Legal protection and legal uniformity: Procedural and institutional rules in European-British trade relations after Brexit

Peter-Christian Müller-Graff

“Legal protection and legal uniformity: Procedural and institutional rules in European-British trade relations after Brexit” – this question, formulated by the organisers of the Mannheim Conference on “Trade Relations after Brexit” is a vast topic.¹ Its discussion is all the more challenging since many parts of it have already been addressed in the foregoing contributions. The justifying reason for this concluding contribution may be that the discussed parts have not yet been treated in a cross-sectional systematic “rapport de synthèse”-analysis under the general aspects of “legal” – protection and legal “uniformity” – in the sense of common rules. In the specific context of future trade relations between the European Union (the Union; EU) and the United Kingdom (UK) the issue of judicial protection is in particular relevant, as far as common rules for mutual market access of market participants will be established. Common rules are required for establishing a so called “equal level playing field” without distortions of competition for market actors and without loopholes in the protection of consumers, health and the environment. Judicial protection is required for settling disputes on the interpretation of agreed provisions and for the enforcement of reliable legal standards. A modest attempt of answering the given question can be divided into three parts: first, looking at the scenario of a total lack or severe shortcomings of an agreement on common marketing and competition relevant rules and on judicial protection after Britain’s withdrawal from the Union (A); second pondering on the scenario of establishing common rules for trade relations in a future relationship (B); and third considering the scenario of establishing rules on judicial protection (C).

¹ Text of the concluding lecture at the Joint Conference of EURO-CEFG, MaCCI and the University of Mannheim on ‘Trade Relations after Brexit: Impetus for the Negotiation Process’ on 26 January 2018.
A. Scenario of No Agreement on These Topics.

I. Reasons for Specific EU-UK Common Substantive Rules.

The question of common (uniform or at least compatible) marketing and competition relevant rules arise if the Union and/or the UK are not satisfied with the existing basic international public legal framework of the WTO (as presented by Christoph Herrmann), but see a need for a bilateral free trade agreement after a transitional or interim period, if it ever ends (as cautiously reflected by Stefaan Van den Bogaert and Albert Sanchez-Graells) – a need that was somewhat scaled down by Clemens Fuest’s economic estimations. But in the case of a future Free Trade Agreement (FTA) the main driving factors for legal alignment (as subtly differentiated in the forms of mutual recognition, equivalence and harmonization by René Repasi, exemplified by others and profoundly fanned out for services by Gavin Barett) will arise from political, economic and legal continuity reasons.

The main political reason is mentioned by par. 49 of the Joint Report of 8 December, 2017 (Joint Report), namely Britain’s commitment to its (possibly not fully feasible) guarantee of avoiding a “hard” border on the Irish island, which entails the necessity of uniform mandatory standards of health, safety, consumer protection etc for products imported from Northern Ireland into the Republic of Ireland (as stated by several discussants).

The main economic factors concern the interests of enterprises on both sides, namely, in particular, the interest to avoid the necessity to comply with different standards for the marketing of products in different jurisdictions (as knowledgeably outlined by Friedemann Kainer and Elmar Brok). The reply to Patrick Minford’s pure free trade recommendation is: Transnational liberalisation requires regulatory cooperation. Zero tariffs don’t overcome non-tariff barriers, such as specific marketing requirements for safeguarding health, safety, the consumer, intellectual property etc, but also specific technical standards and restrictions of competition (such as the handling of public procurement and subsidies). This was already the wisdom behind the empowerment of the EEC “for the approximation of such legislative and administrative provisions of the Member States as have direct incidence on the establishment or functioning of the Common Mar-

---

The intensity of such regulatory cooperation has to be – as a matter of course – debated in the course of the adoption of every concrete standard. But the necessity of approximation or at least mutual recognition of the relevant different standards as a pre-condition of free trade can not be negated.4

Eventually, a certain demand for legal continuity appears as a driving force for legal alignment (as substantiated for competition law in the relation between the Union and the UK by Florian Wagner).

