### Design questions

#### Consultation and negotiation

##### **What provisions do the agreements make to resolve disputes through negotiation?**

DRMs are often, in fact, sequences of different DRMs.

DRMs often must begin with, or must be preceded by, a negotiation or consultation stage, resembling a political or diplomatic DRM. At this stage, parties try to resolve their dispute amicably, through discussion, before pitting their lawyers against each other. The complaining party or surveillance body opens a dialogue with the party accused of a breach. Sometimes this occurs through ordinary diplomatic channels. Sometimes it occurs in the more formalised setting of a joint committee of senior diplomats and/or ministers, set up by the treaty itself. In recent trade agreements, the EU has tended to prefer the latter approach.<sup>75</sup>

Quasi-judicial DRMs almost always provide for a consultation stage.<sup>76</sup> At the WTO, 'a solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred'.<sup>77</sup> A party must open consultations, and must try to resolve the dispute through consultation or mediation for 60 days before it can proceed to the next stage and request a panel of adjudicators. The DRMs in trade agreements and EU association agreements generally mimic this sequence. For example, Article 305 of the EU-Ukraine Association Agreement provides that 'the Parties shall endeavour to resolve any dispute regarding the interpretation and application of the provisions of this Agreement referred to in [the trade-related sections] of this Agreement by entering into consultations in good faith with the aim of reaching a mutually agreed solution'.<sup>78</sup>

Judicial DRMs do not always provide for a consultation stage as such, but they come close. The first stage of the EU's procedure, for instance, is for the European Commission to send formal notice to a state, giving the state an opportunity to respond. The Commission then follows up with a 'reasoned opinion', again giving further opportunities for dialogue before escalating the case to the ECJ.

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These early stages provide an opportunity to get the facts straight, since states do not always know the details of a trading partner's domestic laws or regulatory regime.<sup>79</sup> They also provide an opportunity to resolve disputes, in and of themselves. A majority of WTO disputes go no further than this initial consultation stage.<sup>80</sup> In the EU, around 66% of infringement proceedings were resolved before the involvement of the court last year.<sup>81</sup>

## Supporting resources

### **What financial and human resources does the DRM have to aid its function?**

The organs of DRMs do much more than resolve disputes. Porges draws attention to a number of other tasks and functions:

- management of document exchanges and hearings
- co-ordination of a roster of adjudicators (should there be one)
- secretarial, translation and interpretation services
- provision or rental of a place to hold hearings
- research and drafting assistance to adjudicators
- payment of adjudicators' fees and expenses
- information services
- capacity building.<sup>82</sup>

Some DRMs have budgets, financed by regular payments from participating states, to fund all this. Some do not, with countries instead making the necessary financial and administrative arrangements ad hoc when a dispute arises. This distinction broadly tracks the distinction between judicial DRMs on the one hand, and quasi-judicial and political DRMs on the other.

Some quasi-judicial or ad hoc DRMs, however, do have some infrastructural support behind them. Each of the following has a 'secretariat', tasked with some of the above functions:

- NAFTA, the North American trade bloc comprising the United States, Canada and Mexico
- ASEAN, the Southeast-Asian trade bloc currently comprising Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam
- Mercosur, the South-American trade bloc currently comprising Argentina, Brazil, Paraguay and Uruguay.

Likewise the WTO Secretariat fulfils many administrative and legal functions for WTO dispute settlement.

DRMs with more year-round money and staff are often thought to be:

- quicker at dealing with cases
- more administratively effective

- 
- cheaper in the long term, if a high volume of disputes is expected.

That these features flow from consistent resourcing is fairly intuitive. Less obvious is that DRMs with more money and staff – particularly staff devoted to technical and legal work – are also often thought to be:

- more independent of participating states in their approach to legal issues
- more consistent in their reasoning.<sup>85</sup>

This is because the DRM's supportive apparatus becomes, to some extent, its own organisation with a culture, intellectual personality and institutional memory. If the same staffers and legal secretaries are providing advice and research services for the next case as did for the last, or for the next set of panellists as for the last set, it is more likely that similar legal issues will receive similar treatment. This is a benefit, insofar as it increases legal certainty. It is a risk for participating states' governments, insofar as it can weaken their grip on the dispute process.

DRMs without such standing resources often require the parties to a dispute to share the costs of the dispute, with 59% of quasi-judicial DRMs in trade agreements requiring parties to share the tribunal expenses equally.<sup>84</sup>

## Surveillance and monitoring

### **Is there a surveillance and monitoring authority, and if so, how is it organised and paid for?**

Some international agreements set up an apparatus to conduct 'surveillance' and monitoring – that is, to look out for rule breaches in the first place and, where recommendations have been issued by the DRM, to keep tabs on whether the parties are implementing those recommendations. Some agreements, by contrast, leave it to participating states to handle this, assisted by complaints from their nationals and companies. This divide broadly tracks the divide between judicial and quasi-judicial DRMs.

For example, as discussed in Chapter 2, the EU uses the European Commission for surveillance and monitoring, an organisation with a total staff of around 33,000 people<sup>85</sup> and resources of €3.29 billion in 2016 (though not all of this is used for surveillance and monitoring).<sup>86</sup> The European Economic Area, similarly, uses the EFTA Surveillance Authority (ESA) for surveillance and monitoring. This has broadly the same surveillance functions as the European Commission, but for the EEA-EFTA states. The EFTA Surveillance Authority is, commensurate with its coverage, much smaller, with a budget of around €13 million in 2015.<sup>87</sup> The EU and the EEA represent one end of the spectrum in surveillance.

The World Trade Organization, meanwhile, does not have a formal surveillance authority. It does nonetheless task some of its institutions with some light-touch surveillance functions. This is true both at the front end of dispute resolution – where surveillance amounts to looking out for breaches – and at the back end, where it amounts to ensuring that the DRM's decisions are properly implemented.

At the front end, the Trade Policy Review Mechanism (TPRM), consisting of diplomatic representatives from all WTO members, reviews national trade policies from time to time and reports on whether they are compliant with WTO law, among other things. It



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uses the resources of the WTO Secretariat to do so. However, the TPRM does not refer cases for formal dispute settlement. It is for members to raise grievances, and for the WTO Dispute Settlement Body – the same group of diplomatic representatives in a different guise – to compose panels of adjudicators.<sup>88</sup> At the back end when there is a dispute, and once a panel of adjudicators or the WTO Appellate Body has issued a decision, the Dispute Settlement Body (that group of diplomatic representatives) ‘shall continue to keep under surveillance the implementation of adopted recommendations or rulings’.<sup>89</sup>

Many trade agreements do not have any formal surveillance architecture. The deeper the integration, in particular the more liberalisation of trade in services through regulatory co-operation or alignment, the greater the need for surveillance will be in order to enforce the agreement.<sup>90</sup>

## Overlap

### **When a dispute could be resolved in more than one forum, how do the parties choose between them?**

The issue of overlap arises when the two parties take part in two international regimes with overlapping jurisdiction. For example, if a trade agreement between two countries covers some of the same ground as WTO agreements to which they are both signed up, then the trade agreement will need to set out whether disputes are to be resolved using the trade deal’s dispute resolution system, or the WTO’s.

One solution in this case is to give precedence to the WTO, as the EU-Chile trade deal does.<sup>91</sup> A second solution is to give precedence to the trade deal’s own DRM, an option popular in agreements with judicial systems, such as the EU.

A third is the most common solution for quasi-judicial DRMs: a so-called ‘fork in the road provision’.<sup>92</sup> This says that the complaining party can choose between the two forums, but once the choice has been made, it cannot be unmade. This avoids a scenario in which a party can relitigate a dispute in a different forum, which would be inefficient and detrimental to legal certainty.<sup>93</sup>

## Composition and appointment

### **Who judges?**

This question lies at the heart of the distinction between judicial and quasi-judicial DRMs.

(By contrast, the questions of composition and appointment do not arise meaningfully for political DRMs. If negotiation takes place through ordinary diplomatic channels then disputes are handled by ordinary diplomats; if it takes place through a joint committee comprising particular representatives or ministers then disputes are handled by them.)

The central dilemma is whether the adjudicators are standing judges with fixed terms, or panels convened ‘ad hoc’ for each dispute, and then disbanded subsequently.

As in the case of resourcing and surveillance, the issue of composition and appointment embodies the trade-off between robust enforcement and sovereignty. If states opt for a court system with standing judges, this has obvious benefits for the rule of law. The DRM is more likely to be consistent in its approach to the interpretation

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of the treaty. It will develop its own legal and intellectual personality. A system of precedent, whether *de facto* or *de jure*, is more likely to form. These things all make it easier for citizens, businesses and governments to know what the law is and how it will be interpreted.

At the same time, a supranational court may be seen as a greater brake on states' sovereignty than an ad hoc arrangement. It creates a power base separate from a state's own executive, legislature and judiciary, over which the state has only intermittent influence, that can make decisions that directly affect, and possibly constrain, public policy.

If the DRM has standing judges, the following further issue arises:

- **Appointment process.** In trade agreements with judicial DRMs, judges are almost always appointed by participating states (with the exception of the Caribbean Court of Justice, where an independent body of officials selects candidates, and the WTO Appellate Body, where a set of seven standing judges who hear appeals are appointed by mutual consensus). However, the court itself can have more or less influence over the process. In the EU system, before a member state can appoint a new judge, a seven-person 'panel' composed of former members of the ECJ, members of national supreme courts and 'lawyers of recognised competence' is set up to 'give an opinion on candidates' suitability'.<sup>94</sup>

If panellists are selected ad hoc, the following further issues arise:

- **Selection in the first instance.** It is normal to convene a panel of three to adjudicate (occasionally five). At the WTO, panellists are proposed by the WTO Secretariat in the first instance. By contrast, most trade agreements leave it to the states themselves to pick panellists by mutual agreement. Some trade agreements let the state pick whom they like. Some use a 'roster' (also known as an indicative list, a reserve list or a contingent list) of names to make the process easier.<sup>95</sup> The WTO's roster is maintained by the WTO Secretariat; the roster for the EU-Chile free trade agreement is maintained by the EU-Chile Association Committee (a group of diplomats).<sup>96</sup>
- **Dealing with blockages.** Sometimes the parties to a dispute cannot agree on a panel. At the WTO, if the parties to a dispute do not assent to the Secretariat's choice of panellists within 20 days of the decision to establish a panel, either party can ask the WTO's Director-General to take the reins.<sup>97</sup> Chase, Yanovich and Crawford note that free trade agreements in recent years have found various different ways of addressing the same problem:
  1. Selection by lot from a roster (e.g. NAFTA and some other trade deals to which the US is a party)<sup>98</sup>
  2. Selection by the chair of the joint committee which oversees the agreement
  3. Selection by some neutral third party, such as the WTO Director-General, the Secretary General of the Permanent Court of Arbitration or the President of the International Court of Justice.<sup>99</sup>

Whether adjudicators are convened ad hoc or are standing judges, there are usually

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some constraints on the kind of people that can decide disputes. To qualify for appointment to the WTO Appellate Body, for instance, persons must be 'of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally'.<sup>100</sup>

## Standing

### **Is it only states that have standing before the DRM, or do individuals, companies and international bodies have standing too?**

The question of who has standing before the DRM is the question of who can bring a case before it or, put another way, who can initiate a dispute. Some DRMs grant standing only to states. Some grant standing to private parties, like individual citizens and businesses, too. Some also grant access to international organisations, like the European Commission.<sup>101</sup>

Political and diplomatic DRMs, by their nature, provide opportunities for governments to resolve their disagreements without the help of a third party. Only states, or the EU, have access to these DRMs.

Likewise the 'vast majority' of judicial and quasi-judicial DRMs in trade agreements grant standing only to states or the EU, denying it to individuals and businesses.<sup>102</sup> That means that individuals and businesses need to lobby their governments to initiate a dispute if they believe they are, for instance, facing discrimination at the hands of the other party to the agreement. This is already the case for UK businesses which believe they are the victim of a breach on the part of a country outside the EU. Such a business can lobby the Commission to bring a case against the offending government – either at the WTO if there is no trade agreement or, if there is one, at the DRM.

That has two major implications:

1. **Economics plays diplomacy.** If the decision as to whether to initiate a dispute falls to governments, they must weigh the potential benefits of winning the dispute against other foreign policy objectives. It may not be prudent for the UK to be seen to start fighting a legal case against measures enacted by the German Government at the same time as trying to build a coalition with Germany for some international standards drive or other international agreement, or at the same time as prosecuting a charm offensive to attract German investment.

This can be partially mitigated with the creation of a relatively independent surveillance authority. That body, if seen as distinct from the governments that raise complaints with it, can 'take the heat' when governments are irritated by the initiation of a case. In the EU, the European Commission performs that function. In only six cases have states had to go toe-to-toe via Article 259 of the TFEU, since the Commission will ordinarily take up any cases that have legs.

2. **Bigger is better.** Bigger businesses will do better than small and medium-sized enterprises (SMEs) from a state-to-state mechanism, for two reasons. First, their government will have a stronger economic interest in taking up the infraction if the case could be worth a lot of money. This is more likely if it affects big businesses. Second, big businesses often have a slicker lobbying operation and more access to government than SMEs.

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This latter effect can be mitigated by the creation of a formal mechanism through which businesses can raise concerns with government. In addition, where industry bodies and associations develop expertise in public international law, they can raise concerns about infractions that affect large numbers of SMEs in the industry.

There are two ways in which private parties have been given some standing before DRMs.

1. **Co-opt national courts.** Private parties always have standing before their national courts. In the EU, and under some other international agreements, it is not only the DRM that applies the treaty, but national courts, which also have the option or the obligation to refer thorny questions of interpretation up to the DRM.

This has some benefits:

- a. **Soft judicial power.** Where national courts interpret and apply the treaty in the first instance, it gives them more influence in shaping the interpretation of the law. Even if cases are subsequently heard in supranational tribunals, those tribunals will often look at what national courts have said.
- b. **Handling the caseload.** Trade treaties do not generally generate a massive caseload. However, the UK-EU case is novel. The withdrawal agreement is likely to generate more disputes, particularly over citizens' rights. National courts already have an infrastructure for handling big caseloads. They may have to change or adapt to cope with new cases generated by a new treaty, but this would likely be easier than for a new mechanism.
- c. **Access to justice.** If private parties can enforce their rights under treaties in national courts, they have easier access to justice than if they have to lobby their governments to bring cases.

It also has some costs:

- a. **Someone else's soft power.** The other side's courts get a starring role in shaping the law, too.
- b. **Ceding judicial sovereignty.** In the EU, the concepts of direct effect and supremacy, along with the procedure for referring legal questions to the ECJ, are designed to ensure that EU law is applied uniformly across the bloc. What this means, however, is that national courts have limited discretion over how they apply EU law. They cede some of their control. Similarly in the EEA, though the corresponding doctrines (quasi-direct effect and quasi-supremacy) are technically different from their EU ancestors, and the reference procedure is an option rather than an obligation for the highest national courts, and national courts are not strictly bound to follow the decision of the EFTA Court, the effect is very much the same.

