
International Courts and the European Legal Order

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Abstract

The growth of a range of different areas of international law gives rise to the possibility of conflict between them. International courts and tribunals created by one branch of international law may be called upon to adjudicate in other areas of the discipline. The risk of conflict presents a particularly acute problem to the EU legal order, because the Court of Justice of the European Union sees itself as the final, and exclusive, authority on questions of interpretation of EU law. On two occasions the Court has issued opinions prohibiting EU Member States from signing agreements creating international courts, because those courts' roles would necessitate constraining EU law and their composition would mean they could not guarantee the 'homogeneity' necessary to EU law. The more recent of these opinions, concerning the European and Community Patents Court, sets an unusual legal test for the consistency of international tribunals with the EU legal order that, taken to its logical conclusion, would preclude several well-established international courts and tribunals to which EU Member States are parties. Ultimately this standard may fetter development of EU law, and the ECJ would do well to adopt a more flexible approach.

The European Union is supposed to have a self-contained legal system, in which EU law will be interpreted consistently across all 27 Member States. Yet unlike in the United States, there are no federal courts *per se*. If a person believes a government entity or a private individual has breached his or her EU legal rights, (s)he cannot complain direct to the European Courts in Luxembourg unless the wrongdoer is an EU institution. Instead a plaintiff must go through a national court which is relied upon to apply EU law faithfully, if necessary to the exclusion of its domestic legal order.

Two tools exist to ensure uniformity in the application of EU law by different Member States' domestic courts. One is the prospect of a reference by national courts to the Court of Justice of the European Union (ECJ) under Article 267 TFEU (ex Article 234 EC); the other is referral of a state by the Commission to the ECJ for infringement

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proceedings, for failure to comply with EU law. Both these mechanisms are imperfect. The former is voluntary in practice if not in theory, in that the national court may choose not to refer even if it is supposed to do so. The Bundesverfassungsgericht (Germany's Constitutional Court) has never referred a case to the ECJ,¹ even though it is under an obligation to do so as a national court from which no appeal lies.² The latter mechanism is very seldom used by the Commission in respect of a national court decision;³ its most common use is confined to cases where national legislative authorities fail to take action to implement EU directives fully or on time. Nevertheless in principle national courts in the European Union are obliged to apply EU law and have the ECJ to guide them if they wish, or the Commission to threaten them if they do not. The ECJ issues rulings on the interpretation of EU law using these mechanisms, in an ever more expansive case law.

A new threat has recently emerged to the consistent application of EU law, namely interpretation of EU law by the ever growing range of international tribunals that sit outside the domestic legal order of any particular state. International courts may be called upon to interpret or decide upon the applicability of EU law even though those tribunals are formally outside the EU institutional system. Examples of international judicial bodies that have had issues of EU law raised before them include the International Court of Justice,⁴ the European Court of Human Rights,⁵ the World Trade Organization Dispute Settlement Body,⁶ investment treaty tribunals,⁷ and even the

¹ Grimm, 'The European Court of Justice and National Courts: The German Constitutional Perspective after the Maastricht Decision', 3 *Columbia J European L* (1997)229, at 238.

² Art. 267(3) TFEU: '[w]here any [question of EU law] is raised in a case before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court [of Justice]'. See also Case 283/81, *CILFIT v. Ministry of Health* [1982] ECR 3415.

³ One rare case in which the Commission did bring infringement proceedings in respect of a Court decision was Case C-154/08, *Commission v. Spain*, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:171:0017:0017:EN:PDF>, in which Spanish courts' interpretation of national legislation implementing the 6th EU VAT Dir. was held inconsistent with EU law.

⁴ *Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Belgium v. Switzerland)*, ICJ (withdrawn), history available at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=e6&case=145&code=besu&p3=0>, raised questions of construction of the 1988 Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, OJ (1988) L146/5. The Lugano Convention is identical in content to the EU legal regime for intra-EU enforcement of judgments, contained in EU Reg. 44/2001 ('the Brussels Reg.', OJ (2001) L12/1), and the Lugano Convention, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:147:0005:0043:EN:PDF>, is intended to be interpreted in the same way as the Brussels Reg. Proceedings were commenced on 21 Dec. 2009 and were withdrawn on 5 Apr. 2011 after Switzerland conceded that the contested ruling of its Federal Tribunal did not have the effect, inconsistent with the Convention, that Belgium feared.

⁵ See, e.g., App. No. 45036/98, *Bosphorous Airways v. Ireland*, Judgment of the Grand Chamber, 30 June 2005, available at: <https://www.suepo.org/rights/public/archive/bosphorus.pdf>.