II. Scenario of No Agreement on Common Substantive Rules

As far as no agreement between the EU and the UK is reached on these often very detailed standards as they exist and as they will develop, the UK – with a view to the situation on the Irish island – committed itself in par. 49 Joint Report that it “will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement.” However, already two days later, Her Majesty’s Brexit Secretary labelled par. 49 of the Joint Report as just “a statement of intent.”5

Hence, if the total or partial absence of such an agreement occurs, then it seems plausible that the gravity of the respective subject relevant territorial markets and the persuasiveness of standards on both sides will urge the legislator of one side into the issue to align with the standards set by the other side. While the quantitative gravity-relation between such markets in the case of the Union and the UK may relatively differ from that of the Union and Switzerland, the experience in the latter relation might nevertheless be of interest. There, the trading interests have created the widely applied Swiss practice of the so called “autonomer Nachvollzug”6 (“au-

3 Former Article 100 EEC-Treaty; today developed into Articles 114 and 115 TFEU.
tonomous national adaptation to EU-rules”). Well elaborated examples of this technique can be found on the website of the “Schweizerischen Bundeskanzlei”\textsuperscript{7} In the British case the EU Withdrawal Bill already demonstrates this method in relation to existing EU law.\textsuperscript{8}

III. Lack of Common Rules on Judicial Protection.

In the scenario of the absence of any agreement on judicial protection for the market participants after the termination of the jurisdiction of the ECJ for the UK, the situation would be similar to that between the Union and Switzerland. There, legal protection of individuals and enterprises under the manifold bilateral Agreements is in the hand of the rules and the interpreting minds of the respective autonomous jurisdiction of both sides with no common judicial authority to overcome discrepancies of interpretation or judicial protection.\textsuperscript{9} Hence, the solution of controversial interpretation is left to diplomats as, e.g., in the case of the disputed compatibility of a bail requirement of Basel Land for craftsmen from EU-countries who want to provide plaster work (Kautionspflicht für Gipserarbeiten) with the Agreement on the free movement of persons.\textsuperscript{10} As a result, market participants lack legal certainty.

B. Scenario of Establishing Common Rules for Trade Relations

I. Presumptions

The treatment of this scenario depends on several presumptions. Most likely two presumptions will prove to be strong. First presumption: Even as far as the Union and the UK will seek to establish –in its scope still to be defined – uniform rules, the UK will aim at avoiding any supranational mechanism


\textsuperscript{9} Tobler/Beglinger, Brevier zum institutionellen Abkommen Schweiz-EU (Ausgabe 2018-03.1), 8.

\textsuperscript{10} OJ EU 2002 L 114/6.
for ensuring legal uniformity. On 17 December 2017 Her Majesty’s Foreign Secretary has uttered “Britain must not become a “vassal state” of the Union by being forced to adopt all its regulations.”\textsuperscript{11} This view is certainly an understandable position for a former imperial power. However, there is a second presumption: The Union will not be willing to adapt to British law and, even the less, if an attitude towards the continent similar to a certain language attitude should appear. Hence, in view of the present gravity realities of trade in the second decade of the 21\textsuperscript{st} century a possible conundrum is how far the UK might be willing to adapt its law to marketing and competition relevant law of the Union. Under this aspect the adaptation of British law to existing Union law and to future Union law have to be distinguished.

\textbf{II. Uniformity of Existing Law.}

Under the mentioned two presumptions alignment to existing marketing and competition relevant Union law could best be guaranteed by an agreement that copies it for the EU-British relationship into international public law, similar to the Agreement on the European Economic Area between the Union and three of the four EFTA States (EEA-Agreement).\textsuperscript{12} This would draw from primary law in particular the basic market freedoms and the competition rules and from secondary law all the provisions which are considered to be trade and competition relevant, similar to the list of secondary law contained in the Annex to the EEA-Agreement, among them also the so called “horizontal provisions relevant for the four freedoms” in Articles 66 to 77 EEA-Agreement which concern social policy, consumer protection, environment, statistics and company law.

\textit{If, however} – as it is constantly declared by Her Majesty’s Prime Minister\textsuperscript{13} (and has been affirmed by Patrick Minford in this conference) – the UK