There are shades of grey in the relationship between national courts and supranational ones. Not all relationships are as one-sided as those in the EU, or even the EEA. For instance, the UK courts have a complex relationship with the European Court of Human Rights (ECtHR) in Strasbourg, which interprets the

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European Convention on Human Rights (ECHR). The rights enshrined in this convention are replicated in UK domestic law, under the Human Rights Act (HRA) 1998. UK courts themselves apply the HRA, not the ECHR as such, and there is no reference procedure from national courts to the ECtHR. However, UK courts are bound to 'take into account' relevant jurisprudence of the Strasbourg Court where the tribunal has ruled on a similar matter.<sup>103</sup> This has led to a 'judicial dialogue' between the UK courts and the Strasbourg court. The UK courts give ECtHR reasoning considerable weight, but do not consider themselves bound by it in every instance.<sup>104</sup>

The upshot is that, while some provision for national courts to apply the treaty gives them first-instance power, it often denies them total final-instance control, either binding them to, or pushing them towards, the decisions of a supranational tribunal.

2. **Investor-State Dispute Settlement (ISDS).** Some trade agreements that include an investment chapter give investors standing before a DRM that applies and interprets certain provisions of that chapter. This issue is discussed in more detail in Chapter 5.

Related to the issue of standing are two further issues, which will not be discussed in detail here, but warrant government's consideration.

1. **Participation of third parties.** This is the involvement, in legal proceedings, of a party to the agreement which is neither the complainant (the party initiating the dispute) nor the respondent (the party alleged to be in breach). This might be a concerned non-governmental organisation, or a company or industry body with a commercial interest in the dispute. In trade agreements, all judicial DRMs allow for this. Some quasi-judicial DRMs do too.<sup>105</sup>
2. **Amicus curiae submissions.** These are submissions of legal arguments or evidence from entities, such as non-governmental organisations (NGOs), that are not party to the dispute, but nonetheless wish to contribute to proceedings. The US has, over the past two decades or so, advocated the inclusion of *amicus curiae* provisions in its trade agreements.<sup>106</sup> Judicial DRMs do not tend to provide for *amicus curiae* submissions. Quasi-judicial DRMs do.<sup>107</sup>

## Remedies and non-compliance

### What remedies is the DRM empowered to hand down to bring parties into line?

This question does not arise for political DRMs, where the parties continue to negotiate until one side decides, voluntarily, to change their behaviour or laws. With judicial and quasi-judicial DRMs, however, the question of remedies is fundamental. A tribunal, whether judicial or quasi-judicial, might be empowered to hand down the following remedies.

1. **Report.** This is a written document that sets out the tribunal's findings in fact and in law. This report might find that a certain domestic policy measure by one of the parties constitutes a failure to implement the agreement. Handing down a report is the least that any quasi-judicial or judicial DRM can do. However, states may fail to comply with the tribunal's recommendations within a reasonable timeframe, as defined by the agreement. In that case, it may be necessary to resort to one of these further remedies:

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- a. **Retaliation.** The tribunal might find that, while the breach continues, the offended-against state may retaliate against the offending state by limiting market access. In its simplest form, this means putting up a tariff. In the first instance, agreements normally specify that this should be done in the same sector as the breach. That is, if one side has put an illegal tariff on beef imports, the other side can too. About 73% of quasi-judicial DRMs in trade agreements provide for retaliation of this kind.

However, in some cases, cross-retaliation is also permitted. If it is not possible or feasible to suspend concessions in the same sector as the other side, the tribunal can authorise a government to suspend a concession in another sector. Suppose State A puts an illegal tariff on beef, but State B does not import any beef from State A, so retaliating in kind would have no impact. Suppose, however, that State B does import car batteries from State A. In that case, State B might be authorised to put a tariff on car batteries, instead. About 60% of quasi-judicial DRMs provide for cross-sectoral retaliation of this kind.<sup>108</sup>

Cross-sectoral retaliation imposes upon the offending government an incentive to change its rules. However, it does little to benefit the businesses actually affected by the breach on the other side.

- b. **Compensation.** The tribunal might be able to rule that, while the breach continues, the offending party must make some further concession, like a tariff reduction, which will be of economic benefit to the other party, of a value commensurate with any losses suffered as a result of the breach. In its simplest form, this means cutting a tariff. Although a few DRMs provide for compensation in the form of a monetary payment, and this has been discussed at the WTO, this is not a standard feature of DRMs in trade agreements, nor is it ordinarily how the term 'compensation' is understood.<sup>109</sup> About 58% of quasi-judicial DRMs provide for compensation as a remedy.<sup>110</sup>
- c. **Fines.** In the EU system, the ECJ can impose 'penalty payments' on a member state that fails to comply with its ruling if the Commission brings a further case requesting this. The money does not go to the wronged member state, but to the European Commission. This is unusual.
2. **Damages.** The DRM might be able to compel one side to make payments to the party they have injured with their non-compliance, equivalent to the losses suffered as a result of that non-compliance. This is different from compensation, since it directs the money at the injured party, not the government of the injured party. This is not often a feature of DRMs in trade agreements; it is more often to be found in investor-state dispute settlement mechanisms (discussed below).
3. **Quashing.** The tribunal might be empowered to quash a domestic law which it finds incompatible with a state's treaty obligations. This remedy is extremely rare, if indeed it exists at all. It might be said to be a power of the ECJ, although some would argue otherwise.

The more powerful the remedy, the more effective the enforcement. At the same time, more robust compliance procedures amount to handing more control over states' money and public policy to the DRM.

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Intimately related to remedies is the legal status of any tribunal's rulings. In the EU, the ECJ's decisions engage the doctrines of direct effect and the supremacy of EU law. Once the ECJ rules on the meaning of a provision EU law, the court's ruling trumps domestic statutes and domestic judgments, thanks to the principle of supremacy. Rights identified in the judgment can be invoked by citizens and businesses before their national courts, thanks to the doctrine of direct effect. That means that, although the ECJ may not technically be able to quash the laws of EU member states, its powers come close.<sup>111</sup>

This is highly unusual for an enforcement mechanism. The doctrines of direct effect and supremacy are essential parts of what make EU law its own *sui generis* legal order, distinct from other kinds of international law.

## Certainty enhancements

### **What does the DRM do to ensure that the treaty law is well known and certain?**

Citizens and businesses are better off if they know what the law is than if they do not. It is harder to know what the law is, however, if it is interpreted in different ways at different times. It is also harder to know what the law is if the process of interpretation is more secretive.

There have been various attempts, therefore, to improve the consistency and transparency of judicial and quasi-judicial DRMs.

### **Transparency**

Some DRMs are more transparent than others. Transparency enhances both legal certainty, and the perceived legitimacy of the legal process itself. It can, however, impose greater financial or reputational costs on disputing parties.

Private arbitration tribunals represent one extreme on the transparency spectrum. They are not much discussed in this paper, since trade agreements and other international agreements of an economic character rarely use these institutions, preferring to set up their own procedures with their own rules. Where disputes are settled by private arbitration tribunals, proceedings need not be public at all. The entire process, from initiation to the submission of legal arguments and evidence, to the ruling of the tribunal, can be secret. For this reason, it is difficult to know how often private courts of arbitration have been used by states to settle disputes. They are thought to be used more often for investor-state arbitration.

At the WTO, there are some provisions for transparency in the dispute settlement system. Disputing parties can make their submissions public, and often do so, but they are not obliged to do so. Panel proceedings or proceedings before the Appellate Body can be conducted in 'open court', and sometimes are, but do not have to be. Panels and the Appellate Body can take *amicus curiae* submissions (briefs containing legal arguments or evidence) from individuals or organisations that are not parties to a dispute, and can request the participation of such actors as 'experts' too – another way of opening up the process. Overall the WTO dispute settlement procedure has become more transparent in recent years. The US has been a key driver of this trend, and the EU has recently been supportive of greater transparency.<sup>112</sup>

Trade negotiators have often tried to make DRMs in trade agreements more transparent than at the WTO. All judicial DRMs require disputing parties to produce

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non-confidential summaries of any confidential submissions (which may be necessary, for instance, to protect sensitive commercial information). All judicial DRMs also provide for public hearings and the publication of parties' submissions, or summaries of parties' submissions. Some quasi-judicial DRMs contain similar provisions. Some quasi-judicial DRMs also provide for the submission of *amicus curiae* briefs, following the example of the WTO.<sup>113</sup>

Political DRMs are as transparent as participants want them to be. A number of recent EU trade agreements have specified that the joint committee or trade committee, which handle the negotiation stage of disputes, 'may communicate with all interested parties including private sector and civil society organisations', or similar.<sup>114</sup> In addition, committees will often publish reports after their regular meetings.

### **Precedent**

This issue is germane to judicial and quasi-judicial, but not political, DRMs.

Systems of precedent can be formal or informal. A formal system of precedent binds a current tribunal, in the majority of instances, to cleave to the reasoning of its predecessors, under the principle of *stare decisis* (literally 'to stand by decisions'). Common law systems, such as English law, are underwritten by this principle.

Civil law systems (like, say, Germany) are not. In this constitutional tradition, case law is to be taken into account but is not binding for future sittings of the court. The situation is similar at international tribunals. Technically there is no system of precedent at the International Court of Justice, the ECJ, the WTO at panel stage, the WTO at Appellate Body stage, the EFTA Court or DRMs for trade agreements.

The absence of a formal system of precedent, however, does not mean the absence of an informal one. The scholarly debate about the nature and extent of precedent in international law systems is ongoing, but it is well established that past case law has substantial precedential power at major international tribunals like the ECJ<sup>115</sup> and the WTO.<sup>116</sup> Even in an arbitration context, there is a trend towards increasing recognition of previous cases.<sup>117</sup>

The consensus among Institute interviewees, therefore, was that the formal precedential requirements of a DRM are academic. It is well understood among parties and adjudicators that legal certainty is desirable, and that this is better served when treaties are interpreted consistently across time. The extent of consistent interpretation in practice will depend more on other features of institutional design, such as the permanence of adjudicators, supporting infrastructure, the transparency of proceedings (all discussed above) and the inclusion of an appeal mechanism (discussed below).

### **Appeal**

This is, again, an issue for judicial and quasi-judicial DRMs, where there is a legal decision to appeal. Some DRMs provide for an appeal procedure. Some do not.

An appeal mechanism is designed to 'prevent or correct judicial errors'<sup>118</sup> and '[enhance] certainty and uniformity in the application of international trade law'.<sup>119</sup> This is its benefit. Its cost is to make dispute resolution lengthier, less expeditious and more costly. Some also question its efficacy at enhancing legal certainty. One Institute



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interviewee described appeal, in the context of quasi-judicial DRMs, as “just three random people evaluating what three other random people have done”.

Past DRMs have varied in their approach. Where the ECJ hears infringement proceedings or delivers preliminary rulings in response to references from national courts, its decisions cannot be appealed. Neither can equivalent decisions of the EFTA Court.

At the WTO, by contrast, there is a system of appeal. Once an ad hoc panel of adjudicators has issued its final report to WTO members, parties to the dispute have 60 days to decide to appeal, and may appeal on points of law only (not on points of fact). Appeal proceedings are heard orally before three members of the WTO Appellate Body, which comprises seven standing, full-time experts each serving four-year terms.<sup>120</sup> Whereas the panel stage of WTO dispute settlement is quasi-judicial in character, the appeal stage is clearly judicial.

DRMs in free trade agreements do not normally include an appeal stage. This is the most significant way in which they depart from the WTO procedure. There are, however, some exceptions. The DRMs for Mercosur, the South African Development Community and ASEAN include appellate review, exercised by a standing body like the WTO, and limited to questions of law like at the WTO.<sup>121</sup> Likewise, the so-called ‘investment court’ system for investment disputes in CETA (the EU-Canada Comprehensive Economic and Trade Agreement), discussed in more detail below, includes a review stage modelled on the WTO.

### Other technical issues

This section has discussed the issues in institutional design that relate closely to political trade-offs. There are plenty more questions, many of a more technical nature, which have not been discussed. These include:

- What are the time limits, if any, on each stage of the procedure?
- Does the DRM include an ‘interim review’ stage at which a tribunal gives parties to the dispute an opportunity to comment on its thinking before reaching a final decision?
- Can the DRM hand down ‘interim remedies’ at this stage?
- Can the DRM hand down only prospective remedies, calculated on the basis of losses incurred from the point of the decision onwards, or retrospective remedies, calculated from the start of the breach onwards?
- Are there provisions for parties to review the size of remedies imposed?
- How do proceedings at the DRM interact with ongoing proceedings in other forums, such as national courts, other international tribunals or private courts of arbitration?

## Investment dispute settlement

### What is investment dispute settlement?

Trade agreements that include a chapter on investment often set up a separate dispute resolution mechanism for that chapter. These ‘investment dispute settlement’ systems have, in the past, provoked massive controversy, but hysterical headlines on

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investor-state dispute settlement (ISDS) in the UK would be premature. An investment chapter is very unlikely to be included in the withdrawal agreement.

Nevertheless, the UK must consider carefully whether it seeks to include one in the future partnership agreement and, in particular, what DRM it would seek for that chapter. Investment chapters in free trade agreements are largely identical in substance to bilateral investment treaties (BITs), of which the UK has 96 in force already, mostly independent of its EU membership. These investment treaties typically protect investors against **expropriation** and give them a right to **fair and equitable treatment** by the government of the territory in which they invest. Those terms are capacious. They go far beyond the literal seizure of physical or financial assets by a government, and their meaning is constantly evolving. Changes in regulation, government procurement decisions and tax-and-spend have all provoked ISDS claims before. There is also an ongoing controversy in investment law about what constitutes an 'investment' under the terms of an investment treaty or free trade agreement.

Of the UK's existing BITs, 92 include ISDS.<sup>122</sup> Unlike ordinary DRMs in trade agreements, which tend to provide only for state-to-state dispute resolution, ISDS allows individual investors to sue a government in arbitration directly, when the investor believes that its assets have been 'expropriated' or it has been denied fair and equitable treatment. The investor picks one arbitrator, the state picks a second, and the third is chosen either by mutual agreement or by a mutually acceptable third party. The arbitrators convene, hear legal arguments and submissions from the investor, the state and in some cases third parties, and come to a view on the facts and the correct interpretation of the treaty. They then issue an 'award'. This is a ruling which can include damages, but cannot include a binding requirement that a state changes its laws. The award is ordinarily enforceable in the state's national courts.