⁶ See, e.g., WT/DS27 *EC – Bananas III*, Appellate Body Report 9 Sept. 1997, finding provisions of EC Reg. 404/1993, OJ (1993) L47/1, inconsistent with the GATT 1994.

⁷ See, e.g., *AES v. Hungary*, Award, ICSID Case No. ARB/07/22, 23 Sept. 2010, in which Hungary defended a claim that utility tariff reductions violated the fair and equitable treatment standard under the UK–Hungary bilateral investment treaty by asserting that the tariff reductions were required under EU law.

ILO (International Labour Organization) Administrative Tribunal.⁸ At first sight it may appear that neither of the two institutional mechanisms for ensuring harmony of their decisions with EU law is available even in principle to check the jurisprudence of these institutions. These tribunals are not ‘courts of a member state’, and thus they cannot themselves make an ECJ reference.⁹ Nor are they responsible to an individual Member State, and thus the Commission seemingly cannot bring infringement proceedings against a Member State if they err.¹⁰ Thus international courts might get EU law wrong without the possibility of correction by the European Court of Justice.

This article explores these concerns. Its starting point is a recent opinion of the ECJ declaring a proposed European and Community Patents Court to be unlawful. At first glance, that decision is hard to understand; but it highlights a paradox in the notion of supremacy of EU law that remains unresolved. Many extant international tribunals share the same flaw as the proposed European and Community Patent Court: by the ECJ’s reasoning they are all unlawful. The ECJ’s insistence that it must be the final arbiter of EU law is unsustainably rigid.

The European and Community Patents Court

Europe has a common system of patent law. While each country has its own domestic patent authority responsible for issuing patents, an inventor can also apply to the European Patent Organization (EPO) for a patent. A patent granted by the EPO is considered equivalent to a bundle of national patents granted by the national authorities of every Member State of the EPO,¹¹ of which there are 38, including all 27 EU Member States. Nevertheless the ordinary rule in patent law is that, even once granted, the validity of a patent can subsequently be challenged in legal proceedings to enforce it. Because a European patent is considered to be a collection of 38 national patents,

⁸ See, e.g., Judgment 1369 (1994), *European Organisation for the Safety of Air Navigation*, available at: www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=fr&p_judgment_no=1369&p_language_code=EN; Judgment 1295 (1993) *European Patent Organization*, available at: www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=1295&p_language_code=EN.

⁹ This was the conclusion the ILO Administrative Tribunal reached in Judgment 768 (1986) *European Patent Organization*, available at: www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=768&p_language_code=EN. In Case C–196/09, *Miles v. European Schools*, available at: <http://eur-lex.europa.eu/Notice.do?val=548468:cs&lang=en&list=578675:cs,574632:cs,548468:cs,499758:cs,&pos=3&page=1&nbl=4&pgs=10&hwords=C-196/09-&checktexte=checkbox&visu=#texte>, in her opinion of 16 Dec. 2010 at para. 84, Sharpston AG opines that the European Court of Human Rights and WTO panels cannot make references to the ECJ under Art. 267.

¹⁰ The closest the Commission has come is in the ‘MOX’ arbitration, in which Ireland commenced arbitral proceedings against the UK pursuant to the UN Convention on the Law of the Sea for environmental harm. In Case C–459/03, *Commission v. Ireland* [2002] ECR I–2943, the Commission applied for an order, which the ECJ granted, that by bringing these arbitration proceedings Ireland had violated its obligations to accord the ECJ exclusive jurisdiction in disputes between EU Member States in areas covered by the EU Treaty, of which environmental protection was one. However the Commission was not attacking the ruling of the arbitral tribunal as such; it was attacking Ireland’s decision to bring a claim before it.

¹¹ Art. 2(2) European Patent Convention 1973, available at: www.epo.org/law-practice/legal-texts/html/epc/2010/e/ma1.html.

enforcement proceedings must take place separately in the national court of the jurisdiction in which infringement is alleged, and the same issues of patent validity can be relitigated in each jurisdiction. This is inefficient, and a major drawback for those holding European patents who may wish to limit themselves to a single subsequent legal challenge to the validity of their patents once granted.