refuses to subscribe to the coherent concept of the internal market, which includes, besides the free movement of goods and capital, as integral part also the free movement of workers, the free establishment of natural persons and the free transnational provision of services, then the Union might be forced by its own normative genetic code and objective, in particular by Article 1 par. 2 TEU (“an ever closer union”), to refuse any agreement which jeopardizes the attainment of this substantive and supranational core element of its inner cohesion. Nevertheless, a counter argument in Union law could arise from Article 8 TEU’s assignment, that “the Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness”. The UK is certainly a neighbouring country. However, Article 8 TEU has to be understood to be pursued within the context of respecting the “ever closer union” – principle. This is a so called “fundamental interest” of the Union, which (according to Article 21 TEU) the Union has to safeguard in the cooperation “in all fields of international relations”, herein included the common commercial policy (Article 207 par. 1 s. 1 TFEU). It is clear that the Union enjoys a considerable discretionary leeway in defining the way of safeguarding its fundamental interests, but there is an unalienable core, an identity, of primary law (a sort of “europäische Verfassungsidentität”), which certainly comprises the basic tasks of the Union as laid down in Article 3 TEU, among them prominently the establishment of the internal market (Article 3 par. 2 TEU) as defined in Article 26 par. 2 TFEU and its consequences. While primary law can be amended by the Member States, international Treaties of the Union cannot change it. The reference to the existence of British exceptions and privileges in Union law by Wolf-Georg Ringe is not conclusive, since they are rooted in primary law – nor was the reference to crisis measures in point (as rightly emphasized by Gavin Barrett). Therefore, any envisaged “creative” Agreement with the UK should be brought before the ECJ according to Article 218 par. 11 TFEU for obtaining an opinion as to whether it is compatible with primary law.

Hence, as far as the radius of future trade relations between the Union and the UK will be drawn in the negotiations, legal uniformity could, in

14 See the definition in Article 26 para.2 TFEU. This concept has been labelled as the “indivisibility” of the internal market; see, e.g. Michel Barnier in his address to the XXVIII Congress of the Fédération Internationale pour le Droit Européen (F.I.D.E.) on 26 May 2018 at Estoril.
15 Explicit reference in Article 205 TFEU to Article 21 TEU.
16 Müller-Graff, in: Frankfurter Kommentar zu EUV, AEUV, GRC (2017), Art. 3 EUV.
principle, be preferably served (in terms of time economy and experience) by using the *proven pattern* of negotiating Accession or Pre-Accession Treaties, Association Agreements, enhanced Free Trade Agreements or New Partnership Agreements of the Union with third States (the labels change). This implies (from the side of the Union) more or less the familiar procedural chapter-technique method\(^\text{17}\) – namely *first*, attempting to agree in principle on relevant existing primary and secondary trade relevant market and competition law in a particular subject area as a *starting point* and benchmark in order to enable free trade without distortions of competition, and, *second*, agreeing on those *exemptions* and special rules which are deemed necessary.

**III. Uniformity of Future Legislation.**

However, such an agreement establishes legal uniformity on the basis of *conventional international law only at the time of the conclusion* of the agreement. In view of the *dynamics* of trade, competition and regulatory actions and reactions, the second aspect of legal uniformity concerns the issue of *future alignment after* the conclusion of the agreement. In light of the two mentioned presumptions such future legal uniformity could be achieved only by way of later agreements between both sides. If the somewhat bizarre wild growth of consecutive single bilateral agreements as developed between the Union and Switzerland\(^\text{18}\) is to be avoided, the EEA solution\(^\text{19}\) could serve as a starting point.

*Instead of the necessity of permanently concluding new agreements* the EEA Agreement contains a *smooth amendment* procedure “in order to guarantee the legal security and homogeneity of the EEA” (Article 102 par. 1 EEA-

---


Agreement) with the purpose “to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect for the same rules” (Art. 1 EEA-Agreement). To these ends Article 102 EEA-Agreement provides that “the EEA Joint Committee shall take a decision concerning an amendment of an Annex to this Agreement as closely as possible to the adoption by the Community of the corresponding new Community legislation with a view to permitting a simultaneous application of the latter as well as of the Annexes to the Agreement.” Although the EFTA States enjoy rights in the shaping of relevant new Union legislation (Articles 99 and 100 EEA-Agreement) and although any of them can block an amendment (Article 102 par. 3 and Art. 93 par. 2 EEA-Agreement), the procedure is obviously one-sidedly orientated to the development of Union legislation and its potential parallelism in EEA law. It is hard to see that such a device might comfort the British side. Nevertheless, it is worthwhile to consider whether a procedure could be provided, which (1.) guarantees the exchange of views in any case, in which new trade relevant legislation is drawn up by either side along the lines of Article 21 of the Comprehensive Economic and Trade Agreement EU-Canada (CETA) with the establishment of a “Regulatory Cooperation Forum” (as proposed by Friedemann Kai ner) and (2.) which enables a Joint Committee to take a unanimous decision of amending the Agreement as closely as possible to the adoption of relevant Union legislation (similar to the EEA).