#### Example 1: Plain packaging in Australia

This is the most famous ISDS claim, often known as the 'Philip Morris case'. It was brought by tobacco company Philip Morris against the Australian government. Australia announced in 2010 that it would bring forward new laws to force all tobacco companies to sell their products in plain packaging and unattractive colours. Philip Morris is an American company, and the US does not have a BIT with Australia. Philip Morris therefore rearranged some of its assets to become a Hong Kong investor, in an effort to gain access to the Australia-Hong Kong BIT (1993), and sued the Australian government on the basis that the measures would reduce the value of the company's assets and thus constituted a denial of fair and equitable treatment. The case was thrown out, as the panel did not consider the tobacco company a real Hong Kong investor in Australia at the time the dispute arose.<sup>123</sup> It is difficult to know how the dispute would have played out if it had proceeded further.

#### Example 2: Ethyl Corporation v Canada

In 1997, Canada passed the Manganese-based Fuel Additives Act (MMT Act), which banned all imports of Methylcyclopentadienyl manganese tricarbonyl (MMT), a gasoline additive. The Canadian Government believed that MMT was a source of pollution. Ethyl Corporation, an American company, sued Canada for \$251 million under the investment provisions of the North American Free

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Trade Agreement (NAFTA). It argued that the measure amounted to expropriation without compensation, of both its MMT production and its reputation.<sup>124</sup> Once the panel of arbitrators had ruled on where the remainder of the proceedings should happen, but before they reached a final decision, Canada repealed the ban and paid Ethyl Corporation \$13 million in compensation.<sup>125</sup>

## Reasons to include ISDS

- 1. Investment protection can boost foreign direct investment.** One purpose of investment protections, backed by ISDS, is to incentivise investment. There has been extensive econometric research on whether bilateral investment treaties do, in fact, boost investment. They often do, but most studies find that the impact is biggest where the BIT substitutes for a weak domestic legal or regulatory system in one country or the other.<sup>126</sup> There has been less research on whether ISDS itself boosts investment.<sup>127</sup>
- 2. ISDS can boost access to justice.** As discussed in the 'Standing' section (page 33), state-to-state DRMs in trade agreements can be bad news for businesses seeking to enforce their rights abroad. A UK company that believed it had been denied its rights by an EU member state government could have to lobby the UK Government to open a dispute under the agreed DRM with the EU, or at the WTO. This may conflict with the UK Government's foreign policy objectives at the time; it may not be worth the hassle if the business is small. ISDS gives a certain class of companies (investors) direct access to a tribunal.
- 3. The UK Government rarely gets caught out.** The UK Government is thought to have been sued through ISDS very seldom. Two cases have been recorded on the United Nations Conference on Trade and Development (UNCTAD)'s database. One arose under the UK-India BIT when the City of London raised rents on a property it leased to an Indian investor. The outcome of this case is unknown.<sup>128</sup> The other arose when a French investor sued the UK Government under the UK-France Treaty of Canterbury 1986, which provided for the construction of the Channel Tunnel. This claim was partially successful.<sup>129</sup>
- 4. UK companies have often benefited from ISDS.** At the time of writing, UK investors have brought 67 ISDS cases against other countries. There are recorded awards for 27. UK companies won 13 of these (52%) – an above-average success rate. Overall, at the time of writing, 495 ISDS cases have been concluded and recorded on UNCTAD's database. The state party won in 36% of cases. The investor won in 27.7%, while 24% settled and the rest were either dropped or concluded with no damages awarded.<sup>130</sup> From a purely commercial standpoint, therefore, the benefit-to-cost ratio of including ISDS is probably positive.<sup>131</sup>

## Reasons to omit ISDS

- 1. EU courts are fine already.** ISDS provides for legal grievances to be heard before adjudicators other than national courts. So if a UK investor judges that their assets have been expropriated by the Venezuelan Government (the UK-Venezuela BIT was signed in 1986), then they do not bring a case before the Venezuelan courts, but sue in arbitration under the terms set out in the BIT. This incentivises investment in markets where the courts are seen as unreliable, corrupt or biased. However, this is

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not generally true of national courts in EU member states. French and German courts are, in the main, considered reliable. There are some newer member states, such as Bulgaria, Hungary, Romania and Poland, where legal and political risk is higher for investors.<sup>132</sup> The UK already has BITs with those countries in force, however, which pre-date their accession to the EU.<sup>133</sup> (This said, there is an ongoing controversy over whether such intra-EU BITs, as they currently are, are compatible with EU law. A case is pending before the ECJ on this matter.<sup>134</sup>)

2. **ISDS has been criticised for undermining the rule of law.** In particular, it has been criticised for:
  - a. **Lack of transparency.** Traditional ISDS is often conducted in private. Hearings are rarely open to the public and awards are not always published. Where public money and public policy is involved, this is highly controversial. It also makes it more difficult for an informal system of precedent to grow around the system.
  - b. **Lack of appeal.** There is no appeal in traditional ISDS. As discussed under 'Certainty enhancements' (page 37), this reduces the consistency of application of the treaty, and therefore legal certainty.
  - c. **Tendency towards bias.** The adjudicators in ISDS are arbitrators, not standing judges. This means that one lawyer could act as a counsel in one case, and an arbitrator in the next. That could give rise to conflicts of interest. In addition, if certain individuals get a reputation for being 'pro-investor' or 'pro-state', this prejudices the independence and robustness of the proceedings.
3. **ISDS may be incompatible with 'taking back control'.** The Prime Minister said in her Lancaster House speech that 'taking back control of our laws' entails that those laws should 'be interpreted by judges not in Luxembourg but in courts across this country'.<sup>135</sup> The Government's white paper on Brexit likewise promised to 'protect the role of our courts'. Including ISDS in a UK-EU treaty would allow foreign companies to exert influence on the UK Government's policy and regulatory decisions, since any such decisions that could lead to viable ISDS claims would cost the Government money in damages. That does not mean that an ISDS tribunal could change UK law, but it does mean that the threat of ISDS cases could change the incentives that the Government faces. The UK was, while a member of the EU, relaxed about this. The Government response to the House of Commons Business, Innovation and Skills Committee's 2015 report on the Transatlantic Trade and Investment Partnership (TTIP), a putative US-EU trade deal, raised concerns about ISDS provisions in the deal, but noted that the ISDS clauses being discussed would 'not prevent countries taking regulatory action to protect the public or the environment', nor would they 'overturn or make changes to law'.<sup>136</sup> However, the political context has changed since then.
4. **ISDS is politically combustible.** Brexit is politically sensitive enough already. ISDS is increasingly controversial and could stall negotiation and ratification of UK-EU treaties. Controversies over ISDS have consistently caused deadlock in negotiations over TTIP.<sup>137</sup> Similar concerns were, in significant part, responsible for Belgium's failure to ratify a draft of CETA in October 2016.<sup>138</sup> This ratification hiccup has driven significant reform of investment dispute settlement in the EU, as discussed in the next section.

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## 'ISDS is dead. Long live ICS'

The Commission recently declared that 'for the EU ISDS is dead'. In future trade agreements, including the one agreed in principle with Japan, it intends to pursue the new 'Investment Court System' (ICS).<sup>139</sup>

ICS is an alternative model of investment dispute settlement, which merges elements of ISDS with elements of the WTO dispute settlement system. It was developed for CETA, a Canada-EU trade agreement, which is provisionally in force as it continues to make its way through the obstacle course of ratification. ICS has also been used for the EU-Vietnam trade agreement, which was signed in 2015 and is being ratified.

ICS is a system of two stages. The first looks much like traditional ISDS. Investor and state each pick an arbitrator, and agree together on a third. However, in CETA, these arbitrators must be chosen from a roster of 15 people, created and maintained jointly by Canada and the EU. That roster is composed of five Canadian nationals, five EU nationals and five nationals of third countries. Hearings are always chaired by the third-party national.<sup>140</sup>

In addition, ICS establishes an 'appellate tribunal', made up of standing judges, modelled on the WTO Appellate Body. This is supposed to make the jurisprudence more consistent and predictable. The panel members are appointed by states only, not by investors. There are also new transparency and accountability requirements. Commentators are divided on whether this suite of innovations adequately responds to concerns about ISDS.<sup>141</sup>

At the same time as moving towards ICS in new trade agreements, the EU is working on proposals to institutionalise investment dispute settlement further by creating a multilateral investment court. This would be a permanent institution, like the WTO, responsible for adjudicating in investment cases between EU member states and third countries. The proposal is still in gestation and the precise contours of the court have yet to be drawn with any precision. 'The idea', says a Commission fact sheet on the proposals, 'is to establish a permanent body to decide investment disputes, moving away from the ad hoc system of investor to state dispute settlement (ISDS)'.<sup>142</sup>

## Hiving off investment

Whatever the merits and demerits of ISDS, governments have struggled to build popular support for it.

Some Institute interviewees therefore suggested that investment be omitted from a UK-EU trade deal. The case for this is strongest if the final deal needs to be negotiated and ratified very quickly. In that case, the Government may wish to find a way around political stumbling blocks. Investment, along with ISDS or ICS, could be included in a separate investment agreement, negotiated in parallel or subsequently.

This is in line with the European Commission's own approach to investment liberalisation. The Commission's latest report on EU trade strategy said that the EU is pursuing investment liberalisation 'through both FTAs and stand-alone investment agreements',<sup>143</sup> and the Commission's official recommendation to open trade negotiations with Australia and New Zealand did not include investment protection and the resolution of investment disputes.<sup>144</sup>

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Building or selecting a DRM is complicated, and requires policymakers to answer a long list of questions about institutional design. This chapter has looked at those questions in some detail. The next looks at some possible answers, examining a number of possible 'finished products' to which negotiators could turn.

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## 6. The options

The UK Government has discussed a range of precedents on dispute resolution. In its paper on the subject, the Department for Exiting the EU devoted some attention to the EFTA Court, the ECJ and the DRMs in various bilateral free trade agreements.

What that paper failed to do, however, was discuss how these precedents could be relevant to the predicament facing the UK and the EU. The purpose of this chapter is to set out in greater detail some options for a UK-EU DRM, and test them against both sides' principles and red lines.

This chapter therefore discusses negotiability in some detail. The UK Government faces greater constraints when attempting to design a DRM than in many other parts of Brexit talks. That is because, in this area, UK negotiators are trying to get agreement not just from the Commission and the 27 EU member states (EU27), but also, in effect, from the ECJ. The EU has said that the DRM must protect the 'legal autonomy of the Union', a concept defined and developed by the court.

The ECJ could easily end up ruling on whether the mechanism meets that standard. There are two possible avenues to an ECJ ruling. First, under Article 218 of the TFEU, 'a Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement [with a third party] envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.'<sup>145</sup> Some legal experts have cast doubt on whether the ECJ could use this as a basis to rule on the withdrawal agreement, since it is not technically an agreement with a third party – the UK will still be a member state when the agreement is concluded. However, there is a second route to a ruling. Any EU actor who wanted the ECJ to review the deal could ask the court to review the Council's act in concluding it. As discussed above, the court can review the act of any EU body under Article 263 of the TFEU.

### Old systems

Negotiators could attempt to use, or build on, an existing set of institutions. There are three obvious candidates: the ECJ, the EFTA Court and the WTO Dispute Settlement System.

#### ECJ

##### What is the ECJ?

As detailed in Chapter 2, the ECJ applies and interprets EU law where it is unclear, or where there are disagreements between member states, or between member states and EU institutions, as to the obligations that EU law places on member state governments. Article 19 of the Treaty on the European Union tasks the court with ensuring 'that in the interpretation and application of the Treaties the law is observed'.<sup>146</sup>

The court is located in Luxembourg. The bench of the ECJ, which rules on infringement proceedings and references from member states' national courts, comprises one judge from each EU member state. These judges are appointed by member states for

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renewable six-year terms. Before their appointment is confirmed, they must go before a panel of former ECJ judges, and judges from member states' supreme courts, which delivers an opinion on their suitability.<sup>147</sup> The judges are assisted by 11 advocates-general, who do not sit as judges but deliver opinions on landmark cases. The bench of the General Court, which is the court of first instance for judicial reviews of EU institutions' acts, among other things, is also made up of judges from all member states and is currently expanding so that member states will have two judges each. Judges in both courts deliberate and vote in secret. The working language of the court is French.

The role of the ECJ in the process of European integration has been contested and controversial. The principles of the direct effect of EU law and the supremacy of EU law, for instance, are not set out explicitly in the treaties, but have been created and developed by the court.<sup>148</sup> The court's interpretative approach is purposive in character. It looks to the purpose of a measure and interprets the provision in that light, looking beyond the literal meaning of the words if necessary.<sup>149</sup> Some have accused the court of taking an activist approach to driving European integration.<sup>150</sup>

### **How could the UK use the ECJ for dispute resolution after Brexit?**

The Commission wants the ECJ to be able to adjudicate on disputes between the UK and the EU over the meaning and implementation of all aspects of the withdrawal agreement.<sup>151</sup> It is notable that the Commission has gone further than the Council did in its negotiating mandate. Whereas the Council said only that the ECJ should resolve disputes over parts of the withdrawal agreement that relate to EU law, the Commission's proposals give the court a role in settling other disputes, too, so long as the joint committee has already tried, and failed, to resolve them.

The advantage of the ECJ option, insofar as there is one, is that it is very easily negotiable. Indeed, it could be negotiated immediately by total capitulation on the UK's part. However, such a solution clearly runs counter to the Government's objective of ending the jurisdiction of the ECJ. In addition, it is clearly not in UK interests. DRMs are expected to be neutral between the disputants. It would be difficult for one of the EU's own institutions to be neutral in a dispute between the EU and a third party. Such a wide-ranging role for the court in settling disputes over an external agreement would also be unprecedented. The court has had some role in the application and interpretation of treaties with other countries before, but only over provisions of those agreements that relate to concepts in EU law.

## **EFTA Court**

### **What is the EFTA Court?**

The EFTA Court is the court that applies and interprets the law of the EEA for the EFTA states.

The terminology of this arrangement is bewildering, and requires some explanation. The European Free Trade Association (EFTA) comprises four states: Norway, Iceland, Liechtenstein and Switzerland. The EEA is the legal framework which ties together the European single market. The EEA comprises all EU member states, and three of the EFTA states: Norway, Iceland and Liechtenstein. Those three states are often called the EEA-EFTA states.

Switzerland is in EFTA, but is not inside the EEA and so is not inside the single market. Instead it participates in the single market through a range of bilateral agreements with



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the EU. Switzerland is not subject to the jurisdiction of the EFTA Court. Its arrangements are discussed in the 'Joint committees' section (page 57).