Since 2000, discussions have been underway to create a patent that is valid across all European jurisdictions and is not susceptible to repeat challenges in different national courts. In 2009 the European Commission presented a proposal to create a European Patent Court,¹² which would adjudicate on claims of infringement and validity of European patents. As part of this proposal, the EU would accede to the European Patent Convention in its own capacity, and an EU regulation would create common rules on the operation of patents across the EU. The European and Community Patents Court (ECPC) would have a central registry and a number of district registries. It would consist of a first instance court and a court of appeal, and would have exclusive jurisdiction over disputes relating to patents granted by the EPO. It would be the first European federal court in which EU law granting individuals rights and imposing liabilities is enforced not in national courts but before a specially created international judicial authority. The proposal represents a milestone on the way towards the judicial federalization of Europe. The ECPC would also have the right to refer points of EU law to the ECJ,¹³ in a procedure parallel to that contained in Article 267 TFEU (ex Article 37 EC), much as can national courts. Nevertheless the European Court of Justice has declared the proposed new Court, which would represent a remarkable extension of European judicial authority, unlawful.

In its *Opinion 1/09 (Unified Patent Litigation System)* of 8 March 2011, the ECJ ruled that the ECPC would be illegitimate, because the prospective new Court would remove the prerogative of national courts to decide issues of EU law themselves. The ECJ said:¹⁴

the member States cannot confer the jurisdiction to resolve . . . disputes [about patents] on a court created by an international agreement which would deprive those courts of their task, as 'ordinary' courts within the European Union legal order, to implement European Union law and, thereby, of the power provided for in Article 267 TFEU, or, as the case may be, the obligation, to refer questions for a preliminary ruling in the field concerned.

The draft agreement provides for a preliminary ruling mechanism which reserves, within the scope of that agreement, the power to refer questions for a preliminary ruling to the PC while removing that power from national courts.

. . .

The tasks attributed to the national courts and to the Court of Justice respectively are indispensable to the preservation of the very nature of the law established by the Treaties.

¹² COM(2007)165 final, 'Enhancing the Patent System in Europe'; Consilium document 7928/09, Draft Agreement on the European and Community Patents Court and Draft Statute, 23 Mar. 2009.

¹³ *Ibid.*, Art. 48(1): '[w]hen a question of interpretation of the Treaty establishing the European Community or the validity and interpretation of acts of the institutions of the European Community is raised before the Court of First Instance, it may, if it considers this necessary to enable it to give a decision, request the Court of Justice of the European Communities to decide on the question. Where such question is raised before the Court of Appeal, it shall request the Court of Justice of the European Communities to decide on the question.'

¹⁴ *Opinion 1/09*, OJ (2011) C2112, at paras 80, 81, 85.

Thus it is illegitimate to remove from national courts their jurisdiction to resolve disputes involving EU law, even if the tribunal to which jurisdiction is removed can itself refer cases to the ECJ much as can national courts. National courts are entrusted with the interpretation and application of EU law, and they are not entitled to delegate that function to an international tribunal.

This decision has a direct echo in *Opinion 1/91 (EEA)*,¹⁵ in which the ECJ declared that the establishment of a proposed Court for the European Economic Area (EEA) would be inconsistent with EU law. This Court would have had the power, in much the same way as the ECJ, to adjudicate on issues of EEA law. The purpose of EEA law is to extend EU law on freedom of movement to the EFTA member states. The EEA Court, intended to adjudicate on EFTA member states' compliance with these obligations, would have been bound by ECJ case law existing at the time of the Court's creation.¹⁶ However, the ECJ had two objections to the EEA Court. First, it would not have been bound by ECJ case law that emerged after the EEA Court was established;¹⁷ secondly, EC Member States would have been bound by decisions of the EEA Court¹⁸ on areas of law which are substantially the same as EU law and for which the text of the law follows equivalent EU law. Thus the existence of the EEA Court might usurp the ECJ, ruling on essentially the same issues under the two different treaties (the EC Treaty and the EEA Treaty), but in different ways. This risk would materialize either if the EEA chose not to follow ECJ rulings issued after its establishment in construing equivalent provisions of the EEA Treaty, or because it might decide points of law in a way binding on EC Member States that the ECJ had not itself yet decided. Both of these possibilities were a risk to what the ECJ called the 'homogeneity' of EC law.¹⁹

As a result of the ECJ's adverse opinion, the EEA Court never came into force. In *Opinion 1/92* the ECJ ruled that a successor concept to the EEA Court, the European Free Trade Association (EFTA) Court, was consistent with EU law. The two essential differences were that the obligation upon the EFTA Court to follow ECJ case law applied to rulings both before and after the creation of the Court;²⁰ and, more critically, the decisions of the EFTA Court would not bind EC Member States at all, but only those members of EFTA (Norway, Iceland, and Liechtenstein) that had acceded to its jurisdiction.²¹ The EFTA Court is politically neutered: the small number of states parties that have submitted to its jurisdiction condemns it to a marginalized role, in which it is servile to the ECJ's jurisprudence and its jurisdiction is confined to three countries on the periphery of the EU system.