C. Scenario for Establishing Rules for Judicial Protection

I. Presumptions.

The treatment of this scenario also depends on presumptions. Here the main presumption is again that Britain will aim at avoiding, as far as possible, a supranational solution, hence, in particular, the binding jurisdiction of the Court of Justice of the European Union (ECJ) after the transitional period. The wording of par. 38 of the Joint Report21 which deals with the

20 See OJ EU 2002 L 114/6. As a comparison between the situation of Norway and the UK in this respect see Fossum/Graver, ibid.

specific questions of “consistent interpretation” of the citizens rights Part
of the projected Withdrawal Agreement underscores already this presum-
tion: first, by calling the ECJ the “ultimate arbiter of the interpretation of
Union law” in the context of “rights for citizens following on from those
established in Union law during the UK´s membership of the European
Union”; second, by showing the perspective that“ UK courts shall therefore
have due regard to relevant decisions of the CJEU after the specified date”
of withdrawal; and third, by envisaging a temporary question mechanism
of UK courts or tribunals to the ECJ. “Arbiter”; “due regard”; “question mecha-
anism” – I shall come back to this wording.

A second presumption can be drawn (1.) from the Union´s increasing
uneasiness with the lack of a sufficient device for granting market partici-
pants judicial protection in issues of market access impediments and for ju-
dicially settling disputes on the interpretation in its agreements with
Switzerland22 and (2.) from the new judicial device in the new generation
of Association Agreements in the Eastern Partnership (Ukraine, Moldova,
Georgia) for certain interpretation issues which involve Union law:23
namely the presumption that the Union is striving for reliable judicial dis-
pute settlement mechanisms and the involvement of the ECJ as far as reason-
able – and potentially required by the ECJ´s jurisprudence. I shall come
back to this aspect (see infra II 3).

II. Conceivable Models.

Shaping rules for judicial protection leads to the question of conceivable
mechanisms. Scientists of all disciplines like simple models in order to re-
duce complexity and to gain clarity and conclusiveness. Legal scholars are
no exception. When comparing existing and potential mechanisms of judi-
cial protection of individuals, enterprises and States in the context of
transnational law, in particular four models can be conceived: an absence
model (with full judicial autonomy of both sides), a cooperation model, a
common dispute resolution model and an inclusion model.

22 As a consequence negotiations between the EU and Switzerland on an institution-
al framework agreement have been opened; see Tobler/Beglinger, Brevier zum in-
23 See Article 322 of the Association Agreement EU-Ukraine (OJ EU 2014 L 161/3);
Article 403 of the Association Agreement EU-Moldova (OJ EU 2014 L 260/4); Ar-
1. Absence Model (Full Judicial Autonomy of Both Sides).

The first conceivable model can be called an absence model in the sense that the interpretation of ratified provisions and the judicial protection of affected persons is left to the full judicial autonomy of the Parties.

On the Union’s side a Withdrawal Agreement and a future Trade Agreement would be an integral part of the Union’s legal order with a mezzanine-rank between primary and secondary law (Haegeman-jurisprudence).\(^{24}\) Hence, within the Union both would fall under the full jurisdiction of the ECJ under the available procedures (in particular: annulment procedure\(^{25}\) and preliminary reference procedure\(^{26}\)). Whether provisions of the Agreements could be directly applicable before national courts and whether natural and legal persons could deduce rights from them will – in the light of the previous jurisprudence of the ECJ on international treaties of the EU, such as the Turkey-Association\(^{27}\) and the WTO-Agreements\(^{28}\) – depend (1.) on the formulation of a concrete provision (headwords: clear and unconditional) and (2.) on reciprocity. Reciprocity would be achieved in the Withdrawal Agreement, if the objective of “reciprocal protection for Union and UK citizens”, as envisaged by par. 6 of the Joint Report,\(^{29}\) will be inserted into it.