The EFTA-EEA states are parties to the EEA Agreement, by which they have agreed to implement and comply with EEA law. EEA law is identical in substance to EU law, but it is only the EU law that governs the single market, and aspects of social and environmental law. Other EU law, like that which governs the common fisheries policy, the common agricultural policy and the single currency, is not replicated in EEA law.<sup>152</sup> The EEA Joint Committee decides which new EU laws to incorporate into EEA law. That committee meets six times a year, and comprises representatives of the European Commission (members of the European External Action Service), ambassadors from the three EEA-EFTA states and an observer from the EFTA Surveillance Authority (ESA), a body which performs a set of surveillance and monitoring functions in the EEA-EFTA states similar to those of the European Commission in the EU.<sup>153</sup> The ESA is staffed and resourced by the EEA-EFTA states, and co-operates closely with the Commission.<sup>154</sup>

The EEA operates using a 'two-pillar' system. Which institutions decide on what the law means depends on where the dispute arises.

Suppose a German company believes that Norway has acted towards it in a way that violates single market law. The German company can raise its grievance with the ESA. If the ESA believes that the complaint has legs, it can initiate a 'direct action' (equivalent to infringement proceedings) and bring the Norwegian Government before the EFTA Court.<sup>155</sup> The EFTA Court then delivers a judgment. That judgment is binding on Norway.<sup>156</sup> This is the **first function** of the EFTA Court.

By contrast, if a Norwegian company believed that Germany had acted towards it in a way that violated single market law, the Norwegian firm would take it up with the Commission. The Commission could then initiate infringement proceedings against Germany, before the ECJ, in the ordinary way described in Chapter 2.

In addition, the EFTA Court receives references from EEA-EFTA states' national courts, just as the ECJ receives references from EU member states' national courts. However, whereas in the EU, member states' national courts of last resort *must* refer unanswered questions of EU law interpretation to the ECJ, EEA-EFTA states *may* do so.<sup>157</sup> The court's opinion in such cases is not strictly binding on the EEA-EFTA state's national court. This is the **second function** of the EFTA Court. Its **third function** is to rule on actions brought by an EEA-EFTA state or any natural or legal person against the ESA.<sup>158</sup>

There are committees which act as bridges between the pillars. The most important of these is the EEA Joint Committee. Under Article 105 of the EEA Agreement, the Joint Committee must 'keep under constant review the development of the case law of the Court of Justice of the European Communities and the EFTA Court', and 'act so as to preserve the homogeneous interpretation of the Agreement'.<sup>159</sup>

Under Article 111 of the EEA Agreement, the Joint Committee may settle a dispute on the interpretation or application of the Agreement. If, however, the dispute concerns the interpretation of provisions identical to EU law, and the dispute has not been settled within three months, the parties may agree to request a binding ruling from the ECJ. This must be by consensus. If there is no agreement to refer to the ECJ within six months, or if agreement to do so breaks down, then a party may take a 'safeguard

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measure', or agree to suspend parts of EEA law. If there is a dispute over the scope or duration of such a safeguard measure, it can be referred to arbitration, but the arbitrators cannot rule on the interpretation of any EU law.<sup>160</sup>

The Article 111 procedure has never been used. All issues so far have been resolved within the respective pillars.

## **The EFTA Court and the ECJ**

### ***Similarities and differences***

The EFTA Court is composed in a similar way to the ECJ. The bench consists of three judges, one nominated by each of the EEA-EFTA states. The judges are appointed for a renewable term of six years.

There are also some differences, however. The EFTA Court's working language is English, whereas the ECJ's is French. The ECJ has advocates-general; the EFTA Court has none.

### ***Relationship***

The EFTA Court has a unique relationship with the ECJ. It is bound by the pre-1992 case law of the ECJ, excepting some cases that cover particular constitutional features of the EU that do not apply to the EEA, such as the concepts of direct effect and supremacy.<sup>161</sup> The EFTA Court must also 'pay due account' to subsequent ECJ jurisprudence. In practice, the EFTA Court generally treats the two bodies of case law in the same, deferential way.<sup>162</sup> Its purpose, after all, is to ensure the function of the single market as a level playing field. That means that the same rights must be available to anyone in the single market.

Of course, in many instances, the EFTA Court has to rule on novel legal questions which the ECJ has not yet addressed.<sup>163</sup> Legal experts are divided as to how intellectually independent the EFTA Court is in these cases. Where the EFTA Court does go first, and a similar issue comes before the ECJ subsequently, the ECJ often follows the EFTA Court's lead.<sup>164</sup>

## **Lessons from the EFTA Court saga**

The saga which led to the creation of the EFTA Court is instructive for the UK. It was not easy to get the EU, and in particular the ECJ, to accept another court on its doorstep. In fact the first draft of the EEA agreement, which would have created an 'EEA Court', was thrown out. The ECJ set out its reasons in Opinion 1/91, which offers some pointers on what features of a UK-EU DRM are likely to prove unacceptable to the ECJ.

The lessons below are not intended as an exhaustive analysis of the concept of the legal autonomy of the EU, nor even of the legal problems identified in Opinion 1/91 with the proposed EEA Court. They provide a starting point.

### **1. No functional integration**

The first draft of the EEA Agreement, which the ECJ rejected, would have likewise set up a two-pillar system, but with some key differences. Instead of an EFTA Court, there would have been an EEA Court, consisting of five ECJ justices and three justices from the EFTA countries (or, for competition, two and two respectively). Because of asserted substantive differences between the EEA Agreement and the EU treaties, however, this would have left ECJ judges interpreting 'the same

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provisions but using different approaches, methods and concepts in order to take account of the nature of each treaty and of its particular objectives'. In those circumstances, said the ECJ, it would have been 'very difficult, if not impossible, for those judges, when sitting in the Court of Justice, to tackle questions with completely open minds where they have taken part in determining those questions as members of the EEA Court'.<sup>165</sup>

## 2. **No non-binding ECJ rulings for anyone**

In addition, the first draft would have allowed the courts of the EFTA states to request non-binding rulings from the ECJ. If those rulings were 'purely advisory and without any binding effects', said the ECJ, that would 'change the nature of the function of the Court of Justice as it is conceived by the EEC Treaty, namely that of a court whose judgments are binding'.<sup>166</sup> Worse, since the agreement would have had member states take account of those rulings too, the ECJ worried that member states might start considering that even its ordinary rulings, rendered only inside the EU pillar, were non-binding, too.<sup>167</sup>

## 3. **No tribunal but the ECJ to rule on competences in the EU**

Under the original proposals for an EEA Court, the court could have been called upon to interpret a provision of the EEA Agreement that included the term 'Contracting Party'. The Court would thus have had to determine whether, 'for the purposes of the provision at issue, the expression "Contracting Party" means the Community, the Community and the Member States, or simply the Member States'.

This was unacceptable for the ECJ, since it meant a court other than the ECJ issuing binding rulings as to 'the respective competences of the Community and the Member States'. This, said the ECJ, is ruled out by what was then Article 219 of the TEEC (now Article 344 of the Treaty on European Union – TEU), which says: 'Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.'<sup>168</sup>

However, there is an important caveat. The ECJ was explicit that where an international agreement 'provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement', it is 'in principle compatible with Community law' for that court's decisions to be 'binding on the Community institutions, including the Court of Justice'.

The first draft of the EEA Agreement was unacceptable specifically because it gave that court the power to issue binding rulings for EU institutions on 'an essential part of the rules – including the rules of secondary legislation – which govern economic and trading relations within the Community and which constitute, for the most part, fundamental provisions of the Community legal order'.

## 4. **No tribunal but the ECJ to issue binding rulings on EU law for the EU?**

In the parts of Opinion 1/91 discussed above, it is not entirely clear whether the big issue, for the ECJ, was that the EEA Court could have ruled on provisions of EEA law which replicated provisions of EU law, or that it could have ruled on provisions of EEA law which replicated so-called 'essential' provisions of EU law (for instance, those affecting the competences of EU institutions). If the problem were only with

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interpreting provisions identical to 'essential' parts of EU law, the UK and EU would have a much wider berth in the design of a post-Brexit DRM.

A different part of the opinion, however, suggests that the ECJ's problem ran deeper than that. The first draft of the agreement bound the parties to aim for homogeneous interpretation of rules throughout the EEA. Suppose the EEA Court were to deliver a judgment on the interpretation of a rule that exists in both EEA law and EU law. If a similar question then came before the ECJ, the objective of homogeneous interpretation would oblige the ECJ to follow the EEA Court's interpretation of EEA law, when interpreting EU law. That, said the ECJ, conflicted with 'the very foundations of the Community'.<sup>169</sup> This implies that tasking a DRM with issuing binding interpretations on *any* provision that mirrors EU law is unacceptable, where the agreement includes the objective of homogeneous interpretation.

Other opinions support this view. Opinion 2/13, on the accession of the EU to the European Court of Human Rights, said that any action by the European Court of Human Rights 'must not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law'.<sup>170</sup> Opinion 1/00, on the establishment of a European Common Aviation Area, used exactly the same form of words.<sup>171</sup>

## 5. 'Taking account' is not optional

The first draft would only have obliged the EEA Court to follow the ECJ's jurisprudence as it stood prior to the date of signature (in fact this was unclear, but that was the interpretation the ECJ adopted). But, said the ECJ, 'since the case-law will evolve, it will be difficult to distinguish the new case-law from the old and hence the past from the future'.<sup>172</sup>

The second draft of the EEA Agreement, however, which the ECJ accepted, distinguished between the two. As discussed above, it obliges the EFTA Court to follow pre-signature ECJ case law, and pay due account to post-signature ECJ case law. It also tasks the joint committee with keeping the development of the two courts' jurisprudence under review, albeit with no power to disregard the case law of the ECJ. That means, in effect, that if anyone were to 'back down' in a judicial dispute, it would have to be the EFTA Court. That system governing the role and restrictions on the committee was described as an 'an essential safeguard which is indispensable for the autonomy of the Community legal order'.<sup>173</sup>

## How could the UK use the EFTA Court after Brexit?

The EFTA Court is discussed, in a Brexit context, as the basis for four significantly different options. It is important to disentangle them.

### 1. Staying in the EEA as an EEA-EFTA state

The UK could seek to remain a party to the EEA as an EEA-EFTA state, either during a transitional period after Brexit or in the long term. This would involve coming under the jurisdiction of the EFTA Court in exactly the way described earlier in this chapter.

There is a host of technical and diplomatic issues associated with membership of the EEA, which are not addressed in detail here. The UK would have to apply to rejoin EFTA, and apply for EEA membership as an EFTA state. The institutions themselves would also

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have to adapt to deal with the UK. The bench of the EFTA Court would have to take another judge, or possibly two to keep the numbers odd. The UK would have to be represented in, and contribute to the resourcing and operation of, the EFTA Surveillance Authority. Additionally, UK representatives would have to join the EEA Joint Committee, technical working groups and all the other 'bridging' institutions that link the two pillars.

Diplomatically, the UK would need not only the agreement of the EU27, but also of the three EEA-EFTA states. This is not guaranteed. In particular, numerous Institute interviewees noted that Norway currently dominates the EFTA institutions, and it is happy with that situation. In the words of the Norwegian foreign minister, EFTA is 'the only international organisation where Norway is a superpower'.<sup>174</sup> The UK's entry would disrupt this equilibrium. That would be particularly problematic, some interviewees argued, if the EEA were only a 'transitional' solution. That would mean the UK entering the institutions and disrupting their function, but with no incentive to ensure that they are preserved in the long term. Others believe that the UK could pass through on the explicit understanding that it is 'not to upset the apple cart'.

In some ways, becoming an EEA-EFTA state would line up with the Government's jurisdictional objectives. (Other objectives, on budgetary contributions and immigration control, are not considered here.) As detailed in Chapter 3, the Government is particularly concerned to end the direct effect and supremacy of EU law, or most EU law, in UK law. EEA law does not have direct effect or supremacy.

However, it has what have become known as 'quasi-direct effect' and 'quasi-supremacy'. In practice, these are similar to direct effect and supremacy in EU law. Article 7 of the EEA Agreement says that EEA law shall be made 'part of [the] internal legal order' of contracting parties as follows: '(a) an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties; (b) an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation'.<sup>175</sup> Protocol 35 of the EEA Agreement says that, 'for cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases'.<sup>176</sup>

The EEA-EFTA states are therefore under a treaty obligation to behave as if EEA law had direct effect and supremacy. As the Government itself has noted, EEA-EFTA states use different legal means to meet these obligations. They do not have to use the concept of 'direct effect'.<sup>177</sup>

If the UK joined the EEA as an EEA-EFTA state, the UK courts would also be able to refer legal questions to the EFTA Court as the national courts of Norway, Iceland and Liechtenstein can. It is for the Government to decide whether this is compatible with its objective to 'protect the role of our courts'.

## **2. Docking to the EFTA institutions (two pillars)**

The UK would not have to join the EEA to use the EFTA Court. Alternatively, it could reach its own agreement with the EU, but 'dock' to the EFTA institutions (the EFTA Court and the ESA) and give those institutions a role in resolving disputes over that agreement.

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The most straightforward option would be to copy the two-pillar structure: that is, ask the EFTA Court and the ESA to handle breaches of the withdrawal agreement by the UK. The ESA would be responsible for monitoring Acts of Parliament and actions of the UK Government to check that they are in accordance with the UK-EU treaty, and could bring proceedings against the UK before the EFTA Court (sitting with a UK judge) in cases of non-implementation. Under a two-pillar structure, the EU institutions would still handle complaints against EU actors. If a UK business believed that it had been mistreated by the German Government, for example, it would be for the European Commission to deal with that.

This arrangement would see the EFTA institutions interpreting and applying a new body of law. When it came to cases involving the UK, they would not be applying the EEA Agreement, but the UK-EU agreement or agreements. However, particularly in the case of the withdrawal agreement and any transitional arrangements, much of this is expected to be identical in substance to EU law. While the objectives of the agreement will be different from those of the EEA, and many provisions of the withdrawal agreement will be different from EU or EEA law, the EFTA institutions will still be relatively well placed to apply that treaty. It would be appropriate, in a docking scenario, for the UK to form new joint committees and working groups with the EU to bridge the two pillars, rather than participating in existing ones.

This two-pillar solution could help to resolve the jurisdictional controversy about citizens' rights. At the moment, the EU insists that expatriate EU citizens resident in the UK must have their rights under the withdrawal agreement enforced by the ECJ. The UK wants UK institutions to enforce those rights. In theory, within a two-pillar structure, the EU could still insist that if an EU expatriate resident in the UK raises a grievance against the UK Government, this is considered to be a dispute within the EU pillar. However, if the UK pillar sat underneath the EFTA Court, which the ECJ regards as a reliable interpreter of EU law provisions, Brussels would be more likely to agree to classify those disputes under the UK pillar, and allow the UK legal system (as refashioned) to deal with them.