¹⁵ Opinion 1/91 [1991] ECR I-06079.

¹⁶ Art. 6 of the draft Agreement between the EEC and the states of the EFTA on the Creation of the EEA, OJ (1994) L1/3.

¹⁷ Opinion 1/91, *supra* note 15, at paras 26 ff.

¹⁸ *Ibid.*, at paras 34 ff.

¹⁹ *Ibid.*, at paras 22, 23, 25, 28, 29, 45.

²⁰ Art. 3 Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, OJ (1994) L344/3.

²¹ Indeed the only parties to the agreement establishing the EFTA Court are Norway, Iceland, and Liechtenstein. There can therefore be no question of the Court's judgments binding EU member states. Switzerland, the fourth member of EFTA, never acceded to the EFTA Court.

It is also worth noting how the ECPC differs from the Benelux Court of Justice. This is an international Court established by treaty between the three Benelux nations as a final court of appeal from domestic courts. The ECJ expressly sanctioned this Court in the same breath as it condemned the ECPC. In *Opinion 01/09*²² the ECJ explained, ‘Since the Benelux Court is a court common to a number of Member States, situated, consequently, within the judicial system of the European Union, its decisions are subject to mechanisms capable of ensuring the full effectiveness of the rules of the European Union’. Thus an international tribunal applying EU law must either be ‘common to member states’, i.e., have as its constituent member states *only* EU Member States (as for the Benelux Court); or it must have *no* EU Member States as its members (as for the EFTA Court). An international court, such as the EEA Court or the ECPC, that counts amongst its members some (or all) EU Member States and some third party states will fall foul of the ‘homogeneity’ requirement.

As a matter of policy this might be thought somewhat restrictive, given the EU’s expansionist aspirations. The members of the EEA and of the European Patent Convention, aside from the EU Member States, are virtually all either candidates for EU membership (as is the case with Turkey and the nations of the Western Balkans) or potential future adherents to the EU treaties and already heavily integrated with the EU legal system (as with Switzerland). One could view hybrid courts as a transitional phase towards EU membership, whereby candidates for accession or those with close relations with the EU can participate in the EU legal system and share common judicial institutions in areas in which they have undertaken to be bound by EU law. To foreclose such a possibility as a matter of principle might seem short-sighted.

Perhaps the locus of the concern is that a hybrid court will inevitably involve judges hailing from outside the EU applying EU law to Member States inside the EU. Perhaps those judges cannot be relied upon; their presence may dilute the EU’s legal system. This is one possible way of understanding the ECJ’s reasoning, although it may overestimate the gap in quality and fidelity of judges within the EU and those from outside. Moreover it is doubtful whether the ECJ would ever want to admit this as the source of its objection to hybrid courts. For both the EEA Court and the ECPC, the judges from EU Member States would have outnumbered the judges from outside. Add to this obligations to follow ECJ case law and the right (and even obligation) of the international court to refer questions of law to the ECJ under procedures equivalent to Article 267, and one may wonder whether homogeneity concerns are overstated.

Even beyond the danger of ‘dilution’ by foreign judges, the position adopted by the ECJ entails more fundamental conceptual difficulties. If the twin system of national courts and the ECJ is really an exclusive framework for deciding disputes relating to EU law, then how can it be that private arbitration tribunals are permitted to resolve disputes which impinge upon EU law? It is now well established that EU law is arbitrable, and indeed arbitration tribunals in the EU are obliged to observe EU law.²³

²² OJ (2011) C2112, at para. 82.

²³ Case 102/81, *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei AG & Co KG* [1982] ECR 1095, at para. 14.

Thus the invalidity of a contract under EU competition law can be a defence to an action for breach of contract before an arbitral tribunal.²⁴ Nevertheless arbitral tribunals stand outside the EU legal order, which anticipates that questions of EU law will be resolved by national courts and the ECJ alone. Arbitral tribunals cannot make references to the ECJ under Article 267 TFEU.²⁵ Although some jurisdictions will permit appeals from arbitral tribunals to domestic courts on points of law, the majority will not, and even those that do restrict the right significantly.²⁶

It may be possible to apply to the courts of the seat of the arbitral proceedings to annul an arbitral award that is inconsistent with EU law, on the ground that it is inconsistent with public policy,²⁷ but this is a high hurdle. This may particularly be so where the tribunal has not ignored EU law in its entirety, and instead has just applied it in a way with which the ECJ might respectfully differ. Moreover arbitral tribunals called upon to decide points of EU law may not even have their seats in the jurisdiction of an EU Member State, despite the locus of the dispute being in the EU; worse, some or all of the arbitrators may not be citizens of EU Member States. Nor may they be qualified in the domestic law they are charged with applying or, by extension, the EU law which forms part of that domestic law. Two parties, both based in the EU, may choose to resolve an English dispute under English law with arbitration in Geneva and a Swiss arbitrator. Because EU law forms part of English law, that arbitrator may end up applying EU law without the possibility of reference to the ECJ: the courts of the seat of the arbitration, with supervening jurisdiction over the arbitral proceedings, are not in the EU and have no jurisdiction to make an Article 267 reference. Arbitral tribunals are entirely removed from the homogeneous system of EU law that the ECJ is apparently concerned to preserve.