Direct applicability will be underscored, if par. 35 of the Joint Report becomes part of the Withdrawal Agreement, which states that “the provision in the Agreement should enable citizens to rely directly on their rights set out in the citizens’ rights Part of the Agreement and should specify that inconsistent or incompatible rules and provision will be misapplied.” Such a provision would substantially be parallel Protocol 35 to the EEA-Agreement and the jurisprudence of the EFTA-Court.\(^{30}\) It could go further, if the direct applicability would flow directly from the Agreement and not from the implementation of an obligation into the internal law of the Parties.

---

25 Articles 263 and 264 TFEU.
26 Article 267 TFEU.
2. Cooperation Model (Modified Judicial Autonomy).

The second model can be called a cooperation model in the sense that judicial protection is based on the judicial autonomy principle of both sides, but establishes links between their judicial systems in order to promote a parallel interpretation. These links can be distinguished according to their legal strength. In view of practiced Treaties’ designs at least five types of links are conceivable.

a. First: A rather soft link for supporting and facilitating consistent interpretation is the obligation of exchanging relevant judgements between the courts and fostering judicial dialogue on both sides, as it was planned by par. 39 of the Joint Report and has been inserted in Article 163 of the Draft Agreement on the withdrawal of the UK for the citizen rights’ Part of the Withdrawal Agreement. This is practiced within the EEA between the EFTA Court, the ECJ (both the Court and the Tribunal) and the Courts of last instance of the EFTA States and serves the objective “to ensure as uniform an interpretation as possible of this Agreement, in full deference to the independence of courts”32. It can be supported by establishing an administrative exchange system (as, e.g., in Article 2 and 3 of Protocol 2 to the Lugano Convention) or a common monitoring system (as provided for by Article 106 EEA-Agreement33) or a common body, as abstractly intended by par. 40 of the Joint Report and inserted in Article 159 of the Draft Agreement on the withdrawal of the UK34 (Commission and British Authority). The unilateral information on judgments issued after the signing of the Agreement is provided by some of the bilateral Agreements between

32 Article 106 of the EEA-Agreement.
the Union and Switzerland. This all can be helpful for parallel interpretation, but does not guarantee it, perhaps with the exception of the Schengen Mixed Committee with Norway and Iceland which acts under a guillotine clause, if it fails to settle a dispute within a fixed deadline in the case of a substantial difference in application between the authorities of the Member States concerned and those of Iceland and Norway.

b. Second: Slightly stronger worded is the objective “to arrive at as uniform an interpretation as possible” of the agreed provision (as expressed in the Preamble of the Lugano Convention 2007 or in Article 106 of the EEA-Agreement). The EEA-Agreement contains, besides the objective of the uniform interpretation of the Agreement (internal homogeneity), the second objective of arriving “at as uniform an interpretation as possible” in view of “the provisions of the Agreement and those provisions of Community legislation which are substantially reproduced in the Agreement” (external homogeneity). While this objective “to arrive at as uniform an interpretation as possible” does not seem to have been achieved under the Lugano Convention in relation to Switzerland (as outlined by Burkhard Hess), it has worked very well so far in the EEA in both dimensions (according to the assessment of the EFTA Court’s former President Carl Baudenbacher), but might encounter specific difficulties in the relation between continental courts and common law courts. It could be made more robust with a restriction for a court or tribunal to deviate from previous interpretations of the ECJ only if justified by mandatory requirements (together with the establishment of a consultative – or even binding – reference procedure of UK courts and tribunals to the ECJ; see infra).

35 See, e.g., Article 1 para. 2 s. 3 Abkommen der Schweizerischen Eidgenossenschaft und der Europäischen Gemeinschaft über den Luftverkehr v. 21.6.1999.
37 Article 105 para. 1 EEA-Agreement; Fredriksen, in: Agreement on the European Economic Area – Commentary (2018), Article 105, notes 8 to 14; Müller-Graff, in: Agreement on the European Economic Area – Commentary (2018), Article 34 note 5.
40 Hess, The Unsuitability of the Lugano Convention (2007) to Serve as a Bridge between the UK and the EU after Brexit (2018, p. 6 et seq.)
c. Third: A procedural link is established by the device to give both sides the procedural right to intervene in relevant cases before a court of the other side, as envisaged by par. 39 of the Joint Report\(^{41}\) for the UK Government before the ECJ and the Commission before UK courts or tribunals. The Articles 161 and 162 of the Draft Agreement on the withdrawal of the UK state more precisely these possibilities.\(^{42}\) Good arguments can influence an interpretation, but, as an essential of the rule of law, the judiciary remains independent in its findings.