The great advantage of the docking solution is its negotiability. As the foregoing sections make clear, getting the ECJ to accept a competitor tribunal is difficult. It has already accepted the EFTA Court, and the system seems to work. In the words of Koen Lenaerts, the President of the ECJ: 'We don't need to reinvent everything; like the wheel, [the EFTA Court] exists. The question is whether this wheel is adapted to the situation and this is subject to political negotiation.'<sup>178</sup> The President of the EFTA Court has also raised the possibility of 'docking' in remarks to the press.<sup>179</sup>

In addition, the EU has previously proposed the 'docking' solution to Switzerland, which is in EFTA but not in the EEA.<sup>180</sup> At present, relations between the EU and Switzerland are governed by over 120 sectoral agreements, mostly overseen by joint committees rather than judicial or quasi-judicial mechanisms. Brussels is completely dissatisfied with this. In 2010, the Council's conclusions said that, if Switzerland wanted any further negotiations to extend its participation in the single market, 'a homogeneous and simultaneous application and interpretation of the evolving acquis – an indispensable prerequisite for a functioning internal market – has to be ensured as well as supervision, enforcement and conflict resolution mechanisms'. It is therefore notable that it proposed docking. That implies the EU considers this an acceptable DRM.

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To achieve that negotiability bonus, however, the UK Government would likely have to import the constitutional model of the EEA Agreement. That would involve quasi-direct effect and quasi-supremacy. To whatever extent the UK was obliged to accept the acquis under the agreement, it would also mean the EFTA Court regarding pre-Brexit ECJ decisions as binding, and following post-Brexit ECJ decisions in almost all cases. Crucially, it would likely mean copying the dispute resolution mechanisms in Articles 105 and 111 of the EEA Agreement, which provide for homogeneous interpretation overseen by the joint committee and, if this fails, a reference to the ECJ. There has not been much discussion on whether 'docking' would have to involve (the possibility of) references from UK national courts to the EFTA Court. In all probability, it would.

### **3. Docking to the EFTA institutions (one pillar)**

If the UK considered it unacceptable for the EU institutions to maintain an oversight role within the EU, the Government could try to propose a 'docking' model that involved only one pillar. Rather than using the EFTA Court on the UK side and the ECJ on the EU side, as detailed above, a one-pillar solution would make the EFTA Court the ultimate authority on the meaning of the UK-EU treaty for both sides. Whether disputes arose involving UK actions, EU actions or member state actions, they would be dealt with by the ESA and the EFTA Court.

There would still be a joint committee, but rather than acting as a bridge between the two pillars, the committee would perform the ordinary function of a joint committee in a treaty, tasked with overseeing the agreement in general and ensuring its good function.

It is likely, however, that this would offend against the legal autonomy of the EU in the eyes of the ECJ, at least if proposed for the withdrawal agreement. Past ECJ opinions suggest that, if the EFTA Court could give binding rulings on treaty provisions identical to EU law, and do so for EU member states, then this would challenge the ECJ's monopoly on the interpretation of the treaties. It might be argued that it is possible to circumvent that problem by making clear that the ECJ could overrule the EFTA Court in any such scenario. However, it is not clear that either the EFTA Court or the ECJ would be happy with that arrangement.

### **4. As a model for a new two-pillar system (an 'EFTA Court replica')**

The UK could decline to participate in the EFTA institutions, but try to replicate their structures for the UK-EU DRM.

A pure replication would involve creating a new court, which sits above the UK Supreme Court, tasked only with the interpretation and application of the UK-EU treaty in the UK. The bench would be filled only by UK judges. The UK Supreme Court would be able to refer cases involving unresolved questions of treaty law to that treaty court. The treaty court's rulings in those cases would be non-binding, but in reality they would have to be followed in every case to prevent the agreement from breaking down. The treaty would not have direct effect, but quasi-direct effect and quasi-supremacy along the lines set out above.

The UK would also create a 'UK Surveillance Authority', staffed by UK officials, to look out for breaches of the treaty in the UK and bring them before the new tribunal. The tribunal's rulings in those cases would be binding. Meanwhile all disputes that arose in the EU would be handled by the EU institutions.

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There would be a joint committee bridging the gap between the two. That committee would have to ensure that the interpretation of the UK treaty tribunal converged with those of the ECJ, and deal with any disputes. Where such disputes could not be resolved by negotiation, the treaty would be able to refer them to the ECJ by consensus.

The benefits of this approach, in terms of sovereignty, are substantial. In most instances, the UK would not be subject to the rulings of any foreign judges. It could be if the joint committee referred any issues to the ECJ, but that could only happen by consensus.

Additionally, it is difficult to see how the EU, and in particular the ECJ, could argue that this system offended against its legal autonomy. The system would be the exact analogue of a system that, in Opinion 1/92, the court accepted. If the UK wanted to close off the suggestion of a threat to the EU's legal autonomy, it could simply copy and paste the EEA's Surveillance and Courts Agreement (SCA), which established the EFTA institutions, just replacing the nouns as appropriate.

However, the diplomatic challenge of proposing such an approach is enormous. The EFTA institutions provide some form of 'external review'. Since there is more than one EFTA-EEA state, the setup does not amount to any country policing itself. If one pillar of a UK-EU system, however, was made up of only the UK, the UK would be allowed to mark its own homework. It is highly unlikely that this would be politically acceptable to the EU. The good function of the system would also depend on the UK courts adopting an approach to ECJ jurisprudence that is as supine as the EFTA Court's. This is what has prevented the dispute resolution procedure, involving a reference to the ECJ and possible safeguard measures, from being used in the EEA-EFTA case.

This option could also have significant implications for the domestic rule of law and the UK constitution. The UK Supreme Court would no longer be the highest court in the UK. At the same time, Parliament would be looking to create a new UK court whose rulings have a different status and set of legal characteristics from the rulings of other UK courts. That would be disruptive. Some Institute interviewees also argued it would be bad for legal certainty. Even if the diplomatic hurdles to this solution were surmountable, therefore, the Government and Parliament would have to approach it with extreme caution, and in close consultation with the judiciary.

## WTO dispute settlement

### What is the WTO dispute settlement system?

The WTO has a system to settle disputes about whether countries are discharging their obligations under the WTO agreements.

The system is state-to-state only. It has three main stages:

1. **Consultations.** The WTO favours mutually agreed solutions to disputes.<sup>181</sup> This can be achieved either through consultations between the disputing parties, or through the voluntary use of good offices, conciliation and mediation.<sup>182</sup> This is the use of third parties to assist in the resolution of the dispute. In any event, the parties must attempt to find a mutually agreed solution for 60 days before they can proceed to the next stage.



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2. **Adjudication.** If the parties cannot find a mutually agreed solution by consultation within 60 days, they must notify the Dispute Settlement Body (DSB), a committee comprising ambassadorial representatives from all member states. The DSB must then establish a 'panel'. (The option to resolve the dispute by negotiation, good offices, conciliation or mediation is not closed off at this point: it remains open throughout the entire process.) A panel is a group of three, or very occasionally five, lawyers or legal academics, composed to hear the legal arguments. The panel is ad hoc, meaning that there is a different panel for each dispute. Panellists may not be nationals of the states which are parties to the dispute, or (in most cases) any third parties involved with the dispute. The WTO Secretariat, the WTO's 600-strong bureaucracy in Geneva, nominates panellists. The parties must have compelling reasons to oppose those nominations. If there is no agreement on the composition of the panel within 20 days of it being formally established by the DSB, the WTO Director-General intervenes and appoints the panellists.

The panellists hear factual submissions and legal arguments, and then issue an interim report containing their findings.<sup>183</sup> Parties are invited to make comments. Then the panellists draft a final report, which they circulate to all WTO members. This normally happens within six months of the date on which the panel was composed.<sup>184</sup> Within 20 days of the report being circulated, the DSB 'adopts' the report, unless a party to the dispute decides to appeal.<sup>185</sup>

If a party does decide to appeal, which it can do only on a matter of law and not a matter of fact, the Appellate Body hears the appeal. The Appellate Body comprises seven standing, full-time experts each serving four-year terms.<sup>186</sup> It conducts its review within 90 days. The Appellate Body's report becomes binding on the parties once it has been formally adopted by the DSB.

3. **Implementation.** Once the panel or the Appellate Body has delivered a final report and it has been adopted by the DSB, 'prompt compliance' is expected.<sup>187</sup> If it is not feasible to implement the findings immediately, member states must implement them within a 'reasonable period of time'. That is 45 days, 90 days or a time established through arbitration, depending on the nature of the dispute. If a member state fails to comply, then in the first instance it is expected to offer an extra trade concession, like a tariff reduction, to the other party.<sup>188</sup> This is called 'compensation'. If it does not, then the injured party may suspend a concession, for instance by raising a tariff, provided it has the authorisation of the DSB. The retaliatory measure should be equivalent to the value of the original impairment.

The DSB must continue to keep under surveillance the implementation of any adopted recommendations or rulings.<sup>189</sup>

The WTO system is generally thought to be an effective, successful system. The DSB makes its decision through 'negative consensus', which means it automatically adopts reports unless there is a unanimous consensus *against* doing so. This smooths decision making. Established timeframes avoid blockages. The appellate system enhances legal certainty and the rule of WTO law.

### **How could the UK use the WTO system after Brexit?**

The WTO dispute settlement system is used to enforce WTO law under the WTO agreements. It is the default forum in which to resolve disputes between countries that

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do not have a trade agreement with one another. It is also used to settle disputes between countries that do have a trade agreement with one another, because those agreements often invoke WTO law. It does not enforce EU law. That means that it is unlikely to be a useful tool to resolve disputes over the withdrawal agreement, which will consist in part of EU law.

However, the WTO dispute settlement system is important for the UK after Brexit, for three reasons:

1. **No deal.** If negotiations collapse and there is no UK-EU deal, the UK will be reliant on this system for the resolution of any trade-related disputes with the EU and its member states. Given the high level of uncertainty and low level of trust likely in a no deal scenario, there could be many such disputes. (Any non-trade-related disputes would have to be resolved by diplomacy, by international arbitration or between the UK and individual member states at the International Court of Justice.)
2. **UK-EU free trade agreement (FTA).** If the UK and the EU conclude a trade agreement in the long term, some of it could be enforced under the WTO system.

If the UK reaches a free trade agreement with the EU, it might be of a very unusual kind. That is because, whereas most trade deals try to bring countries' rules and regulations closer together, the UK and the EU start from a point of convergence.

However, if the UK-EU FTA ends up looking like an ordinary FTA, it will likely replicate or refer to WTO law in areas such as trade in goods and services, sanitary and phytosanitary provisions (SPS provisions), and technical barriers to trade, among others. In these areas, it is typical for even those countries which have their own FTAs, with their own DRMs, to use the WTO's dispute settlement system instead, framing the dispute as one about WTO obligations, not FTA obligations. Of the 443 disputes brought to the WTO by 2010, 82 were between members who also had trade agreements with each other.<sup>190</sup> By contrast, the number of disputes using FTA DRMs has been extremely small, with the notable exceptions of the ECJ, the EFTA Court, Mercosur's Permanent Tribunal of Review and the Andean Tribunal of Justice.<sup>191</sup>

Commentators have suggested a number of reasons for this:

- **Precedent.** Though former WTO rulings are not strictly binding on future WTO panels and Appellate Bodies, there is an informal system of precedent which enhances predictability and certainty.<sup>192</sup>
- **Appeal.** The existence of appellate review does the same.<sup>193</sup>
- **Resources.** The WTO Secretariat provides support throughout the process, and few DRMs in FTAs have standing bureaucracies with the resources to do this.
- **Legitimacy.** Because of the respect the WTO commands and its established status, decisions of WTO panels and the Appellate Body are more likely to be considered as legitimate and so are more likely to be followed.<sup>194</sup>

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If countries have shown a preference for the WTO system over their own DRMs, it is possible this could happen with a UK-EU FTA too, in which case it is important for the Government to get to grips with the WTO system. Equally, however, it is important for the Government to learn from the experience of the WTO system and learn from its successes when it comes to designing a UK-EU DRM – whether for the withdrawal agreement or for the future partnership agreement.

3. **Rest of the world.** Regardless of what happens in the UK-EU negotiation, the UK Government is going to have to learn to use the WTO system. That is because WTO disputes with other, non-EU countries will no longer be handled by the European Commission.

## New systems

Negotiators could try to build a new system to resolve disputes. One option in this category, a new tribunal modelled on the EFTA Court, is discussed above in the section on the EFTA Court (page 53). There are three other possible starting points: a system of joint committees, a joint tribunal of some kind, or a form of ad hoc arbitration.

### Joint committees

There is absolutely no question that there will have to be a system of committees overseeing any UK-EU agreement. This is par for the course in international agreements.

However, it is wildly unlikely that the EU would accept a system that involved political and diplomatic dispute resolution alone. This is the current situation with Switzerland. Switzerland's relationship with the EU comprises over 120 bilateral agreements, covering areas of trade and co-operation such as pensions, migration, competition law, agricultural products, public procurement, civil aviation and many others.

Most of these are governed by a joint committee. The committee can try to reach a mutually acceptable solution and, in some cases, if this is impossible then the agreement permits one party to adopt safeguard measures or suspend parts of the agreement. (This process could only ever be enforced by the joint committee anyway.)<sup>195</sup> In some cases, there is some role for the ECJ, as in the Air Transport Agreement. Some of them give ad hoc arbitration tribunals a role, like the Insurance Agreement 1989.<sup>196</sup>

The EU is not happy with this arrangement. It considers Switzerland's single market participation too static. There are generally no institutional mechanisms to translate updates in EU law, or in the interpretation of EU law, into Swiss law.<sup>197</sup> The EU has made an institutional framework to do that job a precondition of further negotiation.<sup>198</sup> Negotiations to develop a new framework began in Spring 2014, though in June this year they reportedly broke down over the role of the ECJ.<sup>199</sup> Reports indicate that the EU was also keen to bring in a system of references from Swiss courts to the ECJ, as well as imposing a more rigorous surveillance regime.<sup>200</sup>

It is therefore implausible that the EU would be willing to countenance a DRM that is chiefly diplomatic or political. In any event, it is not clear the UK would want one even in an ideal world. With no decisive procedure for settling disputes to which there is no mutually agreed solution, disagreements can 'linger unresolved for years'.<sup>201</sup> In recent

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years, many trade agreements that started with political DRMs have therefore moved towards quasi-judicial arrangements, modelled on the WTO.

## Joint tribunal

A number of politicians and commentators have suggested a joint UK-EU tribunal to handle UK-EU dispute resolution after Brexit. In June 2017, Sigmar Gabriel, the German foreign minister, said that the UK would have to accept the ECJ, 'or at least a common court composed of Europeans and Britons, which in principle follows the decisions of the European Court of Justice.'<sup>202</sup> Meanwhile, in July, Laura Kuenssberg, political editor of the BBC, reported that prominent Leave-supporting MPs on the Conservative backbenches were 'talking about joint panels of judges' as an 'ECJ compromise'.<sup>203</sup>

There are clear advantages to this approach. It puts the UK and the EU on an equal footing and ensures that there is a neutral space in which to resolve disputes.