It might be replied that arbitration operates by consent; the parties to the dispute have agreed to remove their dispute from the EU legal system and thus there is no problem. But if states may not by their own agreement disrupt the homogeneity of EU law, then it is unclear why individual litigants may agree to do the same thing. What if a state is a party to an arbitration agreement under a state contract?²⁸ Does it make sense to say that states cannot agree to create tribunals

²⁴ See, e.g., L. Craig, W. Park, and J. Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, 2000), at 66–67, para. 5.07.

²⁵ *Nordsee*, *supra* note 23, at paras 10–12.

²⁶ Switzerland and France do not permit annulment of arbitral awards on the grounds of an error of law. England does, in s. 69 Arbitration Act 1996, but the permission of the court is required absent the consent of the parties to the arbitration, and will be granted only where the point of law is ‘of general public importance and the decision of the tribunal is at least open to serious doubt’ or the decision of the tribunal was ‘obviously wrong’.

²⁷ This was the solution proposed by the ECJ to the problem of arbitral tribunals issuing awards inconsistent with EU law in Case C–126/97, *Eco Swiss China Time Ltd v. Benetton International BV* [1999] ECR I–3055.

²⁸ That is to say, an investment contract between a sovereign and a (typically) private contractor from another state: see, e.g., UNCTAD, *State Contracts*, UNCTAD Series on Issues in International Investment Agreements (2004).

exogenous to the EU legal system with one another but can agree to do so with private litigants? If there are sound policy reasons for preserving the structural integrity of the EU court system and refusing to permit issues of EU law to be resolved outside the tribunals anticipated in the EU treaties, then it is not clear why litigants' consent should override so fundamental a policy goal. If there is a danger of degeneracy in the ECPC deciding points of EU law, then that danger is multiplied by several factors in having a network of private tribunals all over the world doing the same thing.

Consider next the International Centre for Settlement of Investment Disputes (ICSID). Part of the World Bank, ICSID is an arbitral tribunal, but of no ordinary kind: it is a permanent body, established by international treaty, the operations of which for the most part take place in public.²⁹ Its 146 members include every EU Member State, and thus it is just the sort of hybrid tribunal that the ECJ took objection to in *Opinions 01/09* and *1/91*. But it is far worse than either of those tribunals, because its expansive membership means that it is unlikely that a panel of three arbitrators sitting in ICSID will generally include a majority of individuals from EU Member States. Under the terms of a network of bilateral investment treaties and also the multilateral Energy Charter Treaty (ECT),³⁰ to which all EU Member States are parties, ICSID is granted jurisdiction to hear complaints by investors against states of breaches of international investment law.

ICSID is not the only arbitral forum with jurisdiction to hear investors' complaints against states; investment treaties frequently set out a choice of fora, such as *ad hoc* arbitration under UNCITRAL rules or arbitration under the auspices of the Stockholm Chamber of Commerce.³¹ Investment tribunals are being called upon to decide issues of EU law with increasing frequency, as respondent EU Member States raise compliance with EU law as a defence to claims by investors of infringement of their rights under investment treaties.³² In one case an investment tribunal even decided that EU law was subordinate to international investment law and the latter would trump the former in the event of conflict.³³ The possibility that EU Member States might abrogate their obligations under EU law by entering into inconsistent international treaties is

²⁹ ICSID is established by the 1968 Convention on the Settlement of Investment Disputes between States and Nationals of Other States. ICSID's case docket is public. Awards of ICSID tribunals are published with the consent of both parties, which is strongly encouraged. Where a party does not consent, ICSID publishes extracts from awards.

³⁰ The Energy Charter Treaty is an international agreement to which 51 countries are parties, and provides for international legal protections for cross-border investments in the energy sector. Art. 26 permits an investor to commence arbitration against a host government, one of the available venues for which is ICSID.