d. Fourth: Closer knit is the device that one Party allows, but does not oblige, its courts to ask a court of the other Party for the interpretation of a ratified provision. This is provided for in the EEA for the courts or tribunals of an EFTA State in relation to the ECJ for questions of “interpretation of provisions of the Agreement, which are identical in substance to the provisions of the Treaties establishing the European Communities, as amended or supplemented, or of acts adopted in pursuance thereof”\(^{43}\). Such a decision is considered to be binding upon the referring court or tribunal.\(^{44}\) It has never been used so far.\(^{45}\) From the competence side of primary Union law such a request must be covered by the arbitration power of the ECJ according to Article 272 TFEU (which is the case for the device in the EEA-Agreement).

Concerning the citizens’ rights Part of the potential Withdrawal Agreement, already the mechanism envisaged by par. 38 of the Joint Report\(^{46}\)

---

43 Article 107 EEA Agreement and Article 1 of Protocol 34 to the EEA Agreement; see Fredriksen, in: Agreement on the European Economic Area – Commentary (2018), Article 106, notes 1 to 6.
pointed in this direction, but left open questions. On the one side it provided – in a certain alliteration to the preliminary reference procedure in Article 267 TFEU – for “enabling UK courts or tribunals to decide, having had due regard to whether relevant case-law exists, to ask the CJEU questions of interpretation of those rights where they consider that a CJEU ruling on the question is necessary for the UK court or tribunal to be able to give judgement in a case before it.” “Those rights” were supposed to be those which the Withdrawal Agreement establishes for citizens “following on from those established in Union law during the UK’s membership in the … Union.” Hence, although “those rights” had to be considered in their legal nature as Agreement rights, they referred in their substance to rights in Union law. Therefore it is conclusive to lay their interpretation in the hands of the ECJ. But it remains a strange wording to call the ECJ the “ultimate arbiter of the interpretation of Union law”. In relation to Union law the ECJ is not only an arbiter, but the regular ultimate public interpretation authority of the transnational polity. However, in relation to the envisaged question mechanism, the ECJ would act on the basis of its arbitration competence (Article 272 TFEU). In view of the legal force of its judgements for British courts, par. 38 of the Joint Report spoke only of “due regard to relevant decisions of the CJEU” and limited this to decisions “after the specified date”. “Due regard” is not identical with “binding authority” (as documented by Burkhard Hess for the Swiss practice of Article 1 of Protocol 2 to the Lugano Convention47 which reads “that any court applying and interpreting this Convention shall pay due account to the principles laid down by any relevant decision concerning the provision(s) concerned … rendered by the courts of the States bound by this Convention and by the Court of Justice of the European Communities”). Par. 38 of the Joint Report seemed to echo the “advisory opinion”-procedure on the interpretation of the EEA-Agreement between the courts and tribunals in an EFTA-State and the EFTA Court, which is laid down in Article 34 par. 1 of the Surveillance and Court Agreement between the EFTA States. Now, Article 158 par. 2 of the Draft Agreement on the withdrawal of the UK from the EU48 provides that the legal effects in the UK of such preliminary rulings “shall be the same as the legal effects of preliminary rulings given pursuant to Article 267 TFEU in the Union and its Member States”, hence are bind-

48 See supra fn. 44; see already European Commission, TF50 (2018) 35 – Commission to EU 27 (19.03.2018).
ing on the referring courts or tribunals in the UK. However, the Draft Agreement does not contain an obligation for them to refer such questions to the ECJ, but only a possibility (“may request”).