No detailed proposals along these lines have been published, however. Media reports that the Government would put forward proposals for a joint tribunal in its policy paper did not materialise.<sup>204</sup> If the Government does intend to table proposals of this kind, it has many questions to answer. All of the issues raised in Chapter 5 would have to be dealt with. Particularly pressing questions include:

1. **Composition.** There are three possible approaches to composing a UK-EU tribunal:
  - a. **UKSC-ECJ Tribunal.** Some commentators have suggested that treaty disputes could be resolved by a joint panel of UK Supreme Court (UKSC) and ECJ judges. This has the advantage of being cheap and requiring little new institutional design. Nevertheless, it is almost certainly a non-starter. The ECJ made its objections to 'functional integration' between a DRM and the ECJ clear in Opinion 1/91. ECJ judges would struggle to approach their ordinary duties with full 'independence of mind' when interpreting a provision of EU law in an ECJ law context if they had previously interpreted an identical provision in the treaty tribunal, since the two legal orders would likely have different aims. The ECJ is unlikely to rule that this arrangement is legal.
  - b. **UK-Member State Tribunal.** To get round this, the UK could try to propose tribunals involving UK judges and judges from whatever member state the dispute involves. Such a scheme has not been tried before so it is difficult to know for certain how the ECJ would react, but Institute interviewees considered that the court would likely consider this an even bigger threat to its monopoly on the interpretation of EU law.
  - c. **UK-EU Tribunal.** Alternatively, the UK could propose a new tribunal, either permanent or ad hoc, staffed by new UK and EU judges appointed according to a new appointment process. Of the three possibilities, this is the most likely to be a runner with the ECJ since it does not obviously change the functions of the ECJ nor devolve any EU-wide interpretative function to member states. This is not saying much, however, as a result of other likely objections outlined below.

With all three of these approaches to appointment, there is a further unanswered question: is there a 'third judge', who is neither from the UK nor the EU? If so, how are they appointed? If not, how is it decided which side has a majority on the panel?

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2. **Pillars.** The section on the EFTA Court above discussed the difference between one-pillar and two-pillar systems. In a one-pillar system, one tribunal would interpret the treaty for both the EU and the UK. In a two-pillar system, one tribunal would interpret the treaty for the UK, and another tribunal, probably the ECJ, would interpret the treaty for the EU. In a two-pillar system, however, there would probably be mechanisms to ensure that the two tribunals do not diverge too much in their interpretations. The question is: would a UK-EU tribunal interpret the treaty for one side, or both?

If the joint tribunal governed only the UK pillar of a two-pillar system, while the EU institutions governed the EU pillar, this would not prevent European judges from having a say over UK law. It would reduce the influence of European judges relative to UK judges.

This arrangement would, however, seem an unusual system. The EU judge's only role would be occasionally to adjudicate in UK-EU disputes for the UK. There would be no equivalent UK judicial emissary on the EU side. In crude terms: the EU would have more representation in a two-pillar system of this kind than the UK. EU judges would make up 100% of the bench in the EU pillar, but also 50% or 33% of the judges in the UK pillar. In terms of brute representation, that still represents an advance on the status quo (in which the UK has a 28th, or 3.6%, of the judges on the ECJ bench). It would nevertheless be odd.

If the joint tribunal sat atop a one-pillar system, and so was responsible for interpreting the treaty for both the UK and the EU, the system would be in danger of offending against the EU's legal autonomy. If the joint tribunal could give any binding rulings on provisions of the treaty identical to EU law, then the ECJ would be unlikely to rubber-stamp it. If the tribunal were carefully subjugated to the ECJ, it might be compatible with the EU's legal autonomy. If, for instance, the tribunal could refer issues to the ECJ whenever they involved the application of EU law-identical treaty provisions in the EU, and was bound by ECJ case law on these matters in the first instance, and was liable to have its rulings on these matters overturned if it got them wrong, then a one-pillar system might be compatible with the EU's legal autonomy. However, it is difficult to see the point of a one-pillar system, in which the new DRM interprets the treaty for everyone, if in reality it is the ECJ that ends up doing all the heavy lifting on the EU side. A one-pillar joint tribunal is, therefore, a sub-ideal solution.

3. **Surveillance.** Who would carry out surveillance on whom, and who would pay for it? Would the European Commission have a role, or indeed the ESA? Would there be some new, bespoke surveillance authority instead?
4. **Standing.** Which of the following actors would be able to bring cases before the tribunal:
- the UK Government
  - EU27 governments
  - the European Commission and other EU institutions

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- d. any new surveillance authority built to monitor compliance
  - e. EU27 individuals and businesses
  - f. UK individuals and businesses?

Relatedly, would references from national courts to the DRM be permitted? Or required? And if so in what circumstances?

5. **Remedies.** What remedies could the joint tribunal hand down? Would its decisions be binding? If not, what levers would it have to ensure compliance? Could it award damages, or just deliver findings in fact and law? Could it fine countries for non-compliance, like the ECJ can? Could it authorise trade retaliation (that is, suspension of parts of the agreement)? Could it require compensation (that is, the introduction of new trade concessions)? Could it authorise the suspension of the entire agreement?

## 'Ad hoc' arbitration

### What is ad hoc arbitration?

Ad hoc arbitration is a system of a dispute resolution whereby the parties compose a new panel of arbitrators to settle each dispute. Within this framework, this DRM can take a wide variety of forms. Almost all of the questions raised in Chapter 5 need to be answered of any ad hoc arbitration mechanism.

A starting point is the type of ad hoc arbitration mechanism used in most recent trade agreements. This will be called '**ordinary' ad hoc arbitration**. It works in a similar way to the WTO dispute settlement system, with a few modifications and omissions. Like the WTO system, it can be divided into three main stages. The text below sketches the DRM used in the EU-Singapore Free Trade Agreement, CETA and the EU-Vietnam FTA, which have basically similar provisions. Quotations are from the EU-Singapore FTA, but much of the text is identical.

1. **Consultations.** 'The Parties shall endeavour to resolve any difference regarding the interpretation and application [...] by entering into consultations in good faith with the aim of reaching a mutually agreed solution.'<sup>205</sup>
2. **Adjudication.** 'Where the Parties have failed to resolve the dispute [by consultations], the complaining Party may request the establishment of an arbitration panel', providing notice to the other party and the trade committee or joint committee.<sup>206</sup> The parties 'shall enter consultations in order to agree on the composition of the arbitration panel' but, where they cannot agree in some specified period of time, the chair of the trade committee shall intervene (often selecting panellists from a list maintained by the joint committee).<sup>207</sup>

The panel shall 'issue an interim report to the Parties' setting out its findings in fact and law, after some specified period of time.<sup>208</sup> The parties may comment. After a further specified period of time, the arbitration panel shall 'issue its ruling to the Parties and the relevant joint committee'.<sup>209</sup>

3. **Compliance.** The parties shall comply with the ruling within a 'reasonable period of time', the duration of which will be determined either by mutual agreement or by a

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ruling from the original arbitration panel.<sup>210</sup> The party complained against shall 'notify the complaining Party and the [relevant] committee' of any measures taken to ensure compliance, within the reasonable period.<sup>211</sup>

If a party fails to do this, or if the arbitral panel rules that the compliance measures are inadequate, the parties shall 'enter into negotiations [...] with a view to developing a mutually acceptable agreement on compensation', that is, on a new trade concession on the part of the complained-against party.<sup>212</sup> If this is not possible, the complained-against party may 'suspend obligations [...] at a level equivalent to the nullification or impairment caused by the violation'.<sup>213</sup>

Any disagreement about the level of the retaliatory measure can be referred to the original arbitral panel.<sup>214</sup> The complained-against party shall then notify the complaining party and the relevant committee of any further measure to ensure compliance, and if there is a disagreement, the original arbitral panel can rule over whether the suspension of obligations should cease.<sup>215</sup>

This process is similar to the WTO system, but for a few key differences. First, the rulings of the panel do not have to be 'adopted' by the dispute settlement body or any other similar decision-making body. Second, in most ad hoc arbitration systems in trade agreements, there is no possibility for appeal. (The exceptions are the SADC, Mercosur and ASEAN DRMs.<sup>216</sup>) In addition, trade agreements sometimes have more stringent transparency requirements than the WTO. Most of the other advances that ad hoc DRMs make on the WTO process are technical.

However, it is important to note that countries do not use these ad hoc DRMs much. This is for a variety of reasons:

1. **They use the WTO instead.** As discussed in the section on WTO dispute settlement above, where countries have a trade agreement with one another, they often resolve their disputes using the WTO system nevertheless.
2. **Effective deterrence.** It might be the case that the DRM is such an effective deterrent from violating or failing to implement the agreement that countries do not often transgress, meaning there is no need to start a formal dispute using the DRM.
3. **Effective 'dispute prevention'.** As discussed in the section above on joint committees, international agreements typically provide for joint committees and technical working groups to catch any problematic divergence early. In addition, there may be informal links between regulators which have the same effect. If the parties have a trusting, communicative relationship and strong processes for preventing, rather than resolving, disputes, it is less likely they will need to use the DRM.

As discussed in the section on 'Lessons from the EFTA Court Saga' (page 48), the relationship between the UK-EU DRM and the ECJ will be crucial in determining its acceptability. Most DRMs in ordinary EU free trade agreements with third countries do not provide for any relationship with the ECJ.

Some do, however. As the Government noted in its dispute resolution policy paper, the EU-Moldova Association Agreement allows the arbitration tribunal to refer questions of

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EU law to the ECJ.<sup>217</sup> So do the EU-Ukraine Association Agreement and the EU-Georgia Association Agreement. Article 322 of the Ukraine Association Agreement, Article 267 of the EU-Georgia Association Agreement and Article 403 of the EU-Moldova Association Agreement have near-identical text:

Where a dispute raises a question of interpretation of a provision of EU [Moldova/Georgia: Union] law [in the areas to which the dispute resolution procedure applies], the arbitration panel shall not decide the question, but request the Court of Justice of the European Union to give a ruling on the question. In such cases, the deadlines applying to the rulings of the arbitration panel shall be suspended until the Court of Justice of the European Union has given its ruling. The ruling of the Court of Justice of the European Union shall be binding on the arbitration panel.

### **How could the UK use ad hoc arbitration after Brexit?**

The UK could try to instate ordinary ad hoc arbitration, as used in CETA, the EU-Vietnam FTA, the EU-Singapore FTA and others, as a UK-EU DRM after Brexit. Some ministerial remarks suggest that this is what the Government intends.

This would be a tough sell – perhaps an impossible one – as a DRM for the entirety of the withdrawal agreement. That treaty is set to include citizens' rights and the financial settlement at least, which will likely contain many provisions that replicate EU law. The ECJ would likely strike down an ordinary ad hoc arbitration mechanism that contained no special provisions to affirm the supremacy of the ECJ in interpreting EU law for EU actors. Ordinary ad hoc arbitration will be hard to negotiate for any transitional arrangements too, for similar reasons.

Ad hoc arbitration could be a viable DRM, from a legal point of view, for any parts of the withdrawal agreement that do not relate to EU law. Ad hoc arbitration could also work for the future partnership agreement. If this takes the form of an ordinary free trade agreement, replicating swaths of WTO law, committing to some regulatory co-operation and some mutual recognition, then ordinary ad hoc arbitration will likely be sufficient to enforce it, and negotiable. If the future partnership agreement is a more innovative treaty that takes advantage of the two sides' uniquely convergent starting point and constructs some new system to manage divergence, it is less likely that ordinary ad hoc arbitration will be a viable solution. That is because any treaty that hinges on the UK's starting point hinges on the status quo, which is EU law.

The EU does have some agreements which allow ordinary ad hoc arbitration to settle disputes which relate to EU law. The EU's agreements with Andorra, San Marino and Monaco commit those countries to applying a range of EU law provisions. Article 7 of the EEC-San Marino Agreement on Co-operation and Custom Union (signed 1991) states that San Marino 'shall apply' the common commercial policy, and a range of other EU law that applies to customs. Article 24 provides for ordinary ad hoc arbitration to settle disputes. Likewise Article 7 of the Agreement between the European Economic Community and the Principality of Andorra (signed 1990) says that Andorra shall 'adopt' EU law on 'import formalities' and EU law 'applicable to customs matters in the Community'. Article 18 provides for disputes to be settled by arbitration.

However, the EU is dissatisfied with these arrangements. In 2012 it pushed for the 'micro-states' to join the EEA, or to embed them all in a catch-all 'framework association



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agreement'.<sup>218</sup> Since 18 March 2015, it has been negotiating with Andorra, Monaco and San Marino 'with a view to concluding one or several Association Agreement(s)'. In particular, the most recent council conclusions stressed 'the importance of establishing a coherent, efficient and effective institutional framework to underpin the Agreement(s) that [...] provides for the uniform application and consistent interpretation of the provisions of the Agreement(s); and includes a fair, effective and efficient dispute resolution mechanism.'<sup>219</sup> These states do not, therefore, provide an obvious precedent for a mutually acceptable ad hoc arbitration mechanism that involves the interpretation of provisions of EU law, or provisions identical to EU law.

That does not rule out some kind of arbitration. However, for an arbitration system to get past the ECJ, it would likely have to copy the reference procedure used for Ukraine, Georgia and Moldova – that is, create a reference procedure from the arbitration panel to the ECJ for matters of EU law. That would likely be enough to satisfy the Commission and the ECJ on regulatory issues. Whether it would do for citizens' rights is another matter. That is because state-to-state arbitration does not offer standing to citizens. If a Polish individual in the UK believed their rights had not been respected by the UK courts, they would have to lobby the Commission or the Polish Government to bring a case, with the hope of getting it referred to the ECJ. For this reason, the EU may insist on an additional reference procedure – not just from the arbitral tribunal to the ECJ, but also from national courts to the ECJ, or from national courts to the arbitration tribunal, or from national courts to the EFTA Court. However, this cuts directly across the UK Government's red lines.

One further objection to an ad hoc solution is cost. Ad hoc DRMs have very low fixed costs, and high variable costs. If there are never any disputes, an ad hoc DRM costs next to nothing. If there are many, it costs a lot. This contrasts with permanent DRMs, which have higher fixed costs and lower variable costs. From a purely fiscal standpoint, therefore, which option represents value for money depends on the volume of cases the Government is anticipating. It should anticipate a higher caseload than is associated with a normal trade agreement, particularly over citizens' rights. For this reason, some round-the-year resourcing might be desirable.

### **A new hybrid**

As has been evident, it is challenging to conceive of a DRM that sits within both the UK's red lines and the EU's, particularly for elements of the withdrawal agreement that relate to EU law. Below is one option for discussion, which might do. It is not presented as the most desirable option from the point of view of sovereignty, or effective enforcement, or the UK's national interest, or the EU's collective interest, but rather as a compromise that could be mutually negotiable. Legal experts interviewed by the Institute were divided on whether it would be legally acceptable to the EU.