³¹ See, e.g., the Russia–Ukraine bilateral investment treaty, dated 27 Nov. 1998, Art. 9(2)(b) and (c). Stockholm and UNCITRAL are also the two alternatives to ICSID arbitration available under Art. 26 Energy Charter Treaty.

³² See, e.g., *Eastern Sugar v. Czech Republic*, Partial Award, SCC No. 088/2004, 27 Mar. 2007; *AES v. Hungary*, *supra* note 7; *Eureko BV v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, PCA Case No. 2008-13, 26 Oct. 2010.

³³ *AES v. Hungary*, *supra* note 32, at para. 7.6.6.

foreclosed by Article 351 TFEU (ex Article 307 TEC).³⁴ International investment tribunals present serious challenges to the homogeneity of EU law, and thus on the reasoning of *Opinions 1/09* and *1/91* it should be unlawful for EU Member States to sign treaties that imbue them with jurisdiction.

Consider next the Administrative Tribunal of the International Labour Organization. This tribunal is in effect a department within the International Labour Organization, itself an international institution devoted to the promotion of employment law. The tribunal serves as a forum to resolve disputes between employees of international organizations and those institutions themselves; international organizations can subscribe to its jurisdiction, and pay a substantial fee per case filed against them.³⁵ The judges of the Tribunal are appointed by the International Labour Conference on the recommendation of the Governing Body. Every member state of the ILO (there are 183) is represented in the Conference, including every member of the EU, but EU Member States' voices in the Conference may be overridden by those of other members. Indeed half the delegates to the Conference are not government representatives at all, but represent employers' organizations or unions. The tribunal's statute contains no provision for referral of a case to the European Court of Justice under provisions akin to Article 267 TFEU, and the tribunal has asserted that it has no power to make any such reference.³⁶ How can EU Member States lawfully be parties to the agreement to create this tribunal, embodied in the tribunal's statute, given their obligation to respect the homogeneity of EU law?

The Tribunal's reply is that it does not apply EU law, which is irrelevant to employment disputes with international organizations of the kind that the Tribunal is called upon to adjudicate on.³⁷ But this is obviously not correct. The European Patent Organization (EPO) is an international organization that has accepted the jurisdiction

³⁴ Art. 351 provides: '(1) The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding states, before the date of their accession, between one or more Member States on one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties. (2) To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the compatibilities established.' Para. (1) is denuded of much of its permissive force by para. (2), which may require member states to denounce pre-accession treaties inconsistent with EU law: see, e.g., Case C-308/06, *Intertanko* [2008] ECR I-4057, Opinion of Kokott AG, at para. 77. If Art. 351 prohibits states from evading their EU legal obligations through the treaties existing prior to their accession, then it must follow yet more compellingly that member states cannot conclude agreements after the date of their accession that are inconsistent with the treaties: see, e.g., Case 22/70, *AETR* [1971] ECR 263, at paras 17, 22; *Opinion 2/91 ILO Convention 170* [1993] ECR I-1061, at paras 10, 11.

³⁵ The amount each respondent pays per case filed is not a matter of public record, and it varies by respondent organization. However members of the tribunal secretariat have confirmed that the fee charged is typically between €15,000 and €25,000 per claim filed.

³⁶ ILOAT Judgment 76 (1964), available at: www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=76&p_language_code=EN.

³⁷ See, e.g., Judgment 1296 (1983), Consideration 7, available at: www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=fr&p_judgment_no=1296&p_language_code=EN; Judgment 860 (1987) Consideration 24, available at: www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=fr&p_judgment_no=860&p_language_code=EN. In both these cases the EPO was the defendant.

of the Tribunal over claims by its employees. The EPO has its seat and all its offices in EU Member States.³⁸ The majority of its members are EU Member States,³⁹ and the majority of its employees are citizens of EU Member States.⁴⁰ Is it really open to the EU Member States to agree to create an international organization in such circumstances and to exclude the protections of EU law from the organization's employees? Can the German government, consistently with the EU treaties, sign an international convention the effect of which is to deprive EU citizens working in the EPO's office in Munich of their rights under EU law, whereas everyone else working in Munich has those same rights? There is a compelling argument from the text of the TFEU and the case law of the ECJ that it cannot: EU Member States cannot conclude treaties inconsistent with their EU legal obligations.⁴¹ The Tribunal has never considered this argument and refuses point blank to apply EU law.