e. Fifth: The strongest linkage in a judiciary cooperation model is the obligation of parallel interpretation. Such a far reaching commitment can be deduced in the EEA-Agreement from its Article 6, which also binds on the courts of the EEA-EFTA-States and the EFTA Court, in conjunction with the principle of loyal cooperation in Article 3 EEA-Agreement. It provides: “Without prejudice to future developments of case law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the (TEEC) and the (TECSC) and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of the signature of this Agreement.” This obligation is plausible in the light of the homogeneity objective of the EEA-Agreement. A parallel perspective was opened by par. 38 of the Joint Report which was worded that “the use of Union law concepts in the citizen rights’ Part of the Withdrawal Agreement is to be interpreted in line with the case law of the Court of Justice … by the specified date.” Article 4 par. 3 to 5 of the Draft Agreement on the withdrawal of the UK generalises this orientation in three directions: interpretation and application of the provisions of the Agreement referring to Union law or to concepts or provisions thereof in accordance with the methods and general principles of Union law, implementation and application of such provisions in conformity with the relevant case law of the ECJ handed down before the end of the transition period, due regard of the UK’s judicial and administrative authorities to relevant case law of the ECJ handed down after the end of the transition period interpretation and application of the Agreement. This device triggers the farer reaching and pivotal political question whether the conformity-rule of Article 6 EEA-Agreement as the strongest judiciary cooperation tie could reasonably serve the objective of uniform interpretation and legal protection in a future EU-UK Trade Agreement, as far as its provisions are identical in substance to corresponding rules in Union law. It could also help in keeping bridges between


the European and British legal order – even the more, if dynamically designed for future alignments.

3. Common Dispute Resolution Model.

Agreements on common dispute resolution devices are a standard model in international Treaties, but they usually don’t directly serve the legal protection of individuals or enterprises.

a. The ECJ finds, in principle, an international agreement of the EU compatible with Union law which provides for an own system of courts “including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement” with binding force on the Union institutions, including the CJEU, inter alia when “the Court of Justice is called upon to rule on the interpretation of the international agreement, in so far as that agreement is an integral part of the Community legal order.”

b. However, the ECJ sees a conflict to its own task of interpretation (today Article 19 TEU) in a case in which an international agreement “takes over 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.” This criterion led to the ECJ’s assessment of the incompatibility of the once planned EEA Court with Community law. Whether this reasoning applies only, if and as far as an objective of securing uniform application and equality of conditions of competition and, hence, of ensuring homogeneity of the interpretation of corresponding rules is intended, is an open question, though, in principle, it might be answered in the affirmative. But a core of the inner logic of the autonomy and coherence of Union law and the Union appears: The more legal uniformity is sought with a third country in trade relations on the basis of internal market and competition relevant Union law provisions, the less a common jurisdiction with binding force on the ECJ is compatible with Union law.

c. As a consequence, it can be observed that the requirement of the autonomy of Union law and the ECJ’s task, as emphasized in several opinions of

the ECJ,\textsuperscript{54} does not seem to be touched by an ancillary dispute settlement system between the Parties on the interpretation and application of substantive provisions of their agreement as envisaged by the Singapore – Agreement in form of an arbitration panel with the power of adopting rulings binding on the Parties.\textsuperscript{55} But the more substantive internal EU law is copied or referred to by an international trade agreement of the Union, the more the involvement of the ECJ becomes an issue.

Specific competence issues of Union law are raised in relation to an agreement on an Investor-State dispute settlement system. According to the ECJ’s opinion, a regime, which provides for removing disputes from the jurisdiction of the courts of the Member States (and, by that, from the preliminary reference procedure of Article 267 TFEU) cannot be established without the Member States’ consent.\textsuperscript{56} Pending before the ECJ are the questions, whether the Investment Court System introduced by Articles 18.8 et seq. of the CETA is compatible, in particular, with the exclusive competence of the ECJ to provide the definitive interpretation of Union law, and, furthermore, with the right of access to the courts, with the right to an independent and impartial judiciary and with the general principle of equality and the “practical effect” requirement of Union law.\textsuperscript{57} It cannot be excluded that the reasoning of the ECJ on the incompatibility verdict on the Investor-State-dispute settlement system in an intra-EU-bilateral investment Treaty in the Achmea-case with the preliminary reference system\textsuperscript{58} is transferable to such Treaties between the Union and a third country.

4. The Inclusion Model

The fourth model can be designed as an inclusion model in the sense that a court of one side is entrusted with the binding decision on the interpretation of provisions of the Agreement. Here, two different forms of inclusion can be conceived: an inclusion which requires an additional agreement be-

\textsuperscript{55} Opinion 2/15, 16.05.2017, Singapore, ECLI:EU:C:2017:376, para. 276, 303; see also chapter 29 of CETA.
\textsuperscript{56} Opinion 2/15, 16.05.2017, Singapore, ECLI:EU:C:2017:376, para. 292.
\textsuperscript{57} See: Belgium Request for an Opinion from the European Court of Justice, 8 September 2017.
\textsuperscript{58} Case C-284/16, 06.03.2018, Achmea, ECLI:EU:C:2018:158, para. 58.
tween the Parties in a concrete dispute and the inclusion without such an additional agreement.