There is no permanent tribunal that sits above the UK-EU withdrawal agreement for the purposes of dispute resolution. Instead, disputes are handled by ad hoc arbitration according to a set of rules enumerated in the treaty. The arbitration is not state-to-state, however.

Instead there is a surveillance authority, jointly resourced and staffed by the UK and the EU, which is responsible for bringing cases against member states accused of

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failing to implement the treaty. Private parties can apply to this surveillance authority to have a certain interpretative issue contested when it affects them.

Unlike the European Commission, the UK-EU Surveillance Authority does not have total discretion over which cases to take to arbitration and which ones not to. This is to avoid a situation in which only cases of high economic value are brought (that is, to avoid a situation in which citizens' rights cases are never brought). Instead, if the UK-EU Surveillance Authority is petitioned but wishes not to pursue the case, for instance because it is vexatious, then it must explain its reasons to a UK-EU Ombudsman.

This Ombudsman is from neither the UK nor the EU. They are an international lawyer or legal academic of standing, but not a national of any European country (even a European country that is not in the EU). They are appointed to a fixed term by a joint panel of UK, EU and third-party selectors. If the Ombudsman believes that the UK-EU Surveillance Authority has made a mistake, they can overturn the decision and compel it to bring a case in arbitration.

There are no references from national courts.

Although there are no standing judges, there is an arbitration facility which is jointly resourced by the UK and the EU. It is separate from the UK-EU Surveillance Authority. It has offices, administrative staff, perhaps some clerks and legal researchers if this is considered advantageous. It resembles private courts of arbitration (such as the Permanent Court of Arbitration) in this respect. This feature is intended to provide better value for money than a totally ad hoc system would.

The arbitral panel's relationship with the ECJ is as follows. The panel is bound by pre-exit case law of the ECJ. The panel must pay due account to post-exit ECJ jurisprudence, but is not bound by it. The panel must also pay due account to post-exit UK Supreme Court jurisprudence, but is not bound by it. When the treaty provision in question is also a provision of EU law, or references a concept in EU law, and there is no settled ECJ jurisprudence on the interpretation of that provision, the arbitral panel may/must refer the matter to the ECJ. (The UK side could also try adding: where the treaty provision in question is also a provision of UK law, but is not also a provision of EU law, the arbitral panel may/must refer the matter to the UK Supreme Court.)

As with ordinary state-to-state international arbitration, the panel's only remedy is a report containing findings of fact and law. If states do not comply with this report, the panel can authorise the suspension of provisions of the treaty. 'Cross-retaliation', that is, the suspension of a different part of the treaty from the one denied, is allowed, but must be proportional. That means that, if the UK failed to comply with a ruling on citizens' rights, the EU could limit market access for UK firms. The reports are binding on the parties as a matter of international law, but not as a matter of UK law in the UK, and only as a matter of EU law in the EU to the extent that the UK-EU treaty meets the legal criteria of direct applicability within the EU.

### Options summary

Figure 2 summarises some of the options discussed in this chapter. No option is perfectly aligned with both sides' objectives, because some of those objectives are contradictory.

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However, some get closer than others. The ECJ is a non-starter. So is a Swiss-style joint committee. The WTO dispute settlement system is not appropriate to the resolution of disputes that do not concern WTO law and, even if it were, it would still cut across both sides' negotiating objectives.

The landing zone, in terms of meeting both sides' objectives, is either an EFTA Court model or, more aspirationally, a new and inventive system with the right set of design characteristics.

The EFTA Court solution comes in two guises. First, the UK could dock to the EFTA institutions. This would be negotiable and ensure effective enforcement, but may not be compatible with 'taking back control'. Second, the UK could create a new court modelled on the EFTA Court – an 'EFTA Court replica'. This would be much harder to negotiate, as a true replica would involve only UK judges and so would look like the UK policing itself. It could also be disruptive to legal certainty within the UK.

A joint UK-EU court is a tempting starting point for any new system, but if this body interprets EU law for the EU as well as the UK, it would be difficult to get past the ECJ. So would an arbitration mechanism, though the UK may be able to boost the chances of agreement on arbitration by moulding it into a hybrid mechanism, with a permanent infrastructure, a surveillance authority and a system of references to the ECJ.

**Figure 2: Dispute resolution options**

	Judicial			Quasi-judicial				Political	New hybrid
	ECJ	EFTA Court	New court	New arbitration mechanism	Ordinary FTA arbitration	WTO**	Joint committee		
Standing	ECJ	✓*						Joint committee	?
	EU		Norway			Vietnam/Singapore	164 members worldwide	Switzerland	?
Remedies		✓*	Depends	Depends	Depends	✓	✓	✓	✓
		✓	Depends	Depends	Depends	✓	✓	✓	✓
Remedies in case of non-compliance		✓	Likely	Likely	Likely	✓	✓	✓	✓
		✓	✓	✓	✓	✓	✓	✓	✓
Consistency		✓	Depends	Depends	Depends	Depends	Depends	Depends	Depends
		✓	Depends	Depends	Depends	Depends	Depends	Depends	Depends
Interaction with other courts		✓	Depends	Depends	Depends	Depends	Depends	Depends	Depends
		✓	Depends	Depends	Depends	Depends	Depends	Depends	Depends
Institutional structure		✓	Depends	Depends	Depends	Depends	Depends	Depends	Depends
		✓	Depends	Depends	Depends	Depends	Depends	Depends	Depends
UK objectives		✓	Depends	Depends	Depends	Depends	Depends	Depends	Depends
		✓	Depends	Depends	Depends	Depends	Depends	Depends	Depends
Shared objectives		✓	Depends	Depends	Depends	Depends	Depends	Depends	Depends
		✓	Depends	Depends	Depends	Depends	Depends	Depends	Depends
EU objectives		✓	Depends	Depends	Depends	Depends	Depends	Depends	Depends
		✓	Depends	Depends	Depends	Depends	Depends	Depends	Depends
End ECJ jurisdiction		✓	Depends	Depends	Depends	Depends	Depends	Depends	Depends
		✓	Depends	Depends	Depends	Depends	Depends	Depends	Depends
Maximise legal certainty		✓	Depends	Depends	Depends	Depends	Depends	Depends	Depends
		✓	Depends	Depends	Depends	Depends	Depends	Depends	Depends
Protect the role of our courts		✓	Depends	Depends	Depends	Depends	Depends	Depends	Depends
		✓	Depends	Depends	Depends	Depends	Depends	Depends	Depends
Effective enforcement		✓	Depends	Depends	Depends	Depends	Depends	Depends	Depends
		✓	Depends	Depends	Depends	Depends	Depends	Depends	Depends
Preserve autonomy of EU law		✓	Depends	Depends	Depends	Depends	Depends	Depends	Depends
		✓	Depends	Depends	Depends	Depends	Depends	Depends	Depends
Follows pre-Brexit ECJ case law		✓	Depends	Depends	Depends	Depends	Depends	Depends	Depends
		✓	Depends	Depends	Depends	Depends	Depends	Depends	Depends
Takes into account post-Brexit ECJ case law		✓	Depends	Depends	Depends	Depends	Depends	Depends	Depends
		✓	Depends	Depends	Depends	Depends	Depends	Depends	Depends

\* Though private parties do not technically have standing before the ECJ and the EFTA Court, they do have effective access to the tribunals via reference procedures.

\*\* Not applicable to withdrawal agreement.

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## 7. Legislative implementation

### The challenge

It is impossible to view the task of designing a DRM and the task of implementing the treaty in domestic legislation separately. That is because any interaction between the DRM and UK law, or between the DRM and UK institutions (such as the courts or the Government), will have to be given effect in UK legislation.

This is at the heart of the disagreement over dispute resolution. The EU wants citizens' rights (and possibly other rules) to be both enumerated by treaty provisions with direct effect, and interpreted by the ECJ.<sup>220</sup> Together those demands seem to cut across the Government's commitment to end the 'direct jurisdiction' of the ECJ. If the provisions have direct effect, then citizens can invoke them before the UK courts. If the ECJ can issue binding rulings on the meaning of those provisions, that means the ECJ interprets law that is applied in UK courts.

As discussed in Chapter 2, though the Government was initially reluctant to talk about the agreement having 'direct effect', this seems to be changing. The Prime Minister said in Florence that the Government will "incorporate our [withdrawal] agreement fully into UK law and make sure the UK courts can refer directly to it".<sup>221</sup> David Davis called this "direct effect, if you like".<sup>222</sup>

Michel Barnier welcomed the talk of 'direct effect', but he cited the absence of a role for the ECJ in enforcing those rights as a 'stumbling block'.<sup>223</sup> This speaks to a major problem with the Government's approach to implementing the withdrawal agreement in domestic law. It is really not clear what the Government's commitments on 'incorporation' and 'direct effect if you like' mean. It is not clear by what legislative means the Government intends to accomplish incorporation, nor what the Government wants the courts to do when the withdrawal agreement and other domestic law come into conflict after Brexit, nor what effect the decisions of any DRM for the withdrawal agreement would have on the meaning of UK law. The remainder of this chapter therefore explores different ways of giving effect to treaty rights in UK law. Legislative implementation will be explored in more detail in a subsequent Institute for Government paper.

### The options

#### Importation

As discussed in Chapter 2, treaties are not part of UK law by default. Parliament could, however, provide that a given UK-EU treaty is part of UK law. This is approximately the approach taken to EU law at present. The European Communities Act 1972 (ECA) said that the EU treaties, and all the directly applicable EU law that flows from those treaties, are part of the UK legal order. Parliament could achieve a similar outcome by adding the withdrawal agreement to an Act of Parliament as a schedule.

If Parliament took this approach to a future UK-EU treaty then it would fall to UK judges, in the first instance, to interpret the treaty in the UK when disputes over its meaning arose in the UK. However, any DRM would also be tasked with interpreting the treaty, where the UK and the EU disagreed about its meaning. The bill incorporating the

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treaty would also have to make clear what the relationship between UK judges and that DRM is, and how judges are to handle conflicts between the treaty and future Acts of Parliament.

## Replication

Parliament could instead copy and paste the rights in any new treaty into domestic legislation. Then UK judges would not be interpreting the rights in the treaty, but those in the statute. That is important, because it means that even if the treaty were interpreted by a body other than a UK court, that body would not be interpreting law that has effect in the UK.

This is the situation with the Human Rights Act 1998. That law replicates, in UK law, the rights set out in the European Convention on Human Rights (ECHR). The ECHR is interpreted by the European Court of Human Rights (ECtHR) in Strasbourg. Strasbourg's interpretations do not, however, have an automatic effect on the meaning of UK law. This is because, while the ECtHR interprets the ECHR, the UK courts do not. Instead, they interpret the Human Rights Act.

The Government's promise to 'incorporate' the withdrawal agreement could be interpreted as a promise either to 'import' the treaty or to 'replicate' it. After all, Tony Blair's first Government described the Human Rights Bill as a piece of legislation to 'incorporate' the ECHR.

If Parliament adopts either an 'importation' or a 'replication' approach, there are further steps it could take to entrench any treaty rights in UK law:

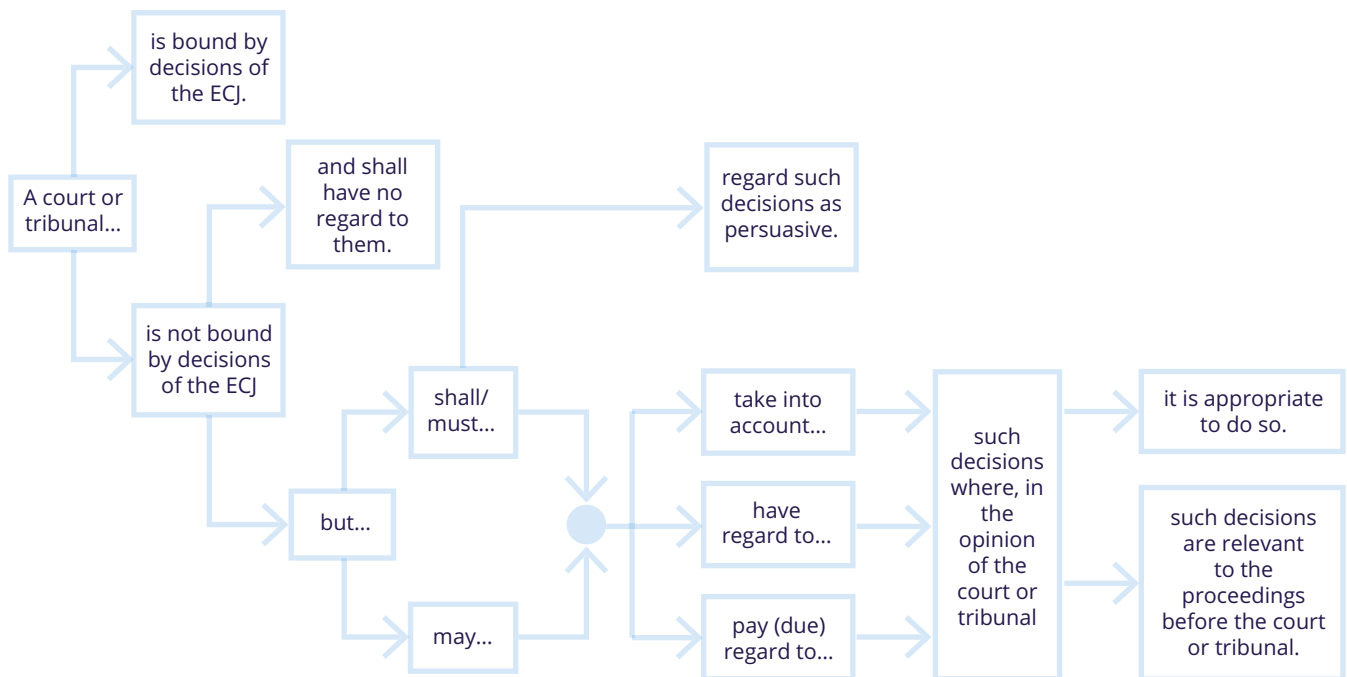
1. **Link to a supranational court.** If the DRM tasked with interpreting the treaty is judicial in nature, Parliament could establish a link between domestic courts and the DRM. This would make it less likely that UK and EU *judicial interpretations* of the treaty would diverge. The link could take the form of:
  - a. **Reference procedures.** The UK could allow its courts to refer ambiguous questions of treaty-related law to the DRM. This was discussed in Chapters 5 and 6.
  - b. **Instruction on jurisprudence.** Parliament could say that the UK courts must take into account the decisions of the DRM where those are on treaty provisions replicated in UK law (or some other duty). This is the approach adopted for the Human Rights Act. UK courts are not technically bound by the decisions of the Strasbourg court, but they must take those decisions into account when, in the opinion of the UK court, they are relevant.<sup>224</sup> In practice, the UK courts keep pace with the ECtHR most of the time.