Presumably the purpose of the homogeneity requirement is precisely to prevent questionable evasions of EU law by hybrid courts such as the ILO Administrative Tribunal. Ultimately the question whether EPO employees have EU legal rights in connection with their employment relationships should be answered by the ECJ; but the case cannot get to the ECJ, because the ILOAT refuses to refer cases to it. National courts have no jurisdiction over these employment claims because international organizations claim immunity from jurisdiction in domestic courts,⁴² and thus no reference from those courts is possible either. The same problem infects several other international organizations to which EU law arguably ought to apply, including EUROCONTROL⁴³ (all offices are in the EU; 27 of the organization's 39 member states are EU members), the European Molecular Biology Laboratory⁴⁴ (all offices but one are in the EU; 20 of 25 its member states are also EU members), and the Energy Charter Secretariat⁴⁵ (27 of 51 members are EU members; a 28th member is the EU itself; the organization's seat is in Belgium).

Other hybrid tribunals arguably falling foul of the homogeneity requirement contained in *Opinion 1/09* include the World Trade Organization Dispute Settlement Body in Geneva (153 member states, including all members of the EU) and the European

³⁸ The seat of the EPO is Munich, and its other offices are in The Hague, Vienna, and Berlin.

³⁹ 27 of the EPO's 38 member states are EU Member States, the same 38 members as are proposed parties to the ECPC.

⁴⁰ Data provided by the Staff Union of the EPO show that as of 30 June 2010, of 6,807 staff, 6,698, or 98.4%, were citizens of EU member states.

⁴¹ See *supra* note 34. The case law referred to therein suggests that EU member states are not entitled to sign treaties abrogating the rights EU citizens would otherwise have under EU law.

⁴² Art. 3(1) Protocol on Privileges and Immunities of the EPO, available at: www.epo.org/law-practice/legal-texts/html/epc/2010/e/ma5.html, sets out a near-absolute regime of immunity from the jurisdiction of domestic courts.

⁴³ EUROCONTROL is the European Organization for the Safety of Air Navigation, established by international treaty in 1963 to coordinate pan-European air traffic management. Its headquarters are in Brussels and it also has offices in Maastricht.

⁴⁴ The European Molecular Biology Laboratory was created by treaty in 1974 to undertake publicly funded scientific research. It has offices in Germany, France, the UK, and Italy.

⁴⁵ The Energy Charter Secretariat is a small international organization of approximately 50 staff that exists to administer the terms of the Energy Charter Treaty.

Court of Human Rights in Strasbourg (47 members, including all 27 EU Member States). Both human rights and international trade are the subject of the EU treaties and EU legislation.⁴⁶ Both these international tribunals have had cause to evaluate EU legislation in their case law.⁴⁷ Neither tribunal exhibits the homogeneity the ECJ requires in *Opinion 1/09*.

Consider next the model it is anticipated will replace the ECPC now that the ECJ has condemned it. The thought is that instead of a federal European patent court, national courts of Member States will have jurisdiction to adjudicate upon the validity and enforcement of European patents (as they do currently), but their adjudications will be *res judicata* for courts of all other EPO member states. Thus re-litigation of the same issues will be precluded. Homogeneity will be preserved, because there is no question of EU Member States' national courts abdicating jurisdiction to a supra-national court with extra-EU membership. All that is needed is a treaty dividing jurisdiction between Member States (which will presumably follow the 'Brussels' jurisdictional rules set out in Regulation 44/2001⁴⁸) and prescribing the circumstances in which a patent ruling of one EPO member state will be enforced in other member states.

Exclude for now the dangers of forum shopping that this approach entails. (Patent litigants may rush to courts in jurisdictions which display certain trends in the enforcement or overturning of patents.) While this model may provide a pragmatic tool by which to evade the ECJ's rules on homogeneity, the net result actually turns out to be more offensive to the EU's legal order than the hybrid ECPC. A court in a non-EU member state, with no opportunity to make a reference to the ECJ equivalent to that under Article 267, may unilaterally issue rulings based upon European patent law applicable throughout the EU that will be binding throughout the EU. Judicial homogeneity is meticulously preserved, but the risks of external judicial interference in EU Member States' internal legal orders are substantially greater than those anticipated by the ECPC.

⁴⁶ See the Charter of the Fundamental Rights of the European Union, OJ (2000) C364/1; the Consilium has issued a 'text of the explanations relating to the complete text of the charter', Chartre 4473/00 Convent 49, 11 Oct. 2000, which explains that several Arts in the Charter are based upon and even copied *verbatim* from the ECHR, which the ECtHR applies. International trade within the EU is regulated by Pt III, Title I, Arts 26 ff TFEU and a host of implementing legislation: see <http://eur-lex.europa.eu/en/legis/latest/chap02.htm>. Trade between EU member states and third countries is regulated by Arts 206 ff TFEU and a range of secondary legislation: see <http://eur-lex.europa.eu/en/legis/latest/chap11.htm>.