a. The first form has been inserted in the EEA-Agreement. Article 111 par. 3 of the EEA-Agreement offers the possibility that the Contracting Parties to a dispute on the interpretation of provisions of EEA law “which are identical in substance to corresponding rules” in EU law, “may agree” (“if the dispute has not been settled within three months after it has been brought before the EEA Joint Committee”) to request the ECJ “to give a ruling on the interpretation of the relevant rules”. This provision does not explicitly address the question of the legal effect of the ruling of the ECJ. However, the procedure would be deprived of its sense if the ruling had no binding effect on the EEA Joint Committee.

b. Even farther goes the inclusion of the ECJ in a dispute resolution system, as it is contained in the new type of an Association Agreement in the Eastern Partnership of the EU for questions of interpretation and application of certain trade and competition related provisions which involve the interpretation of Union law (e.g. Article 322 par. 2 of the EU-Ukraine Association Agreement). There, an arbitration panel, which has to be established on the unilateral request of the complaining Party (Article 306 par. 1 of the EU-Ukraine Association Agreement), “the arbitration panel shall not decide the question, but request the Court of Justice to give a ruling on the question” and this ruling “shall be binding on the arbitration panel.” This device is also part of the EU-Association Agreements with Moldova and Georgia and discussed in the current negotiations on an institutional framework Agreement EU-Switzerland. In relation to the UK, the Union would be well advised to aim, at least, at generalizing the mentioned “question mechanism” (as conceived by par. 38 Joint Report) for such questions. Such an inclusion model evidently requires the interest of a third country in a particularly intensive connection with the EU, while it

59 In the result also ECJ, Opinion 1/92, 10.04.1992, EEA II, ECLI:EU:C:1992:189, para.35; Fredriksen, in: Agreement on the European Economic Area – Commentary (2018), Article 111 note 22.
60 See Article 322 of the Association Agreement EU-Ukraine (OJ EU 2014 L 161/3); Article 403 of the Association Agreement EU-Moldova (OJ EU 2014 L 260/4); Article 267 of the Association Agreement EU-Georgia (OJ EU 2014 L 261/4).
61 Tobler/Beglinger, Brevier zum institutionellen Abkommen Schweiz-EU (Ausbgabe 2018-03.1),27, 30 et seq.
avoids hurdles of Union law for a dispute settlement system as in the case of the failed EEA Court.\textsuperscript{63}

\textbf{D. Conclusion.}

As a summarizing impetus for the ongoing negotiations three conclusions may be drawn from this conference: \textit{First}, for the Union, the conclusion that it has to attain the objectives of Article 3 TEU and to realize its mission of Article 1 TEU to promote an ever closer Union (and hence stand firm against seductive songs of pure economic considerations as intoned, e.g., by Her Majesty’s former Brexit Secretary in Berlin on 16 November, 2017).\textsuperscript{64} In view of the UK’s withdrawal from the Union it is no more Britain’s task to participate in defining what the Union should be. \textit{Second}, for both sides, the recommendation can be drawn to avoid a wild growth of single bilateral agreements and to avert shortcomings in judiciary protection. And \textit{third}, for both sides, the suggestion can be submitted to keep in mind, as a \textit{fourth scenario}, the potential \textit{return of the UK to the Union} – be it Britain’s next generation, be it already the withdrawal from the notification of the withdrawal intention.\textsuperscript{65} In the case of a new accession according to Article 49 TEU the granting of special arrangements for the UK in Union law, as it is presently the case, should be reconsidered.


\textsuperscript{65} According to the (disputed) judgment of the ECJ in Case C-621/18, 10.12.2018, \textit{Wightman}, ECLI:EU:C:2018:999 Article 50 TEU allows a Member State “to revoke that notification unilaterally, in an unequivocal and unconditional manner … after the Member State concerned has taken the revocation decision in accordance with its constitutional requirements.” In view of the disruptive potential of this interpretation for the Union’s function the Member States should consider to amend Article 50 TEU in the sense of the position of the Council and the Commission as referred in recital 42 of the judgment (“allowing revocation, but only with the unanimous consent of the European Council”).