In a Brexit context, there are two different versions of this approach. If there is a non-ECJ judicial DRM which sits above the UK-EU treaty or treaties, Parliament could try to entrench rights by instructing the courts to take account of, or follow, the decisions of that DRM.

Alternatively, or in addition, it could deliver a stronger instruction to the courts on how to regard the decisions of the ECJ than that which is currently in the EU

(Withdrawal) Bill. Since the withdrawal agreement is likely to replicate or reference elements of EU law, this would reduce the chances of divergent interpretation. The options for how to make an instruction of this kind more or less robust are shown Figure 3.<sup>225</sup>

**Figure 3: Parliament's options on the ECJ**



2. **Make the rights hard to repeal.** Alternatively, or in addition, Parliament could try to entrench the rights by making them difficult to repeal. This step would protect not against divergences in judicial interpretation, but divergence in *legislative implementation*.

Whether it is possible for Parliament to entrench a statute in this way is unclear. The default position is that, since Parliament is sovereign, it can always make or unmake any law whatsoever, regardless of what a previous statute said. This is a crucial point in the context of David Davis's statements on 'direct effect, if you like'. Even if the withdrawal agreement is made part of UK law, so that the UK courts can refer to it, that does not, in and of itself, stop Parliament from changing UK law.

The judiciary has acknowledged the existence of some 'constitutional statutes', that is, statutes which cannot be impliedly repealed. This is weak entrenchment, since a constitutional statute can still be repealed if a simple majority of MPs explicitly say so, but it is a degree of entrenchment nonetheless. The ECA is one such constitutional statute. Parliament could attempt to mimic the provisions of the ECA which made it so, in its implementing legislation.

This would be difficult, however. Parliament might try to copy Section 2(4) of the replace with ECA, which says that future Acts of Parliament are to be construed by the courts in accordance with EU law and any legislation that implements EU law. Parliament could, in that vein, say that future Acts of Parliament are to be construed as consistent with the set of UK-EU treaty rights that the UK has replicated in or

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incorporated into domestic law, unless a future Act explicitly says otherwise. This would be an attempt to give the treaty a kind of 'supremacy' over UK law, similar to that enjoyed by EU law at the moment. However, in *Thoburn v Sunderland City Council*, the case that first generated the concept of a 'constitutional statute', Lord Justice Laws implied that the ECA did not attain its 'constitutional' status by virtue of Parliament providing for a certain approach to repeal in Section 2(4).<sup>226</sup> Parliament 'cannot stipulate against implied repeal any more than it can stipulate against express repeal'.<sup>227</sup>

Rather, what makes a law a constitutional statute (or, as commentators have nuanced Lord Justice Laws' position, what makes a provision a constitutional provision) is that, in the view of the courts, it '(a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights'.<sup>228</sup> This position was developed by the Supreme Court in the HS2 judgment, in which Lords Reed, Neuberger and Mance referred to constitutional 'principles' that are 'embodied' in legislation.<sup>229</sup> Some have taken their reasoning to imply that the provision's 'constitutional' character, and its capacity to override other constitutional provisions (let alone ordinary provisions) of law, is determined by the extent to which the provision embodies a constitutional principle.<sup>230</sup>

On this view, it is not up to Parliament whether a given provision is 'constitutional' or not. It is up to the courts, in their application of these tests as they have been developed by subsequent jurisprudence. The interaction between common law principles, Section 2(4) of the ECA and principles of EU law is complex and has generated much debate. It is difficult to know, at this stage, whether the courts would consider as 'constitutional' clauses of an Act of Parliament that conferred upon citizens rights identical to those in the UK-EU treaties. It is also difficult to know, at this stage, whether the courts would consider as 'constitutional' a clause which itself attempted to prevent implied repeal of the Act.

Does Parliament have other options for entrenchment, in that case? Commentators are divided on this question. The Act of Parliament which replicates the UK-EU treaty rights could try to impose the requirement of a supermajority (two thirds of MPs, say) to pass any Act of Parliament that overturns those rights. This might be possible, or it might not. There is no settled case law on this issue.<sup>231</sup>

## Imitation

Parliament may judge that it does not need to bestow rights explicitly enumerated in the treaty using legislation, because those rights are already available in other statutes or in the common law. It would, then, be up to the UK courts to interpret that law according to ordinary interpretative practice and any other instructions given to the courts about how to regard ECJ jurisprudence in any implementing legislation.

This was approximately the situation with respect to the ECHR before the Human Rights Act 1998. The UK was a member of the convention, and considered that the rights enumerated therein were already available in UK law, meaning that transposition was unnecessary. In this instance, however, individuals did have access to their rights at the Strasbourg court, at which individuals have standing once they have exhausted all remedies in their own legal system.



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This approach seems unlikely, given the Government's statements so far about incorporating the agreement into UK law.

## **Making sense of the Government's position on implementation**

The Government's current position on dispute resolution, legislative implementation and how the two interact is either incomplete or incoherent.

Assuming it is incomplete, the most intuitive way of reading the Government's statements so far is as follows:\*

During the transitional period, the ECJ will continue to have direct jurisdiction on exactly the same terms as at present. UK law will continue to recognise the supremacy and, where appropriate, the direct effect of EU law. The ECJ's rulings will continue to be binding on the UK courts.

When the transitional period ends, two different treaties will apply to the UK and the EU: the withdrawal agreement, which will cover citizens' rights, the Irish border and the financial settlement; and the future partnership agreement, which will cover trade and other matters. Some elements of the withdrawal agreement will be superseded by the future partnership agreement, but some will not.

The withdrawal agreement is imported into UK law, not just replicated on the UK statute book. That is, Parliament provides, as it did with the EU treaties, that the withdrawal agreement is part of UK law. The withdrawal agreement itself replicates certain provisions of EU law.

The ECJ, as ever, interprets EU law. A DRM is the final authority on the meaning of the withdrawal agreement, and can hand down remedies to ensure that the UK, the EU and the EU member states are following it. The UK courts interpret the withdrawal agreement in the UK, when individual cases arise. A UK statute says that the UK courts may take account of the ECJ's case law on any provisions of EU law pertaining to citizens' rights which the withdrawal agreement replicates.

Unanswered questions include:

- Is the DRM for the withdrawal agreement the same as the DRM for the future partnership agreement?
- What does the DRM for the withdrawal agreement look like?
- Is the situation in domestic law the same for all elements of the withdrawal agreement – the Irish border, the financial settlement and citizens' rights? Given that the withdrawal agreement is incorporated into UK law, could the UK courts end up judging whether the UK Government is paying its dues under the financial

\* The summary below takes the Prime Minister's Florence speech on Friday 22 September as the authoritative statement of the Government's position.

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settlement, as they could end up judging on citizens' rights cases? If not, how does domestic law differentiate between different parts of the withdrawal agreement?

- How are the UK courts to treat any new UK law which conflicts with the withdrawal agreement, as it is incorporated into UK law? (As discussed, the Government and Parliament may not have the last word on this question – the courts will take their own view.)
- What is the relationship between the UK courts and the withdrawal agreement DRM? (Since the nature of a DRM is to be the final authority on the meaning of the law it interprets, and the UK courts and the DRM would in this scenario be interpreting the same law, it would make sense for the UK courts to be bound by the DRM's decisions.)
- What is the relationship between the withdrawal agreement DRM and the ECJ?

## The EU (Withdrawal) Bill

This section has referred, in general terms, to the legislation which implements the UK-EU treaties. A large part – possibly the entirety – of that legislation is already before Parliament, in the form of the EU (Withdrawal) Bill.

The EU (Withdrawal) Bill, as brought forward by the Government before the summer recess, is an instrument to replicate most pre-Brexit EU law in UK law. To the extent that the withdrawal agreement also replicates EU law, the EU (Withdrawal) Bill can also be considered as an instrument to replicate rights in the withdrawal agreement. On this basis, the entrenchment steps described above could be applied to the EU (Withdrawal) Bill.

Such entrenchment steps could be added to the bill by amendment in Parliament. Or, in theory, they could be included in a statutory instrument used to implement the bill under the Section 9 power. That clause currently says:

- (1) A Minister of the Crown may by regulations make such provision as the Minister considers appropriate for the purposes of implementing the withdrawal agreement if the Minister considers that such provision should be in force on or before exit day.
- (2) Regulations under this section may make any provision that could be made by an Act of Parliament (including modifying this Act).
- (3) But regulations under this section may not:
  - (a) impose or increase taxation,
  - (b) make retrospective provision,
  - (c) create a relevant criminal offence, or
  - (d) amend, repeal or revoke the Human Rights Act 1998 or any subordinate legislation made under it.
- (4) No regulations may be made under this section after exit day.<sup>252</sup>

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A word of caution is required on that front. As this chapter and the Prime Minister's remarks in Florence have made clear, the legislation which implements the withdrawal agreement is likely to be of profound constitutional significance. It could shape the relationship between citizens, the state, the European Court and possibly a new DRM for many years. It could materially affect the means by which Parliament is able to effect a change in the law. It could impose upon judges new duties and privileges, beyond those written in to the EU (Withdrawal) Bill at present, with respect to their treatment of foreign courts' jurisprudence.

Making that legislation by statutory instrument is dangerous, for three reasons. First, legislation of this significance needs proper scrutiny: if a law is made as secondary legislation under the Section 9 power, it is unlikely to get that scrutiny. The implementing statutory instruments would be highly likely to need a vote in each House of Parliament to pass, since they would likely meet the criteria set out in Schedule 7(6)(2)(f)-(g) (creating or amending a power to legislate, or amending the EU (Withdrawal) Bill itself). However, the House would still be unable to amend the implementing legislation in this event. Neither would previous parliamentary votes, for example on the text of the withdrawal agreement. The treaty will be indicative, but by no means conclusive, on how the Government intends to give effect to any new international obligations in domestic law.

Second, secondary legislation has a different status from primary legislation. It is subject, for instance, to judicial review. That means that judges could end up ruling on the legality of the implementing legislation. Though experts are divided on the likelihood of such a case, and on the likelihood of its success, a judicial review of this kind is an outcome that Parliament and the Government should work hard to avoid. As the Institute has argued in a previous paper,<sup>233</sup> the responsibility for setting the terms of the UK's post-Brexit constitutional order should be seen to rest in Westminster, not beneath a wig.

Third, it is unlikely, bordering on impossible, that the courts would ever designate a provision of secondary legislation a 'constitutional statute' or 'constitutional instrument' (a law not subject to implied repeal by future Acts of Parliament). The EU is keen to entrench any rights in the deal, and the Government's current plans close off the small level of entrenchment that is readily available under the UK constitution.

The Government could answer all these concerns by seeking to implement the withdrawal agreement not by statutory instrument, but by an Act of Parliament. This would be perfectly feasible.

At present, three main parliamentary interventions on the Brexit deal are expected. First, the so-called 'meaningful vote' on the withdrawal agreement to take place before that agreement has been concluded.<sup>234</sup> Second, the ratification vote under the Constitutional Reform and Governance (CRAG) Act 2010. Third, the votes on any statutory instruments that, under the terms of the EU (Withdrawal) Bill, are brought forward by the Government to correct deficiencies on the statute book, ensure the UK meets its international obligations and implement the withdrawal agreement. They would probably take place in that order, although the Government has not been explicit on this point.

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The Government could approach things differently. It could negotiate the deal, then bring forward a resolution in Parliament endorsing that deal, and then conclude the deal, provided that Parliament assented. But instead of then proceeding to ratification, it could bring forward an 'EU (Withdrawal) Implementation Bill' – a piece of primary legislation – to implement the withdrawal agreement. This would allow for proper scrutiny. Parliament could then proceed to ratification. This would ensure that Parliament got a meaningful vote not just on the Brexit deal, but also on how the Brexit deal was given effect in UK law.

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## 8. Conclusion

At present the UK and the EU are locked in a stalemate over dispute resolution for the withdrawal agreement. The EU has said little about its view on dispute resolution for the future partnership agreement, but disagreements are likely there too.

If neither side changes its current position, there will be no agreement. Negotiators need to move the conversation on and think, pragmatically, about the options. This is in UK interests – both because it will move negotiators closer to a deal, and because an effective dispute resolution mechanism is essential to ensuring that UK citizens, businesses and civil society enjoy access to justice and legal certainty after Brexit.

The Government acknowledges this, counting legal certainty and effective enforcement among its objectives. Yet these goals are in tension with the Government's others – for the UK to take back control of its laws and to protect the role of UK courts. Ministers must therefore face up to some difficult trade-offs. The more control that each side has over how the withdrawal agreement is interpreted inside its borders, the greater the chances of divergence and, therefore, uncertainty and even deprivation of rights or barriers to trade. This trade-off will apply to the future partnership, too. The deeper that agreement, the more provision it will make for regulatory co-operation and convergence. That would require robust mechanisms to maintain agreement on what the rules mean.

Once the Government has come to its own view on how to prioritise its objectives, it will come up against significant constraints from the EU side. The rarely-mentioned and little-understood concept of the EU's 'legal autonomy' binds the hands of EU negotiators. That is because its limits are defined by the ECJ. Governance arrangements that are at all controversial will likely have to be approved by that court. It is a jealous guardian of its exclusive power to interpret EU law, and any replicas of EU law, for EU institutions.

For a time, the Government's main message on dispute resolution was a commitment to ending the jurisdiction of the ECJ. That, on its own, will not square these circles. There are signs, however, that the Government has begun to think about the issue in a more nuanced way. Its recent paper discussed a range of precedents on some elements of institutional design, such as remedies, surveillance, monitoring and even references to the ECJ. Nevertheless, that paper was backward-looking. It did not discuss how any of these precedents could be applied to the future UK-EU relationship.

That is the challenge negotiators now face. This paper has argued that the 'landing zone' for the withdrawal agreement is likely to be the EFTA Court, a new institution that is EFTA Court-like, or possibly a new, hybrid mechanism unlike anything that has gone before.

Whatever the solution, it will likely have to be implemented through domestic legislation. At present the Government wants to make provision, in the EU (Withdrawal) Bill before Parliament, to implement the withdrawal agreement by statutory instrument. That legislation could be constitutionally significant, however, shaping the relationship between Parliament, the Government, the courts, the dispute resolution mechanism and the ECJ. The Government needs to develop and set out a clear view on

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how it wants this legislative implementation to work. Statements so far have been cryptic at best. The Government must recognise, too, that the implementing legislation should be contained not in a statutory instrument, but an Act of Parliament.

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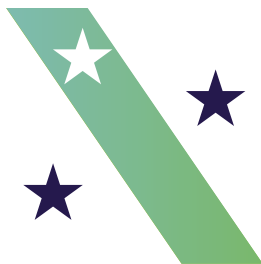
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