⁴⁷ See *supra* notes 5 and 6.

⁴⁸ EC Reg. 44/2001, *supra* note 4 (known as the 'Brussels Reg.' because it supersedes the 1968 Brussels Convention which created substantially the same rules), sets out jurisdictional rules common to all EU member states; in simplified terms, it provides that for actions in tort (a claim for patent infringement presumably counts as a tort) a claimant may sue either in the courts of the jurisdiction of the defendant (Art. 2(1)) or in the courts of the jurisdiction in which the wrongful act was committed (Art. 5(3)). Its rules are extended to EEA member states (all of which are members of the EPO) by the 1988 Lugano Convention, *supra* note 4. Neither the Brussels nor the Lugano regime contains a caveat for patent claims. Thus any convention between EPO member states on common jurisdictional rules for patent actions would have to follow the same rules as the Brussels and Lugano regimes or the EU member states would presumably be in breach of Reg. 44/2001, OJ (2001) L12/1, in adopting it.

Finally, consider another comment the ECJ made in *Opinion 1/09* about the possibility of the Commission bringing infringement proceedings:

It must be added that, where European Union law is infringed by a national court, the provisions of Articles 258 TFEU to 260 TFEU provide for the opportunity of bringing a case before the Court to obtain a declaration that the Member State concerned has failed to fulfill its obligations . . . It is clear that if a decision of the [ECPC] were to be in breach of European Union law, that decision could not be the subject of infringement proceedings nor could it give rise to any financial liability on the part of one or more member States.⁴⁹

In other words the actions of the ECPC are not attributable to EU Member States, and therefore infringement proceedings are impossible. Yet this logic fails for two reasons. First, there is no reason why infringement proceedings could not be instituted against all Member States if they jointly agreed to create a court that serially disregarded EU law. Presumably an infringement action in respect of an incorrect decision of the Benelux Court of Justice would lie against all three Benelux member states responsible for the court's creation. In the same way an infringement action in respect of a wrongful decision of the ECPC would lie against all 27 EU Member States responsible for creating the Court. In practice this might be unlikely; but infringement actions in respect of court decisions are exceptionally rare in any event. More fundamentally, like the homogeneity requirement this argument is a *reductio ad absurdum*. It also precludes arbitration proceedings and accession of EU Member States to other international courts, because by the same logic those courts and tribunals are not subject to Commission infringement proceedings either.

Conclusions

The ECJ's doctrine of homogeneity, as set out in *Opinion 1/09*, betrays two weaknesses. It is too restrictive: taken to its logical conclusion, it excludes all sorts of international courts and tribunals that in practice decide issues of EU law with some frequency and from which the EU Member States are very unlikely to withdraw. It also represents bad policy: the ECPC, and other similar courts that facilitate extension of EU-wide legal and judicial standards to countries on the fringe of the European Union, are to be encouraged.

Nevertheless the foregoing discussion of the doctrine of homogeneity reveals a real risk that an international court or tribunal may misapply or refuse to apply EU law. The failure of the Luxembourg courts to provide a direct right of access to private litigants creates a lacuna, because in some international disputes EU law is relevant but national courts are not available. Where national courts have jurisdiction to adjudicate on disputes, a case can reach Luxembourg through the Article 267 procedure. But where those courts have no such jurisdiction, because the defendant is an international organization which claims immunity or because the claim is subject to investment arbitration, there is in principle no route to a determinative Luxembourg adjudication.

⁴⁹ Paras 87 and 88 of the Court's *Opinion 1/09*, *supra* note 22.

The Court of Justice should learn to be more relaxed about other international tribunals adjudicating on EU law. International courts are a growth industry, and it is inevitable that investment treaty law, international trade law, and a host of other areas of international law that international courts have mandates to apply overlap with the ever-expanding ambit of EU law. Nevertheless the ECJ is right to be concerned that this plethora of international tribunals might get the EU law over which it is the final guardian wrong or refuse to apply it altogether. Ultimately the solution to this problem is expansion of direct rights of action before EU Courts, in which contentious issues of EU law can be tested by private litigants without relying on courts to make ECJ references which they may not be inclined to make or (if they are international courts or arbitral tribunals) arguably have no jurisdiction to make. Such an expansion would require a substantial increase in resources beyond those currently committed to the Luxembourg Courts; it might require the development of a fully-fledged system of EU federal courts. That should not seem so surprising; as the US experience shows, federal law may require federal courts to enforce it. If this is the direction in which the EU judicial structure ought to develop, it is all the more perplexing that the first attempt at a system of European federal courts, the ECPC, has been struck down.